CCASE:
KATHLEEN I. TARMANN V. INTERNATIONAL SALT
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

KATHLEEN I. TARMANN, COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. LAKE 89-56-DM
v.	
	MD 89-10
INTERNATIONAL SALT COMPANY, RESPONDENT	Cleveland Mine

DECISION

Appearances: Daniel Kalk, Esq., Valore, Moss & Kalk, Cleveland, Ohio for Complainant;
Joseph S. Ruggie, Jr., Esq., Thompson, Hine and Flory, Cleveland, Ohio for Respondent.

Before: Judge Melick

This case is before me following remand by the Commission on January 8, 1990, (and by subsequent reassignment to the undersigned on April 26, 1990) for a determination of whether in fact a binding settlement agreement had been reached between the parties. In its Remand Order the Commission observed, quoting from Peabody Coal Company, 8 FMSHRC 1265 at page 1266 (1986) that "the record must reflect and the Commission must be assured that a motion for settlement [approval], in fact represents a genuine agreement between the parties, a true meaning of the minds as to its provisions." More particularly, at issue in this case is whether a binding settlement agreement was consummated during an October 26, 1989, teleconference between then counsel for the Complainant, Richard Valore, and then counsel for the Respondent Keith Ashmus.

The validity of a settlement or release agreement is in the first instance governed by the applicable contract law and that law is ordinarily the law of the place where it is made--in this case the State of Ohio. Williston on Contracts, Third Edition 1792. U.S. v. ITT Continental Baking Company 420 U.S. 223, 238 (1975); Glazer v. J.C. Bradford and Co., 616 F.2d 167, 169 (5th Cir. 1980); Village of Kaktovika v. Watt 689 F.2d 222, 230 (D.C. Cir. 1982). In certain cases involving litigants under a nationwide federal program however, federal law may control. U.S. v. Kimbell Foods, Inc., 440 U.S. 715, 727 (1979); Mid South Towing v. Harwin, Inc., 733 F.2d 386, 389 (5th Cir. 1984),

Fulgance v. J. Ray McDermett & Co., 662 F.2d 1207, 1209 (5th Cir. 1981). Since there is no conflict in the basic principles of contract law here at issue there is no need to decide in this preliminary analysis which law is applicable.

In this case, upon reviewing the evidence introduced at hearings on the issue, I find that the Respondent has failed to sustain its burden of proving that a sufficiently definite and certain offer was made that could in any event result in a binding settlement agreement. In this regard when given the opportunity at hearing to set the background and to specifically describe the terms of the settlement "offer", the Respondent's principal witness, Mr. Ashmus, responded in the following colloquy:

> [By Mr. Rugge] Q. Did you subsequently receive authority from International Salt Company to settle for $3,000?
>
> [Mr. Ashmus] A. Under certain circumstances, yes.
>
> Q. And what were those circumstances?
> A. Well, they did not want to pay anything directly to the Complainant, Miss Tarmann; they said that the money would have to go to Mr. Valore for attorney's fees and then he could do whatever he wanted with the money; they said they wanted to make sure that she would not welch on the agreement because of past experiences with her, and they said we had to make sure it would settle all of the claims.
>
> Q. Did you then call Mr. Valore to discuss this matter and communicate that to him?
>
> A. Yeah. I called him on the next day, which would have been the 2 --
>
> Q. 26?
>
> A. 26. And told him that, and I said I specifically --
>
> THE COURT: Told him what?
>
> A. Told him that I -- that the client had indicated a willingness to go along with the figure but that the offer hasn't come from their side, it had to have authority from his client, it had to be payment to him and it had to cover everything.

Q. After you reviewed each of those points of agreement that your client had authorized to you, did Mr. Valore have a response?

A. Yeah, he said he'd get back to me.

Q. Did he, in fact, get back to you?

A. Yes, he did.

Q. And what was his response when he did get back to you?

THE COURT: Was that on the same day?

A. Same day, a little later in the morning. He said that he had talked to his client and that she was accepting of it, and we went over all four points again, and I said, "Fine. Then I'm authorized to accept the offer." And we talked a little bit about the fact that it was $3,000 and he was going to have to get something to his client, and so I was going to prepare the release documents so that he wouldn't have to put in any time doing that. And he said to get the money to him as quickly as possible so that we could get everything signed up, and I said that I would get the check to him as soon as I could and that at the latest I would get it to him would be on Monday.

Q. And did you, in fact, get the check to him as well as the release document even before Monday?
A. Yes, that was delivered to his office on Friday.
(Tr. 24-26).

Within this framework of evidence I cannot find that a sufficiently definite or certain offer had been made, whether by Mr. Ashmus or, as Respondent claims, by Mr. Valore, during the telephone conversations on October 26, 1989. See General Motors Corp. v. Keener Motors, Inc., 194 F.2d 669 (6th Cir. 1952); Lyles v. Commercial Lovelace Motor Freight Inc, 684 F.2d 501, 504 (7th Cir. 1982); U.S. v. Orr Construction Co., 560 F.2d 765, 769 (7th Cir. 1977). Accordingly no contract could have been consummated during these telephone conversations.

It is apparent from the record, moreover, that the parties contemplated that there would be no binding agreement until committed to writing and signed by the Complainant herself. This was the understanding of Mr. Valore according to his testimony at hearing and also the clear inference to be drawn from Mr. Ashmus'

version of the October 26, 1989, telephone conversations. The fact that a precisely drawn written offer, providing details not discussed during the teleconferences was thereafter prepared by Mr. Ashmus and delivered to Valore corroborates this. Significantly that document states that this case "has been or will be settled" thereby further indicating an existing lack of finality. (Appendix A)

There is in any event an overriding public interest under the Federal Mine Safety and Health Act of 1977 and in particular under the provisions of Section 105(c) of that Act, warranting Commission overview and approval of all settlement agreements. It would indeed be difficult to find in any case that this public interest would be served by compelling enforcement of any settlement when the individual miner/complainant has not accepted the proposed agreement. See Peabody Coal Co., 8 FMSHRC 1265, 1266 (1986); Secretary on behalf of John Koerner v. Arch Mineral Coal Co., Docket No. DENV 78-564 (March 1979). (Appendix B). Williston on Contracts, supra, Section 1792. It is clear from the credible testimony of the Complainant herein that she neither offered nor accepted any settlement agreement.

ORDER

Respondent International Salt Company has failed to sustain its burden of proving that a binding settlement agreement existed in the captioned proceeding and accordingly this case will proceed with trial on the merits as previously scheduled commencing August 28, 1990, at 9:00 a.m. in Cleveland, Ohio.

Gary Melick
Administrative Law Judge

APPENDIX A

October 27, 1989

(216) 566-5723

VIA HESSENGER

A. Richard Valore, Esq.
Valore, Moss & Kalk
75 Public Square, Suite 300
Cleveland, Ohio 44113

Re: Kathleen I. Tarmann v. International Salt Company

Dear Dick:

Enclosed are three duplicate originals of the Release in the abovecaptioned matter, plus a check drawn to your order in the amount of $3,000.00. Please hold the check in escrow pending the execution of the Release by Ms. Tarmann (including its witnessing, approval by you and notarization), and the return of two executed originals to me. At that time, you may then negotiate the check.

Please call me if you have any questions.

Very truly yours,

Keith A. Ashmus

Enclosures

~1296

RELEASE

DO NOT SIGN WITHOUT READING AND UNDERSTANDING

I, KATHLEEN I. TARMANN, on behalf of myself and my heirs, successors and assigns, in consideration of the payment of attorneys' fees to my attorney, A. Richard Valore, Esq., in the amount of THREE THOUSAND AND NO/100 DOLLARS ($3,000.00), the receipt of and sufficiency of which are hereby acknowledged, hereby release and forever discharge AKZO Corporation, International Salt Company, and their officers, directors, shareholders, agents, assigns, subsidiaries and affiliates (collectively referred to hereafter as "AKZO") from all claims, costs, damages, demands, liabilities and causes of action, including claims for attorneys' fees, which I now have or ever had from the beginning of the world to the date of this Release, including, without limitation on the general nature of this Release, any and all claims, costs, damages, demands, liabilities or causes of action arising out of or connected in any way with:

1. Any subject matter that was or could have been raised in my compliant in the case of Kathleen I. Tarmann v. International Salt Company, Docket No. LAKE 89-56-DM, MD-10, U.S. Mine Safety & Health Review Commission, which case has been or will be settled and dismissed with prejudice and which I agree never to refile in any form or forum;

2. Any subject matter that was or could have been raised in my compliant in the case of Kathleen I. Tarmann v. International Salt Company, Charge No. 220891426, U.S. Equal Employment Opportunity Commission, which case has been or will be settled and dismissed with prejudice and which I agree never to refile in any form or forum;

3. Any subject matter that was or could have been raised in my compliant in the case of Kathleen I. Tarmann v. International Salt Company, Case No. 8-CA-21410, National Labor Relations Board, which case has been or will be settled and dismissed with prejudice and which I agree never to refile in any form or forum;

4. My employment with AKZO;

5. The termination of my employment with AKZO and my reinstatement to employment;

6. My membership and activity in Teamsters Union Local No. 436; and

7. Any other claim that AKZO violated any statutory, contractual or common law obligation owed to me, including, without limitation, any civil rights, labor relations or employment contract law.

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Initials

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I warrant the following:

1. That no promise or inducement has been offered to me except as herein set forth;

2. That this Release is executed without reliance upon any statement by the parties released or their representatives except as herein set forth;

3. That I am legally competent to execute this Release and accept full responsibility for doing so;

4. That this Release evidences the compromise of claims disputed both as to liability and amount;

5. That AKZO does not admit to any liability or wrongdoing whatsoever; and

6. That I have not assigned or attempted to assign any claim or part thereof that I have or claim to have against AKZO. I acknowledge that the terms of the settlement of my claims are confidential and agree not to reveal the existence of the settlement or the terms to any person.

I have read and understand the terms of this Release.

IN WITNESS WHEREOF, I have set my hand this ÄÄÄÄÄÄÄ day of ÄÄÄÄÄÄÄÄÄ, 1989, at ÄÄÄÄÄÄÄÄÄ, Ohio.

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
Witness

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
Kathleen I. Tarmann

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
Witness

APPROVED TO AS FORM:

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
Valore, Moss & Kalk
A. Richard Valore, Esq.
Counsel for Kathleen I. Tarmann

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STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

BEFORE ME, a Notary Public in and for said County, personally appeared KATHLEEN I. TARMANN, who swore to the accuracy of the statements contained in the foregoing instrument, acknowledged that she read, understood and personally signed the foregoing instrument and affirmed that the same was and is her free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this ÄÄÄÄÄÄÄ day of ÄÄÄÄÄÄÄÄ, 1989, at ÄÄÄÄÄÄÄÄ, Ohio.

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
Notary Public

(SEAL)

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Initials

APPENDIX B

Federal Mine Safety and Health Review Commission

March 9, 1979

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

On behalf of John Koerner,
Applicant No. DENV 78-564

v.

ARCH MINERAL COAL COMPANY,
Respondent

DIRECTION FOR REVIEW AND ORDER

The decision of the Administrative Law Judge, dated February 7, 1979, is directed for review. We find that the Judge's decision may be contrary to law or Commission policy, or that a novel question of policy is presented.

On September 12, 1978, the Secretary filed with the Commission his findings that John Koerner had brought a complaint of unlawful discrimination by Arch Mineral Coal Company, and that the complaint was not frivolously brought. He moved that Mr. Koerner be reinstated to his former position, or equivalent position, until a final Commission order on the complaint is issued. The motion was granted. On January 31, 1979, the Secretary filed a motion to vacate the order of reinstatement. The only stated basis for the motion was that "the parties have successfully negotiated a settlement of all matters formally in issue." Judge Malcolm P. Littlefield noted the ground for the motion, stated that "[a]s a result [of the settlement], continuation of the reinstatement order serves no purpose", and granted the motion to vacate. The terms of the settlement were not entered into the record; the record also does not disclose whether Mr. Koerner agreed to or acquiesced in the motion to vacate the reinstatement order.

The issue is: Were there sufficient grounds to grant the motion?

The Commission concludes that the record should be supplemented before we resolve this issue. Accordingly, we remand this case to Judge Littlefield for the limited purpose of supplementing the record

with answers to the following questions: What are the terms of the settlement agreement? Did Mr. Koerner agree to or acquiesce in the motion to vacate the order of reinstatement? The Commission otherwise retains jurisdiction of this case. The parties need not file briefs unless the Commission requests them to.

Jerome R. Waldie Chairman

Richard V. Backley Commissioner

Frank F. Jestrab Commissioner

A. E. Lawson Commissioner

Marian Fearlman Nease Commissioner