

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE POLLUTION CONTROL AGENCY

In the Matter of the Revocation of Air
Emission Permit 05300480-003 Issued
to Northern Metals, LLC

**ORDER DENYING MOTION
IN LIMINE TO EXCLUDE EVIDENCE**

The above-entitled matter is pending before Administrative Law Judge James E. LaFave pursuant to a Notice and Order for Prehearing Conference dated July 13, 2016.¹ On August 8, 2016, the Minnesota Pollution Control Agency (MPCA) moved the Administrative Law Judge to exclude certain evidence.² In a letter dated August 15, 2016, Northern Metals, Inc. (Northern Metals) opposed this motion.³ On August 17, 2016, the MPCA submitted a response memorandum.⁴ On August 23, 2016, Northern Metals filed its memorandum in opposition to the MPCA's Motion in Limine.⁵ The Administrative Law Judge held a motion hearing on August 25, 2016. The record closed at the conclusion of the hearing.

Ann E. Cohen and Christina Herriges, Assistant Attorneys General, represent the MPCA. Jack Y. Perry and Jason R. Asmus, Briggs and Morgan, represent Respondent Northern Metals.

Based upon the file, record, and proceedings, and for the reasons set forth in the attached memorandum,

IT IS HEREBY ORDERED:

The MPCA's Motion in Limine is **DENIED**.

Dated: September 23, 2016



JAMES E. LAFAVE
Administrative Law Judge

¹ NOTICE AND ORDER FOR PREHEARING CONFERENCE (July 13, 2016).

² NOTICE OF MOTION AND MOTION (Aug. 8, 2016).

³ Affidavit (Aff.) of Jason R. Asmus, Exhibit (Ex.) L (Aug. 23, 2016).

⁴ RESPONSE MEMORANDUM IN SUPPORT OF MPCA'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF COMPROMISE AND OFFERS TO COMPROMISE (Aug. 17, 2016) (Response Memo).

⁵ NORTHERN METALS' MEMORANDUM OF LAW IN OPPOSITION TO MPCA'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF COMPROMISE AND OFFERS TO COMPROMISE (Aug. 23, 2016) (Northern Metals' Memo).

MEMORANDUM

Procedural History

On July 13, 2016, the MPCA filed a Notice and Order for Prehearing Conference in this case seeking to revoke Northern Metals' air emissions permit without reissuance.⁶ In addition, there is a parallel district court action between these parties involving whether the emissions from the Northern Metals' plant exceeded the emissions levels allowed in its permit.⁷ By its Motion in Limine, the MPCA seeks to exclude alleged settlement negotiations that occurred within the context of that district court action.⁸

Analysis

Minnesota law provides a mechanism by which a party may bring a motion to exclude evidence before such evidence is offered at trial.⁹ A motion in limine functions as a device to "prevent injection into trial of matters which are irrelevant, inadmissible and prejudicial."¹⁰ The MPCA filed a Motion in Limine on August 8, 2016.¹¹

The MPCA moves the Administrative Law Judge to preclude "Northern Metals, any witness, or counsel, from offering or discussing any proposed settlement offer or counteroffer, or any statement made in compromise negotiations, including statements related to the pending district court matter, or as incorporated into discovery, either at the contested case hearing or in any submission made to the MPCA."¹² Or, "[i]n the alternative, the MPCA requests that if Northern Metals seeks to submit evidence of its corrective actions, it be required to do so through direct evidence not through settlement proposals exchanged between the parties."¹³

The MPCA bases its argument for exclusion primarily on Minnesota Rule of Evidence 408. Rule 408 provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as

⁶ NOTICE AND ORDER FOR PREHEARING CONFERENCE (July 13, 2016).

⁷ *Northern Metals, LLC v. Minn. Pollution Control Agency*, No. 62-CV-15-3827 (Ramsey Cnty District Court).

⁸ See MPCA's Memo at 1.

⁹ See *Wood v. Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 353 N.W. 2d 195, 197 (Minn. Ct. App. 1984).

¹⁰ *Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 418 (Minn. Ct. App. 2003).

¹¹ NOTICE OF MOTION AND MOTION (Aug. 8, 2016).

¹² MEMORANDUM IN SUPPORT OF MPCA'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF COMPROMISE AND OFFERS TO COMPROMISE, OR IN THE ALTERNATIVE TO ALLOW BOTH PARTIES TO OFFER RULE 408 EVIDENCE at 1 (Aug. 8, 2016) (MPCA's Memo).

¹³ *Id.* at 1-2.

to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

A committee comment to rule 408 indicates that “[t]he rule does not immunize otherwise discoverable material merely because it was revealed within the context of an offer of compromise.”¹⁴ Moreover, “the rule only excludes evidence of compromise on the issue of liability, not for other possible purposes as suggested in the rule.”¹⁵

It would therefore be inappropriate to order a blanket exclusion of all “settlement negotiations” without context. As noted above, rule 408 only requires exclusion of evidence submitted “to prove liability for or invalidity of the claim or its amount.”¹⁶ The rule does not require exclusion of evidence offered for another purpose.¹⁷ And, at this early stage, it is not clear for what purpose Northern Metals might offer these documents into evidence.¹⁸ For instance, Issue 4 in the Notice and Order for Prehearing Conference is “Whether Northern Metals violated its permit and Minn. Stat. § 116.091 when it refused to provide information regarding the emission generated by the shredder residue processing operation when requested to do so by the MPCA.”¹⁹ Northern Metals argues that the counsel communications demonstrate its provision of requested information relating to issue 4.²⁰ Therefore, because there may be a valid purpose for admitting settlement negotiations that does not violate rule 408, wholesale exclusion of settlement negotiations at this time would be inappropriate.

Moreover, Northern Metals argues that the communications at issue here are not settlement negotiations.²¹ Northern Metals insists that “[t]here is simply no merit to MPCA’s revisionist spin that the Counsel Communications were ‘settlement’ discussions.”²² It is difficult to determine if this assertion is true, however, because the MPCA fails to identify the precise communications it seeks to exclude.

¹⁴ Minn. R. Evid. 408 1977 comm. cmt.

¹⁵ *Id.*

¹⁶ See Minn. R. Evid. 408.

¹⁷ *Id.*

¹⁸ It is therefore similarly difficult to determine relevance. See Minn. Stat. § 14.60, subd. 1 (2016).

¹⁹ NOTICE AND ORDER FOR PREHEARING CONFERENCE at 3 (July 13, 2016).

²⁰ Northern Metals’ Memo at 6-11; see NOTICE AND ORDER FOR PREHEARING CONFERENCE at 3 (“Whether Northern Metals violated its permit and Minn. Stat. § 116.091 when it refused to provide information regarding the emissions generated by the shredder residue processing operation when requested to do so by the MPCA.”).

²¹ *Id.* at 11.

²² *Id.*

Rather, the MPCA merely asserts that “the settlement documents exchanged between Northern Metals and the MPCA, including those documents discussing changes that Northern Metals has made or intends to make to its facility, should not be admitted in this proceeding.”²³ And in response to Northern Metals’ observation that the MPCA has failed to identify any of the purported settlement discussions to which it objects, the MPCA indicated that “[n]o such detail is necessary. Northern Metals knows that the objectionable material is that which drew objection in response to its discovery, and which was attached to the affidavit that was filed (and subsequently withdrawn) by attorney Jason Asmus.”²⁴ Northern Metals attempts to identify these documents, but it would be inappropriate to rely on the opposing party regarding the exact communications that the MPCA seeks to exclude.

Certainly the Administrative Law Judge has the authority to prohibit submission of all documents pertaining to settlement negotiations to the extent prohibited by rule 408. The parties, however, do not agree on what documents are, in fact, documents reflecting settlement negotiations. Therefore, a ruling excluding settlement documents would have little practical effect on which documents Northern Metals would submit at the evidentiary hearing.

Conclusion

The Administrative Law Judge concludes that the MPCA’s Motion in Limine is premature and overbroad. Therefore, the MPCA’s motion is **DENIED**. Nonetheless, it is possible that the documents the MPCA now seeks to exclude could be properly excluded at the evidentiary hearing. To that end, the Administrative Law Judge will thoroughly consider the purpose for which any alleged settlement negotiations are offered, as well any objections from the MPCA regarding those communications, when they are offered.

J. E. L.

²³ MPCA’s Memo at 4.

²⁴ Response Memo at 2.