United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEPARTMENT OF THE NAVY NAVY PUBLIC WORKS CENTER NORFOLK, VIRGINIA and TIDEWATER VIRGINIA FEDERAL EMPLOYEES METAL TRADES COUNCIL, AFL-CIO	Case No. 92 FSIP 72

FACTFINDER'S REPORT

The Department of the Navy, Navy Public Works Center, Norfolk, Virginia (Employer) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Union). The undersigned was designated by the Panel to conduct a factfinding hearing on the issue of environmental differential pay (EDP) for employees exposed to asbestos in the main Power Plant (P-1). The parties also were notified that the report of the Factfinder, without recommendations for settlement, would be submitted to the Panel in accordance with the Panel's regulations, 5 C.F.R. § 2471.9(c) (FF. Exh. 1(f)). Both parties submitted pre-hearing briefs outlining their respective positions (FF. Exhs. 1(f), 1(g)). A hearing was held on September 28 and 29, 1992, in Norfolk, Virginia, and October 6, 1992, in Washington, D.C. A stenographic record was made, testimony and arguments were presented, and documentary evidence was submitted. Following the hearing, the parties submitted additional evidence and filed post-hearing briefs;[1/] the record is now closed.

1/ On November 30, 1992, the Factfinder received from the Employer a written motion to strike from the record two exhibits attached to the Union's post-hearing brief; the Union's response thereto was received on December 1, 1992. After consideration of both parties' positions, the Factfinder hereby grants the motion with respect to exhibit A, an article authored by Dr. William J. Nicholson entitled "On the Carcinogenic Risks of Asbestos Exposure in Buildings," and

BACKGROUND

The Employer's mission is to provide public works support services to naval customers at the Norfolk Naval Base, including maintenance, utilities, housing, engineering, environmental, and transportation (Tr. 11, 212; FF. Exh. 1(g)). The Union represents approximately 1,400 Wage Grade (WG) employees who work in a variety of trade occupations (Tr. 11; FF. Exh. 1(g)). The parties' collective-bargaining agreement (CBA) is due to expire in May 1993 (Tr. 29; Jt. Exh. 1; FF. Exh. 1(g)).

This dispute concerns approximately 135 employees stationed in P-1 or who may be assigned to work there as part of their duties (Tr. 224-26; Emp. Exh. 6). Those who work in P-1 on a regular basis are boiler plant operators, boiler makers, pipefitters, welders, instrument mechanics, and machinists; they are responsible for operating, repairing, and maintaining the equipment (Tr. 222-23; Emp. Exh. 6). They do not wear protective work clothing or respiratory equipment to perform their duties (Tr. 395-97). A team of 4 to 5 insulators is permanently stationed in P-1 (Tr. 255, 327). They are the only employees who perform asbestos-related work (i.e., removing ("ripout"), repairing, and encapsulating insulation) (Tr. 75, 255, 324, 327, 332, 414-15). Carpenters, painters, and electricians may be assigned to work there on occasion (Tr. 225). Because all WG employees who enter P-1 for any period of time get EDP, access to P-1 is controlled by the Employer (Tr. 17-19, 226). Each year, approximately $200,000 is paid out to P-1 employees in EDP (Tr. 126, 173, 283, 290; Emp. Exh. 14).

P-1, which was constructed over 50 years ago, is the main steam generating facility at the naval base (Tr. 215-16, 221). Together with five auxiliary facilities (Z-309, SP-85, NH-200, CEP-43, and Pier 12 Complex), it provides all power for the base (Tr. 260, 305-07). The facility, which is 500 to 700 square feet in area and four stories high, has multiple levels separated by decks of open steel grating (Tr. 78, 218-19). It contains eight large, multiple-story boilers, fuel oil conditioning equipment, air-free heaters, air compressors, pumps, and a maze of steam piping and valves (Tr. 218). The machinery vibrates when in operation (Tr. 220, 233). During the winter months (end of November through mid March) all eight boilers are in operation unless any one of them is being repaired (Tr. 237). For the last 4 years, any five boilers have been shut down for valve repair for 2 weeks in the summer (Tr. 234-37). The facility is ventilated by three large garage-type roll-up doors, two regular doors in the front and side, and

---

denies it with respect to exhibit B, the 1980 National Institute for Occupational Safety and Health report entitled Workplace Exposure to Asbestos: Review and Recommendations.

two or three overhead fans (Tr. 81-82). Air flow is maintained when any number of boilers are in operation (Tr. 236-37).

About 50 percent of the P-1 equipment (boilers, air preheaters, steam pipes, et cetera) requires insulation (Tr. 221). When the equipment was first installed some 50 years ago, it was insulated with asbestos, which was in popular use at the time (Tr. 221). The primary asbestos used was chrysotile, although some amosite was also used (Tr. 78, 220-21, 402, 540). Approximately 50 percent of the original asbestos insulation has been removed, at least 10 to 15 percent since 1989 (Tr. 244, 320, 371-74, 390, 421; Emp. Exhs. 17, 20). That is, about half of the original asbestos insulation on boilers, the majority on air preheaters, and around some valves on steam pipes, has been removed; most of what remains is on steam pipes in the upper levels of the facility where employees do not work on a regular basis (Tr. 244-46, 253, 312-13; Emp. Exh. 8). In accordance with Navy policy, asbestos insulation is removed ("ripped out") only if "it is on something that is being worked on;" otherwise, it is simply encapsulated (Tr. 245; Jt. Exhs. 4, OPNAVINST 5100.23B, Chapter 17, dated January 3, 1991, p. 17-2; 5, PWCNORVA INST 5100.33D, Chapter 10, section 1, dated March 2, 1990, p. 10-9). There is a plan for the complete removal of asbestos; however, because it will require P-1 to be shut down for about 6 months, it will not be implemented until construction on a new boiler plant (Z-312) is completed sometime within the next 5 years (Tr. 248-50; Emp. Exh. 7).

Between the end of May 1983 and mid May 1988, excluding 1987, 91 employees were monitored for asbestos exposure under the direction of the Norfolk Industrial Hygiene Department, Naval Hospital Portsmouth, Virginia, (NIHD) pursuant to the workplace monitoring plan (Tr. 436; FF. Exh. 1(g), Attachment 4(a)). The monitoring method used was the "personal breathing zone" (PBZ) method authorized by Government and agency regulations (Tr. 433, 465; Jt. Exhs. 3, 29 C.F.R. § 1910.1001(d)(1)(i), (d)(6)(i), and Appendix A; 4, p. 17-2; 5, p. 10-6). The air samples gathered were analyzed using the OSHA-approved NIOSH (National Institute for Occupational Safety and Health) 7400 method also known as phase contrast microscopy (PCM) (Tr. 440-41, 494-96; Jt. Exhs. 3, 29 C.F.R. 1910.1001(d)(6)(ii), and Appendix A; 4, p. 17-12; Emp. Exh. 33). The test results ranged from .0030 to .0640 fiber[2/] per cubic centimeter (f/cc) of air over an 8-hour time-weighted average

---

2/ OSHA defines fiber as "a particulate form of asbestos ... 5 micrometers or longer, with a length-to-diameter ratio of at least 3 to 1" (Tr. 494; Jt. Exhs. 3, 29 C.F.R. 1910.1001(b); 4, p. 17-3).

(TWA), well below the OSHA "action level"[3/] (AL) of .1 f/cc (Tr. 502-03; Jt. Exhs. 3, 29 C.F.R. § 1910.1001(b); 4, p. 17-3; FF. Exh. 1(g), Attachment 4(a)). Another 45 employees were monitored between March 30 and April 10, 1992, to determine whether the levels of asbestos to which employees were being exposed had changed since 1988 (Tr. 442, 444, 450; Emp. Exh. 23; FF. Exh. 1(g), Attachment 4b). Once again the PBZ monitoring method was used (Tr. 444). This time, however, the air samples were analyzed using both the PCM and AHERA transmission electron microscopy (TEM) methods (Tr. 445, 497-500).[4/] The samples ranged from .0025 to .1598 f/cc TWA under PCM, and .0046 to .1075 under AHERA TEM (this range includes only 43 samples because 2 were "too dirty to read or unacceptable for analysis"); a single sample was above the OSHA AL but below the .2 f/cc TWA "permissible exposure level" (PEL) (Tr. 431, 449-51; Jt. Exhs. 3, 29 C.F.R. § 1910.1001(c); 4, p. 17-3; Emp. Exhs. 23, 26; FF. Exh. 1(g), Attachment 4b). When the Employer could not locate for remonitoring the employee (maintenance worker) who had tested above the OSHA AL, it monitored another employee (painter) who routinely brush painted; the samples were taken over 5 separate days from mid August to September 1, 1992. (Tr. 454-60; Emp. Exhs. 24-26). The samples, this time analyzed using the TEM (NIOSH 7402) method[5/], ranged from .0060 to .0158 f/cc TWA, well below the OSHA AL (Tr. 458; Emp. Exhs. 24-25). It was determined that the high exposure reading resulted from the employee having "cleaned off[ed] some of the ledges in the boiler plant with a paint brush before he painted [a boiler]" (Tr. 454). As a result, procedures now require insulators wearing protective clothing and equipment to perform that task (Tr. 273-74, 388-89). The parties agree that the air samples were taken and analyzed "properly and correctly;" nor are the results in dispute (Tr. 460-61, 466, 472, 509).

The Factfinder toured P-1 on September 29, 1992, with representatives of both parties (Tr. 515) and observed unspecified dust in corners, ledges, equipment, and upper level decking and

---

3/ The AL is the level which, if exceeded, requires "the initiation of air monitoring, employee training, and medical surveillance" (Tr. 140; Jt. Exhs. 2, pp. 22679, 22682; 4, p. 17-3).

4/ Under the PCM method all fibers that meet OSHA's definition are counted. The chemistry of the fibers cannot be identified using this method; thus, the PCM method may give "false positive" results. Under the AHERA TCM method, actual asbestos fibers of all sizes are counted. (Tr. 447, 495-501.)

5/ Under this method, the fibers that are counted are those that are (a) identified as asbestos and (b) meet the OSHA definition of fiber (Tr. 445-46).

steam pipes, as well as torn or deteriorated insulation on some lower level steam pipes and around steam valves. In only one of those cases did the parties agree that the insulation was asbestos.[6/] Nonasbestos insulation on pipes and boilers was clearly marked in red lettering.

The disputed issue has a long and tumultuous history. In 1980, P-1 employees filed a grievance seeking 8 percent EDP for exposure to asbestos retroactive to March 9, 1975, and for the Employer to take measures to protect them from the hazards associated with airborne asbestos fibers in accordance with Article 29, of the parties' then CBA (Un. Br. 3-6). Navy Public Works Center, Norfolk, Virginia and Tidewater Virginia Federal Employees Metal Trades Council, Decision No. F-FMCS-8 (August 11, 1980) (Arbitrator Paul Fasser) (FF. Exh. 1(g), Attachment 10). This contract article required the Employer to pay EDP when conditions prescribed in Federal Personnel Manual (FPM) Supp. 532-1, Appendix J, (FF. Exh. 1(g), Attachments 3, 10, p. 7) were met. The Union argued that since "any concentration of airborne asbestos fibers is hazardous to the health of employees," the Employer had the obligation of paying 8 percent EDP and taking protective measures (FF. Exh. 1(g), Attachment 10, p. 10). It cited a 1980 OSHA/NIOSH study in support of its position (Id. at 12). The Employer, on the other hand, argued that only if the then OSHA PEL (.2 f/cc) was exceeded was it required to pay the 8 percent EDP and take the appropriate action established by OSHA (Id. at 11). Since four samples of the ambient air in P-1 revealed that the airborne fiber count was less than that level, payment of the environmental differential was inappropriate (Id.). Arbitrator Fasser disregarded the results of those air samples because he found that they had not been taken as prescribed by OSHA and, therefore, were "deficient and improper" (Id. at 13). He also rejected the Employer's argument that the OSHA PEL and the FPM EDP standard are interdependent, reasoning that the former is designed to reduce the hazard while the latter is to provide compensation for asbestos exposure (Id. 11-12). He "encouraged" the parties to negotiate an agreement over EDP, noting a number of such agreements at other of the Employer's facilities (Id. at 13). Barring such agreement, however, he order the Employer to conduct air samples in accordance with OPNAVINST 6260.1A and to pay 8 percent EDP retroactive to March 9, 1975, if they revealed that there was asbestos present in

---

6/ The Employer's witness, John Edgar Norman III, the General Foreman of the Emergency Service Branch, Environmental Department, which is responsible for all insulation work, including asbestos removal, also testified that he toured P-1 the Saturday before the hearing (September 26, 1992) and noticed torn insulation in various areas which he identified as asbestos based on his 20 years' experience working with it (Tr. 324, 380, 400-01).

the air (Tr. 15; FF. Exh. 1(g), Attachment 10, p. 14). He also ordered the Employer to take "protective measures necessary to reduce and insofar as necessary eliminate the hazard according to the provisions of 29 C.F.R. 1910.1001, OPNAVINST. 6260.1A, and PWCNORVA INST. 5100.31A" (Id.) No exceptions to this arbitral decision were filed by either party (Tr. 30; Un. Br. 6). Rather than negotiating over the matter, the Employer chose to conduct air samples (Un. Br. 6-7). Navy Public Works Center, Norfolk, Virginia and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, 15 FLRA 296, 301 (1984) (Un. Exh. 1). When the results came back showing exposure levels under the OSHA PEL, it refused to pay EDP arguing that there was "no legal basis or obligation" for such payment (Id.) The Union filed an unfair labor practice charge which was ultimately heard by Administrative Law Judge Alan W. Heifetz (Id. at 299). The Employer argued that the parties' dispute concerned "differing but reasonably arguable interpretations" of Arbitrator Fasser's decision, which it interpreted as requiring it to pay EDP only if tests showed asbestos exposure levels at or above the OSHA PEL (Id. at 304). Judge Heifetz rejected the Employer's argument noting that the Employer's claim that the OSHA PEL determines whether EDP is paid was rejected by Arbitrator Fasser who instead "implicitly accepted the Union's argument that any amount of asbestos would be compensable" (Id.). He concluded that since the Employer's samples showed there was asbestos in the ambient air, the Arbitrator's "clear and unambiguous" award directed the Employer to pay EDP (Id. at 306). Its failure to do so was in violation of §§ 7116(a)(1), (5), and (8) of the Statute (Id.). On exceptions, the Authority affirmed Judge Heifetz's decision. (Id. at 296).

A few years later, the issue was raised as part of negotiations over the CBA which preceded the current one (Tr. 95-96; FF. Exh. 1(g), Attachment 13; Un. Br. 7). When the parties reached impasse over payment of EDP for existing "authorized local work situations" -- those work situations where employees already were receiving EDP -- the Union requested the assistance of the Panel (Tr. 24, 94-96; FF. Exhs. 1(g), Attachments 12, p. 1, 13; Un. Br. 8). Department of the Navy, Navy Public Works Center, Norfolk, Virginia and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, Case No. 86 FSIP 101 (September 18, 1986), Panel Release No. 247 (FF. Exh. 1(g), Attachment 12). After the parties accepted the Panel's recommendation that they submit their dispute to mediation-arbitration, they appeared before Arbitrator Patrick J. Halter (FF. Exhs. 1(g), Attachments 12, p. 1, 13; Un. Br. 8). The parties specifically noted that the primary problem was EDP for asbestos exposure (FF. Exh. 1(g), Attachment 12, p. 3). Both parties' proposals would have continued EDP in those work situations where it was already being paid as a result of negotiated agreements or arbitral decisions (FF. Exh. 1(g), Attachment 12, p. 2). The Employer would have continued payment until the parties negotiated the matter under another provision which had already been agreed upon; although not specified, it most

likely refers to Article 26, § 3, of the then and current CBA[7/] (Tr. 99-100; Jt. Exh. 1; FF. Exh. 1(g), Attachment 12, p. 2). The Union's proposal, on the other hand, would have continued payment of EDP until "it [was] determined that the work categories no longer meet the requirement due to technology or the elimination of the hazard" (FF. Exh. 1(g) Attachment 12, p. 2). Arbitrator Halter rejected the Employer's proposal requiring "reexamination" of all work situations where employees already were getting EDP because doing so would be "repetitive, costly, and disruptive to the workplace" (FF. Exh. 1(g), Attachment 12, p. 4). While he adopted that part of the Union's proposal which "grandfathered" those work situations, he rejected that part which would have allowed termination of EDP "due to technology and elimination of the hazard" (emphasis added) (FF. Exh. 1(g), Attachment 12, pp. 2, 4). Instead, he modified the Union's proposal to require the continued payment of EDP only until "it is determined that the work categories no longer meet such requirements due to protective devices or safety measures that practically eliminate the potential for such injury or illness" (emphasis added) (FF. Exh. 1(g), Attachment 12, p. 4). The Arbitrator reasoned that the Union's criteria did not comport with FPM Supp. 532-1, Appendix J (FF. Exh. 1(g), Attachment 12, p. 4). The provision ordered by Arbitrator Halter was incorporated into the parties' 1986 CBA as Article 26, § 4[8/], and subsequently rolled over into the current CBA (Tr. 23, 27-29; Un. Br. 9; Emp. Br. 9). In practice, the Employer currently pays EDP to any unit employee who enters P-1 for any amount of time

---

7/ This contract provision states that:

> Within thirty (30) calender days after approval of this Agreement the PARTIES will commence negotiations of applicable local work situations. ... Once the work situations are finally resolved in accordance with this section the EMPLOYER will publish such situations as an appendix to this agreement. (Jt. Exh. 1.)

8/ This contract provision reads as follows:

> It is agreed the currently authorized EDP situation will automatically be considered an "authorized work situation" unless it is determined that work categories no longer meet such requirements due to protective devices or safety measures that practically eliminate the potential for such illness or injury. (Jt. Exh. 1.)

because there continues to be a "measurable, detectable level of asbestos" in the ambient air (Tr. 12, 18-19).

Negotiations over the disputed issue ensued when the Employer approached the Union to change the level of airborne asbestos above which EDP would continue to be paid at P-1 (Tr. 43-44, 142; FF. Exh. 1(g), Attachment 17). The Employer concedes that it did not specifically invoke the mid-term reopener provision in the CBA, Article 34, § 3 (Tr. 158; Jt. Exh. 1; Emp. Br. 11).

JURISDICTIONAL ARGUMENTS

a. The Union's Position

The Union argues that the issue in dispute is specifically covered under Article 26, §4, of the parties' CBA, which embodies Arbitrator Fasser's decision (Jt. Exh. 1; FF. Exh. 1(g), Attachment 10; Un. Br. 11-12). When the Employer raised the issue to the Union, it did not abide by the procedures set forth in Article 34, §3, for requesting mid-term negotiations to amend the CBA (Tr. 158; Un. Br. 12). Because the terms of this contract provision were not met, the parties' discussions and exchanges of proposals did not rise to the level of binding negotiations (Un. Br. 12). Article 26, §§ 3 and 4, of the CBA do not contain exceptions to the procedural requirements of Article 34, §3 (Un. Br. 13-14). It notes that the testimony of the Employer's representative, D. Musacchio, at the factfinding hearing contradicts the Employer's position in its prehearing brief that Article 26, §3, covers payment of EDP at P-1 (Tr. 99-100; Un. Br. 14). In addition, in an affidavit from that same witness which was submitted to the Panel, he expressed the view that Arbitrator Halter's decision "required that management continue to pay EDP at P-1 until the Appendix J requirements were met" (FF Exh. 1(g), Attachment 3; Un. Br. 14). Article 26, §4, provides that EDP will not be required where a determination is made that a work category has changed such that a hazard has been practically eliminated; "it does not speak to [a] mid-term amendment at all" (Un. Br. 14). The Employer "is not seeking to prove that it has come into compliance with the Fasser award as embodied in the CBA" but rather, "to eliminate the Fasser standard and change the contractual terms under which EDP will be paid" (Un. Br. 14). But, regardless of whether it is seeking to prove that it is in compliance with or to negotiate a change to the contract, the Panel does not have jurisdiction over the matter (Un. Br. 14). Whether the Employer has complied with Article 26, §4, is for an arbitrator to determine; if it wishes to negotiate an amendment to that provision, "it must follow contractual procedures, which it has not done so" (Un. Br. 14-15).

Finally, as recognized by the Panel in Department of Health and Human Services, Social Security Administration, Santurce Branch Office, Santurce, Puerto Rico and Local 2608, American Federation of Government Employees, AFL-CIO, Case No. 88 FSIP 52 (June 20,

1988), Panel Release No. 270, there is no obligation to bargain over subjects covered under the CBA (Un. Br. 15). Where there is no such obligation, the Authority has determined that parties may withdraw at any time prior to reaching an agreement (Un. Br. 15).[9/] In Department of the Treasury, U.S. Customs Service, Boston District, Boston Massachusetts and Chapter 133, National Treasury Employees Union, Case No. 90 FSIP 162 (August 22, 1991), Panel Release No. 316, the Panel recognized that where a party is under no contractual obligation to bargain, it may "engage in bargaining, exchange proposals and pursue its proposals before the FMCS and in meetings with a Panel representative" and still, "at the 'eleventh hour,' withdraw its proposal and deny any duty to bargain" (Un. Br. 15).

b. The Employer's Position

The Employer's argument in support of the Panel's retaining jurisdiction in this case is elaborate. First, there is no question that the parties negotiated over the disputed issue under 5 C.F.R. §§ 2470.2(e) and 2471.1, and are at impasse (Emp. Br. 2). In this regard, documentary and testimonial evidence show that the parties (1) negotiated "informally" on two occasions, and "formally" on three, including once with a mediator; (2) exchanged proposals; and (3) the Union had a proposal on the table (for a .07 f/cc EDP standard) when the Employer filed the request for assistance with the Panel (Tr. 11-12, 44-52, 141-49; Emp. Exhs. 3-4; FF. Exh. 1(g) stipulations and Attachment 5; Emp. Br. 2-3). Given that the Union's Chief Negotiator is an experienced negotiator, his testimony that he was not aware that the parties' meetings and proposal exchanges were not negotiations is not credible (Tr. 41, 44; Emp. Br. 3).

During negotiations, the Union did not contend that it had no duty to bargain over the matter (Tr. 151; Emp. Br. 3-4). Rather, it was not until the parties' September 10, 1992, telephone conference with the Factfinder, in preparation for the hearing, that the Union first argued that the Panel lacks jurisdiction over this dispute (FF. Exh. 1(g), Employer's pre-hearing brief; Emp. Br. 4). While the Union argues that earlier it had notified the Employer in writing and the Panel verbally that it was withdrawing its last proposal, it admitted that the Employer's notification was not provided to its representative before the Panel (Tr. 52; FF. Exh. 1(g), Attachment 8; Emp. Br. 4). In light of these facts, if the Panel were to relinquish jurisdiction, it would "mock" the Employer's good faith bargaining efforts and "condone" the Union's bad faith efforts (Emp. Br. 4).

Second, Arbitrator Fasser's 1980 decision did not bar future

9/ Federal Deposit Insurance Corporation, Headquarters and National Treasury Employees Union, 18 FLRA 768, 772 (1985).

negotiations over EDP. On the contrary, he "encouraged" the parties to negotiate, which is consistent with FPM 532-1, S8-7(g)(3)(a) and Appendix J (FF. Exh. 1(g), Attachments 3, 10; Emp. Br. 4, 6). He also ordered the Employer to pay EDP retroactively but not "prospectively," and certainly not forever, thereby foreclosing all future negotiations on the matter (Emp. Br. 5). What he did do was direct the Employer "to take protective measures necessary to reduce, and insofar as necessary, eliminate the hazard according to 29 C.F.R. 1910.1001, OPNAV INSTRUCTION 6260.1A, and PWCNORVA INSTRUCTION 5100.31A" (FF. Exh. 1(g), Attachments 10, p. 14 11; Emp. Br. 5). His decision, therefore, required the Employer to eliminate the hazard to the extent required under the cited regulations, not totally; thus, the Employer would be in compliance with the award if it met the then OSHA and Navy limits (.2 f/cc) (Emp. Br. 6). Furthermore, it notes that FPM Supp. 532-1, Appendix J, provided for the "practical" not the "total" elimination of the hazard (FF. Exh. 1(g), Attachment 3; Emp. Br. 6).

Over the 12 years since Arbitrator Fasser's decision was issued, the Employer has "cleaned up" much of the asbestos from P-1, provided asbestos training to workers, and instituted protective and safety measures (i.e., clothing, equipment, and administrative control procedures) (Tr. 258, 320, 333-75, 398; Emp. Exhs. 15-17; Jt. Exh. 5; Emp. Br. 7). In 1991, prompted by Congressional inquiries over why unit employees and not others are receiving EDP, it determined that it had reduced the hazard as ordered by Arbitrator Fasser (Tr. 228-30; Emp. Exh. 2; Emp. Br. 8). After a review of (a) the negotiations and arbitral history of EDP at P-1 and at other of the Employer's facilities, (b) relevant regulations, and (c) case law, the Employer's Chief Negotiator determined that negotiations was the appropriate vehicle for the parties to revisit EDP for P-1 employees, and requested from the Union that they do so (Tr. 130-39; Emp. Br. 6-7).

Third, Arbitrator Halter's interest arbitration decision also does not require the Employer to pay EDP to P-1 employees until there is no asbestos in the ambient air (FF. Exh. 1(g), Attachment 12, pp. 3-4; Emp. Br. 8). Rather, he ordered a contract provision which requires the Employer to recognize P-1 as an "authorized work situation" for EDP purposes, but only until "work categories no longer meet such requirement due to protective devices or safety measures that practically eliminate the potential for illness or injury" (Tr. 100-02; FF. Exh. 1(g), Attachments 3, 12, p. 4; Emp. Br. 8). The quoted wording mirrors that in Appendix J (Tr. 100; Jt. Exh. 1; FF. Exh. 1(g), Attachments 3, 12; Emp. Br. 8). The Employer admits that it did not offer evidence to Arbitrator Halter showing that it had "practically eliminated" the hazard in P-1 (Emp. Br. 8).

The parties agree that Arbitrator Halter's decision in effect "grandfathered" Arbitrator Fasser's (Tr. 68-69; Emp. Br. 8-9). Arbitrator Halter's decision, therefore, as Arbitrator Fasser's,

"encourages" the parties to negotiate over P-1 EDP after the Employer has "practically eliminated" the hazard (Emp. Br. 8-9). The Employer cannot unilaterally terminate EDP after it has done so; rather, in accordance with regulations, it must negotiate the matter (Tr. 98, 101-02, 152; FF. Exh. 1(g), Attachments 3, 12, FPM Supp. 532-1, S8-7; Emp. Br. 8-9). Department of the Navy, Philadelphia Naval Shipyard and Philadelphia Metal Trades Council, AFL-CIO, 18 FLRA 902, 913-14 (1983).

Four, under Article 26, § 3, of the CBA, the Employer can request to negotiate over EDP after it determines that it has "practically eliminated" the hazard under § 4 (Tr. 135-136; Jt. Exh. 1; Emp. Br. 9-11). Throughout negotiations, the Union never argued that negotiations were precluded under these contract provisions (Tr. 151; Emp. Br. 10). Consistent with these provisions, the parties negotiated the matter (Tr. 139-51, 228-30; Emp. Br. 10). While it admits that negotiations under § 3 did not commence within the requisite 60 days following the effective date of the contract but about 1 year later, it notes that the Union has never argued that negotiations were untimely (Tr. 151; Emp. Br. 10).

The Employer admits that a request for bargaining was not tendered under the mid-term reopener provision in the CBA, Article 34, § 3 (Tr. 158; Jt. Exh. 1; Emp. Br. 11). Nevertheless, the parties' actions -- meeting on various occasions, restricting subject of the meetings, and exchanging proposals -- amounted to a reopener of the contract under that provision (Emp. Br. 11). For the Panel to find otherwise, would be for it to accept "form over substance" (Emp. Br. 11).

Six, the Employer argues without explanation, that the Panel must determine whether the Employer has "practically eliminated" the hazard before the Panel can decide whether it is appropriate for it to retain jurisdiction (Emp. Br. 13).

Finally, the Panel must consider the effect of its relinquishing jurisdiction in this case (Emp. Br. 13). Relinquishment will not only serve to condone the Union's bad faith bargaining efforts, but will lead to costly litigation or negotiations when the CBA expires in 1993 (Emp. Br. 13-14). Whether the parties litigate or negotiate P-1 EDP, the Employer will be unduly and substantially prejudiced because only the Union will have the benefit of a "comprehensive and thorough" presentation of the other's case on the issue (Emp. Br. 14).

ISSUE

The substantive issue at impasse is whether the concentration level for payment of EDP for asbestos exposure in P-1 should be raised from "any measurable, detectable level" to .1 f/cc of air over an 8-hour TWA, the current OSHA AL.

POSITIONS OF THE PARTIES

1. The Parties' Proposals

In essence, the Employer proposes that: (1) in other than spill situations, asbestos EDP will be paid to P-1 personnel when air samples taken in accordance with other previously agreed upon provisions indicate that they are being exposed to levels greater than .1 f/cc over an 8-hour TWA, the current OSHA AL; (2) air sampling will be conducted (a) monthly, with each party choosing one employee to be tested and (b) daily, after any sampling reveals an exposure level above .1 f/cc and until "applicable regulatory requirements for the cessation of testing in defined exposure situations" are met; and (3) exposure levels for payment of EDP will change to coincide with OSHA AL whenever it changes (FF. Exh. 1(g), Attachment 9).

The Union proposes that the status quo be maintained; that is, that EDP for asbestos exposure be paid to P-1 personnel so long as there is "any measurable, detectable level of asbestos" in the ambient air (Tr. 12; FF. Exh. 1(f); Un. Br. 10).

2. The Employer's Position

The Employer contends that in determining the question of EDP for P-1, the Panel must first decide whether the asbestos in P-1 poses an unusually severe hazard which could result in significant illness, injury, or death to employees (FF. Exh. 1(g), Attachment 3, FPM Supp. 532-1, S8-7(d)(1); Emp. Br. 14, 41). If such hazard is found to be present, the Panel then must decide whether the potential for illness or injury has been practically eliminated by protective devices and safety measures (FF. Exh. 1(g), Attachment 3, FPM Supp 532-1, Appendix J, Part II; Emp. Br. 15, 41).

An evaluation of the severity of the hazard in P-1 requires the Panel to look at the "overall work environment" -- "the concentration of asbestos fibers, type of asbestos, and size of fibers" (Emp. Exh. 41, p. 294; Emp. Br. 15, 41). In this regard, about 50 to 60 percent of the asbestos originally in P-1 has been removed (Tr. 244, 371, 421; Emp. Br. 16, 42). Most of what remains is encapsulated and located at the upper levels of the facility where employees very rarely work (Tr. 244-48, 320, 380-81; Emp. Br. 16-17, 42). Moreover, the greatest amount of what remains is the type of asbestos known as chrysotile (Tr. 77, 220, 369; Emp. Exh. 37; Emp. Br. 18, 43). This asbestos type, the predominant variety used in the United States, is not considered a medical threat to employees not working directly with it, and "does not increase the risk of asbestos-related disease [asbestosis, lung cancer, and mesothelioma]" (Tr. 544-47, 564-66, 568-69; Emp. Exhs. 38, p. 231-34; 41, pp. 294, 299; 45, p. 232; Emp. Br. 18-19, 43). Given its type, the asbestos remaining in P-1 does not pose an "unusually severe hazard" (Emp. Br. 43).

Research shows, and the Employer's expert witness testified, that asbestosis is unlikely to occur at exposure levels below 1 f/cc or 2 f/cc, 8 hours per day, 5 to 6 days per week, for 25 years and 12 1/2 years, respectively (Tr. 548-51; Emp. Exhs. 45, p. 231, 46b; Emp. Br. 19, 43). At the OSHA AL (.1 f/cc), therefore, employees would have to be exposed for 250 years to possibly develop asbestosis (Tr. 552-53; Emp. Exh. 46b; Emp. Br. 19-20, 43). Chrysotile-related lung cancer has been found to exist only at exposure levels of .4 f/cc or above (Tr. 581-82; Emp. Exhs. 42 (Table 35), 45 (Table 3); Emp. Br. 20). Moreover, research indicates, and its expert witness so testified, that most lung cancers related to asbestos are found in smokers (Tr. 554-55; Emp. Exhs. 38, p. 232; 40, p. 1726; 45, p. 232; Emp. Br. 20). In essence then, at a .1 f/cc, exposure level, the chances of employees' contracting asbestosis or lung cancer are virtually nonexistent; therefore, such level does not pose an "unusually severe hazard" (Tr. 547-48, 561; Emp. Exhs. 38, p. 232; 43, p. 16; Emp. Br. 19-20, 43).

Of 137 air samples taken by the Employer between 1983 and 1992 and analyzed under the OSHA-approved PCM method, only 1 showed a level of asbestos exposure above .1 f/cc (Tr. 438-40, 453; Emp. Exhs. 23-25; FF Exh. 1(g), Attachments 4(a-b); Emp. Br. 28-30, 43-44). Moreover, even the mean level reading of forty-three 1992 samples analyzed under the more stringent AHERA TEM method used for schools was much less than .1 f/cc (Tr. 445-47, 506-07, 514; Emp. Exh. 22; FF. Exh. 1(g), Attachment 4(b); Emp. Br. 30-31, 33, 44). An analysis under the TEM (NIOSH 7402) method, which only measures the size of asbestos fibers determined to have health implications, would indicate even lower levels (Tr. 597-98; Emp. Br. 31-32, 44). Even when analyzed under the PCM method, which counts all fibers that meet the OSHA definition regardless of whether they are actually asbestos, the fiber counts still were between 1/10 and 1/20 below .1 f/cc -- a "level at which research would indicate no disease would be generated" (Tr. 598-600; Emp. Br. 31, 44). Clearly, these air samples show that the current asbestos exposure levels in P-1 are not "unusually severe" (Emp. Br. 44).

OSHA has determined that the incidence of asbestosis at a working lifetime exposure of .2 f/cc is .5 percent (Jt. Exh. 2, p. 22647; Emp. Br. 38, 45). Also, it indicates that the risk of asbestosis in 1000 workers exposed at levels of 2 f/cc, for 45 years is 50 cases; 5 cases at .2 f/cc (Jt. Exh. 2, p. 22647; Emp. Br. 39, 45). Incidence of lung cancer would be 64 and 6.7 at 2 f/cc and .2 f/cc, respectively (Jt. Exh. 2, p. 22646; Emp. Br. 39, 45). Further, OSHA acknowledges that 45 years of exposure is not the norm (Jt. Exh. 2, p. 22648; Emp. Br. 39, 45). Thus, a P-1 employee only has a .2 percent probability of contracting asbestosis or lung cancer after 45 years of exposure at a .1 f/cc level (Emp. Br. 45). Applying those facts to this case, the incidence of asbestosis and lung cancer among the 110 employees of P-1 would be .25 and .35 cases, respectively (Emp. Br. 45). Since

the OSHA .2 f/cc level is set to eliminate "significant risks," as the Court in American Textile Manufacturers Institute Inc. v. Donovan, 452 U.S. 489 (1981) (American Textile) recognized, these statistical probabilities are insignificant (Emp. Br. 45). Therefore, given that the levels of airborne asbestos in P-1 are below the OSHA PEL and AL as noted above, P-1 does not pose a health hazard of an "unusually severe" nature (Emp. Br. 45).

The record shows that the manner in which insulators (asbestos workers) perform asbestos work (repair, encapsulation, "ripout") does not pose an "unusually severe hazard" to themselves or others (Emp. Br. 44). They are trained and state certified to do such work (Tr. 339-40; Jt. Exhs. 4, p. 17-11; 5, p. 10-17; Emp. Br. 22, 44). Also, when working with asbestos, in accordance with regulatory requirements, they use either glove bags or containments (with negative air pressure (Microchart) machines), wear protective clothing (Tyvek coveralls over cloth coveralls and rubber gloves taped shut), and use respiratory equipment (type C respirator with emergency egress unit) (Tr. 76, 346-50, 353-60, 391-94; Jt. Exhs. 3, 29 C.F.R. §§ 1910.1001 (g-h); 4, pp. 17-5 through 17-9; 5, pp. 10-21 through -23, 10-48 through -51, 10-56 through -61; 6; Emp. Br. 22-24, 44). They are also required to follow a number of administrative procedures designed for quality control, and to ensure safety and compliance with applicable regulations (Tr. 337-38, 341-43, 361-63; Jt. Exhs. 4, p. 17-3 through 17-4; 5, p. 10-23, 10-28 through -32, 10-40 through -43; Emp. Exh. 16; Emp. Br. 24, 44). The Union's Chief Steward, an insulator, testified that requirements and procedures are stringently followed (Tr. 76, 89-91; Emp. Br. 23, 44). Also, in 5 years, there has been only one adverse reporting of these individuals' work in the annual Industrial Hygiene Survey conducted by NIHD (Tr. 482; Emp. Exhs. 27-31; Emp. Br. 35, 44). The incident reported concerned an unusually high reading for a glove bag operation (.03 to .08 f/cc), still below .1 f/cc (Tr. 482; Emp. Exhs. 27-31; Emp. Br. 35, 44). As for nonasbestos workers, they are instructed not to handle insulation and to report any problems to their supervisor for action (Tr. 256, 266-68, 370, 410-11; Emp. Br. 22, 42).

Finally, since the court in O'Neall v. United States of America, 796 F. 2d 1576 (Fed. Cir. 1986) (O'Neall) already has drawn a parallel between FPM Supp. 532-1's "unusually severe" requirement for EDP and the OSHA PEL, the Employer's proposal for the much lower OSHA AL would not pose an "unusually severe" hazard to P-1 employees (Emp. Br. 45).

But, even assuming that the asbestos which remains in P-1 may expose employees to potential illness or injury, that potential has been practically eliminated through use of protective devices and compliance with a variety of safety measures (Emp. Br. 46). With regard to nonasbestos workers (those who do not work directly with asbestos), they have undergone heightened asbestos awareness

training since 1985 (Tr. 258, 267, 410; Emp. Br. 46). Specifically, they are instructed to assume that any disturbed insulation that they encounter is asbestos; therefore, they are not to handle it and are to inform their supervisors of the problem (Tr. 266-69, Emp. Exh. 10; Emp. Br. 46). These employees also receive training at biannual stand-up safety meetings, before the 2-week P-1 shutdown each summer, the new employee asbestos orientation, and annual asbestos training required by regulation (Tr. 410-14, 424-25; Jt. Exhs. 4, pp. 17-11 and 17-12; 5, pp. 10-17 and 10-18; Emp. Exhs. 18, 20; Emp. Br. 46). As a result of all this training, the number of spills has been drastically reduced over the last few years (Tr. 349; Emp. Exh. 46). As for the insulators (asbestos workers), in addition to the above training, they undergo stringent state-required and -controlled certification training, which consists of the initial 40 classroom hours and then annual 8-hour "updates" (Tr. 261-70, 338-40; Emp. Exh. 15; Emp. Br. 46). This training also is provided under agency regulations (Tr. 338-39; Jt. Exh. 5, pp. 10-17 and 10-18). Moreover, grouping insulators in one department (Environmental Department) rather than continuing to have them "dispersed among work gangs" and permanently assigning a group of four to six to P-1 has improved safety (Tr. 327-30, 335-37; Emp. Br. 46-47).

Since 1980, old procedures have been tightened and new ones implemented to ensure that asbestos work is performed safely and that applicable regulations are complied with (Emp. Br. 47). In 1987, for example, the Safety Office implemented a boundary control system for nonemergency asbestos operations (Jt. Exh. 5, pp. 10-7, 10-8, 10-41; Emp. Br. 47). Under this system, a boundary number is assigned to each asbestos operation before the work begins and it is logged (Jt. Exh. 5, pp. 10-7, 10-8, 10-41; Emp. Br. 47). This allows the Safety Office to monitor the work (Tr. 337-38, 341-43; Emp. Exh. 19; Emp. Br. 47). A separate asbestos work tracking system and spill reporting requirement have also been implemented (Tr. 341-43, 415-16; Emp. Exhs. 16, 19; Emp. Br. 47).

Protective clothing and equipment now are required to be worn or used by insulators when working with asbestos (Tr. 344-50; Jt. Exh. 5, p. 10-17; Emp. Br. 47). For small jobs they use glove bags (Tr. 346-47; Jt. Exh. 6; Emp. Br. 47). For large jobs, containments are erected and negative air pressure machines with HEPA filters used as required by OSHA (Jt. Exh. 2, 29 C.F.R. § 1910.1001(g); Emp. Br. 47). In addition, insulators are provided with emergency egress unit respirators, which protects them from risks of exposure should electric power be turned off (Tr. 391-92, 400; Emp. Br. 47). Also, a change facility, with showers and a washer and dryer, now is located in P-1; this allows insulators who have worked with asbestos to shower and change clothing following work with asbestos before leaving the area, thereby avoiding exposing other employees to risks (Tr. 330-31, 382-83; Jt. Exhs. 3, 29 C.F.R. § 1910. 1001(i); 4, p. 17-6; 5, p. 10-23; Emp. Br. 47).

Other indications that the hazard has been "practically eliminated" include: (1) the favorable findings in annual Industrial Hygiene Surveys conducted by NIHD each of the last 5 years; (2) nonexistence of employee reports filed with OSHA concerning unsafe asbestos conditions; (3) lack of formal employee complaints filed with the Safety Office; and (4) lack of evidence that any employee whose ever work in P-1 has contracted an asbestos-related disease; and (5) evidence on record that no P-1 employee has ever filed a workers' compensation claim for an asbestos-related illness (Tr. 279-86, 417-18; Emp. Exhs. 12-13, 27-31; Emp. Br. 35, 48).

The air samples on the record show levels of exposure exponentially lower than the .1 f/cc OSHA AL which itself is well below the .2 f/cc OSHA PEL, the level below which significant risk is eliminated (Jt. Exh. 2, p. 22646; Emp. Exhs. 23-26; FF. Exh. 1(g), Attachments 4(a-b); Emp. Br. 49). These samples, therefore, support the conclusion that the hazard in P-1 has been "practically eliminated" (Emp. Br. 49).

The court in Bendure v. Unites States, 695 F. 2d 1383 (Fed. Cir. 1982) (Bendure) found that FPM Supp. 532-1 does not require "total elimination" of a hazard before EDP can be withheld (FF. Exh. 1(g), Attachment 16; Emp. Br. 49). In fact, with regard to chrysotile asbestos, such a requirement would be "virtually impossible" to meet given that the research indicates that it is found in the lungs of members of the general public (Tr. 571-72; Emp. Br. 49). In carrying out its statutory mandate to "enact the most protective standard possible to eliminate a significant risk of material health impairment, subject only to constraints of technology and economic feasibility," as interpreted by the Court in American Textile, supra, OSHA established the .2 f/cc PEL, as the level below which significant risk of material health impairment is eliminated, and the .1 f/cc AL, after much research and solicitation of comments (Jt. Exh. 2, p. 22615; Emp. Br. 49-50). An EDP threshold level of .1 f/cc, which is well below the level OSHA determined would pose a significant risk, therefore, should be ordered in this case (Emp. Br. 50). A corollary between OSHA PEL and EDP was found by the court in O'Neall, supra, and Arbitrator Arthur Elliot Berkeley in a case concerning the auxiliary power facility Z-309, and between NIOSH or OSHA AL and EDP by the Panel in Department of the Air Force, Fairchild Air Force Base, Washington, D.C. and Local 11, National Federation of Federal Employees, 84 FSIP 63 (September 24, 1984), Panel Release No. 228 (FF. Exh. 1(g), Attachments 14, 15; Emp. Br. 50). Also, the Employer's expert witness testified that the research indicates that it is unlikely that the current OSHA levels will be lowered further (Tr. 627; Emp. Br. 50). Nonetheless, the parties already have agreed to a provision which would change the EDP threshold to revised OSHA levels (FF. Exh. 1(g), Attachment 9).

Finally, while WG employees in P-1 receive EDP, GS employees

there and employees at other power facilities on base do not (Tr. 126; Emp. Exh. 2; Emp. Br. 51). Only one other power facility on base (Z-309) has an EDP threshold level and that is .2 f/cc as established by arbitration (FF. Exh. 1(g), Attachment 14; Emp. Br. 36, 51). The employees at the Norfolk Naval Shipyard power plant likewise are not compensated until the .2 f/cc level is reached in accordance with an earlier arbitration award (Tr. 67-68; Emp. Exh. 48; Emp. Br. 37, 51). Nonasbestos workers in four power plants which still contain asbestos (in varying amounts) located at Navy Public Works Centers in Great Lakes, Illinois, San Francisco, California, Pensacola, Florida, and San Diego, California, also do not receive EDP (Tr. 275-76; Emp. Exh 46-47; Emp. Br. 37, 51). Clearly then, equity dictates that the Employer's proposal be adopted (Emp. Br. 51).

3. The Union's Position

The Union refutes the Employer's argument, espoused by its expert witness, that science has shown that (1) low levels of exposure to asbestos -- below the OSHA AL, .1 f/cc -- is safe, and (2) the type of asbestos found in P-1 is only hazardous if a spill occurs (Un. Br. 16). In fact, his views not only are controversial but have been critized by others in the field, as the expert himself acknowledged (Tr. 530-31, 578-79, 611, 613, 622, 627; Un. Br. 17). In this regard, he admitted that Dr. Irving J. Selikoff, "the preeminent pioneer in the field," would have disagreed with his views (Tr. 611, 613; Un. Br. 17). Dr. William J. Nicholson, another well-respected colleague on whom OSHA has relied in setting its standard, also opposes his views (Jt. Exh. 2; Un. Br. 17). Further, it points out that in its 1986 rulemaking, which resulted in the current .1 f/cc AL and .2 f/cc PEL, OSHA rejected the expert witness' views and instead sided with Dr. Selikoff's that "'low' levels of exposure are to be treated as unsafe" (Jt. Exh. 2, p. 22624; Un. Br. 17-18). An exposure level of .1 f/cc has been rejected as safe by OSHA (Jt. Exh. 2, pp. 22616, 22624, 22646, 22648, 22701; Un. Br. 18). In fact, it specifically said on this matter that "in the case of asbestos, significant health risks are likely to be present at an airborne concentration of .1 f/cc" (Jt. Exh. 2, pp. 22648, 22681, 22701; Un. Br. 18). The Union points out that in Building and Construction Trades Department v. Brode, 838 F.2d 1258, 1264 (D.C. Cir. 1988), the court noted that "OSHA acknowledged that a significant risk of contracting asbestos-related disease would remain at a PEL of .2 f/cc or even .1 f/cc" (Jt. Exh. 2, p. 22648; Un. Br. 18). The court further noted that OSHA's rationale for adopting .2 PEL and .1 AL was not that significant risk is eliminated at those levels but rather, that .2 PEL is the "'lowest feasible level'" (Jt. Exh. 2, p. 22648; Un. Br. 18). The court, concerned with the abundant scientific evidence on the health hazards associated with even low level asbestos exposure, remanded the matter to OSHA where it is currently pending (Un. Br. 18-19). Moreover, it points to an OSHA statement in its

1986 rulemaking that it is "'aware of no instance in which exposure to a toxic substance has more clearly demonstrated detrimental effects on humans than has asbestos exposure'" (Jt. Exh. 2, p. 22615; Un. Br. 18).

OSHA's repeated recognition that its adoption of a PEL, be it .2 or .1, does not "reflect[] a belief that significant risk of disease is eliminated at [those] levels" further undermines the Employer's position (Jt. Exh. 2, pp. 22648, 22681; Un. Br. 19). OSHA's establishment of a PEL or AL evidences a balance between workers' safety and industry's needs (Un. Br. 19-20).

While the Employer's expert argues, based on "preliminary evidence," that the likelihood of contracting asbestosis at .1 or .2 f/cc is at best nonexistent and at worst insignificant, OSHA accepted Dr. Selikoff's position that further decline in asbestosis cases would result from continued reduction of exposure within the low level ranges (Un. Br. 20). With regard to the "Ontario" study on which the expert relies to support his views, OSHA considers it inconclusive (Un. Br. 20). The Employer's expert argues that there is "plenty of evidence" showing that excess lung cancers are not found at a .2 exposure level but admits that the scientific community at large has not adopted this view (Tr. 556, 626-27; Un. Br. 20). OSHA, for one, has found that at a .2 f/cc exposure level over 20 years there will be 4.5 deaths per 1000 workers from cancer, which is above the "significant risk standard" established in Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 655 (1980) (Benzene) (Jt. Exh. 2, pp. 22645-47; Un. Br. 20-21). That standard, the Union points out, "has become a recognized benchmark in industrial hygiene workplace issues" (Jt. Exh. 2, pp. 22646-47; Un. Br. 20-21). At a .1 f/cc exposure level for 20 years, there will be 2 deaths per 1000 workers, which is still twice as high a risk level indicated as significant in Benzene (Emp. Exh. 44; Un. Br. 21). With regard to the Employer's exhibit 45, on which the expert relies to support his position on the health risks associated with low level exposure, it is irrelevant because it addresses the risks of nonoccupational rather than occupational exposure; also, the exposure levels addressed are lower than the OSHA .1 AL and the levels shown in P-1 air sampling results submitted by the Employer (Emp. Exh. 45, pp. 232, 235; FF. Exh. 1(g), Attachments 4(a-b); Un. Br. 22).

The expert's position that the chrysotile asbestos -- a type found in P-1 -- is "relatively benign" also is a minority position (Tr. 623-24, 535-37, 564-72; Un. Br. 21-22). The Employer's exhibit 42, offered through the expert witness in support of his position, in fact, does not (Un. Br. 22). The article submitted as the Employer's exhibit 45 does support his position on the relative safeness of chrysotile; that article, however, relies on an earlier position of the American Conference of Governmental Industrial Hygienists which it has recently disavowed (Emp. Exhs. 32, p.39;

45, pp. 233-34; Un. Br. 23). OSHA, for one, has stated that studies show that workers' exposure to fibers of any asbestos type, either alone or in combination, can cause lung cancer, mesothelioma, and asbestosis; evidence to the contrary is "inconclusive and inconsistent" (Jt. Exh. 2, pp. 22626-28; Un. Br. 21-22). Different PELs for different asbestos types has been rejected by OSHA, noting that NIOSH and others agree that the scientific evidence does not support such approach, (Jt. Exh. 2, p. 22682; Emp. Exh. 44; Un. Br. 22).

Contrary to the Employer's position, current case law does not require the Panel to adopt a .1 f/cc EDP standard (Un. Br. 24). In proferring this position, the Employer (1) misread the cases it is relying upon and (2) fails to cite to cases that support the Union's position that the status quo be maintained (Un. Br. 24).

In O'Neall, the court did not adopt the OSHA PEL standard for EDP purposes, as the Employer argues; rather, it refused to overturn the agency's adoption of that standard absent a contract provision (Un. Br. 24). Further, while the court did "suggest that OSHA and Appendix J could be reasonably read as embracing similar statutory objectives, it said nothing to mandate an approach tying the two together" (Un. Br. 24). In fact, a reading of O'Neall as requiring the use of PEL as the EDP standard is precluded by OSHA's 1986 rulemaking which preceded the court's decision by 2 weeks and, therefore, is not discussed therein (Un. Br. 24).

In support of its position that the Panel is not required to impose a .1 f/cc EDP standard, the Union cites to a number of Authority decisions (Un. Br. 24-26). First, it points to Allen Park Veterans Administration Medical Center and American Federation of Government Employees, Local 933, 34 FLRA 1091, 1092-95 (1990) (Allen Park), where the Authority upheld an arbitrator's decision awarding Wage Grade employees at a VA facility EDP for asbestos exposure under Appendix J based on his finding that: (a) "'as a matter of law', there is no threshold level of airborne asbestos below which the potential for illness or injury did not exist;" and (b) "the scientific evidence demonstrated that the .1 f/cc proposed by the VA posed a significant risk within the meaning of Benzene" (Un. Br. 24-25). The Union noted that the Authority rejected the VA's argument that under O'Neall it was required to adopt "a specific threshold level for EDP purposes and that the appropriate level was the OSHA .1 f/cc standard" (Un. Br. 25). The Union also cites to the Authority's decision in U.S. Department of the Army, New Cumberland Army Depot, New Cumberland, Pennsylvania and American Federation of Government Employees, Local 2004, 40 FLRA 186 (1991), upholding an arbitrator's award rejecting the OSHA level for EDP; U.S. General Services Administration, Kansas City and American Federation of Government Employees, Council 236, 38 FLRA 438 (1990), upholding an arbitrator's award for EDP to workers who work "in areas where they could disturb asbestos insulation on piping and conduits in the course of performing their duties," even

though "air sampling had never shown a reading at the OSHA .1 level;" and U.S. Department of Veterans Affairs and American Federation of Government Employees, 43 FLRA 207 (1991), upholding an arbitrator's award establishing an EDP standard of .005 f/cc (Un. Br. 25-26).

The Panel's decision in Fairchild does not stand for the proposition that the Panel has adopted the OSHA standard as the practical elimination standard, which is advanced by the Employer (Un. Br. 26-27). Rather, the Panel concluded therein that "the level of exposure to trigger EDP should be the lowest proposed level by an established organization with expertise in the area" (Un. Br. 26-27). Based on the record before it, the Panel ordered the adoption of the NIOSH standard at the time, .1 f/cc (Un. Br. 26-27). The NIOSH standard at the time was not .1 f/cc but rather, "the lowest detectable level using currently available analytical techniques," which then just happened to be .1 f/cc (Un. Br. 28).[10/] Current techniques can detect levels lower than the Fairchild .1 f/cc. For example, the NIOSH 7400 or PCM method for analyzing air samples, which has been accepted by OSHA, has been reported to reliably measure limits of .02 to .03 (Jt. Exhs. 2, p. 22690; 3, 29 C.F.R. § 1910.1001, Appendices A-B; Un. Br. 28). Also, pursuant to 40 C.F.R. § 763.90(i)(5), EPA uses this method to measure levels less than or equal to .01 f/cc (Un. Br. 28). These levels are much lower than the Employer's proposed .1 EDP standard and are exceeded by a number of air samples the Employer submitted to the Panel (Emp. Exh. 23; FF. Exh. 1(g), Attachments 4(a-b); Un. Br. 28). Thus, Fairchild, read in light of current technology, favors adoption of "the Union's position, which is to adhere to 'detectable' level standard for payment of EDP" (Tr. 12; Un. Br. 29). In Department of the Navy, Naval Air Station, Patuxent River and Local 1603, American Federation of Government Employees, Case No. 81 FSIP 34 (February 26, 1981), Panel Release No. 182, the Panel adopted the union's proposal continuing EDP payments for asbestos exposure under an earlier arbitration award where the arbitrator had recognized that the OSHA standard is "'not a pay standard'" (Un. Br. 29). This case "is more on point than Fairchild [and] supports the Union's position in this case" (Un. Br. 29).

Even though it stipulated both that the 1983-88 and 1992 samples were taken and analyzed "properly and correctly" (Tr. 432, 409, 462-61), it nonetheless challenges their reliability pointing to (1) the time which lapsed between samples, as little as 2 weeks and as much as 1 1/2 years; (2) the record being silent on "who directed the sampling, what the guidelines were, or indeed whether

---

10/ Workplace Exposure to Asbestos: Review and Recommendation, DHHS (NIOSH) Publication No. 81-103, NIOSH-OSHA Asbestos Work Group, April 1980, U.S. Department of Health and Human Services (Jt. Exh. 2, p. 22616; Un. Exh. B; Un. Br. 28).

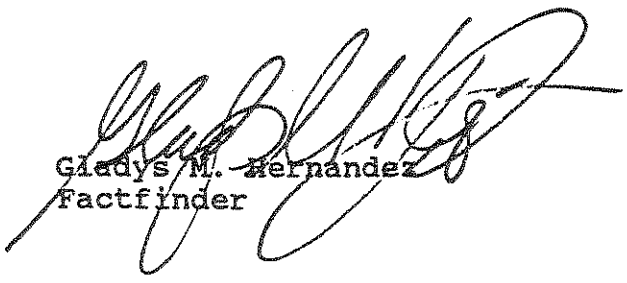
what was presented to the Panel represents all samples taken during that period" (Un. Br. 30). Moreover, there is no evidence on record that these samples and those taken in 1980 pursuant to Arbitrator Fasser's decision differ in any way (Un. Br. 30). The 1992 air samples submitted by the Employer show that, in many cases, there remains in the ambient air asbestos at levels above those limits reliably detectable using the NIOSH 7400 or PCM method (Un. Br. 31).

The hazard from airborne asbestos fibers has not been "practically eliminated" from P-1 (Un. Br. 31). While the Employer has removed some asbestos from P-1, some still remains (Tr. 244, 320, 371-74, 390, 421; Un. Br. 31). Also, the configuration of P-1 allows for asbestos fibers to fall from the upper to lower levels and settle in "crevices, gratings, corners, and ledges where they invariably will be disturbed and become airborne" (Un. Br. 31). Moreover, the nature of P-1 employees' work is such that, as witnesses testified and the Factfinder observed, exposure to torn asbestos insulation and asbestos dust is a regular occurrence (Un. Br. 31). Those measures that the Employer has undertaken, for example, asbestos training, safety procedures, and protective clothing, "have not changed the conditions in the Powerplant sufficiently to allow it to escape its EDP obligation under the Fasser award" (Un. Br. 31). Finally, no compelling reason was offered by the Employer for establishing a new EDP standard (Un. Br. 31).

Based on the foregoing, should the Panel retain jurisdiction over this case, it should direct the parties to maintain the status quo (Un. Br. 31). The Congressional inquiries alone do not justify changing it (Emp. Exh. 2; Un. Br. 30).

CONCLUSIONS

The above Report, which summarizes the transcripts, exhibits, and pre-hearing and post-hearing briefs of the parties, is respectfully submitted to the Panel.



Gladys M. Hernandez
Factfinder

December 1, 1992
Washington, D.C.