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SOL (MSHA) V. MULLIN COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF CLYDE SMITH, JR.,
JAMES R. CLEVINGER, MONROE
MULLINS, DAVID MAY, JERRY LEE
SMITH, JOHN R. TELFER, JR.,
JAMES THACKER, H. K. TILLEY, JR.,
AND THOMAS V. WALKER,
COMPLAINANTS

Complaint of Discharge,
Discrimination, or Interference

Docket No. KENT 81-17-D

No. 1 Mine

v.

MULLIN CREEK COAL COMPANY, INC.,
RESPONDENT

ORDER PROVIDING FOR COMPUTATION OF BACK PAY

Preliminary Considerations

1. The Effect To Be Given to Delay in Providing Data

A hearing was held in the above-entitled proceeding on March 6 and 7, 1981. On March 17, 1981, I mailed to the parties a bench decision finding that respondent had violated section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 and ordering respondent to reinstate four of the nine complainants and reimburse the remaining five complainants for back pay which they would have earned if they had not been unlawfully discharged. Paragraph (E) of the bench decision provided that counsel for complainants was responsible for gathering the required information and computing the amount of back pay due to each of the nine complainants. Paragraph (E) also provided that the time for computing back pay would expire on May 22, 1981, unless an extension of time was requested.

Counsel for complainants filed on May 15, 1981, a request for an extension of time to and including July 6, 1981, within which to compile the necessary information and compute the amount of back pay due to complainants. The sole reason given for the requested extension of time was as follows:

We request an extension because the Mine Safety and Health Administration Special Investigator working with us on the case has been unable to devote any time toward the compilation of the back wages involved, primarily due to a communication breakdown and due to his attendance for several weeks in a training program held in Beckley, West Virginia.

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I issued on May 18, 1981, an order granting the request for an extension of time. I was well aware when I granted the extension of time that respondent's exposure to payment of back pay and interest would be increased by the grant of the extension. Therefore, in my order of May 18, 1981, I made the following observation:

* * * Under the Commission's rules, 29 C.F.R. || 2700.8(b) and 2700.10(b), respondent has a period of 15 days within which to file an answer to complainants' motion for an extension of time. Inasmuch as the date of May 22 will come before the 15-day period for filing a reply has expired, I shall act upon the motion at this time. If respondent's counsel files an answer in opposition to the granting of the extension of time, I shall modify this order, if necessary, to consider any objections which may be raised by respondent in opposition to the grant of the request for extension of time.

Respondent's counsel never did file any objection to the grant of the extension of time.

Paragraph (G) of my bench decision provided, among other things, as follows:

(G) Counsel for complainants and counsel for respondent shall confer and agree upon a mutually convenient time for reconvening of the hearing for the purpose of permitting respondent's counsel to develop any facts which may be required pertaining to places where complainants have worked between the time they were discharged on April 10, 1980, and the time the hearing is reconvened. * * *

The order extending the time for compiling and computing back pay also stated that if the parties could agree on the facts pertaining to computation of back pay, no supplemental hearing would be required. Counsel for complainants filed a letter on July 21, 1981, stating, in its entirety, as follows:

In accordance with your request, be advised that the above respondent's attorney and myself have agreed that the latter part of October, 1981 or anytime in November, 1981 would be an agreeable time to conduct the further hearing in the above proceeding.

The above suggested hearing period was agreed upon in light of respondent's request to obtain copies of complainants' 1980 Federal Income Tax Return and W-2 Forms for 1980 which are not presently in respondent's possession.

Although I presently possess some of the documents respondent has requested, the remaining copies must be obtained from the IRS Center in Memphis, Tennessee. Be

advised, however, that I

have already instituted the procedure whereby the complainants can obtain the requested documents from the Internal Revenue Service; however, the IRS has informed me that the process may take up to 10 weeks.

Accordingly, if the above suggested hearing period is unacceptable, please so inform us so that the parties can undertake to make other arrangements.

In a notice of reconvening of hearing issued August 10, 1981, I stated that I had already scheduled hearings to be held in October and during the first week of November. Therefore, I scheduled the hearing in this proceeding to be reconvened on November 17, 1981.

Up to the time the hearing was reconvened on November 17, 1981, respondent's counsel had voiced no objections to the length of time which had passed between the issuance of my bench decision on March 17, 1981, and the reconvening of the hearing on November 17, 1981. Shortly after the hearing had begun on November 17, however, counsel for respondent stated that he had complied with the orders in my bench decision by furnishing complainant's counsel with the rates of pay which the complainants had been earning at the time of their discharge, but that complainants' counsel had still not provided respondent with the dates and places where the complainants had worked and that he did not think respondent should have to pay for the delay which had resulted from the failure of complainants' counsel to provide the necessary information (Tr. 967-968).

Counsel for complainants stated that he had tried to obtain the necessary information, but had been unable to do so because the complainants had failed to respond to the letters he had sent to them requesting information. Counsel for complainants concluded his explanation for the length of time which had been spent in trying to get information as follows (Tr. 971-972):

* * * I've indicated that this portion of the proceeding is an individual effort; it's not a group effort. They can't rely on information provided by one miner to support their claim for back wages; they have to bring it forward themselves. I've even sent them forms that requested for the IRS where all they had to do was fill out the information and mail it in and IRS would send it back to them. I haven't gotten that from several of the men. Now, Your Honor, I'd like to say for the record I can't come down here and sit with them every day. I can't travel with them to where they're going. I have to put some responsibility on these men and I just haven't got it for each one of them.

I ruled at the hearing that each of the nine complainants would testify and that his back pay would be allowed, based on whether he had cooperated in providing information in a prompt manner (Tr. 973-974).

Now that I have reviewed the transcript and have reconsidered the matter of delay, it is obvious that complainants' counsel could have provided respondent's counsel with complete information from the miners who responded promptly to his requests for information. If that had been done, it might have been unnecessary to have had all of the miners reappear to give testimony about facts which may have been in the possession of complainants' counsel for several months prior to November 17 when the hearing was reconvened.

It is clear that the failure of some miners to provide information caused an inordinate delay between the rendering of the decision on the merits and the calculation of back pay. A large part of the delay resulted simply from the fact that nine complainants are involved. They live in various parts of the country. Complainant Walker, for example, had to drive 400 miles one way just to testify at the hearing (Tr. 974). They have a wide range of ability and understanding of what was required of them.

Respondent's counsel requested that my rulings with respect to back pay take into consideration the complainants' inordinate delay in providing the information required for computation of back pay. I would like to grant respondent's request and place a cut-off date beyond which respondent would not be liable for payment of back pay, but there are various equities to consider. The most unjustified delay occurred immediately after the issuance of my bench decision on March 17, 1981. As indicated above, my bench decision provided that all data be compiled and that back-pay computations be supplied to me by May 22, 1981. Yet nothing whatsoever was done during that 2-month period. Counsel for complainant explained that the 2-month delay had occurred because of a "communications breakdown" and the attendance by MSHA's special investigator at a training program conducted in Beckley, West Virginia. Respondent's counsel can hardly be held responsible for that 2-month delay, but neither can the nine complainants be held responsible because they were not asked to supply any information at all during that 2-month period. I would like to hold that respondent is not liable for payment of back pay during that period, but, if I were to do so, I would be penalizing the complainants for possible shortcomings of their counsel and MSHA's special investigator during that period.

Respondent's counsel did not specifically object to the initial 2-month delay. His objection as to the delay was directed to the period of time after June 10, 1981, when he supplied to complainants' counsel the rates of pay which complainants were earning prior to their discharge. Counsel for respondent also objected to the failure of complainants' counsel to provide him with income tax returns and other data when complainants' counsel sent respondent's counsel a letter dated October 28, 1981 (Tr. 968; 972). Complainants' counsel explained that he had obtained income tax returns and other data from some of the complainants and that he thought they had been sent to respondent's counsel, but that his secretary inadvertently failed

to enclose them with the letter of October 28 (Tr. 969).

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Respondent's counsel, of course, could have called complainants' counsel prior to the hearing to advise him that the enclosures referred to in the letter of October 28 had not been included with the letter. Additionally, neither counsel apparently ever undertook to discuss each complainant's back pay on an individual basis so as to make an attempt to reach a specific figure with respect to each complainant.

The legislative history pertaining to section 105(c) of the Act makes it clear that Congress wanted the miners to be reimbursed for all costs incurred by the miners as a result of any act of discrimination. Page 37 of Senate Report No. 95-181, 95th Cong., 1st Sess., May 16, 1977, states as follows:

It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative. Thus, for example, where appropriate, the Commission should issue broad cease and desist orders and include requirements for the posting of notices by the operator.

In view of the legislative history quoted above, I believe that the ruling I made at the hearing is the only one which can be made with respect to reducing respondent's exposure to payment of back pay, that is, that the complainants are entitled to receive back pay for any period after their discharge when they did not have jobs paying at least as much as they would have received had they not been discharged, the only exceptions being in those instances when complainants caused undue delay by failing to respond to requests for information made by their counsel and MSHA's special investigator (Tr. 972).

2. The Effect To Be Given to Complainants' Decline of Reinstatement

Counsel for respondent also pointed out at the hearing (Tr. 1167) held on November 17, 1981, that five complainants had testified during the initial hearing held on March 6, 1981, that they did not want to be reinstated at respondent's mine. Respondent's counsel argued that respondent should not have to make payments of back wages to any complainant who declined reinstatement on March 6, 1981. As to that argument, it is clear that my bench decision contemplated that the miners declining reinstatement would be entitled to back pay up to the time that checks for back pay were actually written. Paragraph (C) of my bench decision ordered respondent to provide back-pay for the miners who declined reinstatement for the period running from their first discharge on April 10, 1980, to "* * * the time of repayment of back pay". The bench decision was issued on March 17, 1981. If I had had the necessary data regarding back pay, I

could have issued a final decision on March 17, 1981, and that decision would have required that respondent provide back pay for all complainants declining

reinstatement through the date on which the checks for back pay were written. Since I still did not have such information on the date the hearing was reconvened on November 17, 1981, the payment of back pay for the miners who declined reinstatement would still be running if respondent had not, on or about September 14, 1981, offered to reinstate all nine complainants. The running of back-pay obligations ceased as of September 14, 1981, because all those complainants who declined the actual offer of back pay have no right to be paid for any period beyond the date when they either accepted the offer and commenced working again for respondent, or declined the opportunity to be placed on respondent's payroll again. Interest on the payment of back pay will, of course, continue to run until the day the payments are actually made.

3. Stipulation for Period Between First Discharge and Second Discharge

Finding Nos. 11 through 14 in my bench decision explain that all nine complainants in this proceeding were first discharged on April 10, 1980, when they refused to work because of unsafe conditions. All nine complainants were given an opportunity to return to work at respondent's mine on or about May 1, 1980. All nine of the complainants returned to respondent's mine and worked until they were discharged again on May 10, 1980. Consequently, complainants are entitled to back pay for the 14-day period from April 10, 1980, to May 1, 1980. One complainant did not return until after May 1 and is entitled to pay for about 16 days. Counsel for the parties submitted as Exhibit 4 in this proceeding a stipulation providing for the exact amount of back pay each complainant is entitled to receive for the period from April 10 to May 1, 1980. That stipulation will be used to dispose of all questions pertaining to the calculation of back pay between complainants' first discharge and their rehiring on or about May 1, 1980, with a possible exception in the case of Complainant James Thacker, as hereinafter explained.

4. Exclusion of Back Pay for Period from April 9, 1981, to June 8, 1981

Although respondent's No. 1 Mine is not considered to be a "union" mine, respondent's mine was unable to produce coal from April 9, 1981, to June 8, 1981, because of the general strike called by the United Mine Workers of America during that time. Since complainants would not have been able to work during the strike even if they had not been discharged, they are not entitled to back pay or interest on back pay for the period extending from April 9, 1981, to June 8, 1981 (Tr. 1054; 1165).

Method for Computing Back Pay for Each Complainant

1. Thomas Walker

Thomas Walker was discharged by respondent on May 10, 1980. At the time of his discharge, he was earning \$73.20 per day. He began looking for another job on June 6, 1980, when he applied

for work at Greenwood Coal Company and Tibbal Floor Company. He next sought work at Sterns Coal Company

on June 17, 1980 (Tr. 976). He asked for work at West Coal Company on July 10, 1980. He updated his application at Greenwood Coal Company on July 23, 1980, and returned to Sterns Coal Company and Tibbal Floor Company on August 6, 1980. He made two additional trips to Greenwood Coal Company on August 21, 1980, and August 27, 1980 (Tr. 977). He went on September 9, 1980, to the coal washer of Greenwood Coal Company which hires miners for Greenwood. On September 9, 1980, he also tried to get work again at West Coal Company and on September 19, 1980, he went back to Greenwood Coal Company. He returned to Greenwood's coal washer on October 1, 1980. He applied for work at a tent factory in Sterns, Kentucky, on October 16, 1980, and on October 17, 1980, he returned to Greenwood Coal Company to ask for work. He applied for a maintenance job at McNairy County Manufacturing Company on November 14, 1980. He returned to the tent factory and Tibbal Floor Company on December 10, 1980, to ask for work (Tr. 979). When he returned to Greenwood Coal Company on December 19, 1980, he was promised a job. He applied for work at A & S Coal Company on January 3, 1981. He updated his application at A & S Coal Company on January 16, 1981, and the foreman at A & S Coal Company told him to report for work on February 2, 1981 (Tr. 979). The evidence shows that Walker made a conscientious effort to secure alternative employment after his discharge by respondent on May 10, 1980.

Walker was paid \$72.00 per shift when he began working for A & S Coal Company. Walker was still working for A & S when he testified in this proceeding on November 17, 1981, and he was still being paid \$72.00 per shift (Tr. 980). As compared with Walker's rate of pay at A & S, his rate of pay at respondent's mine was \$73.20. If Walker had continued working for respondent, his rate of pay would have increased by \$5.60 to \$78.80 on September 1, 1980 (Tr. 1165). Since Walker is entitled to be paid at the rate he would have earned if he had not been discharged on May 10, 1980, Walker is entitled to be paid at the rate of \$73.20 from May 10, 1980, to September 1, 1980, and at the rate of \$78.80 from September 1, 1980, to February 2, 1981, when he began to work for A & S (Tr. 979). Additionally, Walker is entitled to be paid the difference of \$6.80 between his A & S wages and the wages he would have been paid by respondent up to the time he was offered reinstatement on September 14, 1981, exclusive of payment of differential during the strike, that is, from April 9, 1981, to June 8, 1981.

2. John Robert Telfer

John Robert Telfer was discharged by respondent on May 10, 1980. Immediately after his discharge, he started trying to find work. Between May 10, 1980, and October 31, 1980, he made unsuccessful trips about three times each month to ask for work at Pikco Coal Company, Maxann Coal Company, V & M Coal Company, and Five S Coal Company. Telfer's father-in-law was a foreman at Wolf Creek Collieries and on October 31, 1980, his father-in-law obtained a job for him at the No. 4 Mine of Wolf Creek Collieries (Tr. 996-997). His rate of pay at Wolf Creek's mine was \$12.25 per hour, or \$98.00 per shift, as compared with \$79.20 per shift

which respondent was paying him at the time of his discharge (Tr. 997).

At the time of the hearing held on March 6, 1981, in this proceeding, Telfer testified that he did not want to be reinstated at respondent's mine because on March 6 he was working at Wolf Creek for wages of \$98 per day as compared with respondent's payment of \$79.20 per day (Tr. 998). Although respondent's mine was much closer to Telfer's home than Wolf Creek's No. 4 Mine was, Telfer rode to and from work with his father-in-law without charge. As a foreman for Wolf Creek, his father-in-law was reimbursed by Wolf Creek for the gas used in traveling to and from work (Tr. 1007).

Wolf Creek's No. 4 Mine was divided into an "upper" and a "lower" mine. Management decided to close the upper mine. The closing of the upper mine made it necessary for Wolf Creek to lay off miners at the lower mine so as to provide jobs for employees with considerable seniority who lost their jobs when the upper mine was closed. Telfer had only been working for Wolf Creek for a few months when the decision to close the upper mine was made. Telfer's lack of seniority made it necessary for Wolf Creek to lay him off on July 11, 1981 (Tr. 1008; 1019-1020). Telfer, therefore, did not have any job on September 28, 1981, when respondent offered to reinstate him at its No. 1 Mine. Consequently, Telfer accepted respondent's offer of reinstatement and Telfer is now working for respondent even though he had stated at the hearing held on March 6 that he did not want to be reinstated at respondent's mine.

I stated at the hearing that the unique circumstances described above might qualify Telfer to back pay for the period between the time he lost his position with Wolf Creek on July 11 and the time he was reinstated by respondent on September 29. Respondent's counsel argued that respondent's back-pay obligation ought to be terminated on March 6, 1981, for any miner who testified on that day that he did not want to be reinstated. Respondent argued that that was especially the appropriate procedure in this proceeding because it was not respondent's fault that it has taken the complainants from March 17, 1981, when my bench decision was mailed to the parties, to November 17, 1981, for the hearing to be rescheduled at which complainants introduced the facts required for computation of back pay.

Counsel for complainants argued that Telfer should be paid for the time between his loss of the job at Wolf Creek and the time he was reinstated by respondent because Telfer was among those miners who had from the beginning supplied him with information for computation of back pay. Therefore, Telfer was not responsible for the delay in providing information pertaining to calculation of back pay (Tr. 1010).

As I indicated in the first part of this decision, complainants are entitled to back pay up to the time they were offered reinstatement which, in Telfer's case, was September 29, 1981 (Tr. 1007). Consequently, Telfer is entitled to back pay from May 10, 1980, to October 31, 1980, when he began working for Wolf Creek at a rate of \$98.00 per day. Telfer

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is also entitled to back pay from July 11, 1981, when he was laid off by Wolf Creek to September 29, 1981, when he was reinstated by respondent. The rate of back pay is \$79.20 per day from May 10, 1980, to September 1, 1980, and \$84.80 (\$79.20 á pay increase of \$5.60) per day for all times after September 1, 1980.

3. Clyde Smith, Jr.

Clyde Smith, Jr., was discharged by respondent on May 10, 1980 (Tr. 1023). Between May 10, 1980, and November 3, 1980, he applied for work at Tab Coal Company, Triple J Coal Company, Loftis Coal Company, and Doug Chapman. He went to those places several times and all of them advised him that they were not hiring any miners at that time. Finally, Smith obtained a job with Robert Coal Company on November 3, 1980, and he has been employed by Robert Coal Company since that time, although at the time of the hearing, he was not working because of a back injury (Tr. 1025; 1030-1032).

Counsel for complainants stated that Smith had not only been prompt about providing him with information about Smith's own efforts to find work, but had also been helpful in assisting him in obtaining information from the other complainants (Tr. 1023). Consequently, no reductions in back pay would be appropriate in Smith's case because he has in no way contributed to the delay in providing the facts needed for computing back pay.

Smith was paid at the rate of \$73.20 per day when he worked for respondent. Robert Coal Company paid Smith from \$76.20 to \$79.20 per day (Tr. 1024). Therefore, Smith is not entitled to receive any differential between the rate he was paid by respondent and the rate he was paid by Robert Coal Company, but he is entitled to back pay for the period from May 10, 1980, when he was discharged, to November 3, 1980, when he began working for Robert Coal Company. The rate for that period is \$73.20 per day from May 10, 1980, to September 1, 1980, and \$78.80 (\$73.20 á pay increase of \$5.60) per day from September 1, 1980, to November 3, 1980.

4. Monroe Mullins

Monroe Mullins was discharged by respondent on May 10, 1980. At the time of his discharge, respondent was paying Mullins \$79.20 per day (Tr. 1035). Mullins asked for work at Loftis Coal Company and Teresa Coal Company. He only looked for work at those two places because they are located in Kentucky and Mullins is from Virginia. Mullins wanted to find work in Virginia and moved back to Virginia about July 5, 1980. Mullins was given a job in Virginia with Dyna-Carb Coal Company on July 10, 1980, at a pay rate of \$75.00 per day (Tr. 1035-1036). Mullins worked for Dyna-Carb up to about November 25, 1980 (Tr. 1037). Mullins was able to obtain a job working for Tab Coal Company. Mullins continued to work for Tab Coal Company up to March 6, 1981, when the first hearing in this case was held. He testified on March 6 that he would like to be reinstated to

his job at respondent's mine because on March 6 he did not have a job that paid as much as respondent was paying him when he was discharged (Tr. 1051).

Although Mullins could have continued to work for Tab Coal up to the beginning of the UMWA strike, Mullins elected to terminate his job with Tab Coal on Monday, March 9, 1980, because he knew that the UMWA strike was set to begin toward the end of March and Mullins had already decided that he wanted to move back to Virginia. Mullins next found a job on June 20, 1981, when he began to work for Dotson Coal Company (Tr. 1043). He transferred to Smiley Coal Company when Smiley offered him \$5 more per day than Dotson was paying him. Mullins worked for Smiley until that company went out of business. Thereafter Mullins obtained a job with T.J.P.E. Coal Company at a rate of \$80.00 per day and Mullins was still working for T.J.P.E. Coal Company when respondent offered to reinstate him on or about September 14, 1981. Mullins declined respondent's offer of a job because he liked working for T.J.P.E. more than he liked working for respondent (Tr. 1045). Mullins testified that he lost no working time between his jobs at Dotson, Smiley, and T.J.P.E. (Tr. 1043).

Mullins did not have a job for a short period of time between the time that he left Dyna-Carb and his obtaining work with Tab Coal Company on January 1, 1981. At the hearing held on November 17, 1981, Mullins did not know when he stopped working for Dyna-Carb. I asked Mullins to obtain that information and submit it to me after the hearing, but respondent's counsel objected to my giving Mullins any additional time to obtain that information since he had already been given a period of 8 months between the two hearings held in this proceeding within which to obtain all dates and places where he had worked (Tr. 1057). Mullins' own counsel testified that Mullins had been sent a letter a long time prior to the hearing requesting him to obtain his dates and places of employment (Tr. 1046). In the first part of this order, I ruled that respondent would not be required to reimburse complainants for back pay when their testimony shows that they had contributed to undue delay by failing to provide information in a timely manner. In keeping with that ruling, respondent will not be required to provide back pay for the time lost by Mullins between the termination of his job with Dyna-Carb and the commencement of his job with Tab Coal Company. Also, since Mullins voluntarily stopped working for Tab Coal Company on March 9, 1981, before the strike began, he will not be given back pay for the period from March 9, 1981, to April 9, 1981, when respondent's mine was closed by the strike. Inasmuch as Mullins' voluntary act of quitting his job at Tab Coal Company also prevented him from having a job after the strike ended on June 8, 1981, respondent will not be required to provide Mullins with back pay for the period from June 8, 1981, when respondent's mine was reopened after the strike, to June 20, 1981, when Mullins began to work for Dotson Coal Company (Tr. 1050). Of course, no complainant will receive back pay for the period from April 9, 1981, to June 8, 1981, because respondent's mine was closed for that period on account of the strike (Tr. 1054).

Mullins was being paid \$79.20 per day by respondent at the time of his discharge on May 10, 1980. Mullins was paid only \$75.00 per day when he worked for Dyna-Carb, but Mullins did not know when he stopped working for

Dyna-Carb. Mullins also claimed that he began working for Smiley Coal Company because it offered to pay him \$5 more per day than the \$75.00 per day which Dotson was paying him (Tr. 1040). Later Mullins testified that Smiley only paid him \$75.00 per day (Tr. 1047). Additionally, Mullins first testified that his job with Dotson Coal Company lasted for 3 months after he began working for Dotson on June 20, 1981 (Tr. 1040). That would mean that Mullins worked for Dotson until September 20, 1981. Mullins also testified that he started working for Smiley after leaving Dotson and that Smiley went out of business about the last of July (Tr. 1040). It would have been impossible for Mullins to have worked for Dotson until September and then to have worked for a company which went out of business toward the end of July. In view of Mullins' inability to give the dates when his employment with Dyna-Carb ended and his employment with Smiley began and ended, respondent will not be required to pay Mullins the differential of \$4.20 between his rate of pay of \$79.20 received from respondent and the pay of \$75.00 per day paid by both Dyna-Carb and Dotson because it is impossible to determine on the basis of Mullins' testimony when he ceased to be paid \$75.00 and when he began to be paid \$80.00 per day. The foregoing ruling is consistent with my prior holding that respondent should not be required to reimburse complainants when they are unable to provide the names of the companies for which they worked, the dates they began to work and stopped working, and their rates of pay even though they had been given a period of 8 months within which to prepare such information.

Based on the rulings made above, respondent is required to provide Mullins with back pay at the rate of \$79.20 per day for the period from his discharge on May 10, 1980, to July 10, 1980, when Mullins began working for Dyna-Carb Coal Company.

5. James R. Clevenger

James R. Clevenger was discharged by respondent on May 10, 1980, and at the time of his discharge, respondent was paying him \$79.20 per day (Tr. 1061-1062). Clevenger started drawing unemployment compensation a short time after his discharge and continued to draw it for about 16 months (Tr. 1070; 1077). Clevenger testified that he tried to obtain work at all places which were within a reasonable distance of his home in Hatfield, Kentucky (Tr. 1073). He applied for work at Big Hill Coal Corporation on July 21, 1980, and on August 4, 1980, he asked Loftis Coal Company for work. He went to Barbar Kay Coal Company to seek a job on August 19, 1980, and August 27, 1980. He asked Robert Coal Company for a job on September 8, 1980. He sought work with Preece Coal Company on October 17, 1980, and on July 24, 1980, he tried to get a job in the auto body shop of Hubbard Motor Company. He tried to find work at J & H Coal Company on November 10, 1980, and with Big Hill Coal Corporation on December 1, 1980. About April 1981, he tried to get a job driving a truck for Roy Francis (Tr. 1063-1065).

Clevenger did not try to find work very often between April 1981 and September 14, 1981, when he accepted respondent's offer

to reinstate him at respondent's mine (Tr. 1064). Clevenger said that he did not have the gas to drive around looking for work in 1981, but that other people were

looking for a job for him and would have advised him of any openings if they had occurred (Tr. 1064; 1072). Clevenger said that although he was an electrician, he was not a certified electrician and since most mines were only interested in hiring certified electricians, it was difficult for him to find work (Tr. 1070).

Clevenger testified that he believed he had tried very hard to find work and that he would rather have had a job than to have been drawing unemployment compensation because he could earn the amount of an unemployment check by working only 2 days at a coal mine (Tr. 1075). There is no doubt but that Clevenger had an economic incentive to earn money because he is separated from his wife and is supposed to provide \$250 per month for the support of two children (Tr. 1078). During 1980, he only sent his children about \$600 and he apparently accomplished that primarily by selling his car. The only transportation he had for getting to and from work is a 1947 model truck. He had to borrow \$100 from his brothers in order to replace the engine in the truck before he could drive it to and from work (Tr. 1080-1081).

I find that Clevenger made a reasonable effort to obtain work after his discharge on May 10, 1980. There is nothing in the record to show that he is responsible in any way for the delay which occurred between the first and second hearings in this proceeding. Therefore, respondent should pay Clevenger back pay from the date of his discharge on May 10, 1980, to the date of his reinstatement on September 14, 1981, at the rate of \$79.20 per day for the period from May 10, 1980, to September 1, 1980, and at the rate of \$84.80 (\$79.20 a pay increase of \$5.60) per day for the period from September 1, 1980, to September 14, 1981, exclusive of the period from April 9, 1981, to June 8, 1981, when respondent's mine was closed on account of the strike (Tr. 1054; 1165).

6. Jerry Lee Smith

Jerry Lee Smith was discharged by respondent on May 10, 1980, and respondent was paying Smith \$79.20 per day at the time of his discharge (Tr. 1083-1084). Smith first obtained a job with Big Hill Coal Corporation on September 24, 1980, but he was laid off from that job only 3 days later. His salary for those three days was greater than the amount he was receiving when he was working for respondent (Exh. 20; Tr. 1091). Smith next obtained a job with Robert Coal Company on October 12, 1980, and Smith worked for Robert Coal until March 14, 1981, when he told management that he no longer wished to work for them because the mine released methane (Tr. 1093; 1096). Smith did not obtain any other employment between March 14, 1981, and September 14, 1981, when he accepted respondent's offer of reinstatement. Smith testified that he did seek work during the months of May, June, and July with Loftis Coal Company, Preece Coal Company, Triple J Coal Company, and Thacker Energy (Tr. 1088-1089). Smith brought notes from at least three individuals stating that he had been to the aforementioned companies' places of business to ask for work (Exhs. 22, 23, and 24).

Smith's testimony shows that he is entitled to receive back pay for the periods of unemployment which occurred after his discharge. The fact that he voluntarily stopped working for Robert Coal Company because he was afraid to work in a mine known to release methane could possibly be considered as a reason for disallowing back pay, but I believe that he should be paid for the period between his decision to stop working in a gassy mine because he did try to find work in nongassy mines in the interim between his leaving Robert Coal Company and his reinstatement at respondent's mine. Under the Act, an unlawfully discharged miner has a right to be made "whole" to the extent possible. Smith was working in respondent's nongassy mine up to the time of his discharge on May 10, 1980. He should not be denied back pay because he chose to stop working in a mine which was more hazardous than respondent's mine. Therefore, I find that Smith should be provided back pay for the period between his departure from Robert Coal Company to the time of his reinstatement at respondent's mine.

Consistent with the facts given above and the ruling made above, Jerry Lee Smith should be awarded back pay at the rate of \$79.20 per day from May 10, 1980, to September 1, 1980. He should be awarded back pay at the rate of \$84.80 (\$79.20 a pay increase of \$5.60) per day from September 1, 1980, to September 24, 1980, when he began working for Big Hill Coal Corporation. He only worked through September 26, 1980, for Big Hill before he was laid off. He should, therefore, be awarded back pay at the rate of \$84.80 per day from September 29, 1980, to October 12, 1980, when he began working for Robert Coal Company. Smith stopped working for Robert Coal Company on March 14, 1981. Consequently, he should be awarded back pay at the rate of \$84.80 per day from March 16, 1981, to September 14, 1981, exclusive of the period from April 9, 1981, to June 8, 1981, when the mine was closed because of the strike. Smith is not entitled to be paid any differential between the rate of pay he received at respondent's mine and the rate he was paid by his other employers because all other employers either paid him the same wages he received from respondent, or more than he was receiving when he worked at respondent's mine (Tr. 1086).

7. David May

David May was discharged by respondent on May 10, 1980, and at that time he was being paid \$68.56 per day by respondent (Tr. 1111; 1113). He tried to obtain work in May 1980 with Tab Coal Company. He asked for work with V & M Coal Company in October 1980 (Tr. 1112). He asked for work with Robert Coal Company in October 1980 (Tr. 1112). He also tried to get a job with V & M Coal Company. Although he was unsure about the date of his filing of an application for work with V & M Coal Company, he introduced as Exhibit 27 a note signed by Lorie Chafin stating that he had "put in an application here approximately 3 weeks ago" (Tr. 1119). May was finally able to get a job with Dot Coal Energy on January 9, 1981, and May was still working for Dot Energy on November 17, 1981, when he testified in this proceeding. May declined respondent's offer of reinstatement in September of 1981

because Dot Energy has paid him wages at a higher rate than he was paid by respondent (Tr. 1114-1115).

Based on the evidence summarized above, I find that David May is entitled to back pay at the rate of \$68.56 from May 10, 1980, to September 1, 1980, and to back pay at the rate of \$74.16 (\$68.56 á pay increase of \$5.60) from September 1, 1980, to January 9, 1981, when he began to work for Dot Coal Energy.

8. H. K. Tilley, Jr.

H. K. Tilley, Jr., was discharged by respondent on May 10, 1980 (Tr. 1129) at which time respondent was paying him \$73.20 per day (Tr. 1137). Tilley tried to obtain a job with Northern Coal Company on May 28, 1980 (Exh. 29; Tr. 1133). He asked for work at Stemco on June 14, 1980 (Exh. 30; Tr. 1134). He inquired about work with Cooks Trucking in June 1980 (Tr. 1138). He sought work with LMB River Coal Company on July 15, 1980 (Exh. 31; Tr. 1135). He tried to get a job with T & B Tire Sales on August 20, 1980 (Tr. 1134). He also asked for a job at Ratliff Trucking, Inc., on November 12, 1980 (Exh. 33; Tr. 1135). Tilley introduced as Exhibits 28 through 33 various notes stating that he had made inquiries about obtaining work at the places mentioned above; additionally, Tilley testified that he made about six trips to each of the aforementioned places in an effort to find work (Tr. 1132).

Tilley did not obtain a job until June 11, 1981, when he began to work for LMB River Coal Company. Even though Tilley was working for LMB River Coal Company when respondent offered to reinstate him at respondent's mine, Tilley accepted respondent's offer and began working again for respondent on September 14, 1981 (Tr. 1159). Tilley returned to work at respondent's mine because LMB River Coal was considering closing its mine and because LMB River Coal's mine was "low" coal which had caused Tilley to injure his wrist (Tr. 1139). When Tilley began working for LMB River Coal, he was paid wages at the rate of \$80.00 per day; therefore, he is not entitled to be paid any differential between the amount he earned at respondent's mine and the amount he was paid by LMB River Coal (Tr. 1138). Tilley injured his wrist again shortly after he returned to work for respondent and, at the time of the hearing on November 17, 1981, he had been off from work because of his injured wrist and because his teeth were abscessed and were giving him a great deal of trouble (Tr. 1157-1158).

Respondent's counsel cross-examined Tilley at some length, as he did several of the witnesses, about their injuries and lack of motivation in obtaining jobs sooner than they did (Tr. 1141-1160). I find that Tilley's testimony is sufficiently credible to show that he made a reasonable and satisfactory effort to find work after he was discharged by respondent. The description which he provided of the type of injury he suffered and the kinds of treatment he has been given support a finding that he did not feign injuries just to be off from work (Tr. 1156-1157). The fact that he was out of work for well over a year with no income other than unemployment compensation would explain why he was unable to pay a dentist to stop the deterioration of his teeth (Tr. 1157-1158). During the period of

his unemployment, he lived with his mother-in-law part of the time. It was necessary for him to sell his trailer for \$1,000 (Tr. 1136). None of the aforesaid difficulties would be a reason to hold that Tilley should be denied reimbursement for the pay he lost as a result of his discharge.

Based on the facts summarized above, Tilley should be awarded back pay at the rate of \$73.20 per day from May 10, 1980, to September 1, 1980, and should be awarded back pay at the rate of \$78.80 (\$73.20 + pay increase of \$5.60) per day from September 1, 1980, to June 11, 1981, when he obtained a job with LMB River Coal Company, exclusive of the period from April 9, 1981, to June 8, 1981, when respondent's mine was closed because of the strike (Tr. 1054; 1165). As stated above, no differential need be paid because his wages with LMB River Coal were higher than the amount he would have received had he continued working for respondent, even if one takes into account respondent's pay increase of September 1, 1980.

9. James Thacker

Counsel for complainants stated at the hearing that James Thacker had attended a meeting on Monday, November 16, 1981, the day prior to the day of reconvening the hearing in this proceeding, and that Thacker had stated on Monday that he could not be away from work any longer than Monday. Thacker was, therefore, not present to testify in support of his request for payment of back wages (Tr. 1160). Complainants' counsel also explained that Thacker had obtained work after the discharge on May 10, 1980, more quickly than any of the other complainants. Thacker, in fact, worked for Teresa Coal Company between the time he was first discharged on April 10, 1980, and the date of May 1, 1980, when all of complainants were offered jobs after the first discharge (Tr. 1163). Complainant's counsel further stated that a calculation had been made which showed that Thacker was entitled to 25 days of back pay (Tr. 1162-1163).

Based on the facts provided by complainants' counsel, Thacker would be entitled to back pay at the rate of \$73.20 (Tr. 1163) for the period from May 10, 1980, to June 9, 1980, when Thacker began to work for Triple J Coal Company (Tr. 1161). There were 20 working days between May 10, 1980, and June 9, 1980. Therefore, the remaining 5 working days for which Thacker is entitled to receive back pay occurred between the first discharge on April 10, 1980, and the second discharge on May 10, 1980. As I have previously explained in this order, the parties entered into a stipulation as to the amount of back pay to which each complainant is entitled for the period from April 10, 1980, to May 10, 1980 (Exh. 4). Under that stipulation, Thacker is said to be entitled to back pay for a period of 14-3/4 days, instead of the 5 days specified by complainants' counsel. The stipulation must have been negotiated before counsel for the parties were aware of the exact facts with respect to Thacker. Therefore, the parties are at liberty to amend the number of hours for which Thacker is entitled to be paid between April 10 and May 10, 1980, or they may deduct days from the 20 days between May 10 and June 9, 1980, in determining the amount of back pay to which Thacker is entitled. In no event should respondent pay Thacker for more than 25 days of back pay because some of the other complainants have had their back pay reduced for failure to produce the dates on which they began to work, or ceased to work, for other employers. Since Thacker did not

appear at the hearing in support of his claim for back pay, he must be held to be entitled only to the 25

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days of back pay which was given in the record by his counsel in his absence (Tr. 1160-1163).

Award of Interest

Section 105(c)(2) of the Act provides that any miner who has been discharged in violation of section 105(c)(1) is entitled to reinstatement "* * * to his former position with back pay and interest". The Act does not specify the rate of interest which should be paid. In my decision issued in Local Union 1374, District 28, UMWA v. Beatrice Pocahontas Company, Docket No. VA 80-167-C, issued August 27, 1981, 3 FMSHRC 2004, I ordered miners to be compensated with interest at a rate of 12 percent per annum. I based the 12-percent rate on the fact that the Internal Revenue Service was paying that rate or requiring taxpayers to pay that rate in connection with overpayment or underpayment of taxes. The miners in this proceeding were discharged during a period when interest rates were as high as they have ever been. They would no doubt have had to pay at least 12 percent interest if they had tried to borrow money during the period of their unemployment. Therefore, I believe that the back pay which is required to be awarded in this proceeding should be made at a rate of 12 percent interest.

The parties may defer computing interest until after my final decision awarding back pay is issued because interest will continue to run until the date of payment. The parties may, therefore, prefer to make the interest calculations only once, that is, on the date of payment.

WHEREFORE, for the reasons given above, it is ordered:

(A) Counsel for respondent and counsel for complainants shall confer for the purpose of cooperating in computing the amount of back pay which is due to each of the nine complainants, following the procedures which I have hereinbefore specified for each of the complainants.

(B) Counsel for respondent and counsel for complainants shall supply me with the amounts due each complainant on or before February 8, 1982.

(C) The amounts due each complainant for the period from April 10, 1980, to May 1, 1980, are those stipulated to by the parties in Exhibit 4, except for a possible adjustment which counsel may wish to make in awarding Complainant James Thacker back pay for a period of 25 days.

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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January 26, 1982

Mr. Darryl A. Stewart
Office of the Solicitor
280 U. S. Courthouse
801 Broadway
Nashville, Tennessee 37203

RE: Secretary of Labor, on
behalf of Clyde Jr. Smith,
et al
vs.
Mullin Creek Coal Company, Inc.
Docket No. KENT 81-17-D

Dear Sir:

The company's bookkeeper has just called me and stated that your figures in the above captioned matter appears to be correct, including vacation pay and according to the ruling of the Administrative Law Judge.

I am enclosing a copy of your calculations with a copy of this letter to the Judge for compliance with the Order to have this to him before February 8, 1982.

I remain.

Yours very truly,

Charles E. Lowe
Attorney at Law

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January 22, 1982

Mr. Charles E. Lowe
Attorney at Law
Post Office Box 69
Pikeville, Kentucky 41501

Re: Secretary of Labor, on behalf of
Clyde Jr. Smith, et al v. Mullin Creek
Coal Company, Inc.
Docket No. KENT 81-17-D

Dear Mr. Lowe:

In accordance with Judge Steffey's January 12, 1982 Order,
please find stated below our computations of the gross back
wages, exclusive of interest, due to each of the nine
complainants involved in the proceeding stated above.

(1) Thomas V. Walker

Due 15 days' pay for May,	1980 at \$73.20 per day =	\$ 1,098.00
Due 21 days' pay for June,	1980 at \$73.20 per day =	1,537.20
Due 22 days' pay for July,	1980 at \$73.20 per day =	1,610.40
Due 21 days' pay for August,	1980 at \$73.20 per day =	1,537.20
Due 22 days' pay for September,	1980 at \$78.80 per day =	1,733.60
Due 23 days' pay for October,	1980 at \$78.80 per day =	1,812.40
Due 19 days' pay for November,	1980 at \$78.80 per day =	1,497.20
Due 22 days' pay for December,	1980 at \$78.80 per day =	1,733.60
Due 21 days' pay for January,	1981 at \$78.80 per day =	1,654.80
Due 20 days' pay for February,	1981 at \$6.80 per day =	136.00
Due 22 days' pay for March,	1981 at \$6.80 per day =	149.60
Due 6 days' pay for April,	1981 at \$6.80 per day =	40.80
Due 0 day's pay for May,	1981 at \$0 per day =	0
Due 16 days' pay for June,	1981 at \$6.80 per day =	108.80
Due 23 days' pay for July,	1981 at \$6.80 per day =	156.40
Due 21 days' pay for August,	1981 at \$6.80 per day =	142.80
Due 9 days' pay for September,	1981 at \$6.80 per day =	61.20
Subtotal =		\$15,010.00
Agreed stipulated amount for period April 10, 1980 through May 3, 1980		1,216.95
Total =		\$16,226.95

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(2) John R. Telfer

Due 15 days' pay for May,	1980 at \$79.20 per day =	\$ 1,188.00
Due 21 days' pay for June,	1980 at \$79.20 per day =	1,663.20
Due 22 days' pay for July,	1980 at \$79.20 per day =	1,742.40
Due 21 days' pay for August,	1980 at \$79.20 per day =	1,663.20
Due 22 days' pay for September,	1980 at \$84.80 per day =	1,865.60
Due 22 days' pay for October,	1980 at \$84.80 per day =	1,865.60
Due 15 days' pay for July,	1981 at \$84.80 per day =	1,272.00
Due 21 days' pay for August,	1981 at \$84.80 per day =	1,780.80
Due 21 days' pay for September,	1981 at \$84.80 per day =	1,780.80
Subtotal =		\$14,821.60

Agreed stipulated amount for period April 10, 1980
through May 1, 1980

1,158.30

Total = \$15,979.90

(3) Clyde Smith, Jr.

Due 15 days' pay for May,	1980 at \$73.20 per day =	\$ 1,098.00
Due 21 days' pay for June,	1980 at \$73.20 per day =	1,537.20
Due 22 days' pay for July,	1980 at \$73.20 per day =	1,610.40
Due 21 days' pay for August,	1980 at \$73.20 per day =	1,537.20
Due 22 days' pay for September,	1980 at \$78.80 per day =	1,733.60
Due 23 days' pay for October,	1980 at \$78.80 per day =	1,812.40
Due 1 day's pay for November,	1980 at \$78.80 per day =	78.80
Subtotal =		\$ 9,407.60

Agreed stipulated amount for period April 10, 1980
through May 1, 1980

1,070.55

Total = \$10,478.15

(4) James R. Clevenger

Due 15 days' pay for May,	1980 at \$79.20 per day =	\$ 1,188.00
Due 21 days' pay for June,	1980 at \$79.20 per day =	1,663.20
Due 22 days' pay for July,	1980 at \$79.20 per day =	1,742.40
Due 21 days' pay for August,	1980 at \$79.20 per day =	1,663.20
Due 22 days' pay for September,	1980 at \$84.80 per day =	1,865.60
Due 23 days' pay for October,	1980 at \$84.80 per day =	1,950.40
Due 19 days' pay for November,	1980 at \$84.80 per day =	1,611.20
Due 22 days' pay for December,	1980 at \$84.80 per day =	1,865.60
Due 21 days' pay for January,	1981 at \$84.80 per day =	1,780.80
Due 20 days' pay for February,	1981 at \$84.80 per day =	1,696.00
Due 22 days' pay for March,	1981 at \$84.80 per day =	1,865.60
Due 6 days' pay for April,	1981 at \$84.80 per day =	508.80
Due 0 day's pay for May,	1981 at \$0 per day =	0

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Due 16 days' pay for June,	1981 at \$84.80 per day =	1,356.80
Due 23 days' pay for July,	1981 at \$84.80 per day =	1,950.40
Due 21 days' pay for August,	1981 at \$84.80 per day =	1,780.80
Due 9 days' pay for September,	1981 at \$84.80 per day =	763.20

Subtotal = \$25,252.00

Agreed stipulated amount for period April 10, 1980
through May 1, 1980 1,158.30

Total = \$26,410.30

(5) Jerry L. Smith

Due 15 days' pay for May,	1980 at \$79.20 per day =	\$ 1,188.00
Due 21 days' pay for June,	1980 at \$79.20 per day =	1,663.20
Due 22 days' pay for July,	1980 at \$79.20 per day =	1,742.40
Due 21 days' pay for August,	1980 at \$79.20 per day =	1,663.20

Due 19 days' pay for September,	1980 at \$84.80 per day =	1,611.20
Due 8 days' pay for October,	1980 at \$84.80 per day =	678.40
Due 12 days' pay for March,	1981 at \$84.80 per day =	1,017.60
Due 6 days' pay for April,	1981 at \$84.80 per day =	508.80
Due 0 day's pay for May,	1981 at \$0 per day =	0
Due 16 days' pay for June,	1981 at \$84.80 per day =	1,356.80
Due 23 days' pay for July,	1981 at \$84.80 per day =	1,950.40
Due 21 days' pay for August,	1981 at \$84.80 per day =	1,780.80
Due 9 days' pay for September,	1981 at \$84.80 per day =	763.20

Subtotal = \$15,924.00

Agreed stipulated amount for period April 10, 1980
through May 1, 1980 1,158.30

Total = \$17,082.30

(6) David May

Due 15 days' pay for May,	1980 at \$68.56 per day =	\$ 1,028.40
Due 21 days' pay for June,	1980 at \$68.56 per day =	1,439.76
Due 22 days' pay for July,	1980 at \$68.56 per day =	1,508.32
Due 21 days' pay for August,	1980 at \$58.56 per day =	1,439.76

Due 22 days' pay for September,	1980 at \$74.16 per day =	1,631.52
Due 23 days' pay for October,	1980 at \$74.16 per day =	1,705.68
Due 19 days' pay for November,	1980 at \$74.16 per day =	1,409.04
Due 22 days' pay for December,	1980 at \$74.16 per day =	1,631.52
Due 6 days' pay for January,	1981 at \$74.16 per day =	444.96

Subtotal = \$12,238.96

Agreed stipulated amount for period April 10, 1980
through May 1, 1980 1,002.69

Total = \$13,241.65

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(7) H. K. Tilley, Jr.

Due 15 days' pay for May,	1980 at \$73.20 per day =	\$ 1,098.00
Due 21 days' pay for June,	1980 at \$73.20 per day =	1,537.20
Due 22 days' pay for July,	1980 at \$73.20 per day =	1,610.40
Due 21 days' pay for August,	1980 at \$73.20 per day =	1,537.20
Due 22 days' pay for September,	1980 at \$78.80 per day =	1,733.60
Due 23 days' pay for October,	1980 at \$78.80 per day =	1,812.40
Due 19 days' pay for November,	1980 at \$78.80 per day =	1,497.20
Due 22 days' pay for December,	1980 at \$78.80 per day =	1,733.60
Due 21 days' pay for January,	1981 at \$78.80 per day =	1,654.80
Due 20 days' pay for February,	1981 at \$78.80 per day =	1,576.00
Due 22 days' pay for March,	1981 at \$78.80 per day =	1,733.60
Due 6 days' pay for April,	1981 at \$78.80 per day =	472.80
Due 0 day's pay for May,	1981 at \$78.80 per day =	0
Due 2 days' pay for June,	1981 at \$78.80 per day =	157.60
Subtotal =		\$18,154.40

Agreed stipulated amount for period April 10, 1980
through May 1, 1980

1,070.55

Total = \$19,224.95

(8) Monroe Mullins

Due 15 days' pay for May,	1980 at \$79.20 per day =	\$ 1,188.00
Due 21 days' pay for June,	1980 at \$79.20 per day =	1,663.20
Due 6 days' pay for July,	1980 at \$79.20 per day =	475.20
Subtotal =		\$ 3,326.40

Agreed stipulated amount for period April 10, 1980
through May 1, 1980

1,158.30

Total = \$ 4,484.70

(9) James Thacker

Due 83 hours' pay for May 10, 1980 to June 9, 1980 at \$9.15 per hour	=	\$ 759.45
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Agreed stipulated amount for period April 10, 1980
through May 1, 1980

= 1,070.55

Total = \$1,830.00

If your computations are not the same as ours, please call me here in Nashville at 615-251-5818 so that we may discuss our differences prior to the required February 8, 1982 submission to Judge Steffey.

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Very truly yours,

RALPH D. YORK
Acting Associate Regional Solicitor

By
DARRYL A. STEWART
Attorney