

Buying Silence

Cash-starved whistleblowers zip their lips

BY GEOFFREY ARONSON

Joe Macktal, a journeyman electrician, was fired from his job at the Comanche Peak nuclear power plant in Glen Rose, Texas, after he identified potential construction problems at the troubled installation. In January 1987, Macktal reached a settlement agreement with his former employers, Brown & Root, Inc., the plant's general contractor, which paid him \$35,000 (\$20,000 of which went for legal fees) and promised not to blacklist him in the industry, where news of "troublemakers" travels fast.

In return, Brown & Root elicited a pledge from Macktal not to appear voluntarily as a witness in any administrative or judicial proceeding concerning the safe operation of Comanche Peak. Macktal also agreed to take reasonable steps to resist any subpoena requiring his testimony at such proceedings.

"From day one," Macktal says, "I was opposed to my settlement agreement, opposed to my not being able to bring safety concerns to the NRC [the Nuclear Regulatory Commission]."

Such Faustian bargains are a familiar feature of agreements settling whistleblowers' suits. On issues ranging from the safety of nuclear power plants, as in Macktal's case, to the practices governing the disposal of toxic wastes, access to information affecting public health and safety has been hidden from the public by money-for-silence agreements signed by cash-starved whistleblowers.

A confidential report on "Secret 'Money-for-Silence' Agreements in the Nuclear Industry," compiled in May 1989 by the staff of the U.S. Senate's subcommittee on nuclear regulation, warned, "If management hadn't suppressed safety information from Morton-Thiokol's engi-

neers, the *Challenger* disaster could have been avoided. It is frightening to think that we may be dealing with multiple nuclear equivalents of the *Challenger* disaster."

Lynne Barnabic, a Washington lawyer who often represents whistleblowers, says, "Companies really want to try to buy silence" with restrictive settlement agreements.

"Silence is what they're really buying with their money," Barnabic adds, "and not only in the nuclear industry. Where you are discussing significant health and safety dangers to the public, industry's incentive is in silence these people. The best thing that could happen is if Congress outlawed such provisions."

Congressional interest has been limited so far to highlighting efforts by the nuclear-power industry, which frequently attempts to muzzle whistleblowers.

"It's a very common provision in settlement agreements between employee and employer," explains Elizabeth St. Clair, partner in the New York law firm of Rabinowitz, Boudin, Standard, Krinsky, and Lieberman. One of the firm's clients, Lorenzo M. Polizzi, also a Comanche Peak whistleblower, agreed to a secret money-for-silence settlement agreement.

Like Macktal's attorney, Billie P. Garde, St. Clair insisted that Polizzi had already communicated his concerns to the NRC staff and that the restriction on testimony

was not really a restriction at all. She termed the issue of voluntary testimony "a bargaining chip that gets negotiated over" as part of the give-and-take of the settlement process.

"Maybe [the company] did something wrong and they do not want it all over the business section of *The New York Times*," St. Clair said. "It's just not fair [to tell the whistleblower] to forgo money because of public-policy concerns. Our concern is how to get the best deal that we could."

Attorneys for Macktal and Brown & Root collaborated in opposing the Secretary of Labor's efforts to review the secret settlement of Macktal's suit. Indeed, the agreement did not enter the public domain until Macktal himself revealed it—an action Brown & Root characterized as "a flagrant violation of the confidentiality provision."

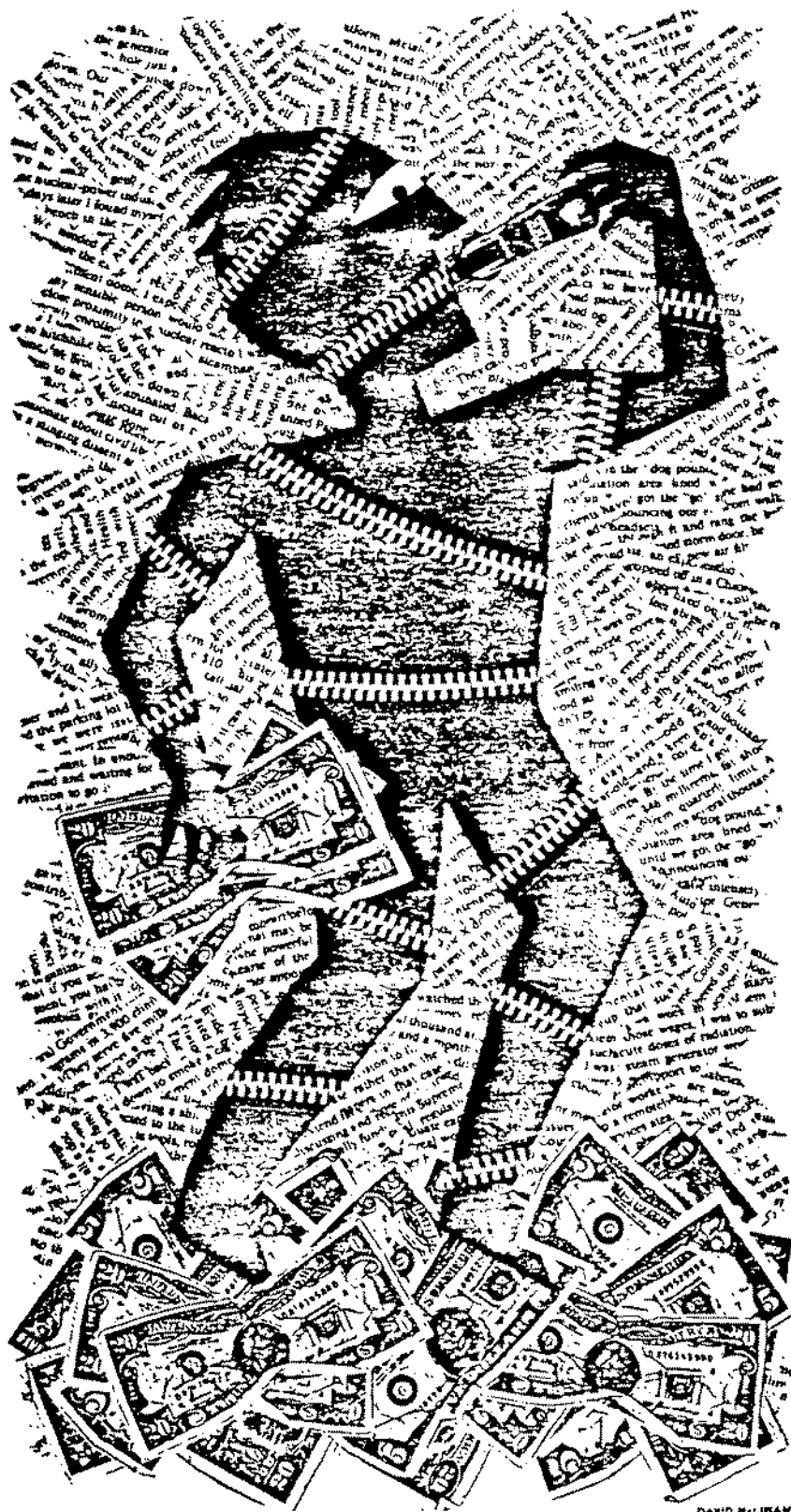
The NRC initially sided with the proponents of secrecy, ruling that the restrictions imposed on Macktal's—or, by extension, any whistleblower's—ability to communicate with Federal agencies were not "a violation of Federal law or NRC regulation." In effect, the NRC said that it was entirely legal to pay potential witnesses not to testify before Federal agencies.

Snubbed by the NRC bureaucrats, Macktal took his file to Capitol Hill. He got nowhere with his Congressman, Charles Stenholm, who also has Comanche Peak as a constituent, or with Texas Senator Phil Gramm. "I practically got thrown out of Gramm's office," Macktal says.

Not until he knocked on the door of the Senate subcommittee on nuclear regulation, chaired by Senator John Breaux of Louisiana, did Macktal receive a sympathetic hearing.

"Everyone was on the wrong side of

Geoffrey Aronson is a free-lance writer in Washington, D.C. Research for this article was supported by a grant from the Fund for Investigative Journalism.



DAVID McILRATH

this—the Department of Labor, the NRC, public-interest groups such as the Government Accountability Project and Trial Lawyers for Public Justice, and Brown & Root,” explained a committee source. “When I got the Macktal file, I was shocked, absolutely outraged,” this source adds. “I can’t see any difference between the president of company X offering money in unmarked bills not to appear in a proceeding and a bunch of lawyers in a settlement conference signing a settlement that does the same thing.”

The NRC, feeling the pressure of imminent public hearings on Capitol Hill, quickly backed away from its endorsement of the Macktal settlement. In a letter sent to every nuclear-plant operator in the country, it demanded copies of all settlement agreements in which restrictive language similar to that in the Macktal settlement appeared.

Within days, two agreements surfaced. Ultimately eighteen hitherto secret settlement agreements were submitted to the NRC. They were signed by whistleblowers working at nuclear power plants throughout the country, including Pennsylvania’s Three Mile Island, Catawba Nuclear Generating Station in North Carolina, Omaha Public Power District plant, Palo Verde in Arizona, Houston’s South Texas Project, and Fermi II in Michigan.

The confidential report on “Secret ‘Money-for-Silence’ Agreements in the Nuclear Industry,” written by Breaux’s staff, noted that “we now have evidence that [restrictive settlements] may be widespread throughout the nuclear industry.” The report suggested that such agreements may have withheld vital safety information from the NRC.

“[Nuclear] plants may be operating that were licensed by a blindfolded agency,” the report noted. “Even more troublesome is that plants may be operating under man-