SECRETARY OF LABOR, Complainant, v. ORMET PRIMARY ALUMINUM CORPORATION, HANNIBAL REDUCTION DIVISION, Respondent, and USWA, LOCAL 5724, Authorized Employee Representative.	OSHRC Docket No. 02-0250

ORDER

Before: RAILTON, Chairman; and ROGERS, Commissioner*
BY THE COMMISSION:

Before the Commission is an order by Administrative Law Judge Michael H. Schoenfeld approving an agreement between the Secretary and Ormet Primary Aluminum Corporation, Hannibal Reduction Division ("Ormet"), to settle a citation issued by the Occupational Safety and Health Administration ("OSHA") under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 ("the Act"). On February 1, 2002, following an inspection of Ormet's facility in Hannibal, Ohio, OSHA issued a citation with a proposed penalty of $3,400. Ormet filed a timely notice of contest, and shortly thereafter the United Steelworkers of America, Local 5724 ("Union"), elected party status in accordance with §10(c) of the Act, 29 U.S.C. § 659(c),[1] and Commission Rule 20(a),

*Commissioner Stephens has recused himself from participation in this case.

[1]Section 10(c) of the Act provides:

> If an employer notifies the Secretary that he intends to contest a citation issued under section 9(a) or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 9(a), any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United

29 C.F.R. § 2200.20(a).[2] On October 11, 2002, the Secretary and Ormet executed a Stipulation and Settlement Agreement ("settlement"), which was submitted to the judge for approval. In an accompanying letter, the Secretary stated that the Union elected not to sign the settlement. On November 6, 2002, the judge issued an order approving the settlement. He noted that proper notice had been given to all parties, including the Union, and no objections to the settlement had been filed. The judge's order was docketed on November 7, 2002.

On November 14, 2002, the Union notified the judge by letter that it had submitted an earlier letter on October 21, 2002, with a timely objection to a provision in the settlement regarding the method of abating the cited conditions. The Union's objections were treated as a Petition for Discretionary Review, and on December 5, 2002, Commissioner Thomasina V. Rogers directed the judge's decision for review.

Commission Rule 100, 29 C.F.R. § 100, sets forth specific provisions with respect to settlement agreements. Under subsection (c) of the rule, an authorized employee representative with party status may file an objection to the reasonableness of the abatement time within 10 days after service or posting of a settlement between the Secretary and a cited employer. If such an objection is timely filed, "the Commission or the Judge shall provide an opportunity for the . . . authorized employee representative to be heard and present evidence on the objection, which shall be limited to the reasonableness of the abatement time." 29 C.F.R. § 100(c). Here, the Union claims to have submitted a timely letter objecting to a provision in the settlement regarding the method of abatement. Because the judge did not receive the letter, he did not rule on the merits of the Union's objections.

The two participating commissioners, Chairman W. Scott Railton and Commissioner Rogers,

---

> States Code, but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

[2]29 C.F.R. § 2200.20(a) states in pertinent part:

> **§ 2200.20 Party Status.** (a) *Affected employees.* Affected employees and authorized employee representatives may elect party status concerning any matter in which the Act confers a right to participate. The election shall be accomplished by filing a written notice of election at least 10 days before the hearing.

are divided on the appropriate disposition of this case. Chairman Railton would affirm the judge's decision to approve the settlement agreement. In his view, it is well settled under both Commission precedent and that of the United States courts of appeals that "a union lacks the right to object to the adequacy of the abatement methods specified in a settlement agreement between the Secretary and an employer, and that the union may object only to the reasonableness of the abatement period specified by the agreement." *See Pan American World Airways, Inc.*, 11 BNA OSHC 2003, 2004, 1984-85 CCH OSHD ¶ 26,920, p. 34,486-7 (No. 83-249, 1984), and cases cited therein. Because the Union's objections do not concern the reasonableness of the abatement time, Chairman Railton would affirm the judge's order.

Commissioner Rogers would remand the case to the judge. She notes that the Union's objections were submitted to the judge, but apparently not received by him, and thus he did not have an opportunity to rule on them before approving the settlement agreement. Therefore, in Commissioner Rogers' view, remand would be appropriate, consistent with Commission precedent, and in accordance with our usual practice, in order for the judge who has handled the case to consider the merits of the Union's objections in light of Commission Rule 100(c) and extant case law. *See Ormet Primary Aluminum Corp.*, 19 BNA OSHC 1146, 2000 CCH OSHD ¶ 32,193 (No. 99-1566, 2000); *Northwest Airlines Inc*., 2001 CCH OSHD ¶ 32,500 (No. 00-0954, 2001). She notes that the scope of cognizable authorized employee representative objection to a settlement agreement is narrow. *See Pan American World Airways, Inc.*, 11 BNA OSHC at 2004, 1984-5 CCH OSHD at p. 34,487; and Rule 100(c). Nevertheless, if this right to object is to have any meaning, she believes the judge who is charged with resolving the case should have the opportunity to review the objection before disposition of the case.

An impasse between the two commissioners presents an obstacle to resolving the case because the Commission can take official action only with the affirmative vote of at least two members. Section 12(f) of the Act, 29 U.S.C. § 661(e). In view of this disagreement and other considerations, Chairman Railton and Commissioner Rogers have agreed to vacate the direction for review.[3] *See, e. g., Texaco, Inc.*, 8 BNA OSHC 1758, 1760, 1980 CCH OSHD ¶ 24,634, p. 30,218 (Nos. 77-3040 & 77-3541, 1980); *Rust Engineering Co.*, 11 BNA OSHC 2203, 2205, 1984-85 CCH OSHD ¶ 27,024, p. 34,777 (No. 79-2090, 1984). In the absence of a direction for review, the judge's decision becomes a final order of the Commission and can be appealed by an aggrieved party to the appropriate United States court of appeals. Sections 10(c), 11(a) and (b), and 12(j) of the Act, 29 U.S.C. §§ 659(c), 660(a) and (b), and 661(i). The judge's decision here thus becomes the appealable final order of the Commission, but it is accorded the precedential value of an unreviewed judge's decision. Accordingly, the direction for review is vacated. It is so ordered.

---

[3]Notwithstanding our action vacating the direction for review in this case, as the separate views of the Commissioners make clear, this was an appropriate case for review. The order vacating the direction for review is entered in order to allow the parties to bring finality to this case. The decisions of some United States courts of appeals have rejected alternative forms of disposition of our cases when only two members are available to decide cases. *See, e.g., Cox Brothers v. Secretary of Labor*, 574 F.2d 465 (9th Cir. 1978); *Shaw Construction, Inc. v. OSHRC*, 534 F.2d 1183 (5th Cir. 1976).

/s/
W. Scott Railton
Chairman

/s/
Thomasina V. Rogers
Commissioner

Dated: March 10, 2003

SECRETARY OF LABOR, Complainant, v. ORMET PRIMARY ALUMINUM CORPORATION, HANNIBAL REDUCTION DIVISION, Respondent, and USWA, LOCAL 5724, Authorized Employee Representative.	OSHRC Docket No. 02-0250 Region V Insp. No. 304362924

ORDER APPROVING SETTLEMENT

The Commission has jurisdiction over the subject matter of the case and over the parties by virtue of the filing of a timely notice of contest. The stipulated settlement between the parties filed on 10/31/02 has been considered. The settlement agreement has been served on all parties and authorized employee representatives and posted in the manner prescribed by Commission Rule 7(g).[4] Ten (10) days has passed since service and posting and no objection to the settlement has been filed.

The settlement is approved under 5 U.S.C. '554(c)(1) and Commission Rule 100. The terms of the stipulated settlement are incorporated, in their entirety, by reference in this order.

The order shall become final thirty (30) days from the date of its docketing by the Executive Secretary, unless review thereof is directed by a Commission Member within that time. 29 U.S.C. Section 661(j).

/s/
Hon. Michael H. Schoenfeld
Judge, OSHRC

Dated: November 6,2002
Washington DC

[4]/Rules of Procedure of the Occupational Safety and Health Review Commission, 29 C.F.R. "2200.1-212, as amended, 55 Fed. Reg. 22780-4 (June 4, 1990).