

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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March 20, 1997

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 97-52  
Petitioner : A.C. No. 46-06448-03534  
v. :  
: Rocklick Preparation Plant  
EASTERN ASSOCIATED COAL CORP., :  
Respondent :

**ORDER DENYING MOTION TO ENFORCE SETTLEMENT AGREEMENT,  
MOTION TO DISMISS AND MOTION FOR CONTINUANCE**

In its Motion to Enforce Settlement Agreement, Respondent maintains that, during the course of settlement negotiations, a Conference and Litigation Representative (CLR) for the Department of Labor, had agreed at a February 20, 1997, meeting, to vacate Citation No. 4400179. It is represented by Respondent that the CLR thereafter advised its representative on February 26, 1997, that he would, in fact, not vacate the citation and advised such representative that the Department of Labor's Mine Safety and Health Administration (MSHA) intended to litigate the citation before an administrative law judge. Respondent seeks in the instant motion to "enforce" what it maintains is a "binding agreement" between the parties to vacate Citation No. 4400179.

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 it is alleged to be the State of West Virginia. *Williston on Contracts*, Third Edition ' 1792. *U.S. 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 McDermott & Co.*, 662 F.2d 1207, 1209 (5th Cir. 1981), *Tarmann v. International Salt Co.*, 12 FMSHRC 1291 (June 1990). 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.

Since the Secretary has the unilateral authority to vacate citations without any settlement motion or agreement, the question arises as to whether there was, in this case, any legal consideration to support the alleged promise by the CLR to vacate the instant citation. Consideration has been defined as some right, interest, profit or benefit occurring to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by another. *Cook v. Heck's Inc.*, 176 W.Va. 368, 342 S.E.2d 453 (1986); *Adkins v. Inco. Alloys Int'l Inc.*, 187 W.Va. 219, 417 S.E.2d 910 (1992).

Respondent does not allege what, if any, consideration existed. It is, of course, a fundamental principle of the law of contracts that every promise or agreement, in order to be enforceable, must have a consideration to support it. 4B M.J., Contracts, ' 31. *Hamilton v. Harper*, 185 W.Va. 51, 404 S.E.2d 540 (1991). Since a settlement agreement is a contract, consideration is a prerequisite to enforceability of such an agreement. *Hamilton v. Harper, supra*.

Thus even assuming, *arguendo*, that Respondent's allegations herein are true, there is insufficient basis for granting the motions "to enforce settlement agreement and to dismiss. No binding "settlement agreement" could have existed as alleged by Respondent and no further legal analysis is necessary to deny its Motion to Enforce Settlement Agreement and Motion to Dismiss. The Motions are accordingly denied. The Respondent's Motion for Postponement is also denied.

Gary Melick  
Administrative Law Judge  
703-756-6261

Distribution:

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