



**Issue Date: 27 October 2016**

Case No.: 2016-FRS-00022

In the Matter of

**MILTON RAMIREZ**  
Complainant

v.

**NORFOLK SOUTHERN RAILWAY COMPANY**  
Respondent

**ORDER GRANTING RESPONDENT'S MOTION TO  
ENFORCE AND APPROVE THE SETTLEMENT AGREEMENT**

This case arises under the employee protection provisions of the Federal Rail Safety Act ("FRSA")<sup>1</sup> and was scheduled for hearing on June 13, 2016 in New York, New York. By order dated May 9, 2016, the undersigned granted the parties' joint motion for extension of time, and rescheduled the hearing for September 12, 2016. Subsequently, the Complainant filed an additional motion for extension of time on August 17, 2016, which the Respondent opposed.

On August 24, 2016—before the undersigned issued an order on Complainant's motion—the parties jointly informed this tribunal that the parties had reached a settlement. In light of the settlement, on September 1, the Respondent petitioned to adjourn the hearing. The Complainant did not object. On the same day, the undersigned granted the Respondent's request, and directed the parties to submit their settlement agreement within thirty days.

On October 4, 2016, Respondent filed a Motion to Enforce and Approve the Settlement Agreement, arguing that the parties reached a meeting of the minds on all material terms and completed a settlement on August 24, 2016. Complainant filed a response in opposition on October 18, 2016, arguing: (1) the Respondent's Motion failed to comply with the requirements

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<sup>1</sup> This case began when Milton Ramirez ("Complainant") filed a complaint with the Secretary of Labor on February 19, 2015, alleging Norfolk Southern Railway ("Respondent") terminated his position on February 10, 2015 in retaliation for his protected activity of reporting an injury. The Occupational Safety and Health Administration ("OSHA") investigated and concluded that Respondent dismissed Complainant for numerous documented infractions and performance issues, and thus would have terminated Complainant in the absence of his protected activity. OSHA subsequently dismissed the complaint, and Complainant filed objections on January 12, 2016, requesting a hearing before an administrative law judge.

of 29 C.F.R. § 188.33(c)(3) by not including a statement that the parties attempted to resolve the Motion's subject matter; (2) the preliminary oral agreement is not enforceable because the evidence demonstrates that the parties did not intend to be bound; and (3) even if the oral agreement is enforceable, the settlement amount agreed to is not binding on the parties because other terms of the agreement were still open for negotiation. After a careful review of the record before me, the undersigned concludes that the parties entered a binding oral agreement to settle the case for \$32,500 on August 24, 2016.<sup>2</sup>

This issue turns on the objective words and deeds of the attorneys for both parties: Mr. Merrill and Mr. Frank, for the Complainant; and Mr. Sirbak, for the Respondent. By the beginning of August 2016, the parties were engaged in settlement negotiations. (Resp. Ex 2; Comp. Ex A.) On August 19, Mr. Sirbak emailed Mr. Merrill, and attached a draft settlement release agreement. (Resp. Ex 2; Comp. Ex A.) In the email, Mr. Sirbak stated that the release agreement was attached "in case we are able to settle the case," and that its "language is pretty much non-negotiable." (Comp. Ex B.) The release agreement set forth the terms of the proposed settlement, with the monetary terms left blank. (Resp. Ex 2.)

On August 23, Mr. Merrill emailed a response to Mr. Sirbak, discussing some newly discovered evidence and other settlement issues. (Resp. Ex 2; Comp. Ex A.) Specifically, Mr. Merrill stated that "[i]n terms of settling this matter, our bottom dollar is \$32,500. I have already reviewed the release and it looks straight forward. I can have my client stop by this week and sign off on it." (Resp. Ex B.) On August 24, Mr. Sirbak called Mr. Merrill to accept his "bottom dollar" figure. (Resp. Ex B; Comp Ex A.) Mr. Sirbak alleges that Mr. Merrill stated that he did not see any problems with the terms of the settlement and final release that had been sent on August 19, and that Complainant would sign the document no later than August 29. (Resp. Ex. B.) During this phone call, the parties jointly called the undersigned's legal assistant, and informed her of the settlement. (Resp. Ex 2; Comp. Ex A.) Mr. Merrill characterizes this exchange as: "with the hearing date quickly approaching, I stipulated that the parties should put the Court on notice about the status of settling this matter." (Comp. Ex A.)

Later that day, Mr. Sirbak emailed a new settlement agreement and final release document to Mr. Merrill, which contained the monetary terms filled in. (Resp. Ex 2, Ex B; Comp. Ex C.) Mr. Sirbak stated that one sentence had been deleted from the previous version because it did not apply to Complainant as a non-union employee, and asked that Mr. Merrill call him to review the mechanics of getting the release signed. (Comp. Ex C.) Mr. Sirbak also specified that he needed W-9 forms from both Complainant and Mr. Merrill's firm before they could process the checks. (Comp. Ex C.) The same day, the undersigned requested that the parties submit a letter indicating that they had settled. (Resp. Ex 2.) Mr. Sirbak emailed Mr. Merrill, stating that he would fax a two-sentence letter to comply with the Court's request. (Resp. Ex 2; Ex C.) Mr. Merrill simply replied, "Okay great." (Resp. Ex C.) Later that afternoon, Mr. Sirbak faxed the letter to the court, stating that the parties had "reached a settlement," and that they would submit a signed settlement agreement by "no later than next

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<sup>2</sup> On October 25, 2016, counsel for Respondent filed a Motion for Leave to File Reply Brief. As this Order had already been substantially drafted at that point, and as Respondent has prevailed in its Motion to Enforce the Settlement, the Motion for Leave to file a Reply Brief is DENIED, and the contents of the Reply Brief have not been considered.

week.” (Resp. Ex D.) Mr. Sirbak also emailed copies to both of Complainant’s attorneys. (Resp. Ex D.)

On August 29, Mr. Sirbak emailed Mr. Merrill to inquire whether Complainant had signed the settlement. (Resp. Ex E.) Mr. Merrill stated that Complainant was unable to come to his office the prior week, but would be there to sign the document the present week and he would send over the signed release. (Resp. Ex E.) On August 31, Mr. Sirbak called Mr. Merrill to inquire when Complainant would sign the settlement. (Resp. Ex 2.) Mr. Merrill stated that Complainant would sign the document as soon as Mr. Merrill’s co-counsel, Mr. Frank, returned to the office. (Resp. Ex 2.) By September 1, Complainant had still not signed the settlement papers, and Mr. Sirbak requested that the hearing be adjourned in light of the parties’ settlement. (Resp. Ex F.) He faxed a letter to the court stating that adjournment would prevent “needless hearing preparation costs” for a case that had “already settled.” (Resp. Ex. F.) Mr. Sirbak also emailed copies of this request to both of Complainant’s attorneys. (Resp. Ex F.) Complainant’s attorneys took no steps to raise any objection to Mr. Sirbak’s letter to this tribunal. The undersigned granted the Respondent’s request, and directed the parties to submit their settlement agreement within thirty days.

By September 20, Complainant’s attorneys had still not submitted a signed settlement, and Mr. Sirbak emailed Mr. Merrill to inquire when he could expect to receive it. (Resp. Ex 2.) Mr. Merrill responded one week later, on September 27, stating that Complainant “was not satisfied with the settlement amount and will not be signing the settlement agreement.” (Resp. Ex G; Comp. Ex A.) Thereafter, Respondent filed the pending Motion to enforce the settlement.

The Office of Administrative Law Judges may enforce a settlement agreement when an attorney has the authority to accept the agreed terms on behalf of his client, and when the terms of the written agreement are not materially different from the terms agreed during negotiations. Glaption v. CSX Trans., ALJ Case No. 2014-FRS-27 (ALJ Dec. 15, 2014). An agreement may be enforced even in the absence of documentation of a complainant’s acceptance, *i.e.* a statement made on the record. Id.

Whether the parties reached a binding settlement is governed by New York or federal common law. Ciaramella v. Reader’s Digest Ass’n, 131 F.3d 320, 322 (2d Cir. 1997).<sup>3</sup> However, on this question, New York law is indistinguishable from federal common law, and thus the result would be the same under either choice of law. Id. In New York, parties can bind themselves to an oral agreement, even when they have intended to commit the agreement to writing. Winston v. Mediafare Entertainment Corp., 777 F.2d 78, 80 (2d Cir. 1985). However, if a party communicates an intent not to be bound prior to execution of a written document, then no oral agreement will result in a binding contract. Id. Accordingly, it is the intent of the parties that determines the time of contract formation. Id.

The intent of the parties is a question of fact for the court to determine by an examination of the totality of the circumstances. Ciaramella v. Reader’s Digest Ass’n, 131 F.3d 320, 322 (2d Cir. 1997). Only the words and deeds of the parties will be considered in determining a party’s

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<sup>3</sup> Complainant is a resident of New York, thus jurisdiction of this matter falls within the U.S. Court of Appeals for the Second Circuit.

intent—subjective intent is irrelevant. Winston, 777 F.2d at 80. To determine if the parties intended for an oral agreement to be binding, courts look to four factors: “(1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing.” Id. In this case, Mr. Merrill had the apparent authority to settle on behalf of his client, and the objective words and deeds of the parties demonstrate that the parties intended to enter a binding settlement agreement on August 24, 2016.

Preliminarily, the undersigned addresses Complainant’s contention that Respondent’s Motion failed to comply with 29 C.F.R. § 18.33(c)(3), which requires a party to include a statement in a motion that the moving party conferred or attempted to confer with opposing counsel in a good faith effort to resolve the motion’s subject matter. However, a statement of consultation is not required for motions to dismiss. § 18.33(c)(3)(i). Here, although Respondent’s Motion is titled “Motion to Enforce and Approve Settlement Agreement,” it could fairly be categorized as a motion to dismiss, as it includes a request for the court to dismiss the complaint in addition to enforcing the settlement agreement. Therefore, the undersigned finds that § 18.33(c)(3) does not apply, and Respondent was not obliged to confer with opposing counsel before filing the Motion.

In addition, the undersigned notes that it is clear from the record that Complainant’s counsel had the apparent authority to enter into settlement negotiations and agree to terms on behalf of his client. Mr. Merrill acknowledged that he was engaged in negotiations with Mr. Sirbak over a potential settlement, and he expressly stated that \$32,500 was Complainant’s “bottom dollar” figure. Moreover, Mr. Merrill was present on the line when the parties called the Court to inform the undersigned that they had reached a settlement, and responded approvingly when Mr. Sirbak informed him that he would provide the court with written notice of that fact. Complainant offers no argument to the contrary. Accordingly, Complainant will be bound to any reasonable settlement agreement that Mr. Merrill has entered into on his behalf.

Turning to the merits of Respondent’s Motion, an application of the four Winston factors evidences the parties’ objective intent to enter into a binding settlement agreement on August 24, 2016. First, neither the Complainant nor his attorneys expressly reserved the right not to be bound in the absence of a writing. Complainant’s primary argument on this point is that Mr. Merrill’s statement to Mr. Sirbak on August 31—that Complainant would not sign the agreement until Mr. Frank returned to the office—constituted a reservation not to be bound prior to the execution of a writing. Complainant’s argument fails. Even if that statement is such a reservation, it was made an entire week after Mr. Sirbak accepted Mr. Merrill’s “bottom dollar” offer and the parties called the court on August 24 to inform the undersigned that a settlement had been reached. In addition, aside from that one statement, Complainant’s attorneys consistently acted as though a final settlement had been reached. Mr. Merrill called the court jointly with Respondent to notify the undersigned that the parties had settled. Neither Mr. Merrill nor Mr. Frank objected to Respondent’s August 24 past-tense characterization of the parties’ negotiation posture as “reached a settlement.” And neither of Complainant’s attorneys protested the Respondent’s request to adjourn the hearing to prevent “needless hearing

preparation costs” for a case that had “already settled.” Therefore, the first Winston factor favors a finding that the parties intended to enter a binding settlement agreement on August 24.

Second, while the parties did not partially perform the contract in a strict sense, they acted in all other respects as if a settlement had been reached. Complainant argues that this factor weighs in favor of a finding that the parties intended not to be bound until a formal written settlement agreement was signed because no funds were transferred and the settlement was not signed. The undersigned disagrees. While no partial payment was issued in this case, a partial payment would not be expected for such a relatively small settlement amount. And a failure to sign the settlement does not constitute a failure to partially perform—only a failure to memorialize the oral agreement. Thus, in the context of this case, a lack of partial performance does not indicate that the parties did not intend to be bound until the agreement was committed to writing. Therefore, the second Winston factor is neutral with respect to showing the parties’ intent to enter a binding settlement agreement.

Third, the parties appear to have agreed upon all material terms by August 24. As discussed above, the parties had agreed to a settlement amount by that time, and were only hammering out the inconsequential details of the settlement. Complainant argues that certain material terms were still being negotiated. Specifically, he alleges that he never accepted Respondent’s deletion of certain settlement terms, allocation of settlement funds, or requirement that he provide signed W-9 forms. This argument lacks merit. Complainant does not demonstrate that these are material terms to his receipt of benefit of the bargain. With regard to the settlement terms in general, Mr. Merrill had already informed Mr. Sirbak that the release looked “straight forward,” and later that day stated that he did not have any problems with the terms of the settlement. Further, Complainant does not dispute Respondent’s contention that the only subsequent modification to the written settlement agreement was a deletion of one sentence that did not apply to the Complainant because he was never a member of the union. Complainant also fails to show that the allocation of settlement funds or the required completion of W-9 forms were material terms to the agreement. In other words, Complainant has not alleged how these provisions—which are important to the Respondent for accounting purposes—are material to Complainant’s receipt of the benefit of the bargain; namely, the settlement funds. Tellingly, Complainant has refused to sign the agreement only because “he is not satisfied with the settlement amount.” For these reasons, the third Winston factor favors a finding that the parties reached an enforceable oral agreement.

Finally, this kind of agreement is not the kind that is usually committed to writing. When examining this factor, courts examine the complexity of the case and the type of relief afforded to the parties. See Winston, 777 F.2d at 83 (holding that a \$62,500<sup>4</sup> settlement, paid over the course of a few years based on a percentage of future earnings, was the kind of complex settlement that would ordinarily be reduced to writing). In this case, the settlement amount is relatively small, a lump sum payment is contemplated, and Complainant concedes that a settlement for this type of case usually contains standard provisions. Complainant does not identify any complexity engendered by his settlement that would suggest that enforceability should be withheld until the agreement is committed to a signed writing. Therefore, the fourth

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<sup>4</sup> The undersigned observes that in 1985, \$62,500 was the equivalent of over \$140,000 in 2016 dollars. See <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=62500&year1=1985&year2=2016>.

Winston factor favors a finding that the parties intended to enter a binding oral settlement agreement.

In conclusion, the undersigned has analyzed the record in light of the Winston factors, and finds that the objective words and actions of the parties weigh in favor of finding that they intended to enter a binding settlement agreement on August 24, 2016. Enforcing a settlement agreed to prior to memorialization permits the settlement process to proceed more smoothly and protects the interests of all involved. Glapion v. CSX Trans., ALJ Case No. 2014-FRS-27 (ALJ Dec. 15, 2014). By enforcing the oral agreement, parties can negotiate settlements without fear that an opposing party will later withdraw from the agreed upon terms. Id.

This tribunal has the authority to enforce the oral agreement made between the parties' agents on August 24, 2016. Accordingly, based on a totality of circumstances, the Motion of Respondent Norfolk Southern Railway Company to Enforce and Approve the Settlement Agreement is hereby GRANTED. The undersigned hereby approves the settlement amount of \$32,500.00 and the Settlement and Final Release attached in Respondent's Exhibit 1. Upon payment of this amount by Respondent, this matter will be DISMISSED WITH PREJUDICE.

SO ORDERED.

**THERESA C. TIMLIN**  
Administrative Law Judge

Cherry Hill, New Jersey