CENTERIOR ENERGY

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September 30, 1996
PY-CEI/NRR-2097L

United States Nuclear Regulatory Commission
Division of Reactor Safety
Attention: Geoffrey E. Grant, Director
Washington, D.C. 20555

Perry Nuclear Power Plant
Docket No. 50-440; License No. NPF-58
Followup transmittal of information regarding response to apparent violation EA 96-253.

Gentlemen:

In the Perry Nuclear Power Plant's (PNPP) letter PY-CEI/NRR-2088L dated August 16, 1996, PNPP stated it would provide you with a copy of the appellate brief before the Department of Labor's Administrative Review Board held on August 22, 1996. A copy of that brief is enclosed for your use.

If you have questions or require additional information, please contact Mr. James D. Kloosterman, Manager - Regulatory Affairs at (216) 280-5833.

Very truly yours,

Lew W Myers

Lew W. Myers
Vice President, Nuclear

Enclosure

HMC:sc

IE54
Rev Jean Lee

August 22, 1996

UNITED STATES OF AMERICA
DEPARTMENT OF LABOR

Before the Administrative Review Board

In the Matter of	)	
	)	
OWEN McCAFFERTY, et al.	)	Case No. 96-ERA-6
Complainants,	)	
	)	
v.	)	ARB Case No. 96-144
	)	
CENTERIOR ENERGY,	)	
Respondent.	)	

BRIEF OF RESPONDENT CENTERIOR ENERGY

Centerior Energy ("Centerior") hereby submits this brief pursuant to the Administrative Review Board's (the "Board") briefing schedule dated July 24, 1996. For the reasons stated below, the Administrative Law Judge ("ALJ") erred in finding that Centerior discriminated against Complainants in violation of Section 211 of the Energy Reorganization Act ("ERA") and in assessing damages. Therefore, the Board should reject the Recommended Decision and Order ("RD&O") and dismiss the Complaint.

SUMMARY OF ARGUMENT

The ALJ erred in concluding that Centerior violated Section 211 by not allowing Complainants to be hired because they had filed a radiation-injury lawsuit under the Price-Anderson Act. Such a private tort action is not protected by Section 211. Congress intended to protect whistleblowers -- participants in

proceedings involving the *Nuclear Regulatory Commission* ("NRC") -- not private tort claimants like Complainants.

Moreover, even if filing a private radiation-injury lawsuit were protected, Centerior had a nondiscriminatory reason for not hiring Complainants. Complainants have openly acknowledged that they are suffering and will continue to suffer "severe and debilitating" emotional distress from radiological exposures within normal and permissible occupational ranges -- exposures within the range that Complainants would again incur if they were hired for nuclear work. In both their lawsuit and this proceeding, Complainants have also demonstrated that they are unwilling to accept the radiation protection philosophy upon which the NRC regulations and Centerior's radiation safety program are founded. It was therefore legitimate for Centerior to refuse to hire Complainants for work in radiation areas.

STATEMENT OF FACTS[1/]

Centerior subsidiaries operate the Davis-Besse and Perry nuclear plants. Tr. 205. Complainants are insulators who received a minor but unplanned radiological exposure from contaminants under a piece of insulation which they were removing, while performing temporary outage work at Davis-Besse in the fall of 1994. Tr. 19-20; Resp. Ex. 2 at 4-5. Because of a change in NRC

[1/] A more complete statement of facts is contained in Centerior Energy's Post Hearing Brief (April 5, 1996) at 3-12.

regulations, Complainants were not wearing respirators at the time. While this exposure was far below NRC-established limits and indeed below natural background dose, Centerior thoroughly reviewed the event and determined that it should have surveyed the work area better. Centerior reported this to the NRC, which issued a notice of violation for the surveying. Resp. Ex. 2.

On August 7, 1995, the six Complainants filed a civil complaint in the United States Court for the Northern District of Ohio. McCafferty v. Centerior Serv. Co., No. 1:95CV 1732 (N.D. Ohio). Comp. Ex. A. Complainants alleged, among other things, that prohibiting the use of respirators was negligent, and that they "have suffered, are suffering, and will continue to suffer harm in the form of serious emotional distress that is both severe and debilitating." They are seeking $30 million in damages. Their action was filed in federal court pursuant to 1988 amendments to the Price-Anderson Act, 42 U.S.C. § 2210, which conferred federal jurisdiction over claims arising from a nuclear incident. Such claims are called a "public liability action."

In September 1995, Complainant Maloney was hired by Fishbach Power Services Inc. (a contractor of Centerior) to perform outage work at Perry. Tr. 33-34. After being hired, Mr. Maloney started making unusual requests for radiological records, which caused someone to associate him with the Davis-Besse event. The Perry Radiation Protection Manager, Mr. Volza, subsequently

contacted Davis-Besse and learned of the concerns expressed in the insulators' civil complaint, including their emotional distress from working in radiation environments without respirators. Tr. 150-51. He was also told that the exposures received by the insulators at Davis-Besse had been small, but that the insulators considered any internal exposure to be bad. Tr. 153.

Mr. Volza contacted the Director of Nuclear Services at Perry, Mr. Schrauder, and informed him that they might have a problem with Mr. Maloney's being able to comply with the radiation-protection programs and policies at Perry. Tr. 152. Mr. Volza expressed a concern with the insulator's emotional ability to work in a radiation environment and a secondary concern that Mr. Maloney was making unusual requests for records that might be related to his civil complaint. Tr. 168.

Mr. Schrauder understood Mr. Volza's concern that the insulators involved in the civil litigation did not seem inclined or able to adapt to the new radiological practices in the nuclear industry requiring performance of a large number of jobs without respirators and that this could be potentially disruptive to the outage. Tr. 207. Mr. Schrauder obtained and reviewed a copy of the civil complaint filed by the insulators, and accepted at face value the assertion that the Complainants had debilitating emotional distress as a result of a common exposure. Tr. 208. Mr. Schrauder became concerned that the Complainants might want to

pick and choose the jobs they would perform, and that this would disrupt the outage schedule. Id. Mr. Schrauder therefore asked his contract administration group to inform Fishbach that Centerior did not wish the Complainants to work at Perry during the refueling outage. Id. When Fishbach subsequently requested that Centerior communicate this request in writing, Mr. Schrauder wrote a short letter stating that, due to the litigation, Centerior could not allow any of the Complainants to work at Centerior's facilities. Id. This led to Mr. Maloney's termination on October 16, 1995. Tr. 41, 46. None of the other Complainants were hired by Fishbach to support the Perry outage.

ARGUMENT

I. A Private Tort Action Is Not A Proceeding Protected by Section 211 of the ERA.

Contrary to the ALJ's recommendation, Complainants' private tort action alleging a radiation injury does *not* constitute protected activity under Section 211 of the ERA, 42 U.S.C. § 5851. While Section 211 can be read hyper-literally to apply to a claim under the Price-Anderson Act (because the Price-Anderson Act happens to be part of the Atomic Energy Act and 1988 amendments to Price-Anderson happened to allow consolidation of claims in federal court), such a novel interpretation and expansion of Section 211 is clearly inconsistent with Congress' intent.

Congress made its intent clear and explicit that the types of "proceeding" protected by Section 211 are those involving the NRC:

> The Senate Bill amended the Energy Reorganization Act of 1974 to provide protection to employees of Commission licensees, applicants, contractors, or subcontractors, from discharges or discrimination for taking part or assisting in administrative or legal proceedings of the [Nuclear Regulatory] Commission.

H.R. Rep. No. 1796, 95th Cong., 2d Sess. 16-17 (1978), reprinted in 1978 U.S.C.C.A.N. 7307, 7309 (emphasis added). Indeed, the fundamental objective of the statute is to preserve and promote the flow of information to the regulatory agency. De Ford v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983); Lissin v. Michigan State Univ., 93-ERA-31, ALJ Op. at 5 (Sept. 29, 1993), aff'd, SOL Op. (June 29, 1995); Remusat v. Bartlett Nuclear Inc., 94-ERA-36, SOL Op. at 9 (Feb. 26, 1996).

Consistent with the intent and purpose of Section 211, the type of activity previously found to be protected by the Department of Labor and courts has involved notifying the NRC or licensee management of safety concerns or regulatory violations or otherwise protecting the dissemination of safety-related information to government regulators. Neither the Secretary of Labor, the NRC[2/], nor any court has ever applied Section 211 (or

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[2/] The NRC's regulation protecting employees makes no reference to this type of conduct. 10 C.F.R. § 50.7 (1995).

its predecessor, Section 210) to protect tort claimants under the Price-Anderson Act.[3/]

Complainants' private tort action lacks any nexus with the NRC. It does not name the NRC as a party or involve any attempt to communicate with or bring matters to the attention of the NRC. In fact, the event underlying the action (the minor radiological exposure) was brought to the NRC's attention by Centerior and investigated and resolved by Centerior and the NRC long before Complainants' private action was ever filed. Because NRC proceedings related to this event were completed in 1994, Complainants' private action filed nearly a year later cannot be viewed, under any fiction, as a first step in the commencement of an NRC proceeding. Without such connection, Complainants' private tort action is beyond the scope of Section 211. See Simon v. Simmons Indus. Inc., 87-TSC-2, SOL Op. at 6 (April 4, 1994), aff'd, Simon v. Simmons Foods, Inc., 49 F.3d 386, 388 (8th Cir. 1995).

Rather than addressing or respecting Congress' intent and purpose, the ALJ ruled that resort to the ERA's legislative history was inappropriate because the meaning of a "proceeding" or "any other action" as used in Section 211 is unambiguous. RD&O at 8. This ruling is erroneous because the courts have

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[3/] The ALJ discounts these facts by a remarkable assumption that "no employer [prior to Centerior] had fired an employee because of the employee's filing of a civil suit under the Atomic Energy Act." RD&O at 7. This is pure conjecture by the ALJ and should be rejected by the Board as lacking any basis whatsoever in the record.

repeatedly held that these terms in the statute are ambiguous and undefined. Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1510 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986); Bechtel Constr. Co. v. Secretary of Labor, 50 F.3d 926, 931 (11th Cir. 1995); Donovan v. Diplomat Envelope Corp., 587 F. Supp. 1417, 1424 (E.D.N.Y. 1984), aff'd, 760 F.2d 253 (2d Cir. 1985).

The ALJ attempted to dismiss this precedent by asserting that "in every instance, the court's intent was not to narrow the definition to exclude a specific legal proceeding such as the present civil action, but to expand the definition to include activity not normally considered a proceeding or action." RD&O at 8. The terms "proceeding" and "action" are either ambiguous or not, and it is blatantly results-oriented for the ALJ to assert that these terms are ambiguous *only* when an *expansion* of Section 211's protection is sought.

The ALJ further erred in ruling that even if the ERA's legislative history were considered there would be no reason to deviate from the "plain meaning" of the ERA. RD&O at 8. The ALJ ignores Congress' statement that Section 211 protects employees who are "taking part or assisting in administrative or legal proceedings of the [Nuclear Regulatory] Commission." In addition, the ALJ's reliance on certain other language in the legislative history (RD&O at 9) indicating that Section 211 protects employees who have "brought suit under [the ERA] or the Atomic

Energy Act" does not answer but rather begs the question: What type of suit? This language certainly does not suggest that Congress intended to protect a private tort lawsuit for money damages. Moreover, the ALJ ignores the language that follows immediately in the Senate Report, which indicates that Section 211 protects "[a]ny worker who is called upon to testify or who gives information with respect to an alleged violation of the Atomic Energy Act or related law by his employer or who files or institutes any proceeding to enforce such law against an employer. . . ." RD&O at 9. Thus, the very passage referred to by the ALJ indicates that protected proceedings, including lawsuits, are those instituted to enforce the Atomic Energy Act, such as proceedings on judicial review of NRC orders pursuant to Section 189(b) of the Atomic Energy Act, 42 U.S.C. § 2239(b). That certain civil actions (those involving the NRC and instituted to enforce the Atomic Energy Act) are protected does not imply coverage of radiation-injury claims under Price Anderson.[4/]

Finally, the ALJ fails to address or consider the stated purpose of Section 211 -- to promote the flow of information to the regulatory agency. Protecting radiation-injury claims would not

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[4/] As Centerior point out in its post-hearing brief, when Section 211 was enacted in 1978, Congress could not have intended for Section 211 to cover a federal tort suit of the kind filed by Complainants because *no* such suit could have been filed at that time. Centerior Energy's Post-Hearing Brief at 20. The ALJ rejected this argument because at the time of Section 211's enactment, Price Anderson did confer federal jurisdiction over "extraordinary nuclear occurrences." RD&O at 9. However, the Complainants civil complaint does not involve an extraordinary nuclear occurrence.

serve this purpose. Nor would any other purpose underlying the Price-Anderson Act, the Atomic Energy Act, or the Energy Reorganization Act be served by expanding Section 211 to protect Complainants' private tort action. Although the ALJ suggests that civil actions under Price Anderson are intended to protect the public (RD&O at 9), the ALJ's discussion is incorrect and reflects a misunderstanding of the Price-Anderson Act.

The Price-Anderson Act was originally enacted in 1957 to remove potentially catastrophic liability as a deterrent to private participation in the development of nuclear energy. S. Rep. No. 218, 100th Cong., 2d Sess. 2 (1988), reprinted in 1988 U.S.C.C.A.N. 1476, 1477. It did so by authorizing the federal government to indemnify its licensees for any liability they might incur as a result of their activities. Pub. L. No. 85-256, § 4, 71 Stat. at 576-77. The government indemnity also served to ensure adequate public compensation in the case of a nuclear accident, by increasing the funds that might otherwise be available for compensating victims. S. Rep. No. 70, 100th Cong., 2d Sess. 13, reprinted in 1988 U.S.C.C.A.N. 1424, 1426. See Lujan v. Regents of the Univ. of Cal., 69 F.3d 1511, 1514 (10th Cir. 1995). These purposes--to limit the liability of nuclear plant operators and to ensure a source of funds for public compensation--in no way seek to promote, protect, or encourage private lawsuits.

Only later, upon passage of the Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066, did Congress confer jurisdiction on the federal courts for "public liability actions." Even here, Congress' purpose was limited, and was certainly not to encourage litigation or provide employees any greater right of recovery for an alleged radiation injury. The 1988 amendments created a federal cause of action to allow the consolidation of claims in federal court, to avoid inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions that may occur in the absence of consolidation. S. Rep. No. 218, 100th Cong., 2d Sess. 13 (1988), reprinted in 1988 U.S.C.C.A.N. 1476, 1488. The substantive law to be applied in such an action continues to be derived from the law of the state in which the incident occurred, provided such state law is consistent with federal requirements. Id. See also 42 U.S.C. § 2014(hh) (1988); In re TMI Gen. Pub. Utils. Corp., 67 F.3d 1103, 1106 (3d Cir. 1995), cert. denied 1996 US LEXIS 1530 (1996); Lujan, 69 F.3d at 1514. Centerior's decision not to allow the hiring of Complainants has absolutely no relationship to or adverse impact on this Congressional purpose (consolidation of claims) for creating a federal public liability action.

II. Centerior Had Legitimate, Nondiscriminatory Reasons For Its Employment Decision.

Even if filing a private tort suit were protected under Section 211, Complainants are not entitled to relief as a factual

matter because Centerior had legitimate, nondiscriminatory reasons for its employment decision. Where an employment decision is motivated by legitimate reasons, rather than retaliatory animus, Section 211 is not violated. See Lockert v. United States Dep't of Labor, 867 F.2d 513, 519 (9th Cir. 1989).

The record shows that Centerior had the following legitimate concerns: that Complainants were unwilling to work without respirators, that Complainants were suffering severe and debilitating emotional distress resulting from radiation exposures that federal regulations allow and that they would likely receive again, that Complainants might refuse to perform certain work, and that such conduct would disrupt Centerior's strict outage schedule. Tr. 207-08. These are business-related concerns, and none involves intent to retaliate against or punish Complainants for their tort lawsuit. There is absolutely no evidence in the record of any hostility towards Complainants.

Moreover, that Centerior's concerns were prompted by allegations in Complainants' civil complaint does not taint or render illegitimate those concerns. Both the courts and the Secretary have long recognized that an employer must not be precluded from taking legitimate personnel actions designed to assure the effectiveness of its workforce and adherence to applicable regulations, even when there is some link between the decision and some protected activity. See, e.g., Harvey v. Merit

Sys. Protection Bd., 802 F.2d 537, 548 (D.C. Cir. 1986); Ray v. Metropolitan Gov't of Nashville and Davidson County and the Urban Observatory of Metro. Nashville-Univ. Ctrs., 80-SWDA-1, ALJ Op. at 11 (Mar. 18, 1980), aff'd, SOL Op. (Apr. 14, 1980). Thus, if an employer takes adverse action because an employee's conduct reveals some undesirable trait that might adversely affect his job performance, the employer acts with permissible motive.

Nonetheless, the ALJ rejected Centerior's concerns over Complainants' fitness and potential disruptiveness, stating that "Centerior has not produced any evidence to support its contentions." RD&O at 12. First, the ALJ erred by placing on Centerior an evidentiary burden that does not exist. Centerior is not required to prove that Complainants in fact were severely emotionally distressed or would have disrupted the outage by refusing to work without respirators. The case law is clear that whether the employer made the best decision, or even a fully informed decision, is irrelevant. All that matters is whether the employer was motivated by legitimate concerns rather than retaliatory animus. Harvey, supra, 802 F.2d at 537 (it is of no consequence whether the employer is correct in his assessment of the employee's activities because even if he is wrong, motivation is still lacking.). Accord Dysert v. Westinghouse Elec. Corp., 86-ERA-39, SOL Op. at 4-5 (Oct. 30, 1991); Bassett v. Niagara Mohawk Power Co., 86-ERA-2, SOL Op. at 13 (Sept. 28, 1993);

Seraiva v. Bechtel Power Corp., 84-ERA-24, ALJ Op. at 8 (July 5, 1984), aff'd, SOL Op. (Nov. 5, 1985). The ALJ therefore erred in discrediting Centerior's concerns by suggesting that they were incorrect or ill-informed. Centerior is under no obligation to investigate whether Complainants have exaggerated the emotional distress allegations of their civil complaint.[5/]

Second, as a factual matter, the ALJ is wrong in finding that Centerior failed to produce evidence to support its position. The record shows that after the minor radiological exposure at Davis-Besse, Centerior's health physicists met with Complainants and explained that wearing respirators is not appropriate if doing so would increase a worker's total exposure. Tr. 72-4. Yet when asked in this proceeding whether he agreed with this respirator philosophy, Mr. Maloney replied "yes and no," and indicated that he might ask to be put on another job. Tr. 74-5, 80. In addition, Mr. Volza testified that, if the Complainants were to work at Perry, they could well receive a total dose of the same magnitude as that incurred during the 1994 outage at Davis-Besse. Tr. 155; 194. Mr. Maloney admitted that he would have the same reaction if he were to receive another such exposure, while acknowledging that such an exposure might well be planned for work during an outage. Tr. 77, 82-3.

[5/] The ALJ further states that "Centerior attempts to argue the merits of the complainants civil case in this proceeding." RO&D at 12. Quite to the contrary, Centerior *accepted* the emotional distress allegations of the complaint *at face value* in making its employment decision.

The ALJ also erred by imputing retaliatory animus from a statement attributed to Don Timms, the Ombudsman at Perry. RD&O at 13. The ALJ ignored the fact that Mr. Timms was not involved in the decision to terminate Mr. Maloney's employment and had no knowledge of the basis for that decision. Mr. Timms' statement was based on a telephone call with a *Fishbach* representative, who merely informed Timms of the letter from Centerior to Fishbach regarding Complainants' employment status. Tr. 274. Mr. Timms never spoke to any *Centerior* employee actually involved in making the decision. Therefore, any inference that Mr. Timms or the Fishbach representative may have drawn from the letter is simply speculative and irrelevant in determining Centerior's motive.[6/]

Finally, the ALJ attempted to discredit Centerior's concerns by observing that "Centerior's argument shows a lack of understanding or concern for the basis of complainants' lawsuit." RD&O at 13. Here, it is the ALJ who presupposes the merits of Complainants' lawsuit and relies on Complainants' self-serving characterizations in this proceeding -- characterizations that were not before Centerior when it made its employment decision. The ALJ is also incorrect in concluding that if Centerior's argument prevails, all protected conduct that includes an

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[6/] The ALJ's reliance on certain testimony of Mr. Schrauder to support his view that Centerior retaliated against Complainants is also misplaced. See RD&O at 13. Mr. Schrauder's testimony only underscores the fact that he was genuinely concerned about Complainants' fitness to perform radiologically-restricted outage work based on the obvious severity ($30 million worth) of their emotional distress. It is not evidence of discriminatory animus.

allegation of injuries could no longer be protected. RD&O at 14. Most alleged injuries have no implication regarding an employee's fitness for duty and hence do not provide grounds for adverse employment action. But when an employee claims an injury that is inconsistent with his continued employment, it is inconceivable that an employer should be required to continue that employment just because the impairment was disclosed in a protected proceeding. For example, suppose a security guard, who is required to meet visual acuity standards, testified that an injury severely impaired his vision. Surely, the employer cannot be required to continue hiring that unfit individual. "Debilitating" emotional unfitness is no different. Centerior cannot, and should not, be required to hire individuals for work in radiologically-restricted areas if those individuals are, by their own admission, debilitated by their fear of radiation. See Mandreger v. Detroit Edison Co., 88-ERA-17, SOL Op. at 17 (Mar. 30, 1994) ("the inherent danger in a nuclear power plant justifies [Respondent's] concern with the emotional stability of the employees who work there"). Indeed, it would be manifestly unreasonable to conclude that Section 211 requires a nuclear plant operator to hire individuals to work in radiologically-restricted areas when those individuals have alleged they are emotionally distressed by radiological exposures within the NRC-approved range normally incurred by workers in radiologically-restricted

areas. Nor would it be reasonable to require a nuclear plant operator to hire individuals who cannot or will not accept respiratory policy designed to conform to NRC radiation-protection standards. See, e.g., Pennsyl v. Catalytic, Inc., 83-ERA-2, SOL Op. at 8 (Jan. 13, 1984).

III. Complainants Failed to Establish That They Were Qualified For Hiring at Perry.

With the exception of Mr. Maloney, who was discharged in October 1995, Complainants allege a refusal to hire by Centerior. In a refusal-to-hire case, a claimant must establish, as an element of his *prima facie* case, that he was qualified for the job for which the employer was seeking applicants. Samodurov v. General Physics Corp., 89 ERA-20, SOL Op. (Nov. 16, 1993).

None of the Complainants established their qualifications. The only evidence presented was the testimony by Mr. Scarl, a union representative, who stated that the pending litigation is the only reason that he knows of why the insulators are not eligible to work at the Davis-Besse outage. Tr. 113. Mr. Scarl, however, was unaware that one of the Complainants (Mr. McCafferty) had failed a drug test and had been denied access to a nuclear plant for falsifying documents. Compare Tr. 120-22 with Resp. Ex. 5; Tr. 264-65. Mr. Scarl did not even know whether all of the insulators had worked at nuclear plants. Tr. 117. Thus,

Mr. Scarl's testimony clearly lacked credibility. The ALJ failed to address this deficiency in Complainants' case.

The ALJ also erred in dismissing the disqualification of Mr. McCafferty. Because of his prior drug abuse, Mr. McCafferty was required to obtain a professional assessment to determine whether treatment is required, before being eligible for reinstatement. Resp. Ex. 5, first page. Mr. McCafferty has not obtained such an assessment. Tr. 267. The ALJ suggested that Mr. McCafferty would have obtained such an assessment if he had not been barred from working at Perry. RD&O at 16. The requirement to obtain a professional assessment, however, was imposed nearly a year before the employment decision at issue in this case, and Mr. McCafferty made no effort to obtain the assessment in this interval. Tr. 267. Even in October 1995, when insulators began to be hired and before Centerior decided that Complainants should not be hired, Mr. McCafferty made no effort to obtain the professional assessment needed before reinstatement could be considered. Clearly, Mr. McCafferty has not met his burden to prove his qualifications in this proceeding. Equally clearly, there was no basis for the ALJ to assume that Mr. McCafferty would have begun employment in October. See RD&O at 18.

IV. The ALJ's Award of Reinstatement and Damages Is Flawed.

The ALJ's award of reinstatement and back pay is incorrect for a number of reasons. First, since the Complainants are

temporary outage workers and there is currently no outage, "reinstatement" is impossible.

Second, in calculating damages, the ALJ improperly assumed that Complainants would always be the first insulators hired and the last insulators laid off. RD&O at 18-19.[7] Such an assumption might be appropriate where the employer alone possesses evidence that would precisely establish hiring and lay off priorities and thus individual employment schedules. However, here, Complainants' union contract and their union hall manager provide the keys to determining when and for how long Complainants would have been employed by Centerior. Complainants could have put on evidence answering these questions, but did not.[8] Because Complainants control the necessary evidence, and because it is their burden to establish their damages, it was error for the ALJ to fill gaps in Complainants' evidence and resolve any doubts in their favor. Accordingly, if damages are awarded, they should be based on average hours worked by insulators, as set out in Centerior's Post Hearing Brief at 39-40. See Sprague v. American Nuclear Resources, Inc., 92-ERA-37, SOL Op. (Dec. 1, 1994).

Last, the ALJ awarded Complainants damages through April 6,

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[7] The ALJ also erred in assuming that insulators hired in October 1995 would have worked through December 22. RD&O at 16, 19. The record shows that insulators who were hired in October were laid off on December 18. Tr. 278.

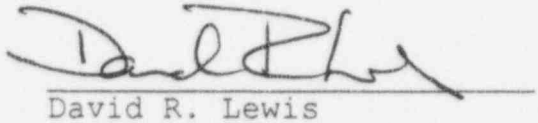
[8] Complainants' own witness, Mr. Scarl, merely testified that the Complainants would have been sent by the union to work at the current Perry outage. Tr. 109-11. He did not testify that any of the Complainants would have been dispatched to Perry in October.

1996, offset only by any earnings received through the date of the hearing on February 26, 1996. Complainants' damage awards must be offset also by any earnings received through April 6, 1996, and Complainants should be required to submit additional proof on this issue.[9/]

CONCLUSION

The Administrative Review Board should find that Centerior did not violate Section 211 of the ERA and should dismiss the Complaint. Alternatively, the Board should find that the ALJ improperly awarded reinstatement and miscalculated the damages.

Respectfully submitted,



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Dated: August 22, 1996

[9/] The ALJ himself recognized that "any wages that Maloney earned between the date of the hearing and April 6, 1996 must be subtracted from the compensation lost because of not working at Perry." RD&O at 17. However, he failed to make any provision for actually reducing the damage awards by such amounts.

SERVICE SHEET

Case Name: OWEN McCAFFERTY, DENNIS MALONEY, SEAN KILBANE, TERRY McLAUGHLIN, SEAN McCAFFERTY AND RICHARD PROHASKA

Case No.: 96-ERA-6

Title of Document: Brief of Respondent Centerior Energy

I hereby certify that on August 22, 1996, a copy of the above-captioned document was served by mail, or where indicated by an asterisk by Federal Express, or where indicated by two asterisks by hand delivery, on the persons listed below.

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