



**Issue Date: 31 January 2011**

**IN THE MATTER OF:**

JESSIE SALYERS,  
Complainant,

**v.**

Case No.: 2009-CAA-00012

BABCOCK & WILCOX TECHNICAL  
SERVICES Y-12, LLC,  
Respondent.

APPEARANCES:

Jessie E. Salyers, *pro se*

Kenneth M. Brown, Esq.  
For the Respondent

BEFORE:

William S. Colwell  
Associate Chief Administrative Law Judge

**DECISION AND ORDER**

This complaint filed by Jessie Salyers against Babcock and Wilcox Technical Services Y-12, LLC, is governed by the employee protection provisions of the Energy and Reorganization Act of 1974 at 42 U.S.C. § 5851, as amended, and the implementing regulations at 29 C.F.R. Part 24<sup>1</sup>.

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<sup>1</sup> On January 18, 2011, the Secretary of Labor amended the regulations implementing 42 U.S.C. § 5851 to incorporate certain amendments contained in the Energy Policy Act of 2005, which is applicable to this complaint. Unless otherwise noted, citations shall be to the amended regulations at 29 C.F.R. Part 24.

## I Evidence

At the July 13, 2010 hearing in Knoxville, Tennessee, several evidentiary rulings were made. Mr. Salyers proffered *Claimant's Exhibits* (Cx.) 1 through 10. Of these, *Claimant's Exhibits* 1, 2, and 5 were admitted as well as the first page of *Claimant's Exhibit* 4. The second page of *Claimant's Exhibit* 4 was excluded. A ruling as to admission of *Claimant's Exhibit* 3, which is titled "Subject Management Program for DOE Nuclear Facilities," was held in abeyance pending further consideration. On further consideration, it is determined that *Claimant's Exhibit* 3 is admitted as evidence. *Claimant's Exhibits* 6, 7, 8, 9, and 10 were excluded.

Mr. Brown proffered the *Joint Exhibits* (Jx.) of the parties and, of these, exhibits 1 through 8, 9b, and 9c were admitted. Claimant objected to admission of *Joint Exhibit* 9a stating that the "BBS Facilities Infrastructure" was "basically disbanded" or was no longer in existence. As a result, it was determined that this exhibit would be admitted on behalf of Employer only.

With regard to the signed "Standing Order" at *Joint Exhibit* 1, Respondent's counsel agreed that the exhibit had been altered for an unexplained reason:

[T]he Company will stipulate that when Mr. Salyers signed the standing order that is essential to this case that in addition to signing it he wrote next to his signature . . . that . . . he protested it, or did not agree with it.

*Hearing Transcript* (Tr.) at 8.<sup>2</sup> Counsel stated that the exhibit offered at hearing "will not have that protest, we will stipulate to that." Tr. at 8. Mr. Salyers recalled that he told his supervisor:

The only way I will sign this is under protest and I will write next to my name that this is a protest and I will initial it.

Tr. at 9. Finally, this tribunal admitted *Administrative Law Judge's Exhibit* (ALJx.) 1, which was the notice of hearing.

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<sup>2</sup> Mr. O'Toole testified that "[t]here's a good chance" that Mr. Guge did not want the "Standing Order" to show as being protested. Tr. at 62.

## **II Testimony at the hearing and evidence summary**

Central to this case is an “emergency shutdown switch” at the steam plant for a nuclear weapons facility. It was clear from the testimony of Mr. Salyers and other witnesses that a properly operating steam plant provides critical support to the nuclear-related operations at Y-12. It was also evident that Mr. Salyers and other witnesses understood and appreciated the heightened need for safety in this hazardous environment that could yield loss of life and long-term environmental contamination in the wake of a catastrophic event at the steam plant, such as fire or an explosion.

### The “emergency shutdown switch”

George Mason Remmel, Jr. testified on behalf of Complainant regarding the critical purpose of the “emergency shutdown switch.” Mr. Remmel stated that he worked at the steam plant for 22 years, but has been assigned to an office for the last nine or ten years. *Tr.* at 88. He stressed the importance of the emergency shutdown switch as follows:

We’re talking about an emergency shutdown switch that’s to be used when you cannot perform the duties in the Control Room due to an emergency evacuation. That’s what the safety switch is for. For the record, I had felt for the twenty (20) plus years that I operated in Y-12 steam plant that I had that access for the purpose of reducing . . . the loss of limb, life, equipment, mission of Y-12 and the economy of East Tennessee.

. . .

We’re talking about if there’s been an explosion, . . . that rendered the Control Room unusable. Then in five seconds I slide down the emergency ladder, throw the switch, and by that time I should have some help to wrap up the water that isolates the plant. That’s what I depended on for the twenty (20) plus years I worked.

Now, at any time . . . management suspected that that switch did not operate as it should have it should have been fixed ASAP. Because it was designed for emergency use only. In my opinion it should not have been locked out.

*Tr.* at 88-89. Indeed, Mr. Remmel noted that a new steam plant at Y-12 has a "similar safety shutdown switch that's accessible to anyone regardless of their training and has no locks on it." *Tr.* at 90.

Mr. Earl Johnson, who is an "insulator by trade" and works at the steam plant, agreed with Mr. Remmel. *Tr.* at 95-97. He stated:

. . . an emergency switch would be for the first guy to come along and deem it as an emergency, or recognize it was an emergency, they'd shut it down . . . and if it was locked it wouldn't be a possibility.

*Tr.* at 96.

William R. Klemm, Deputy General Manager at Y-12, testified for Respondent. He noted that he had spent 40 years in the Navy "ascending through the ranks operating and maintaining steamships and shipyards" until he retired as a Rear Admiral. *Tr.* at 154. At the time of hearing, Mr. Klemm worked for a contractor, Babcock and Wilcox Company, and, in that capacity, he served as the Deputy General Manager of the Y-12 plant. *Tr.* at 154.

Mr. Klemm agreed that the switch at issue was designed to shut down the steam plant under emergency conditions. *Tr.* at 160-161. However, Mr. Klemm testified that he was unable to determine whether the switch worked properly. He explained that the steam plant was built in the 1950s and was designed to operate with the use of coal. *Tr.* at 159. At some point thereafter, the plant was "modified to accept gas." *Tr.* at 159. Then, in the 1980s, the steam plant "went from a pneumatic control system to an electronic control system." *Tr.* at 159. Mr. Klemm asserted that this was part of the problem:

The control system was modified and updated in the eighties sometime to include all electronic controls. So, the switch itself was a carryover from the pneumatic control days. I wasn't certain exactly what that switch might still be attached to, since the pneumatic controls and electronic controls were not intermingled.

*Tr.* at 159.

## The August 11, 2008 meeting

Mr. Salyers testified that, for safety reasons, he was adamant that the "emergency shutdown switch" be available for use. In August 2008, Mr. Klemm served as the Division Manager for Facilities, Infrastructure and Services, which included the steam plant. *Tr.* at 155. Mr. Klemm explained how the August 11, 2008 meeting with Mr. Salyers was initiated:

I had essentially an open door policy that if employees wanted to talk to me they could make an appointment to see me, but only after they had been through their chain of command to resolve any issues at the lowest level. I knew from Jessie's supervision that they were not able to satisfy him, so I agreed to meet with Jessie. He came to my office on that day.

*Tr.* at 157-158. Mr. Salyers stated that Mr. Remmel, Mr. Roberson, and Mr. Charles Krull were at the meeting, but did not talk. *Tr.* at 81.

Mr. Salyers and Mr. Klemm agreed that the meeting lasted about one and one-half hours. *Tr.* at 80 and 158. They also agreed that Mr. Salyers did most of the talking and expressed his concerns about the potentially hazardous consequences of locking the emergency shutdown switch. *Tr.* at 80 and 158.

During the meeting, Mr. Salyers advised Mr. Klemm that the "emergency shutdown system will work" and that Mr. Klemm should not "assume" that the system would fail to operate in an emergency. *Tr.* at 73-74. Similarly, Mr. Klemm recalled that Mr. Salyers discussed his history with the steam plant and the importance of the emergency shutdown switch. *Tr.* at 158. Mr. Klemm asked Mr. Salyers if he knew of any documentation to support a finding that the switch would operate in an emergency given changes to the steam plant over the years and Mr. Salyers did not have documentation. *Tr.* at 158.

Mr. Salyers agreed that he did not have documentation to provide to Mr. Klemm but stated that he had "verified" that the switch worked. *Tr.* at 74. He stated:

I know it works. I do not assume one thing on it there. When you have thirty-two hundred (3200) millicuries of cesium one thirty-seven (137) in them bag houses you need more control of those spaces.

*Tr.* at 74. He told Mr. Klemm that he “was there when it was changed over from the 660 Fire I system, that it does work.” *Tr.* at 80.

The August 12, 2008 “Standing Order”

After the August 2008 meeting with Mr. Salyers, Mr. Klemm testified that he directed that research be conducted regarding the history of the emergency shutdown switch:

Safety devices are very serious and they’re the things that keep people alive when we have a major problem with one of those pieces of equipment. So, I don’t take lightly the fact that it may or may not work. We have to know something.

So, (after) all of the investigation that we were able to pursue in our master drawing files (we) did not have any documentation as to how that switch was wired.

*Tr.* at 159. Mr. Klemm further testified:

Our conclusion was that we were not sure if we activated that switch exactly what components might still be attached to it. If you achieved only a partial shutdown of the plant, it could actually make the situation worse so, the decision was make that we would issue a standing order to disable that switch, because we had the alternative that allow a quick shutdown of the plant from the operator station inside the steam plant.

. . .

If you have a catastrophic failure in a steam plant, typically that involves either a major fire or a major steam leak. One way or the other it becomes a very hazardous environment very quickly. So, the difference between the two processes are you . . . get out of Dodge as quickly as you can. On the way out, in this particular case, you pull that switch to shut down as much of the plant as you possibly can.

After the plant was modified to electronic controls those controls were actually on the panel. The escape route for the operators inside that control booth was out onto the roof of the building and down the escape ladder on the outside of the building so they did not have to go through the building to get out.

*Tr.* at 161-62. Mr. Salyers acknowledged that the steam plant could be shut down from the Control Room in five to ten seconds. *Tr.* at 77. Mr. Guge agreed that “[t]here’s about three switches inside the Control Room that the operator can just flip.” *Tr.* at 109.

Mr. Klemm testified that, after the August 2008 meeting with Mr. Salyers, consulting with other managers, and researching the history of the switch:

. . . it was my conclusion that the danger to the plant and to the people was higher risk if we operated that shutdown device than it would be if we shut the plant down using the emergency methods and incurred some environmental insult.

*Tr.* at 166. As a result, the August 2008 “Standing Order” was issued. *Jx.* 1.

Specifically, the “Standing Order” directed that the emergency shutdown switch at the steam plant be locked and it states, in part, as follows:

**Purpose:** This Standing Order is being issued to address changes to the Response to Abnormal Conditions to the Steam Plant Y56-34-UO-004 regarding emergency shutdown of the steam plant due to a major steam header leak requiring immediate evacuation of the steam plant.

**Background:** The steam plant emergency shutdown switch (SCRAM Switch) located outside the north roll-up door was installed to provide a means of performing a steam plant shutdown in the event that the steam plant control room has to be evacuated immediately. Since the installation of the switch, there have been significant modifications to the steam plant systems without clear documentation of the effects upon the use of the emergency shutdown switch.

**Actions:**

1. The steam plant emergency shutdown switch will be Caution Tagged and the cover over the switch will be locked on August 13, 2008.
2. In the event that the steam plant must be evacuated immediately due to a major steam header leak the supervisor will notify the Plant Shift Superintendent to

have the Power Operations Shift Manager to electrically isolate the steam plant, if necessary.

**Cancellation:** This standing order will be cancelled after appropriate requirements have been completed or incorporated into a procedure or work instruction but no later than October 30, 2008. The cancellation date can only be extended with the approval of the Utilities Operations Manager.

*Jx.* 1. The "Standing Order" further provides that, in the event of a major steam line rupture, "IF the fires CANNOT be secured from CCR, THEN notify PSS to have Power Operations Shift Manager de-energize the Steam Plant" (emphasis in original). Next to this instruction is Mr. Salyers' handwritten notation that the order was "hastily written" and "not feasible."

Mr. Larry O'Toole testified that he obtained Mr. Salyer's signature on the "Standing Order". *Jx.* 2. He noted that there was "no question" that Mr. Salyers understood the "Standing Order" and protested it. *Tr.* at 64. He also stated:

But on the same token, if (Mr. Salyers) didn't sign it, it wouldn't be uncommon for me to threaten to send him to the doctor or the psychologist either, to accomplish the mission of getting them—everybody to sign this paper.

*Tr.* at 64. Mr. O'Toole recalled:

This particular standing order, from what I understand, they were having trouble getting Jess to sign it. So, Mr. Guge asked me if I could get him to sign it, or I might have volunteered to say, 'I can get him to sign it,' one or the other. I don't know how it went down exactly, it's been so long ago. Anyhow, I took it in there and asked Jessie to sign it. He said he didn't believe in it, he didn't think it was right and this and that. I just said, 'Well, it's a standing order, just a way to make sure that . . . you get the message of what management wants you to do.

It's just a way of communicating and a way to document that you know what they want. So, he signed it and he did put some graffiti . . . onto the standing order that he objected.

*Tr.* at 60-61.

Mr. Gary Guge works at the Y-12 as a Shift Manager for the Utilities Department and directs the work of "utility operators and steam plant operators", including Mr. Salyers. *Tr.* at 107. He acknowledged that Mr. Salyers had a "strong opinion" that the emergency shutdown switch could still be used and often spoke about the issue. *Tr.* at 107. After the August 2008 meeting, however, "[m]anagement made the decision to put a lock on the emergency switch" on grounds that it lacked documentation that the switch had been tested and would work. *Tr.* at 108. Moreover, Mr. Guge testified that management "put out a standing order also on that." *Tr.* at 108.

Mr. Guge testified that Mr. Salyers signed the "Standing Order" indicating that he "read it and understood it." *Tr.* at 110. He recalled that Mr. Salyers "made the comment that he didn't agree with standing orders" and he "didn't think that they were viable" such that he "only went by procedures." *Tr.* at 111. This is consistent with Mr. Guge's testimony during the arbitration proceeding. *Arb.* at 30. On the other hand, Mr. Salyers had a different recollection during the arbitration proceeding:

**Mr. Brown:** [Y]ou told Gary Guge . . . during one of your conversations with him that you don't follow standing orders, you just follow procedures, correct?

**Mr. Salyers:** No, sir. I did not say that.

**Mr. Brown:** You never said that? Okay.

**Mr. Salyers:** No, I did not say that.

**Mr. Brown:** You do agree, though, that standing orders change procedures, correct?

**Mr. Salyers:** Yes.

#### Effect of the "Standing Order"

None of the witnesses at the hearing, including Mr. Remmel, Mr. Guge, and Mr. Johnson, testified regarding any instance where they had disregarded the directions of a standing order at Y-12. Mr. Klemm testified that employees are obliged to obey "standing orders" just as they are obligated to follow procedures. *Tr.* at 166.

During the arbitration proceeding, Mr. Guge stated the following regarding the effect of a standing order:

A standing order is a document we use in place – if an event happens that requires a changed procedure, needs to be taken place immediately, they will issue a standing order and that will be put out to the men that this is what’s going to be changed in that procedure until that procedure can be officially changed on that date and training done on the new procedure.

*Arb.* at 26-27. Similarly, during the arbitration proceeding, Mr. Klemm stated that a standing order had the effect of a procedure:

A standing order is an order which modifies a procedure so that a procedure that is outdated or has an irregularity, let’s say, we can adjust the procedure in real time so that we don’t have an improper procedure in use while we modify the procedure to bring the procedure up to date.

*Arb.* at 89-90. Indeed, Mr. Salyers testified as follows during the arbitration proceeding:

**Mr. Pope:** When this procedure, we’re talking about August the 12<sup>th</sup> when the standing order was changed, I think the testimony has been that a standing order is the same as a procedure, you’ve got to follow it.

**Mr. Salyers:** Yes.

*Arb.* at 152. Indeed, Mr. Salyers testified that he would follow a standing order even if it is in the process of becoming a procedure. *Arb.* at 200. In his 35 years with Respondent, Mr. Salyers stated that he never “violated” a standing order. *Arb.* at 201.

When asked why he cut the lock on the emergency shutdown switch, Mr. Salyers stated that the procedure set forth in the “Standing Order” was “unethical” and the “safety and health and the public, too, would be jeopardized if you used (the) procedure.” *Arb.* at 160-61. The arbitrator noted that the issue was not whether Mr. Salyers “violated” the “Standing Order”; rather, the issue was whether he engaged in insubordination based on his actions stemming from his protest of the “Standing Order”. *Arb.* at 202.

The September 18, 2008 discussion

On September 18, 2008, a discussion occurred between Mr. Guge and Mr. Salyers regarding the "Standing Order":

About the middle of September, I think September 18<sup>th</sup>. It was late in the afternoon, about 5:30. I was getting ready to leave the steam plant. I was talking to the supervisor passing on . . . information for the weekend. Jessie walks in and wants to talk about the emergency switch again. I told him, I said, 'Look, the standing order is put out, there's nothing else that's changed. I can't tell you anything else about it.' I said, 'Management has made that decision.' I said, 'that's the way it's going to be.'

*Tr.* at 111-112.

I said, 'How can you go by procedures when you're not going by a standing order?' I said, 'That's part of it.' I handed him a copy of (the Standing Order) and I said, 'It states right here, this is what's got to be done,' but he still didn't agree with it.

*Tr.* at 112.

Mr. Salyers recalls telling Mr. Guge that he was "not authorized" to put a lock on the switch since the "Standing Order" "had not been authenticated." *Tr.* at 71. Mr. Salyers testified that he "tried to talk to Mr. Guge and he plainly stated he didn't want to hear it." *Tr.* at 71-72.

During the arbitration proceeding, Mr. Guge recalled that Mr. Salyers expressed health and safety concerns presented by interim procedures contained in the "Standing Order":

**Mr. Pope:** And did Jessie explain to you, Mr. Guge, this emergency switch was put there to shut the facility down if we couldn't shut it down any other way? And this [proposed procedure of a] series of phone calls and having to call people in from outside the plant who may live 30 minutes away is not feasible? Didn't he try to explain that to you?

**Mr. Guge:** Yes.

*Arb.* at 47. Mr. Salyers also warned of hazardous chemicals being released using procedures set forth in the "Standing Order":

**Mr. Pope:** Okay. Didn't Jessie tell you that part of the company's proposal or suggestion would not work because it would release unauthorized chemicals into the atmosphere if it was invoked like the company suggested that it be changed.

**Mr. Guge:** He was worried about an excess amount of water.

*Arb.* at 52-53.

"Lock out, tag out" procedures and removal of the lock

Mr. Salyers testified that he took the lock off of the emergency shutdown switch. *Tr.* at 72. However, he secured the switch with a tie:

I did take the lock off. I did not leave (the switch) open. I put a tie on it, electrical tie where just nobody could open it, but it could be used in an emergency to be shut down, to shut that plant down.

*Tr.* at 72. He explained that the "Standing Order" required that the emergency shutdown switch "be caution tagged and locked." *Tr.* at 82. He stated:

There was no caution tag. There was no reason it should have been locked there.

*Tr.* at 82. As a result, Mr. Salyers felt that he had removed an "unauthorized lock", an "administrative lock" and, therefore, he did not violate the "Standing Order" by removing the lock. *Tr.* at 82-83.

Mr. Remmel agreed that a proper lock was not used for the switch and the switch had not been "caution tagged" as required by the "Standing Order":

When I personally went down and looked at the lock it looked to me like a lock that you could buy at Wal-Mart. It was not authorized by any of my training, by any procedures of lock out, tag out that I was trained for twenty (20) years.

*Tr.* at 91. When asked about the proper procedure for locking an item at the plant, Mr. Remmel replied:

I just can't use my own personal lock. There has to be a department lock or division lock. It has to be tagged and locked. I have to be given authorization as an operator I have to be authorized to place that lock and I have to have a suspension order to remove that lock. It's a numbered department lock.

*Tr.* at 91. Mr. Remmel testified that there is training for "lock out, tag out" procedures. *Tr.* at 91. Mr. Johnson's testimony supports Mr. Remmel. Mr. Johnson testified:

. . . normally you would put a department lock and a tag on it. You would tear the tab off of the tag and put it in a lock box and then put it in the Control Room . . . so that nobody else could get the keys.

*Tr.* at 95-96. He also reiterated that there is an annual "lock out, tag out" training provided to employees of Y-12. *Tr.* at 98-99.

Mr. Guge does not dispute that the lock removed by Mr. Salyers did not comply with the "lock out, tag out" procedures required by the "Standing Order". During the arbitration proceeding, Mr. Guge admitted that the first lock was not placed on the switch in accordance with procedures. *Arb.* at 41. Mr. Klemm also acknowledged during the arbitration proceeding that the shutdown switch initially was not locked and tagged in accordance with procedures, but he stated that there was a lock on the switch that prevented operation of the switch and this "was the intent of the standing order." *Arb.* at 29. Mr. Klemm and Mr. Guge asserted that Mr. Salyers engaged in subordination the day he cut the lock, wrapped it in tape along with the procedures, and placed it on Mr. Guge's desk. *Arb.* at 69 and 123.

#### The October 9, 2008 confrontation

Mr. Guge had the day off on October 8, 2008. *Tr.* at 113. He initially learned that the lock was removed from the emergency shutdown switch after returning to his office on October 9, 2008. *Tr.* at 113.<sup>3</sup> He recalled:

I had been off the previous day and when I came back into the office on that Thursday I found this big ball of tape on my desk.

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<sup>3</sup> The specific date of the meeting is derived from testimony at the October 29, 2009, arbitration hearing, which was submitted in conjunction with Respondent's March 26, 2010, *Motion for Summary Judgment*.

*Tr.* at 113. Mr. Guge stated that, at that point in time, he used a pocket knife to cut through the tape, which revealed a copy of the "Standing Order" documents with writing in red on them:

It said, 'Not feasible, hastily written, retaliation for August 11<sup>th</sup> meeting. Not viable. Not feasible.'

*Tr.* at 114; *Jx.* 2. There was a second ball of tape on Mr. Guge's desk, which was the size of a softball. *Tr.* 115. Mr. Guge stated that, when he cut through this tape, it contained a lock. *Tr.* at 115. He testified:

So, I put (the lock) down, went downstairs and found that the lock had been taken off the box and a plastic wire tie was stuck on there.

So, I came back upstairs and asked the supervisors . . . also the steam plant coordinators, 'Has anything happened while I was gone yesterday with the standing order?'

They told me that there had not, nothing had changed.

*Tr.* at 115-116. He stated that he also asked Roxanne, the procedure writer of standing orders as well as Larry Petroski, the operations manager, whether there was a change in the "Standing Order" for the emergency shutdown switch at the steam plant and they said there was no change. *Tr.* at 115-16.

Later in the afternoon, Mr. Guge took the lock, tape, and documents to Mr. Petroski. *Tr.* at 116-17. He also "got an administrative lock" to replace the first lock. *Tr.* at 116. He had the operator "appl(y) the lock to the emergency switch box and appl(y) the tag to it." *Tr.* at 116-117. He recalled:

Jessie came in and out of the office a couple of times throughout the day. I never said anything to him. Around 3:30 that afternoon I was getting ready to leave and myself and the supervisor, Mike Bittatoe, was going to go out and do some rounds. Jessie came in the office and said, 'Who put that lock back on the box?'

I said, 'Well, I did.' Of course, I didn't physically, the operator did.

He said, 'Who authorized you?'

I said, 'Larry told me to put it back on there.'

He said he disagreed about having the lock on the box. I said, 'Look Jessie, the standing order is like it is. We're not going to use this emergency switch, you know, that's just going to be part of it till the procedure can be changed.'

'Well, I only go by procedures.'

I said, 'Well, the procedure has got to be changed.' I said, 'The standing order will be there until the procedure is officially put out then the standing order goes down and the procedure is put in place.' I said, 'That's just part of it.'

*Tr.* at 117-118.

Mr. Guge asked Mr. Salyers if he had presented his concerns about the emergency shutdown switch to "Safety" and Mr. Salyers replied that he had, but "they had not gotten back to him." *Tr.* at 118-19. Mr. Guge noted to Mr. Salyers that the steam plant could be shut down from the Control Room:

I said, 'Well, if you can do it safely from the Control Room, why have another switch that we don't know if it's going to work or not?'

He said, 'Well, I know it'll work.'

I said, 'But it's not been documented. We don't have any information that it does work. Even if it does, how much is it going to take to bring the steam plant back up?'

He said, 'Well, I know it works.'

*Tr.* at 118-19.

Mr. Guge warned Mr. Salyers and stated that he "hope(d) nobody decides to mess with the switch and try it to see if it'll work or not, because that would be an act of sabotage." *Tr.* at 120. In response, Mr. Salyers told Mr. Guge not to threaten him or he would go to the National Nuclear Security Administration (NNSA). *Tr.* at 120. Mr. Guge testified that he was not concerned whether Mr. Salyers reported his concerns to the NNSA:

Because what we were doing was the right thing to do. Management had made a decision. We were going by the procedures and . . . it didn't bother me.

*Tr.* at 120-21.

After Mr. Guge delivered the tape, lock, and documents to Mr. Petroski, he stated that he spoke with Al Roberson:

I called back to the supervisor later on and he commented that Jessie was in the office again looking for—asking where the key was. I told Mike Bittato, 'Put that key in your pocket,' I said, 'or Jessie might decide to take that other lock off.'

So he put the key on himself.

*Tr.* at 121.

Mr. Salyers agreed that he asked why the second lock was placed on the emergency shutdown switch, but he firmly denied looking for a key to the second lock:

No sir, I was not (looking for the key). I asked why (the lock) was put back on, because it was not caution tagged according to procedure. It was not locked out according to procedure.

*Tr.* at 84.

The October 2008 investigative report from U.S. Department of Energy

By letter dated December 31, 2008, Y-12 Site Office (YSO) Employee Concerns Manager Samuel L. Gaines notified Mr. Salyers that Babcock and Wilcox Technical Services must address several issues revealed by an investigation of Mr. Salyers' complaint. In a document titled "Summary of YSO Investigation of Y-12 Steam Plant—October 2008," the following was noted:

On October 15, 2008, Anthony Dull, YSO Maintenance Engineer, was asked by Mr. Sam Gaines, YSO Employee Concerns Manager, to investigate an employee concern allegation that was raised by Mr. Jessie Salyers of B&W Y12. Mr. Salyers alleges there are environmental, safety, health and security issues associated with the implementation of Utilities Management Organization Standing Order SO-UM-08-001, "Steam Plant

Emergency Shutdown.” Mr. Salyers has worked at Y-12 for over thirty years. According to his supervision he is a knowledgeable and experienced employee and has been relied on in the past for expert judgment in matters of Steam Plant operations.

. . .

The Standing Order does not address securing the fires in the boilers from the control room. Additionally, the direction to electrically isolate the Steam Plant would be cumbersome and time consuming to implement, particularly during off-shifts and weekends when high voltage electricians are not onsite. YSO also notes that although the Steam Plant has operated for over twenty four years since the boiler controls were upgraded, the Utilities Management Organization did not perform a safety or effectiveness analysis of the Emergency Trip to determine if equipment or procedural changes were necessary.

During his interview with the YSO Maintenance Engineer, Mr. Salyers stated that he was concerned about the environmental impact should the electrical isolation instruction in the Standing Order be implemented. His position has some basis in fact. When electrical power is isolated, valves bypassing the stack scrubbers fail in a fully open position, and valves supplying water to the Boiler Feed Clearwell also fail in a full open position. Bypassing the stack scrubbers would result in unclear boiler exhaust going directly into the atmosphere and could impact existing permit requirements for stack operation.

. . .

During the investigation YSO learned that a lock had been removed from the box that contains the Emergency Trip actuator by a Steam Plant Operator without management authorization. This lock was required to be in place to prevent access to the Emergency Trip per the standing order. The employee in question had removed the lock knowing what the Standing Order requirements were, having signed the required reading sheet for the Standing Order on 8/13/2008. YSO views this as a serious compromise of control that had been implemented to prevent operation of the Emergency Trip, and questions whether adequate control of the Emergency Trip lock box key has been maintained.

Cx. 2. The YSO concluded that it had “partially substantiated the allegations raised by Mr. Salyers” and made recommendations to address certain issues he raised. During the arbitration proceeding, Mr. Klemm conceded that the NNSA agreed with Mr. Salyers’ concerns about lack of access to the emergency shutdown switch. *Arb.* at 126-27. However, the YSO also recommended that “[m]ore stringent controls should be implemented to secure access to the Emergency Trip, or the equipment should be removed/disabled.”

#### Placement on “administrative leave” and investigation

Mr. Klemm testified that he had not heard further about the emergency shutdown switch until he heard about removal of the lock “and the particularly egregious way that he presented it by wrapping it up in the procedure and putting it on the supervisor’s desk.” *Tr.* at 166-67. Here, Mr. Klemm stated that “the behavior took a decided turn when that incident occurred.” *Tr.* at 167. He interpreted the conduct as follows:

In my mind that says to me that Jessie’s intent was I’m going to put this (wire tie) on (the emergency shutdown switch) to keep somebody from inadvertently pulling it, but I’m going to have that available to me. Because I only need a pocketknife or a pair of scissors and I can get that wire tie off of there right now and pull that switch.

*Tr.* at 168. Mr. Klemm further noted:

Up to that point Jessie was concerned. He expressed his concern. I respected that concern. So, we seriously looked into it. There appeared to me to be an escalation in his behavior and my concern was that if Jessie decided that he was going to go back . . . to find the key the second time to . . . unlock that switch . . . (and) resort to pulling that switch just to prove a point. That really did concern me.

As a result of that, we did put Jessie on administrative leave, which is essentially leave with pay, throughout the investigation of this process.

*Tr.* at 167. Mr. Klemm stated that he is responsible for any disciplinary actions with regard to Mr. Salyers’ employment. *Tr.* at 168.

During this same time period, Mr. Klemm recalled that the NNSA initiated an investigation:

I can't recall exactly when Jessie spoke to NNSA, but NNSA keeps an open line for our employees. There are signs posted all over the plant that they have an issue that they're concerned about they can call and make an appointment and go talk to the site office or to the Department of Energy Inspector General. Jessie did talk to NNSA and they initiated their own investigation.

*Tr.* at 169-70.

During the arbitration proceeding, Mr. Guge testified that "while (they are) conducting an investigation it is not unusual for (them) to place a person in leave status and continue to pay them." *Arb.* at 69-70. Mr. Guge stated that Mr. Salyers engaged in insubordination on the day he cut the lock, but he was placed on administrative leave with pay until the March 4, 2009 letter of termination of employment was sent. *Arb.* at 69.

#### Investigation by Respondent's Labor and Employee Relations Department

Olga Patrice Henley serves as the Senior Human Resources Specialist for the Labor and Employee Relations Department at the "Y-12 National Nuclear Security Complex." *Tr.* at 124. In this capacity, she conducts personnel investigations and administers disciplinary policies. *Tr.* at 12.4 Ms. Henley states that she became familiar with Mr. Salyers as follows:

A member of his management team contacted our office and told us that they had an issue with Mr. Salyers. He had removed a lock without authorization from what's been referred to here as an emergency stop or switch button.

*Tr.* at 125. Ms. Henley described her role as helping to "gather facts" and "advise supervision and management about appropriate disciplinary actions that may need to be applied." *Tr.* at 125.

Ms. Henley set forth the disciplinary policy at the Y-12 complex as follows:

We have a disciplinary procedure that has three formal levels. The first level is an oral reminder and it carries with it a probationary period of six months. The second level is the written reminder. It carries a probationary period of nine months, and the third level short of termination is a decision-making leave. It has a probationary of twelve (12) months and it is also a day off with pay for an employee to consider whether

he wishes to continue his employment with the company and whether or not he intends to follow all the rules and regulations and instructions of supervisors.

*Tr.* at 125; *Jx.* 3. The last level of discipline is termination from employment. *Tr.* at 125.

When advising management regarding the appropriate discipline, Ms. Henley states that she reviews the relevant rules and looks “for cases that involve similar conduct with other employees, or misconduct with other employees.” *Tr.* at 126. In Mr. Salyers’ case, Ms. Henley stated that she reviewed the “Standing Order” and the Employee Handbook, including §§ 1.1, 1.2, and 1.4 addressing violations of standard of conduct or company policy that may be grounds for disciplinary action such as termination. *Tr.* at 126-28; *Jx.* 1 and 3. She noted:

There are some examples. The specific rules that we . . . looked at were disregarding any safety or security rule, regulation, or procedure, also, refusing to carry out verbal or written instructions, including willful or careless neglect of duty.

*Tr.* at 128. She also reviewed records in “cases of insubordination.” *Tr.* at 128. At *Joint Exhibit 4*, Ms. Henley stated that a table of acts of insubordination from 2002 to 2009 was prepared. The following exchange in testimony occurred at the hearing:

**Ms. Henley:** Mr. Salyers’ act of insubordination was in—I’ll use my term—an in your face act. He was not sorry for what he did. He believed absolutely that he was right. We believe that if given the opportunity he would do it again.

**Counsel:** But Mr. Salyers didn’t actually pull the switch, so where is the harm?

**Ms. Henley:** No, he didn’t pull the switch. Had he pulled the switch it would have been an act of sabotage, but the fact of the matter is he truly believed that he was right and he was willing to endanger himself and others to prove that point.

**Counsel:** So, what did you recommend to management.

**Ms. Henley:** Termination.

**Counsel:** He wasn't actually fired . . . until several months later. I believe it was in March. Why not fire him on October 9<sup>th</sup>?

**Ms. Henley:** The Company takes termination very, very seriously. We take our time conducting our investigation. In addition to that Mr. Salyers was a long term employee who up until that point had been a good employee. We were concerned that there may be something in Mr. Salyers' life . . . or something going on that might mitigate his actions so, we referred him to our plant psychologist for an evaluation. That took some time.

*Tr.* at 132-33.

#### Termination of employment by letter dated March 4, 2009

Mr. Klemm made the decision to terminate Mr. Salyers' employment as of March 4, 2009.<sup>4</sup> He explained the delay between placing Mr. Salyers on administrative leave and the termination of employment as being due to the "number of appeal processes" and "number of responsibilities that are laid on management." *Tr.* at 169. He stated that "the duration of the time to execute all of those steps . . . does take a long time." *Tr.* at 169. Mr. Klemm also recalled that the investigation was suspended during the time that the NNSA conducted its investigation, "The investigation went through the Thanksgiving Holidays through the Christmas Holidays and into the new year." *Tr.* at 170. During this time that Mr. Salyers was on administrative leave, Mr. Klemm testified that he received one-hundred percent of his pay. *Tr.* at 171.

In determining that termination was appropriate, Mr. Klemm maintained that "insubordination does not make the plant safer." *Tr.* at 179. He noted:

In this particular case a considerable amount of effort had gone into evaluating the risks associated with operating that switch. A

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<sup>4</sup> The date of termination is contained in the transcript of the October 29, 2009, arbitration proceeding at page 75.

decision was made that it was too much risk to operate that switch under the circumstances.

*Tr.* at 179. Mr. Klemm stated:

Jessie had clearly indicated his desire to continue to remove the locks, no matter how many we put on there. I don't know how you can make it any clearer than to put it in a standing order that has the full effect of an instruction, or a procedure. Violation of these procedures is not optional. I mean, we cannot tolerate somebody who will go into a nuclear plant and intentionally do something that might cause harm to other people.

This is not a Ford assembly plant. This is a bomb plant. Everybody there has a security clearance. Everybody that works in the West End has to be absolutely trustworthy.

. . .

I could not take the risk that he would go in there and operate that switch.

*Tr.* at 179. For these reasons, he made the decision to terminate Mr. Salyers' employment. *Tr.* at 180.

Mr. Klemm testified that he did not recall seeing the October 2008 investigative report of the U.S. Department of Energy's Y-12 Site Office, which stemmed from Mr. Salyers' complaint. *Tr.* at 189-90.<sup>5</sup> Moreover, he

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<sup>5</sup> During the arbitration proceeding, the following exchange occurred between Mr. Pope and Mr. Klemm:

**Mr. Pope:** Now, you learned early on, didn't you, that Mr. Salyers made a formal complaint with the . . . NNSA—

**Mr. Klemm:** National Nuclear Security Administration, yes.

**Mr. Pope:** And you were involved in that, weren't you, in writing reports?

**Mr. Klemm:** I was aware of it. When that – when the reports are made to NNSA they do their own investigations.

**Mr. Pope:** That's right. And you got a copy of it, didn't you?

**Mr. Klemm:** Yes.

stated that he did not recall seeing letters dated December 31, 2008, January 20, 2009, or February 10, 2009 from the U.S. Department of Energy to Mr. Salyers prior to Mr. Salyers' termination. *Tr.* at 189-91.

The conclusion of Mr. Klemm's testimony reveals continued disagreement with Mr. Salyers:

**Mr. Salyers:** I'm going to ask you if you wanted to assume that that switch did not work . . .  
..

**Mr. Klemm:** Jessie, in particular I did ask that question and the issue was going to be tracing all of the wires that go down there to that switch and find out where they terminate, was going to take hundreds of hours. That's hours of cost in time and money that we didn't have. That's why I did not do that.

**Mr. Salyers:** So, if the Control Room is filled with smoke, you had to get out of there, you couldn't shut it down, then the lock was . . . your way of saying I need to wait on somebody else . . . .

**Mr. Klemm:** No. My concern, Jessie, was that if we operated that switch and let's say that it stopped the force draft blowers, but not the fuel. We have a potential problem with what's left and if it does not secure all of the elements in that boiler, then the risks to the people in that building could be greater than they would have been if they just got out of there.

I make this point as an issue of emergency. If it was not an emergency, people would go out in the plant and operate the components if they had to. So, if, if the control system failed, we could still secure that boiler by going out

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*Arb.* at 113. Mr. Klemm wrote the December 9, 2008, response of Respondent to the NNSA during this investigation.

in the space and operating all the valves. You know that as well as I do.

If we have a catastrophic failure and we have to secure that boiler, punching those buttons and heading out the door takes a matter of seconds. The object of the game is to save life and limb. So, we want to get the people out of there as quickly as possible, if we have a catastrophic failure.

. . .

**Mr. Salyers:** All right, I can understand, but I still say you're making an assumption . . .

**Mr. Klemm:** I don't know what it takes out, Jessie, and that's my real concern. If it only takes out part of those components, then it's not safe. It's, in fact, worse.

**Mr. Salyers:** Well, that's what it was designed for. ... [I]t seems like you've made an assumption when I – like I said before, I know what it does. You're making an assumption.

*Tr.* at 182-83.

During the arbitration proceeding, Mr. Klemm acknowledged that, if anyone knew what the emergency shutdown switch could do, it was Mr. Salyers as he was considered a subject matter expert at the plant. *Arb.* at 123. However, Mr. Klemm expressed concern that Mr. Salyers could produce no "formal documentation" that the switch worked. *Arb.* at 123. Mr. Klemm stated:

My personal feeling was at that time that he really did want that switch to be operated. And I understand that he really did want to have that switch operated. He made that perfectly clear to everybody he talked to.

*Arb.* at 93.

Similarly, during the arbitration proceeding, the company psychiatrist, Dr. Reynolds, expressed a concern that, although Mr. Salyers' personal psychiatrist, Dr. Hogan, released him as "fit-for-duty" in December 2008 and January 2009, Mr. Salyers continued to maintain that he did the "right thing" by removing the lock. *Arb.* at 183. From this, Dr. Reynolds concluded that he could not recommend that Mr. Salyers "resume performing safety or security sensitive duties." *Arb.* at 183.

During the arbitration proceeding, Mr. Salyers stated that he received the termination of employment letter on March 11, 2009, which was the date he "signed for" the letter. *Arb.* at 169-70.

#### The May 28, 2009 complaint to the U.S. Department of Labor

In his May 2009 complaint to the Department of Labor's Occupational Health and Safety Administration, Mr. Salyers asserted that he was terminated from his employment by Respondent because he expressed health and safety concerns at the steam plant to the National Nuclear Security Administration (NNSA) on October 15, 2008.

### **III Discussion and conclusions**

#### **A. Employee protection provisions**

The Energy Reorganization Act of 1974, as amended, at 42 U.S.C. § 5851 (referred to as the "ERA") prohibits an employer from retaliating or discriminating against an employee who, as in this case, presents health and safety concerns.<sup>6</sup>

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<sup>6</sup> The 180 day limitation of action period for filing a claim under the Energy Reorganization Act runs from the date the employee receives final, definitive, and unequivocal notice of the adverse job action. *Larry v. Detroit Edison Co.*, 86-ERA-32 (Sec'y June 28, 1991). Thus, the limitations period begins to run when the employee is notified of the adverse action, not when the adverse action actually takes effect. For example, in *Devine v. Blue Star Enterprises, Inc.*, ARB No. 04-109, ALJ No. 2004-ERA-10 (ARB Aug. 31, 2006), the limitations period began to run when the complainant was notified of his layoff. Indeed, the amended regulations at 29 C.F.R. § 24.103(d)(2) makes clear that, under the ERA, a complaint must be filed "within 180 days after the alleged violation of the Act occurs (*i.e.*, when the retaliatory decision has been both made and communicated to the complainant) . . ." 29 C.F.R. § 24.103(d)(2). In this case, Complainant received notification of the termination on or about March 11, 2009, which is the date he "signed for" the letter. This complaint was filed on May 28, 2009, within the ensuing 180-day limitation of action period. See 29 C.F.R. § 24.103(b)(2).

These remedial "employee protection" provisions are modeled after, and serve an identical purpose to, employee protection provisions of the Federal Coal Mine Health and Safety Act of 1969, *i.e.* to encourage employees to express health and safety concerns without fear of reprisal. See S.Rep. No. 95-848, 95th Cong., 2d Sess. at 29, 1978 U.S.Code Cong. & Admin. News at 7303. The congressionally-mandated employee protections at issue here bear relationship to nuclear safety and, indeed, serve a critically important public interest. *English v. General Electric Co.*, 496 U.S. 72 (1990).

In 1992, Congress added subparagraph (3) to 42 U.S.C. § 5851, which provides that "[t]he Secretary may determine that a violation . . . has occurred only if the complainant has demonstrated that [protected activity] was a contributing factor in the unfavorable personnel action alleged . . . ." 42 U.S.C. § 5851(b)(3)(C). Thus, if the complainant carries that burden, s/he is not entitled to relief "if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior." 42 U.S.C. § 5851(b)(3)(D).

## **B. Burdens of the parties**

In *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-1 (ARB Apr. 30, 2004), the Board set forth the burdens of production and proof under the whistleblower provisions of certain environmental statutes, including the ERA:

To establish a *prima facie* case of unlawful discrimination under the environmental whistleblower statutes, a complainant needs only to present evidence sufficient to raise an inference, a rebuttable presumption, of discrimination. As the Secretary and the Board have noted, a preponderance of the evidence is not required. See *Williams v. Baltimore City Pub. Schools Sys.*, ARB No. 01-021, ALJ No. 00-CAA-15, slip op. at 1 n. 7 (ARB May 30, 2003). A complainant meets this burden by initially showing that the employer is subject to the applicable whistleblower statutes, that the complainant engaged in protected activity under the statute of which the employer was aware, that the complainant suffered adverse employment action and that a nexus existed between the protected activity and the adverse action.

Moreover, the Board holds that, where a whistleblower complaint has been fully tried on the merits, as in this case, “the ALJ does not determine whether a prima facie showing has been established, but rather whether the complainant has proved by a preponderance of the evidence that the respondent discriminated because of protected activity.” See *Williams v. Baltimore City Pub. Schools Sys.*, ARB No. 01-021, ALJ No. 00-CAA-15, slip op. at 1 n. 7 (ARB May 30, 2003) (slip op. at 1 n. 7)<sup>7</sup>.

At this point, Respondent has the burden to produce evidence or articulate a non-discriminatory, legitimate reason for its action. Here, Mr. Klemm testified that he terminated Mr. Salyers’ employment because Mr. Salyers committed an act of “insubordination” by cutting the lock to the emergency shutdown switch at the steam plant. Therefore, the inference of discrimination “drops from the case,” and Mr. Salyers must prove by a preponderance of the evidence that protected activity was a contributing factor in his termination. See 42 U.S.C.A. § 5851(b)(3)(D); 29 C.F.R. § 24.109(b)(1); *Cox v. Lockheed Martin Energy Sys., Inc.*, ARB No. 99-040, ALJ No. 97-ERA-17, slip op. at 4 n.7 (ARB Mar. 30, 2001); *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981).

### **C. Causal nexus not established**

For purposes of this complaint, Respondent is prohibited from engaging in any adverse employment action, such as discharge, in retaliation for (1) Complainant notifying it of an alleged violation of the ERA or the Atomic Energy Act of 1954 (AEA), or (2) for Complainant’s refusal to engage in any practice made unlawful by the ERA or the AEA. 29 C.F.R. § 24.102(c). However, as previously noted, Mr. Salyers must establish by a preponderance of the evidence that his termination stemmed from engaging in protected activity.

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<sup>7</sup> Because this case has been fully tried on the merits, Mr. Salyers has presented evidence sufficient to raise an inference, or rebuttable presumption, of prohibited discrimination. Indeed, prior to his termination of employment, it is undisputed that Mr. Salyers expressed safety concerns to his supervisor, Mr. Guge, and numerous other employees at the plant as well as to the Deputy General Manager at Y-12, Mr. Klemm, who held a meeting with Mr. Salyers on August 11, 2008 to discuss his safety concerns regarding the safety shutdown switch. Moreover, Mr. Klemm was aware that, during the same time period, Mr. Salyers voiced his safety concerns to the National Nuclear Security Administration. Thus, there is ample evidence in the record that Mr. Salyers engaged in protected activities and Mr. Klemm was aware of these protected activities at the time he made the decision to terminate Mr. Salyers’ employment.

Here, after considering the testimony of numerous witnesses and reviewing the documentary evidence of record, this tribunal does not find that Mr. Salyers has sustained his burden of proof in this regard. Guidance on this issue is found in *Lopez v. West Texas Utilities*, 86-ERA-25 (Sec'y. July 26, 1988):

Although whistleblowers are protected from retaliation for blowing the whistle, the fact that any employee may have blown the whistle does not afford him protection from being disciplined for reasons other than his whistleblowing activities nor does it give such an employee carte blanche to ignore the usual obligations involved in an employer-employee relationship.

*Slip op.* at 8-9. Indeed, the Secretary cited to *Dunham v. Brock*, 794 F.2d 1037, 1041 (5th Cir. 1986) that "[a]n otherwise protected 'provoked employee' is not automatically absolved from abusing his status and overstepping the defensible bounds of conduct."

This tribunal observed Mr. Salyers at the hearing. Mr. Salyers was credible and, based on testimony from other witnesses, he was, without dispute, considered an "expert" on steam plant operations with institutional knowledge of such operations spanning 35 years. His safety-related concerns pertaining to the emergency shutdown switch and the emergency procedures set forth in the August 12, 2008, "Standing Order" were reasonable. Notably, in the U.S. Department of Energy's October 2008 investigative report, which was based on Mr. Salyers' safety complaints, the NNSA determined that the "Standing Order" was deficient in addressing safety concerns at the plant in the event of a catastrophic event. Moreover, during the arbitration proceeding, Mr. Klemm acknowledged that the NNSA agreed with Mr. Salyers' concerns regarding lack of access to the emergency shutdown switch. To the extent that Mr. Salyers expressed his concerns about the emergency shutdown switch and his concerns regarding deficient procedures of the "Standing Order" through internal complaints at the Y-12 plant and external complaints to the NNSA, these avenues of seeking to correct safety issues at the plant are deemed protected activities.

However, Mr. Salyers deviated from proper avenues of redress for his safety concerns when, in protest of the "Standing Order," he cut the lock on the emergency shutdown switch. This act is not deemed protected activity. Importantly, there was no witness who testified at the hearing, or during the October 2009 arbitration proceeding, of any instance of any employee committing such conduct in protest of a standing order. Mr. Salyers testified that, in his 35 years of employment at Y-12, he had not previously deviated from the requirements of a "Standing Order."

Uncontradicted testimony at the hearing and during the arbitration proceeding provides that the "Standing Order" had the effect of modifying procedures regarding the emergency shutdown switch. Mr. Salyers signed the "Standing Order" indicating his understanding of its requirements. Although it is evident that Mr. Salyers disagreed with, and protested, the content of the "Standing Order," the act cutting the lock on the emergency shutdown switch constituted "overstepping the defensible bounds of conduct" by Mr. Salyers. Indeed, the October 2008 NNSA investigative report further supports a finding that Mr. Salyers' conduct was improper:

During the investigation YSO learned that a lock had been removed from a box that contains the Emergency Trip actuator by a Steam Plant Operator without management authorization. This lock was required to be in place to prevent access to the Emergency Trip per the Standing Order. The employee in question had removed the lock knowing what the Standing Order requirements were, having signed the required reading sheet for the Standing Order on 8/13/2008. YSO views this as a serious compromise of control that had been implemented to prevent operation of the Emergency Trip, and questions whether adequate control of the Emergency Trip lock box key has been maintained.

Cx. 2.

Mr. Salyers argues that the actual lock on the switch was an "administrative" lock and was, therefore, not an "authorized" lock. Although there is no dispute that the original lock placed on the switch was not a properly numbered lock, this did not relieve Mr. Salyers from following the requirements of the "Standing Order." Rather, if there was a concern over the type of lock used on the switch, the proper course would be for Mr. Salyers to file an internal and/or external complaint as he did with his other safety concerns.

During the course of the hearing, Mr. Salyers stressed that he would not "assume" that the emergency shutdown switch did not operate properly; rather, given his history and expertise at the steam plant, Mr. Salyers was certain that the switch would operate properly in an emergency. Mr. Klemm, on the other hand, credibly testified that neither his staff nor Mr. Salyers could produce documentation establishing the viability of the emergency shutdown switch. Importantly, Mr. Klemm testified that, under its original design, the plant was designed to operate with the use of coal. Later, the plant was modified to "accept gas." As a result, the pneumatic controls of the early days at the plant were modified and updated to

electronic controls. Mr. Klemm testified that he lacked documentation that the emergency shutdown switch was properly modified and would work. Mr. Salyers, on the other hand, was adamant that the switch worked. He testified that he worked at the plant during the transition period and had first-hand knowledge that the switch would operate properly in an emergency.

While this tribunal accepts Mr. Salyers' expertise of steam plant operations, it also accepts Mr. Klemm's concerns regarding lack of documentation that the emergency shutdown switch would operate properly in a crisis. This tribunal finds that any disagreement expressed by Mr. Salyers to management and/or the NNSA in this case constituted protected activity. However, when Mr. Salyers cut the lock on the emergency shutdown switch, his conduct fell outside the realm of protected activity.

It is noted that, throughout the time that Mr. Salyers presented his safety concerns to Y-12 management and the NNSA, no adverse employment action was taken against Mr. Salyers. To the contrary, management at Y-12 and the NNSA acknowledged Mr. Salyers' safety concerns and discussed the concerns with him. Mr. Klemm and other company officials met with Mr. Salyers to discuss his concerns in August 2008. Once the "Standing Order" was issued, Mr. Salyers noted his disagreement directly on the copy of the document that he signed. Neither his verbal expression of concerns during the August 2008 meeting, nor the written protest he placed on the "Standing Order," resulted in any adverse employment action. Mr. Salyers continued to express his concerns after the lock was placed on the emergency shutdown switch and filed a complaint setting forth his concerns with the NNSA. Throughout the months of August and September 2008, Mr. Salyers was not subjected to an adverse employment action although he continued to express his concerns over the emergency shutdown switch and "Standing Order."

Rather, looking closely at the sequence of events in this case, Mr. Salyers' placement on administrative leave, which led to his termination after an investigation, was directed by Mr. Klemm in October 2008 directly after he learned that Mr. Salyers had cut the lock on the emergency shutdown switch, wrapped it in a copy of the "Standing Order," sealed it with tape, and left it on Mr. Guge's desk. Testimony at the hearing and from the arbitration proceeding demonstrates that Mr. Salyers cut the lock on October 8, 2008, his supervisor (Mr. Guge) learned of the incident on October 9, 2008 and Mr. Klemm was, in turn, advised of the incident. A new lock was placed on the emergency shutdown switch and Mr. Klemm placed Mr. Salyers on administrative leave while the incident was investigated.

Mr. Klemm credibly testified that placement of an employee on administrative leave is standard procedure when investigating an incident at the plant. At the conclusion of the investigation, Mr. Klemm decided to terminate Mr. Salyers' employment and a letter of termination dated March 4, 2009 was sent to Mr. Salyers. As demonstrated from this tribunal's observations of witnesses at the hearing, Mr. Salyer's held a sincere belief that the emergency shutdown switch would work, whereas Mr. Klemm insisted upon documentation to establish that the switch worked. To the extent that Mr. Salyers expressed his concerns orally or in writing to management, the NNSA, or any other entity, his activities were protected. However, once Mr. Salyers cut the lock on the emergency shutdown switch in protest of the "Standing Order," his conduct exceeded the bounds of protected activity. This tribunal finds that Mr. Salyers was terminated because of non-protected activity; namely, cutting the lock on the emergency shutdown switch. Because his termination was not the result of protected activity, his complaint under the ERA cannot be sustained. Accordingly,

### **ORDER**

IT IS ORDERED that the complaint of discrimination filed by Jessie Salyers under Section 5851 of the Energy Reorganization Act is DENIED.

A

William S. Colwell  
Associate Chief Administrative Law Judge

Washington, DC  
WSC:SF

**NOTICE OF APPEAL RIGHTS:** This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. See 29 C.F.R. § 24.110(a). The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages. With your supporting legal brief you may also submit an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages. In addition, an appendix (one copy only) may be submitted with the opposing legal brief consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. See 29 C.F.R. §§ 24.109(e) and 24.110.