

Joe -
I don't know
whether you'll
go for this
- Renee

CIVIL ACTION NO. 85-

KENTUCKY CARBON

VS:

TENNESSEE VALLEY AUTHORITY DEFENDANT.

INTRODUCTION

Subject matter jurisdiction for the present action is alleged to arise under 38 U.S.C. Section 1337, which grants federal jurisdiction over "an action arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies", and the Prompt Payment Act, 31 U.S.C. Sections 3901-3906. It is currently before the undersigned on the defendant's motion for partial summary judgment.

FACTS

Discussion

On August 25, 1978, the Tennessee Valley Authority (TVA) and the Kentucky Carbon Corporation (Kentucky Carbon) entered into a contract for the sale of coal pursuant to which Kentucky Carbon sold and delivered coal to TVA from October, 1978 to August, 1984. The plaintiff thereafter made requests for price adjustments based on increased workmen's compensation costs; however, TVA ^{admittedly} rejected these claims in whole or in part in alleged violation of section C of the contract. The disputed period is for shipments made from July, 1981 onward.

~~TVA admits that it did not pay the sums requested by the plaintiff. However, it makes a number of arguments, including the following that: (1) the request for the earlier period was not timely made; (2) TVA has no liability for prejudgment interest; (3) it has already paid the plaintiff the amounts sought in~~

TVA

ARGUMENT namely, that:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 85-283

KENTUCKY CARBON CORPORATION, PLAINTIFF,

VS:

REPORT AND RECOMMENDATION

TENNESSEE VALLEY AUTHORITY, DEFENDANT.

INTRODUCTION

Subject matter jurisdiction for the present action is alleged to arise under 38 U.S.C. Section 1337, which grants federal jurisdiction over "an action arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies", and the Prompt Payment Act, 31 U.S.C. Sections 3901-3906. It is currently before the undersigned on the defendant's motion for partial summary judgment.

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TVA ARGUMENT namely, that:

parts II and IV of the complaint; (4) the plaintiff ^{by accepting} accepted price adjustments with regard to the matters discussed in Counts III and V of the complaint, ~~and~~ has waived its right to seek monies for these, ~~and,~~ lastly and most pertinent to the decision herein, (5) ~~that~~ the Prompt Payment Act is not applicable.

TVA's motion for partial summary judgment pertains only to the Prompt Payment Act claim, asserted in the plaintiff's amended complaint. TVA indicates that ~~(1)~~ the law is not applicable to contracts entered into before October, 1982 and cites as authority the unpublished memorandum decision in Sigmond Fuel Company v. Tennessee Valley Authority, No. 3-81-488 (E.D. Tenn. September 8, 1983), aff'd 754 F.2d 162 (6th Cir. 1985) and a copy of which is provided as an attachment to the defendant's memorandum (Docket Entry 17); ~~and (2) that, in any event, the plaintiff has failed to comply with the administrative procedures set out in the Contracts Disputes Act, 41 U.S.C. Sections 601-613, as required by 31 U.S.C. Section 3906(e).~~

DISCUSSION

As noted by the defendant, it is undisputed that the Prompt Payment Act only applies to contracts entered into before October, 1982. It is further undisputed that the "contract" signed by the parties was executed before that date.

The plaintiff, however, argues that the price adjustments made thereafter constituted modifications of the original contract, making each adjustment after October, 1982 a separate and enforceable matter under the Act.

Since there is no case authority construing the "contract" within the meaning of the Act, reference must be made to principles of general contract law and a review of the documents in question. Examination of the contract itself reveals that the document was drafted containing provisions dealing with every aspect of the transaction from rates of delivery, sampling and analysis for quality, transportation, as well as a provision relating to "renegotiation of price and terms"

should the parties wish to negotiate a new base price or conditions. Further examination of the record reveals that the controversy now before the Court does not concern a renegotiation of that base price in the original contract, which provides for a floating pricing structure based on changes in certain, specified costs of the supplier), but rather it concerns the application of the original contract terms.

RECOMMENDATION

Thus, it appears that the defendant's motion is well taken and that the Preempt Payment Act is inapplicable. It is, therefore, RECOMMENDED that the defendant's motion for partial summary judgment be granted.

This the _____ day of November, 1986.

JOSEPH M. HOOD,
UNITED STATES MAGISTRATE

SH Objections

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 85-283

KENTUCKY CARBON CORPORATION,
a West Virginia corporation, PLAINTIFF,

VS: MEMORANDUM OPINION

TENNESSEE VALLEY AUTHORITY, DEFENDANT.

INTRODUCTION

The above-styled action, brought pursuant to 38 U.S.C Section 1337 and 31 U.S.C Sections 3901 et seq., was initiated by an allegedly underpaid seller in a coal purchase contract. Specifically before the undersigned are various motions and memoranda associated with the order of September 19, 1986, by which the case was assigned to the Honorable Joseph M. Hood as a special master for trial.

FACTS

On August 25, 1978, the parties entered into a contract for the sale of coal, pursuant to which the plaintiff sold and delivered coal to the defendant from 1978 to 1984. During the life of the contract, the plaintiff made requests for price adjustments based on increased worker's compensation costs; however, the defendant rejected there in whole or in part in alleged violation of section C of the contract. The disputed period is for shipments made from July, 1981 onward.

The defendant admits that it did not pay the sums requested by the plaintiff. However, it indicates that: (1) the request for the earlier period was not timely made; (2) TVA has no liability for prejudgment interest; (3) it has already paid the plaintiff the amounts sought in parts II and IV of the complaint; and (4) the

plaintiff accepted price adjustments with regard to the matters discussed in Counts II and V of the complaint and has waived its right to seek monies for these.

At a hearing on September 12, 1986, the Honorable Joseph M. Hood, Magistrate, held a hearing. Therein, the possibility of consensual reference of the matter to the magistrate was discussed, but both parties could not agree upon the same. Thereafter, the undersigned was advised of the pending status of the case and of the need for a non-jury trial; it was independently determined that the matter would be appropriate for a reference under Fed. R. Civ. P. 53.

APPLICABLE LAW

Fed. R. Civ. P. 53 provides, in pertinent part;

. . .The court in which any action is pending may appoint a special master therein. . . .A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate may be designated to serve as a special master without regard to the provisions of this subdivision...

Whatever the broad powers may be available to the United States Magistrates under the Federal Magistrates Act, 28 U.S.C. Sections 631 et seq., references to magistrates designated as "special master" must be in compliance with this rule. Piper v. Hauck, 532 F.2d 1016 (5th Cir. 1976). Thus, without the consent of the parties, a magistrate may be designated to serve as a special master for a nonjury case upon a showing of some exceptional condition which requires it. Brown v. Wesley's Quaker Maid, Inc. 771 F.2d 952, 954 (6th Cir. 1985).

Among the factors which might be considered justification for such a reference to be appropriate are: (1) an unusual number of parties, (2) an unusual number of or far-flung witnesses, (3) matters which need special monitoring or supervision, and (4) complicated accountings. E.g., United States v. Conservation Chemical Company, 106 F.R.D.210 (W.D. Mo. 1985). Sims

Consolidated, Ltd. v. Irrigation and Power Equipment, Inc., 518 F.2d 413 (10th Cir. 1975), cert. den. 423 U.S.C (197).

DISCUSSION

In the present case, the order referring the matter to the magistrate was not prepared in response to the plaintiff's motion. The order was initially prepared prior to that time, but for reasons not germane to the discussion herein, was not signed until after the aforementioned motion was filed. However, in light of the arguments raised by the defendant, scrutiny of the plaintiff's motion is also in order.

The plaintiff contends that factors allowing a referral under Fed. R. Civ. P. 53 are present. It is noted that the matter involves a non-jury trial, complex and certain accountings, far-flung witnesses, and that the availability of a judge to hear the case is more problematic due to the prolonged illness of Judge G. Wix Unthank.

The defendant's counsel, among other arguments, raises the question concerning the conduct of opposing counsel at proceedings in informing the magistrate that his client would not consent to be tried before the magistrate. Since grounds exist from which a reference may be made without the consent of the parties, this has significance only if there is some indication of bias. Reviewing the record, together with the supplemental affidavit of counsel, it appears that the magistrate was informed inferentially by opposing counsel that the defendant would not consent. However, it is equally clear from a reading of a transcript that the magistrate voiced no preference whatsoever in the choice of the parties and made it clear that he felt that the parties were entitled to their opinions.

The undersigned, having again considered the matter, believes that the requirements of Fed. R. Civ. P. 53 are present and that the reference to a special master is justified.

Although the record demonstrates in no way that the magistrate to whom the case was referred is or would be guilty of any type of bias in the matter, the undersigned will take a cautious approach with regard to the reference procedure. For this latter reason only, the Court will entertain a motion of the defendant to appoint a different special master within ten days of the date of entry of this order, should it desire to make one.

This the _____ day of November, 1986.

WILLIAM O. BERTELSMAN,
JUDGE

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PIKEVILLE

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a West Virginia corporation,

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