

CCASE:  
KATHLEEN TARMANN V. INTERNATIONAL SALT  
DDATE:  
19900108  
TTEXT:

FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.

January 8, 1990

KATHLEEN I. TARMANN

v. Docket No. LAKE 89-56-DM

INTERNATIONAL SALT COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson,  
Commissioners

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"). On November 30, 1989, Commission Administrative Law Judge Avram Weisberger issued an Order of Dismissal based on the failure of the complainant, Kathleen I. Tarmann, to respond to the judge's Order to Show Cause why the case should not be dismissed in view of its reported settlement. On December 18, 1989, following issuance of the dismissal order, Tarmann's counsel filed with Judge Weisberger a Brief in Opposition to Dismissal, requesting that the case be reinstated on the grounds that settlement had not, in fact, been reached and that counsel had "never ... communicated that it had been reached." On December 20, 1989, respondent International Salt Company ("International Salt") filed with Judge Weisberger a Memorandum in Response supported by an affidavit, asserting that a settlement had been reached and opposing reinstatement of the case. Under the circumstances presented, we deem complainant's Brief in Opposition to Dismissal to constitute a timely petition for discretionary review, which we grant. We vacate the judge's dismissal order, and remand for further proceedings.

On February 27, 1988, Tarmann filed with the Commission a

discrimination complaint, pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3), alleging that she had been discriminatorily discharged by International Salt in violation of 30 U.S.C. § 815(c)(1). In an Order to Show Cause issued on November 15, 1989, the judge indicated that complainant's attorney had advised his secretary on November 6, 1989, that "the matters in dispute in this case had been settled by the Parties." Accordingly, the judge directed complainant

to show cause, within 10 days of the order, why the case should not be dismissed. On November 30, 1989, the judge issued the Order of Dismissal, stating that complainant had failed to respond to the show cause order and, accordingly, dismissing the proceeding.

The judge's jurisdiction in this matter terminated when his dismissal order was issued on November 30, 1989. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70. Here, complainant's brief in opposition to dismissal constitutes a request for relief from the judge's decision, and we will treat it as a timely petition for discretionary review. See, e.g., *Secretary on behalf of Joseph DeLisio v. Mathies Coal Co.*, 9 FMSHRC 193, 194 (February 1987). Similarly, we deem International Salt's memorandum to constitute a statement in opposition to complainant's petition. See 29 C.F.R. § 2700.70(e).

"Settlement of contested issues is an integral part of dispute resolution under the Mine Act." *Pontiki Coal Corp.*, 8 FMSHRC 668, 674 (May 1986). In this respect, the Commission has observed 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 meeting of the minds as to its provisions." *Peabody Coal Co.*, 8 FMSHRC 1265, 1266 (September 1986).

Here, Tarmann's brief in opposition to dismissal and International Salt's opposition to that brief reveal a disagreement between the parties as to whether, in fact, a settlement agreement had been reached. 1/ Under these circumstances, further proceedings are necessary and we conclude that the issues raised by the parties should be considered by the judge in the first instance.

---

1/ Tarmann's brief alleges that counsel did not state to the judge's secretary during their telephone conversation of November 6, 1989, that the parties had actually settled the case (as recited by the judge in his show cause order), but only that "settlement negotiations were ... being pursued, ... that [counsel] was agreeable to settlement, but he had to first obtain the approval of his client." The official file in this case does not contain any contemporaneous note or memorandum from the judge's office detailing the contents of the conversation between counsel and the judge's secretary. The conversation appears to have been in the nature of a procedural status discussion rather than an ex parte communication (see 29 C.F.R. § 2700.82; 5 U.S.C. § 551(14) (definition of "ex parte communication" for purposes of the Administrative Procedure Act)), and the

judge referenced the conversation generally in his show cause order. Nevertheless the risks of possible misunderstandings arising from telephone conversations with a party outside of the formal record suggest that the better general practice is to include in the official file a contemporaneous note detailing the contents of any such significant procedural status discussion. Cf. *Inverness Mining Co.*, 5 FMSHRC 1384, 1388 n. 3 (August 1983).

~3

Accordingly, the judge's dismissal order is vacated, this case is reopened, and the matter is remanded to the judge for appropriate proceedings.

Ford B. Ford, Chairman  
Richard V. Backley, Commissioner  
Joyce A. Doyle, Commissioner  
James A. Lastowka, Commissioner  
L. Clair Nelson, Commissioner

#### Distribution

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

Keith A. Ashmus, Esq.  
Thompson, Hine & Flory  
1100 National City Bank Bldg.  
629 Euclid Avenue  
Cleveland, Ohio 44114

Administrative Law Judge Avram Weisberger  
Federal Mine Safety & Health Review Commission  
5203 Leesburg Pike, Suite 1000  
Falls Church, Virginia 22041