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JIMMY R. MULLINS, v. BETH-ELKHORN COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

JIMMY R. MULLINS, COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. KENT 83-268-D
v.	
	MSHA Case No. PIKE CD-83-08
BETH-ELKHORN COAL CORPORATION, RESPONDENT	No. 26 Mine
LOCAL 1468, DISTRICT 30, UNITED MINE WORKERS OF AMERICA, AND INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, (FOOTNOTE.1) RESPONDENTS	

DECISION

Appearances: Mary Bruce Cook, Esq., Hartford, Kentucky, for Complainant;

Michael T. Heenan, Esq., Smith, Heenan & Althen, Washington, D.C., for Respondent Beth-Elkhorn Coal Corporation;
Gregory Ward, Esq., Pikeville, Kentucky, for Respondent Local 1468, District 30, United Mine Workers of America. (FOOTNOTE.2)

Before: Judge Steffey

The Parties' Stipulations

An order was issued on June 21, 1984, in this proceeding in which I noted that all of the questions raised by the complaint appeared to be legal in nature and that complainant had provided sufficient documents with his complaint to support the preparation by me of 13 proposed findings of fact which I

requested counsel for the parties to consider in determining whether all issues could be decided either on the basis of my proposed stipulations or on the basis of modifications of my proposed stipulations agreed upon by counsel.

Counsel for the parties thereafter participated in several discussions and arrived at 20 proposed stipulations which were presented to complainant's counsel for final approval, but complainant stated that he could not agree to some of the stipulations and requested that he be afforded a hearing at which he could testify as to the events which resulted in his filing the complaint in this proceeding. His request was granted and a hearing was held on March 19, 1985, in Prestonsburg, Kentucky, pursuant to section 105(c)(3), 30 U.S.C. 815(c)(3), of the Federal Mine Safety and Health Act of 1977.

Before any testimony was received, the parties agreed that the issues could still be decided primarily on the basis of the 20 proposed stipulations, subject to any modifications which I might find necessary to make in the stipulations to cause them to conform with the testimony of the witnesses. I have carefully reviewed all of the stipulations and I find that they are supported by the preponderance of the evidence, including the witnesses' testimony and the 28 exhibits which were received in evidence by stipulation. The hearing was greatly shortened by the parties' efforts to agree upon stipulations of fact. My job was also made easier than it would have been by Mr. Heenan's having prepared, for each party, in advance of the hearing, a notebook containing all 28 exhibits arranged in tabulated form.

I have made a few changes in the spelling and punctuation in some of the stipulations either to make the language conform with the GPO Style Manual or to make the language conform with the facts given in the exhibits cited in support of the stipulations. The major change I have made is in Stipulation No. 14 which has been changed to quote the two options referred to in Exhibit 19, rather than leave the erroneous impression that only one option was given, as was the case with the language of Stipulation No. 14 as it was originally submitted by the parties. I have also added references to some exhibits in some places to increase the evidentiary support of some of the stipulations.

I did not renumber the stipulations so as to delete the designation of "17A" given to one of the stipulations because the parties would not have had the renumbered stipulations in their possession when they prepared their briefs and a renumbering in my decision could create some confusion in identification of a particular stipulation when and if my decision is reviewed by the Commission. It was also necessary to delete three lines between Stipulation No. 17A and No. 18 because those three lines constituted surplusage which was inadvertently not stricken when the stipulations were prepared in final form.

The parties' stipulations are given below as the primary factual basis for my decision in this proceeding. At the end of the stipulations, there appears a discussion of complainant's objection to Stipulation No. 16. That discussion shows why Stipulation No. 16 is supported by the preponderance of the evidence and explains why I have rejected complainant's objections to Stipulation No. 16.

Stipulations

1. Beth-Elkhorn Coal Corporation is engaged in the operation of the No. 26 Mine in Pike County, Kentucky. It produces coal which enters commerce or affects commerce and is subject to the provisions of the Federal Mine Safety and Health Act and the regulations promulgated thereunder.

2. Jimmy R. Mullins, the complainant in this proceeding, has worked for Beth-Elkhorn at the No. 26 Mine since November 30, 1970. The representative of miners at the No. 26 Mine is Local Union 1468, District 30, United Mine Workers of America.

3. Mullins was first examined for the National Study of Coal Workers' Pneumoconiosis when a chest x ray was made on February 28, 1974, at which time he was notified that there was no evidence of pneumoconiosis. A second chest x ray was made on May 9, 1980, and examination of that x ray indicated that Mullins had a sufficient degree of pneumoconiosis to be eligible to exercise rights under 30 C.F.R., Part 90 (Exhibits 1 through 3).

4. Beth-Elkhorn was notified by MSHA in a letter dated August 29, 1980, that Mullins had elected to transfer to a less dusty area of the mine pursuant to 30 C.F.R. 90.3 and the letter requested Beth-Elkhorn to notify MSHA, in writing, of the date on which the transfer was accomplished. In a letter dated September 29, 1980, Beth-Elkhorn notified MSHA that Mullins was working as a repairman first class on a maintenance or nonproducing shift, and that the mine atmosphere in which he was then working did not exceed the allowable 1.0 milligram of respirable dust in which Mullins was permitted to work. For that reason, Beth-Elkhorn elected not to transfer Mullins, but indicated that it would begin collecting one sample of the air in his working environment every 90 days.

5. Mullins, on February 3, 1981, by exercising his mine seniority rights, rather than his Part 90 rights, obtained the job of electrician first class on the second shift which was a nonproducing shift. Beth-Elkhorn notified MSHA on

June 22, 1981, that Mullins' job as electrician did not expose him to more than 1.0 milligram of respirable dust. Beth-Elkhorn again notified MSHA on August 31, 1981, that the mine atmosphere in which Mullins was working as an electrician was within the 1.0 milligram of respirable dust permitted for a Part 90 miner.

6. MSHA sampled the atmosphere in which Mullins was working on September 15, 1981, and thereafter notified Beth-Elkhorn that he was working in a mine atmosphere having 3.0 milligrams of respirable dust and MSHA issued a citation at that time for Beth-Elkhorn's failure to maintain the atmosphere in which Mullins was working to 1.0 milligram or less of respirable dust. Although Beth-Elkhorn offered to transfer Mullins to a less dusty area, he elected to waive his Part 90 right to transfer to a less dusty area. Based on Mullins' waiver, MSHA terminated the aforementioned citation on October 27, 1981 (Exhibit 7).

7. Nearly a year after the aforementioned citation was terminated, Mullins, by letter of September 17, 1982, informed MSHA that he wished to reexercise his Part 90 rights in order to obtain the job of dispatcher on the second shift at the No. 26 Mine. He further stated: "If I can not obtain this job as dispatcher, then I do not wish to re-exercise my rights as a Part 90 miner" (Exhibit 9).

8. By letter of September 27, 1982, Mullins informed Beth-Elkhorn that he had written to MSHA, reexercising his Part 90 rights (Exhibit 10).

9. By letter of November 8, 1982, MSHA informed Beth-Elkhorn that Mullins had exercised his option "to work in a low dust area", and that "by the 21st calendar day after receipt of this notification, the miner [Mullins] must be working in an environment which meets the [1.0] respirable dust standard" (Exhibit 11).

10. In addition to reexercising his Part 90 option, Mullins had also bid on the job of dispatcher pursuant to the procedures established under article XVII of the National Bituminous Coal Wage Agreement of 1981 (NBCWA; Exhibit 27). Another miner at the No. 26 Mine, Norman Caudill, who had a mine seniority date of October 17, 1967, also bid on the dispatcher's job (Exhibits 12 and 18).

11. Despite the fact that Mullins did not have the greatest amount of mine seniority of any bidder for the dispatcher's job, he was awarded the job on the basis of superseniority

pursuant to article XVII, section (i), paragraph (10),(F00TNOTE.3) of the NBCWA, which provides for the one-time exercise of superseniority by production crew members who have received a letter from the U.S. Department of Labor pursuant to Part 90 of Title 30 of the Code of Federal Regulations (Exhibits 18, p. 15, and 27).

12. Caudill thereafter filed a grievance stating that he was the senior qualified bidder for the dispatcher's job and challenging the award of the dispatcher's job to Mullins (Exhibit 17).

13. The grievance filed by Caudill proceeded to arbitration. In an award issued April 15, 1983, Arbitrator Samuel Spencer Stone upheld the grievance. The arbitrator ruled that Mullins was not eligible for superseniority pursuant to article XVII, section (i), paragraph (10), of the NBCWA, since Mullins had not been employed on a "production crew" at the time he bid on the dispatcher's job, as required by that provision. The arbitrator, therefore, ordered Beth-Elkhorn to award the job of dispatcher on the second shift to Norman Caudill (Exhibit 18).

14. On April 29, 1983, a meeting was held between Mullins and representatives of Beth-Elkhorn and the union. Mullins was informed that the company would comply with the arbitrator's ruling by awarding the dispatcher's job to Caudill, and that Mullins had "two options and they are: (1) go back to the electrician's job or (2) go to a repairman's job. Our understanding is that if you go back to the electrician's job then you waive your rights as a Part 90 miner" (Exhibit 19).

15. The repairman's job offered to Mullins was on the same shift, carried the same hourly rate of pay, and Respondent Beth-Elkhorn is of the opinion and belief that this job complied with the 1.0 dust standard (Exhibit 20).

16. The repairman's job was also classified as an "inside" job and was regularly scheduled to pay the employee holding the job for 8 hours per shift, pursuant to article IV(b)(1) of the NBCWA (Exhibits 20 and 27).

17. Mullins declined the offer of the repairman's job and elected to return to the electrician's job he had formerly occupied (Exhibit 20). The reason that Mullins declined the repairman's job is that he is of the opinion and belief that it was not just a shop job. He further is of the opinion and belief that the job involved working 25 percent of the time in the shop and 75 percent of the time in the mine and that the working conditions associated with the repairman's job expose him to a dust concentration above the 1.0 limitation. Mullins is also of the opinion and belief that the man [Charlie Noble] who accepted the job of repairman works inside the mine for 90 percent of the time (Tr. 70; 116).

17A. In offering Mullins a repairman's job on a non-coal-producing shift, the company was offering a job which in its opinion and belief met the Part 90 dust standard and it was prepared to monitor complainant's dust exposure level as required by 30 C.F.R. 90.100 and 90.208, had he accepted the repairman's job.

18. On May 4, 1983, Mullins filed a complaint with MSHA in Docket No. PIKE CD-83-08, against Bill Looney, UMWA District 30 Field Representative. Mullins alleged in his complaint that UMWA had discriminated against him in violation of section 105(c)(1) of the Act by preventing him from exercising his Part 90 rights to obtain the job of dispatcher with the result that he had been forced to return to the job of electrician which exposed him to a mine atmosphere having a concentration of 3 milligrams of respirable dust, instead of allowing him to retain the job of dispatcher which did not expose him to more than 1 milligram of respirable dust permitted by section 90.3(a) of the Department of Labor's Regulations. Mullins thereafter amended his complaint filed with MSHA on May 9, 1983, and on May 12, 1983, to name Beth-Elkhorn and Arbitrator Samuel Spencer Stone, respectively, as respondents on the ground that they had participated, along with UMWA, in discriminating against him in violation of section 105(c)(1) of the Act.

19. Mullins received a letter from Ronald J. Schell, Chief of MSHA's Office of Technical Compliance and Investigation, dated July 11, 1983, stating that MSHA's investigation

of his complaint had resulted in a finding that no violation of section 105(c)(1) had occurred.

20. On July 27, 1983, Mullins filed, without benefit of counsel, a letter with the Commission in which he stated that he was appealing MSHA's finding in the letter of July 11, 1983, that no violation of section 105(c)(1) had occurred when UMWA obtained an arbitration decision awarding Caudill the job of dispatcher and requiring Mullins to return to the job of electrician, thereby exposing him to a mine atmosphere of 3 milligrams of respirable dust in violation of his rights as a Part 90 miner to be exposed to no more than 1 milligram of respirable dust (Pro se complaint).

The Parties' Briefs

At the conclusion of the hearing, dates were set for the filing of initial and reply briefs. Subsequently I granted two requests for extensions of time for the filing of briefs. The briefs were received over a relatively long period of time because counsel for District 30 filed his initial brief 1 day before the date originally set for the filing of briefs. The other parties timely filed their briefs within the deadlines fixed in the extensions of time. Counsel for District 30 filed his initial and reply briefs on May 6, 1985, and July 24, 1985, respectively. Counsel for Beth-Elkhorn filed their initial and reply briefs on June 25, 1985, and July 25, 1985, respectively. Counsel for the International Union filed his initial and reply briefs on July 11 and 24, 1985, respectively. Counsel for complainant filed her initial brief on July 15, 1985, and did not elect to file a reply brief.

Issues

All of the parties' briefs contain headings to highlight the arguments which are made, but only the International Union's and complainant's briefs specifically articulate the issues which they believe have been raised in this proceeding. Since this will be a lengthy decision, I shall hereinafter abbreviate the names of the parties as follows: Complainant will be called by his actual name of "Mullins". Respondent District 30 will be referred to as "D30". Respondent International Union will be referred to as "UMWA". Beth-Elkhorn will be referred to as "B-E".

UMWA's initial brief (p. 2) gives the issues as follows:

(1) When Mr. Mullins invoked the superseniority provision of the 1981 NBCWA, was he engaging in the protected activity of exercising his Part 90 rights? This issue is discussed on pages 32-36 below.

(2) Do the limited job-bidding rights provided to letterholders under article XVII(i)(10) of the 1981 NBCWA interfere with the Part 90 rights of nonproduction coal miners? This issue is discussed on pages 36-43 below.

Mullins' brief (pp. iv and v) poses seven additional issues as follows:

(3) Is Mullins precluded from exercising his Part 90 status to obtain the job of dispatcher because of his having waived his Part 90 rights in order to retain the job of electrician first class when he was first advised that the atmosphere in his working environment was 3 milligrams of respirable dust per cubic meter of air? This issue is discussed on pages 17-22 below.

(4) Is Mullins precluded from exercising his Part 90 rights to obtain the job of dispatcher simply because that job happened to be a choice job which pays more than the job of electrician which he held at the time he first exercised his Part 90 rights? This issue is discussed on pages 22-23 below.

(5) Since section 101(a)(7) of the Act and section 90.102(a) of the Regulations provide that a miner transferred to a less dusty area "shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer", did B-E comply with the spirit of the Act when it offered Mullins a job in a less dusty area which would have required him to take a reduction in pay even though the pay cut would result from a reduction in working hours rather than in the "rate of pay"? This issue is discussed on pages 9-17 below.

(6) Inasmuch as section 90.3(e) of the Regulations permits a miner to exercise his transfer rights as many times as his working conditions warrant exercise of such rights, should article XVII(i)(10) of the NBCWA be declared null and void because of its provisions that only a miner on a production shift may exercise superseniority? This issue is discussed on pages 26-27 below.

(7) Did UMWA discriminate against Mullins in violation of section 105(c)(1) of the Act by insisting that B-E's awarding of the dispatcher's job to Mullins because of the exercise of his Part 90 rights be made the subject of an arbitration action which resulted in Mullins' being required to give up his job of dispatcher because of the arbitrator's ruling that Mullins could not exercise his Part 90 rights in view of the fact that Mullins was working on a maintenance or nonproducing shift, rather than on a production shift? This issue is discussed on pages 27-32 below.

(8) Did B-E discriminate against Mullins in violation of section 105(c)(1) of the Act by complying with the arbitrator's decision instead of insisting that it was precluded by the provisions of section 101(a)(7) of the Act and Part 90 of the Regulations from complying with the arbitrator's decision? This issue is discussed on pages 50-55 below.

(9) May UMWA be made a respondent in a discrimination case filed pursuant to section 105(c)(3) of the Act when the groundwork is properly laid by naming UMWA as a respondent in the complaint filed by a miner under section 105(c)(2) of the Act and when it is considered that UMWA comes within the definition of a "person" as that term is defined in section 3(f) of the Act and in view of the fact that UMWA may properly be assessed a civil penalty for a violation of section 105(c)(1) of the Act because UMWA comes within the definition of an "operator" of a coal mine because of its having reserved the right in the NBCWA to perform services as an independent contractor pursuant to section 3(d) of the Act? [Note: I have modified the wording of the last issue to conform with the position which is implicit in the arguments made by Mullins on pages 9 and 10 of his initial brief to the effect that UMWA should really be considered to be an "operator" of a coal mine.] This issue is discussed on pages 23-26 below.

The Issue of Whether Mullins Was Offered a Job in No More Than 1.0 Milligram of Respirable Dust Which Would Have Paid Him Less Than His Electrician's Job

As indicated above under the heading of "The Parties' Stipulations", I believe that the first issue which should be considered in my decision is the question of whether B-E actually offered to transfer Mullins to a surface or "outside" job which would pay him less than the underground or "inside" electrician's job which he was holding prior to B-E's offer to transfer him. The job offered was a repairman's job working out of the shop which was located on the surface of the mine. Surface jobs normally pay for only 7 1/4 hours per shift pursuant to article IV(b)(2) of the NBCWA, whereas underground or "inside" jobs pay for 8 hours per shift pursuant to article IV(b)(1) of the NBCWA (Exh. 27). Stipulation No. 16 states that the repairman's job offered to Mullins was an inside job which would have paid the employee holding the job for 8 hours per shift.

As I shall hereinafter demonstrate from the record, I believe that Mullins knew that he was being offered a job which did pay for 8 hours of work per shift and I find that the issue pertaining to Mullins' claim that he was offered a job which would pay him less than the electrician's job which

he held when it was found that he was being exposed to more than 1.0 milligram of respirable dust is an issue which cannot be raised in this proceeding when that question is considered in light of the preponderance of the evidence.

When he testified at the hearing, Mullins emphasized that the "law" [section 101(a)(7) of the Act and section 90.103(b) of the Regulations] refers to the "rate of pay", rather than to the total pay earned per shift. For that reason, he claimed that since the repairman's job on the surface presumably paid for only 7 1/4 hours per shift, as opposed to the 8 hours per shift paid by his electrician's job, he would lose money on a daily basis even if B-E continued to pay him at the same "rate of pay" after the transfer which he was receiving before B-E made the offer to transfer (Tr. 53; 72).

I believe that B-E's management is aware of the fact that it cannot offer a job to a Part 90 miner in no more than 1.0 milligram of dust which pays on a daily basis less than the amount the miner was making on the job from which he is transferred pursuant to section 90.103(b) of the Regulations (Tr. 164). Mullins' brief (pp. 2-3) relies upon interpretations of the pay provisions set forth in section 203(b) of the Act by the courts in Higgins v. Marshall, 584 F.2d 1035 (D.C.Cir.1978), and Matala v. Consolidation Coal Co., 647 F.2d 427 (4th Cir.1981), but the explanatory discussion in MSHA's rulemaking proceeding explains that:

> This new rule is an improved mandatory health program promulgated under section 101 of the Act and as such supersedes provisions contained in section 203(b). Neither the Higgins nor Matala holdings are applicable to the pay provisions specified under this new Part 90 as the issue in both of those cases involves the statutory interpretation of section 203(b) of the Act.

45 Fed.Reg. 80767 (1980).

MSHA's rulemaking comments on page 80767 also refer to the legislative history and quote language from the Conference Committee Report to the effect that Congress anticipated that miners transferred because of evidence of pneumoconiosis would suffer no "immediate financial disadvantage" as a result of the transfer. Obviously, a reduction in working hours, even if the "rate of pay" remained the same as the miner was receiving prior to the transfer, would result in an "immediate financial disadvantage" and would be in conflict with the clear intent expressed by Congress when MSHA was authorized to issue improved mandatory standards pursuant to section 101(a)(7) of the Act.

Mullins testified that he disagrees with Stipulation No. 16 and with Exhibits 19 and 20 which are relied upon in support of the allegation in that stipulation that Mullins was offered a repairman's job paying for 8 hours per shift when the dispatcher's job was awarded to Caudill by the arbitrator (Tr. 60). Stipulation No. 16, as indicated above, states that Mullins was offered an inside job which would have paid him for 8 hours of work per shift. The parties rely on Exhibit 19 to support the allegation that the repairman's job was one which would have paid Mullins for working 8 hours per shift, whereas Mullins has always contended that the repairman's job offered to him was located in the shop where equipment is repaired and that he understood it to be an "outside" job under article IV(b)(2) of the NBCWA which meant that he would be paid for only 7 hours and 15 minutes per shift (Exh. 27).

Exhibit 19 is a memorandum which purports to show what each of the parties attending a meeting on April 29, 1983, said about the job which Mullins would have to accept in lieu of the dispatcher's job which had been awarded to Caudill. The memorandum indicates that the meeting lasted 15 minutes, but the statements attributed to the persons attending the meeting are transcribed on less than 1 1/2 pages and cannot possibly constitute a complete description of all that was said at a 15-minute meeting. The only description of the repairman's job is contained in a statement attributed to J. Bellamy who explained to Mullins that Mullins had two options, one being his returning to the electrician's job which he had held prior to his having obtained the dispatcher's job and the other one being his going "to a repairman's job". Therefore, the parties' reliance on Exhibit 19 in support of their claim that Mullins was offered an "inside" job which paid 8 hours per shift is futile because Exhibit 19 does not in any way explain where the repairman's job was located or provide any information whatsoever as to its classification as an "inside" or "outside" job under the NBCWA. The thrust of Exhibit 19 is directed almost entirely to showing the concern of B-E's management that Mullins take into consideration the fact that if they allowed him to return to the electrician's job, he would have to waive his Part 90 rights because the respirable-dust samples taken in the mine atmosphere breathed by Mullins when he held the electrician's job showed that he had been exposed to at least 3.0 milligrams of respirable dust per cubic meter of air. The memorandum indicates that Mullins at first denied that going back to the electrician's job would require him to waive his Part 90 rights, but on page two of the memorandum, Mullins is quoted as having said that "[i]nitially, I waived my rights for this [electrician's] job". My review of Exhibit 19 shows that the parties may not rely upon that exhibit for their allegation that the repairman's job offered to Mullins was an "inside" job which would pay him for 8 hours per shift.

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The parties also rely upon Exhibit 20 for their allegation that Mullins was offered a repairman's job which would pay 8 hours per shift. Exhibit 20 is a copy of a letter from B-E's mine superintendent dated May 2, 1983, to the District Manager of MSHA's Pikeville Office explaining that an arbitrator had ruled that Mullins' job as dispatcher would have to be awarded to another miner and that Mullins had elected to return to his prior position of electrician despite the fact that he would be waiving his Part 90 rights in returning to that position. The letter states that "[t]he other position [offered to Mullins] was a Repairman (104) working out of the shop and going underground wherever he would be needed". Exhibit 20 agrees with Mullins' understanding of the repairman's job offered to him at least to the extent of showing that it was a shop-oriented job, but neither Exhibit 20 nor Exhibit 19 shows that Mullins was aware of the fact that the shop-oriented job would require the holder of that position to work underground "wherever he would be needed".

The parties also cite Exhibit 27, or the NBCWA, in support of their claim that Mullins was offered a repairman's job which was an "inside" job requiring that he be paid for 8 hours per shift. While article IV(b) of Exhibit 27 defines the meaning of "inside" and "outside" employees, and lists the classifications of "repairmen" in Appendix B, there is nothing in Exhibit 27 which would guide Mullins in determining that the repairman's job "working out of the shop" would necessarily involve his having to work "inside" the mine and thereby require B-E to pay him for 8 hours per shift.

B-E's superintendent, Frederick Mac Collier, testified that B-E has never had a repairman's job on the second shift which involved only outside work and he stated that if the repairman's job offered to Mullins had involved paying the holder of that position for only 7 1/4 hours per shift, the job would have to have been posted as an outside job. Moreover, he testified that if the repairman's job had been posted as an "outside" job, it would not have been possible for B-E to assign the holder of the job any work which involved his going inside the mine (Tr. 151; 162).

Mullins' testimony and letters written with respect to the repairman's job are inconsistent. In his testimony, he claimed that other miners were highly critical of his having rejected the offer of the repairman's job because they understood that he would be working in the shop 100 percent of the time and would never have to work underground (Tr. 60). Later, Mullins testified that Charlie Noble, the miner who acquired Mullins' job as electrician when Mullins was initially given the dispatcher's job, came to him the night before

Mullins was slated to resume working underground and asked Mullins to take the electrician's job so that Noble could obtain the repairman's job in the shop which had been offered to Mullins (Tr. 70). Mullins had already decided to return to the electrician's job before Noble talked to him, but the implication in Mullins' testimony is that Noble thought the optional job of repairman offered to Mullins would involve working only on the surface. Mullins' subsequent testimony shows that if Noble thought the repairman's job involved only surface work, he was sadly mistaken because Mullins said that it ultimately turned out that the repairman's job required Noble to work underground for 90 percent of the time (Tr. 116).

At various points in his testimony, Mullins stated that he declined to take the repairman's job because it would pay only 7 -1/4 hours per shift and that he could not afford to accept a reduction in salary because of the obligations he felt for providing for his family's economic needs (Tr. 47; 53; 98; 113). At another time, Mullins stated that he believed that the repairman's job would require him to work underground where he would be exposed to having to clean coal dust from around conveyor belt components and that the repairman's job would expose him to more respirable dust than the electrician's job (Tr. 50). Although it is not necessarily inconsistent for Mullins to claim that he thought the repairman's job was purely an outside job paying only 7 1/4 hours per shift and simultaneously contend that he would be working underground where he would be exposed to more than 1.0 milligram of respirable dust, he has a background of having worked as recording secretary of the mine committee and on the Board of Directors of the Eastern Kentucky Concentrated Employment Program and he contended at the hearing that he was intimately acquainted with the various positions which had been awarded to other Part 90 miners at the No. 26 Mine (Tr. 55), so that it is difficult to accept his claims that he did not know what kind of repairman's job he had been offered when B-E was required to relieve him of the dispatcher's job in order to comply with the arbitrator's ruling.

The record shows that when Mullins was first advised of the fact that his x rays revealed sufficient evidence of pneumoconiosis to make him a Part 90 miner, B-E sampled the mine atmosphere in which he worked as a repairman at that time and found that the respirable-dust concentration did not exceed 1.0 milligram per cubic meter of air. Therefore, it was unnecessary for B-E to transfer Mullins to any position in a less dusty area than the repairman's job which he then held (Stipulation No. 4). Mullins has always believed, however, that the repairman's job he held when he was first advised that he had pneumoconiosis exposed him to more than 1.0 milligram of respirable dust. In support of that contention, Mullins testified

that B-E excessively watered the area where he was working as a repairman each time he was scheduled to wear a dust-sampling device in order to assure that the results of the sample would not show more than 1.0 milligram of respirable dust (Tr. 41-42). Mullins stated that B-E did not bother to apply water in any appreciable amount at any time except when he was given a dust-sampling device (Tr. 43; 66-67; 84).

Ultimately, Mullins answered my questions regarding the repairman's job in the shop, offered to him when he was relieved of the dispatcher's job, as follows (Tr. 115):

> Q Do you think that Mr. Collier knew that you were turning down the repairman's job [in the shop] because of this underground part of it? Three fourths [working underground] part of it?
>
> A No, sir, I told him I was going to appeal the [arbitration] case.
>
> Q He had no reason at that time to assure you that he would pay you for eight hours?
>
> A No, sir.
>
> Q Or that he would assure you that you would not work underground?
>
> A No, sir.
>
> Q Those two points just didn't arise?
>
> A No, sir.

Mullins made some unclear statements in the letters he wrote to MSHA and B-E for the purpose of reexercising his Part 90 rights to obtain the job of dispatcher (Exhs. 9 and 10). In both of those letters he alleges that he has not previously exercised his Part 90 rights because there was no job available at the time he became a Part 90 miner. MSHA does not require a Part 90 miner to be transferred to another position if respirable-dust samples taken in the atmosphere in which he is working at the time he becomes a Part 90 miner show exposure to no more than 1.0 milligram per cubic meter of air. Since MSHA's and B-E's samples taken in the atmosphere to which Mullins was exposed as a repairman after Mullins became a Part 90 miner did not show more than 1.0 milligram, B-E did not offer to transfer Mullins to another position at the time he was notified that he was a Part 90 miner. Therefore, the record provides no explanation as to why Mullins stated in his letters that he had failed to exercise his Part 90 rights because no job was available.

The record contains as Exhibit 15 a letter dated March 25, 1983, written by Mullins to Congressman Perkins. The letter was inadvertently given a date 3 weeks before the arbitrator had issued his decision finding that Mullins was not entitled to the dispatcher's job under article XVII(i)(10) of the NBCWA. Regardless of the date, Mullins' letter asserts that he has already been advised by B-E that he is not entitled to the dispatcher's job and that B-E is going to reassign him to the electrician's job where he will be exposed to more respirable dust than is allowed for Part 90 miners. The letter also alleges that MSHA advised him to reexercise his Part 90 rights, that he followed MSHA's advice and reexercised his Part 90 rights, that a job [of dispatcher] thereafter became vacant, that MSHA advised him to bid on the dispatcher's job, that he again followed MSHA's advice by bidding on the job, and that he was awarded the job, but that B-E thereafter advised him that because he was not working on a production crew, he was not entitled to bid on the job and that B-E was going to reassign him to the position of electrician which would require him to work in a greater concentration of respirable dust than is permissible for a Part 90 miner to work.

The allegations made by Mullins in the letter to Congressman Perkins are contrary to his testimony in this proceeding, as well as contrary to the testimony of B-E's superintendent, Collier. Mullins testified that MSHA did not know anything about a Part 90 miner's rights and that he was never able to get any helpful advice from MSHA (Tr. 52; 59; 64; 94). Collier testified that he awarded Mullins the job of dispatcher under the impression that Mullins had a right to bid on the job under article XVII(i)(10) of the NBCWA and that the company took the position before the arbitrator that Mullins was entitled to retain the job when B-E's award of the job to Mullins was challenged by Caudill in the arbitration proceeding. Collier further testified that the company did not give the reference to "a production crew" in article XVII(i)(10) the importance placed on that language by the arbitrator (Tr. 133-134).

Congressman Perkins sent Mullins' letter to Ford B. Ford, Assistant Secretary of Mine Safety and Health, and asked him to investigate Mullins' allegations (Exh. 16). Mr. Ford thereafter provided the Congressman with a report which correctly states what actually happened with respect to Mullins' having held the job of repairman when he was notified of his Part 90 status and about Mullins having waived his Part 90 rights in order to continue working as an electrician after MSHA's respirable-dust samples showed that Mullins was working in a concentration of at least 3 milligrams of dust. Mr. Ford's letter also noted that Mullins' right to the dispatcher's job had been challenged under the NBCWA and that those procedures were not within the scope of MSHA's jurisdiction (Exh. 17).

Mullins filed discrimination complaints against UMWA (Exh. 21) and against B-E (Exh. 23). The facts stated in the first 10 paragraphs of the complaint filed against B-E are substantially correct in summarizing the jobs which Mullins held after he was first notified on August 5, 1980 (Exh. 4) that he was a Part 90 miner. Paragraph 11 of the complaint is incorrect because it states that B-E relieved him of the dispatcher's job in compliance with the arbitrator's decision and "ordered" him to "resume my former job duties as electrician" (Exh. 23, p. 2). Mullins' testimony in this proceeding shows, on the contrary, that B-E offered Mullins a repairman's job and warned him that he would be waiving his rights as a Part 90 miner if he returned to his former position of electrician (Tr. 49; 113-114).

Counsel for D30 asked Mullins at the hearing if he would be willing to settle this case if B-E would give him a job on the second shift paying him for 8 hours of work per shift and exposing him to no more than 1.0 milligram of respirable dust (Tr. 86). Mullins replied "No, sir" and explained that he had filed this discrimination case because he wanted to prove that a Part 90 miner on a nonproducing shift has some rights. Mullins further stated that if he is going to die in 5 to 10 years from black lung, that he would like to retain the electrician's job so as to make as much money for his family as he can. He said that he enjoys the work of an electrician and would not want to be forced to return to the repairman's job which he does not like (Tr. 86-87). Mullins stated that he thinks he has "done pretty good" in working himself up to the electrician's job and that he likes to perform the duties of an electrician despite the fact that he works with from 240 to 7,200 volts and can be alive 1 day and dead the next if he makes a mistake in the way he performs his job (Tr. 97).

The above discussion of Mullins' testimony and the letters he has written to various people about his Part 90 rights shows that Mullins just did not like performing the work of a repairman and that he would have declined B-E's offer of that job regardless of whether he was aware of the fact that the job offered to him would have paid him for 8 hours of work per shift and would have involved his having to work underground most of the time. I conclude that the preponderance of the evidence supports a finding that Mullins was well aware of the types of duties he would have to perform if he accepted the repairman's job "working out of the shop and going underground wherever he would be needed" (Exh. 20; Tr. 50).

I believe that the inconsistent statements made by Mullins in testimony and letters resulted from Mullins' fear that some tribunal would reach a conclusion that his declining to

accept the repairman's job would somehow be used to hold that he had waived his Part 90 rights for all purposes, instead of allowing him, pursuant to section 90.3(e) of the Regulations, to reexercise his Part 90 rights any time he wishes to do so. For all of the foregoing reasons, I find that paragraph 16 of the stipulations correctly states that "[t]he repairman's job [offered to Mullins] was also classified as an "inside" job and was regularly scheduled to pay the employee holding the job for 8 hours per shift, pursuant to article IV(b)(1) of the NBCWA."

The Issue of Whether Mullins' Waiver of His Part 90 Rights Precluded Him from Reexercising Those Rights

B-E's answer filed in this proceeding raised the defense that Mullins had waived his Part 90 rights. B-E's initial brief (pp. 3-4; 8-11) does not exactly argue that Mullins' waiver of his Part 90 rights in order to hold the position of electrician precluded him from reexercising his rights to obtain the dispatcher's job, but B-E presents the fact that Mullins did waive his Part 90 rights in as unfavorable a light as possible to make it appear that there is something offensive about his having done so. D30's initial brief (p. 9) devotes a page to noting that B-E offered Mullins the job of repairman before and after he was removed from the dispatcher's job. In each instance, D30 states that Mullins waived his Part 90 rights in order to retain the job of electrician. D30 does not explain, however, why Mullins should be precluded from bidding on the dispatcher's job under section XVII(i)(10) of the NBCWA simply because he had previously waived his Part 90 rights. It is clear that MSHA did not intend for a miner to be prejudiced in procuring a position in no more than 1.0 milligram of dust simply because he may have waived his Part 90 rights on one or more previous occasions. The pertinent provisions are sections 90.104(b) and (c) which read:

> (b) If rights under Part 90 are waived, the miner gives up all rights under Part 90 until the miner re-exercises the option in accordance with 90.3(e).
>
> (c) If rights under Part 90 are waived, the miner may re-exercise the option under this part in accordance with 90.3(e).

Section 90.3(e), referred to above, merely states that a miner may reexercise his Part 90 rights by sending a written request to the Chief, Division of Health, at his address in Arlington, Virginia.

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MSHA's rulemaking comments explained the waiver and reexercise of Part 90 rights as follows:

> The right to re-exercise the option to work in a low dust area of a mine was welcomed by some commenters as a means to encourage voluntary participation in efforts to prevent further development of pneumoconiosis. However, others expressed opposition to this provision because they felt it could be a source of possible abuse creating personnel problems at a mine. In this rulemaking process, MSHA has fully considered the pros and cons both of retaining the more limited right to re-exercise the option as it existed under the old section 203(b) program and of providing miners with the broader right to re-exercise the option as adopted under this new Part 90. Under the old 203(b) program, the option could be re-exercised only when a 203(b) miner left one mine and began employment at another mine or when another X-ray taken of the miner showed evidence of the development of pneumoconiosis.
>
> MSHA does not believe that the policy under the old section 203(b) program provided adequate health protection for affected miners. A miner who once waived the option should not have to wait, perhaps several years, before another X-ray reestablishes the miner's eligibility for the option. The subsequent X-ray does nothing more than confirm the previous diagnosis of irreversible and frequently progressive pulmonary impairment. MSHA believes that once a miner has been identified as having evidence of pneumoconiosis and an increased risk of sustaining progressive and permanent pulmonary impairment, that miner should be afforded the opportunity at any time to protect his or her health by re-exercising the Part 90 option.
>
> Several commenters expressed concern that personnel problems would be increased by eligible miners re-exercising their option and moving from job to job until employed in the most desirable jobs. For several reasons, MSHA believes that it is unlikely that this practice of "jockeying" will occur. A miner who already has evidence of lung impairment should regard his or her health as an urgent priority. Increased health risks for this miner are associated with working in areas of a mine where the respirable dust levels exceed 1.0 mg/m3 of air. The miner's concern in preventing progression of pneumoconiosis and in prolonging his or her productive life, whether at work or at home, should minimize any incentive to

> jockey between positions. Moreover, it may often be the case that an eligible miner is working in a high paying job before the option is exercised. Once the option is exercised, the right to retain the previous rate of pay combined with limited job and shift protections under this final rule should encourage the miner to stay in the low dust position at the mine.

45 Fed.Reg. at 80767-77.

MSHA's rulemaking comments show that Mullins was entitled to reexercise his Part 90 rights when he made a bid for the dispatcher's job. Respondents fail to recognize the importance of Mullins' reexercise of his Part 90 rights when he made the bid for the dispatcher's job under article XVII(i)(10) of the NBCWA. It is clear from section 90.104(b), quoted above, that Mullins gave "up all rights under Part 90 until" such time as he reexercised those rights. Inasmuch as the sole purpose of article XVII(i)(10) is to provide jobs in no more than 1.0 milligram of dust to Part 90 miners, or letterholders, Mullins would not have been entitled to bid for the job of dispatcher under article XVII(i)(10) if he had not reexercised his Part 90 rights prior to bidding on the dispatcher's job. Therefore, it is incorrect for respondents to argue that reexercise of Part 90 rights has nothing whatsoever to do with the award of a job in no more than 1.0 milligram of dust under article XVII(i)(10) of the NBCWA.

D30's initial brief (p. 10) also argues that the comments in MSHA's rulemaking proceeding show that it is inconsistent with the purpose of Part 90 for a miner to "jockey" for the best job at the mine. If one reads all of the comments quoted above, it will be realized that MSHA did not say that jockeying for the best position in low dust was inconsistent with the purpose of Part 90. MSHA simply stated that it did not think that jockeying would occur because a miner's concern for his health would cause him to elect to take a job in no more than 1.0 milligram of respirable dust, rather than continue working in more than 1.0 milligram of dust until a vacancy occurred in a choice job located in a low-dust area. Moreover, if a miner is able to perform a "choice" job in a low-dust area, I can think of no reason why he should not be given that job because he has already sacrificed his health by having worked for his employer in a hazardous environment.

A miner is not entitled to exercise his Part 90 rights unless he is working in an atmosphere which has a concentration of more than 1.0 milligram of respirable dust. That is why Caudill argued in his grievance that Mullins' job as an electrician did not expose him to more than 1.0 milligram of respirable dust because his job had not been sampled in his "entire work area" (Exh. 18, p. 2). That contention was

made despite the fact that section 90.3(a) requires that a Part 90 miner's working environment be "continuously maintained at or below 1.0 milligrams per cubic meter of air." B-E was cited for a violation of section 90.100 because samples taken by MSHA showed that Mullins had been exposed to an average of 3.0 milligrams (Tr. 47; Exh. 7). Moreover, B-E had notified MSHA, long before Caudill's grievance was filed, that B-E would be unable to reduce the dust in Mullins' working environment in his job of electrician to no more than 1.0 milligram so as to make the electrician's job comply with the provisions of section 90.3(a) (Exh. 8).

Respondents try to justify the differential in treatment of Part 90 miners on a production crew from those on a nonproduction crew by claiming that miners on a production crew are exposed to more dust than miners on a nonproducing crew (Initial briefs of UMWA, p. 9, and of B-E, p. 13). They make that argument despite the fact that section 70.100 requires operators to reduce the respirable dust at the working face, or on a production crew, to no more than 2.0 milligrams of respirable dust, whereas Mullins had been exposed to at least 3.0 milligrams of respirable dust while working on a nonproduction crew (Tr. 47; Exh. 7).

Another weakness in respondents' arguments which try to justify the preferential treatment given to Part 90 miners on producing crews, as compared with Part 90 miners on nonproducing crews, is that respondents fail to recognize that if it were true, as they allege, that miners on a producing crew are always exposed to more respirable dust than miners on a nonproducing crew, any Part 90 miner working on a producing crew who could bid for a low-dust job under article XVII(i)(10) of the NBCWA would have had to have waived his Part 90 rights, just as Mullins did, in order to have been working in an environment of more than 1.0 milligram of respirable dust so as to have been eligible to bid on a low-dust job pursuant to article XVII(i)(10) when one became available. In other words, the only Part 90 miner working on a production crew at the time the dispatcher's job became vacant, who would not already have waived his Part 90 rights in order to be still working in an environment of more than 1.0 milligram of dust, would be a miner who just happened to have received his letter or Part 90 notification from MSHA on the day that B-E posted the notice of a vacancy in the dispatcher's job.

It is obvious from the discussion above that D30's initial brief (p. 6) incorrectly states that "no one ever dreamed that Part 90 would entitle Mullins to ask for a particular job over a more senior person." The following comments in the Part 90 rulemaking proceeding show that MSHA may not only

have "dreamed" of that possibility, but specifically stated its expectations that such an event would occur:

> While praising job and shift protections, some commenters urged MSHA to limit reassignment of Part 90 miners only to existing jobs which are vacant. It was argued that the rule should not allow the operator to "bump" a non-Part 90 miner out of his or her job and, perhaps, his or her shift in order to assign a Part 90 miner to the same position. According to such advocates, a sacrifice on the part of non-Part 90 miners would create animosity toward the Part 90 program. One commenter also suggested that in the event that no vacant existing position was available on the same shift as previously worked, the operator should temporarily assign the affected miner to a newly-created job on the same shift until a vacancy occurs in an existing position.
>
> The final rule does not incorporate either of these suggestions. In some cases, it is presumed that if a vacant position exists which satisfies the requirements of the respirable dust standard and this section, the operator will assign the Part 90 miner to this available job. To do otherwise may create a chain reaction, whereby the "bumped" non-Part 90 miner will have to be reassigned and trained, and so will the miner who is replaced by this non-Part 90 miner, and so on. Therefore, obvious advantages will probably encourage the operator to assign the Part 90 miner to a vacant existing position. However, there will be occasions where an operator will reassign a Part 90 miner to a position currently held by a non-Part 90 miner. Moreover, if MSHA required the position to be vacant before assignment of a Part 90 miner could occur, the potential number of positions to which an operator could move a Part 90 miner would be significantly reduced. In concluding that Part 90 miners need job and shift protections to encourage participation, MSHA believes it is important to afford the operator ample opportunity to provide these new protections to affected miners.

45 Fed.Reg. 80766.

The above discussion shows that Mullins was entitled to reexercise his Part 90 rights in order to bid on the job of dispatcher and the fact that he had previously waived his Part 90 rights in order to continue working as an electrician cannot be used as a valid reason to claim that he had no right to bid for the job under Part 90 and article XVII(i)(10) of the NBCWA.

The Issue of Whether Mullins Should Be Precluded from Obtaining the Dispatcher's Job Because It Is a Choice Job Paying More per Shift Than the Electrician's Job

Only Mullins' brief (pp. 1-2) discusses the issue as to whether the fact that the dispatcher's job pays more per shift than his job of electrician should be considered as a bar to Mullins' being able to obtain the job under Part 90 and article XVII(i)(10) of the NBCWA. It is clear from MSHA's comments in the rulemaking proceeding that MSHA places great emphasis on any encouragement that can be given by operators to motivate miners to participate in the program implementing the Part 90 standards which are "intended to prevent the progression of pneumoconiosis among miners in the nation's coal mines" (45 Fed.Reg. at 80760). Since a miner would be encouraged to participate in a program which might provide him with a higher income than he was receiving before becoming a Part 90 miner, it is certain that there is no impediment in Part 90 or in the Act which would suggest that a Part 90 miner should not be transferred to a job which might pay him more per shift than he was making on the job he held prior to his transfer.

As a matter of fact, the dispatcher's job was a Grade 4 job under the NBCWA while both the repairman's and electrician's jobs were Grade 5 jobs (Tr. 163; 166). Consequently, the dispatcher's job would have paid Mullins less than the electrician's job if it had not been for the fact that the dispatcher was required to work 45 minutes more than 8 hours per shift. Therefore, it was the fact that Mullins worked more than 8 hours per shift at a Grade 4 level that enabled him to earn more money as a dispatcher than he earned as an electrician or repairman (Tr. 166).

The additional per-shift income associated with the dispatcher's job and the fact that it was on the surface or outside the mine caused it to be one of the most "sought after" jobs at the mine, according to B-E's superintendent (Tr. 160). The desirability of the dispatcher's job accounts for the mine superintendent's statement that he would not have awarded the job to Mullins under Part 90 by itself because other miners wanted the job and it would have been hard to justify awarding the job to Mullins in the first instance if he had not been able to point to a provision in the NBCWA which showed that he was complying with the contract and that it was a fair decision, at least when he first awarded the job to Mullins (Tr. 143; 160).

In any event, there is nothing in the Act or in Part 90 which indicates that a Part 90 miner should be denied a transfer to any job performed in an atmosphere of no more than 1.0 milligram of respirable dust simply because the job sought by the Part 90 miner might pay a few dollars more per shift

than the job the Part 90 miner may be holding prior to his exercising of his Part 90 rights.

The Issue of Whether UMWA May Be a Respondent in a Discrimination Proceeding and Be Required to Pay a Civil Penalty

In the answer to the amended complaint filed on July 2, 1984, by UMWA and in the answer to the amended complaint filed on July 9, 1984, by D30, both respondents took the position that they cannot be made respondents to an action filed by a miner pursuant to section 105(c)(3) of the Act. Neither respondent, however, denies in its initial brief that UMWA and D30 were improperly made parties to this proceeding. D30's reply brief (p. 2) does state that it is "patently ridiculous" for Mullins to claim in his brief (p. 10) that UMWA should be considered to be an "operator" as that term is defined in the Act.

Inasmuch as UMWA and D30 initially took the position that they should not be made respondents in this proceeding, and since D30 still thinks that it is "patently ridiculous" to argue that UMWA may be considered to be an "operator", it appears that I should consider this issue fully in order that there will be no doubt as to which respondents are parties to this proceeding.

When the amended complaint was filed, counsel for Mullins inadvertently omitted Local 1468 from the list of respondents. Subsequently, she filed a motion requesting that she be permitted to supplement the amended complaint to include Local 1468 as a respondent. That motion is hereinafter granted because it is clear from the complaints filed by Mullins with MSHA that he intended to include Local 1468 as a respondent from the very beginning of his action against the UMWA. When the initial brief was filed by counsel for D30, he stated on page one of the brief that he was filing it on behalf of District 30 and Local 1468.

The starting point, in considering whether UMWA, including Local 1468 and District 30, may be named as respondents in an action by a miner pursuant to section 105(c)(3), is an examination of section 105(c)(1) of the Act which reads as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint

> notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

"Person" is defined in section 3(f) of the Act as "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization." That definition is certainly broad enough to include UMWA as the term "person" is used in section 105(c)(1) of the Act. There can be no doubt but that Congress intended for an organization like UMWA to be included within the definition of a "person" who is barred from discriminating against miners. Senate Report No. 95-181, 95th Cong., 1st Sess. 35-36 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977. at 623-624 (1978) (FOOTNOTE.4) states that miners "must be protected against any possible discrimination" and that "[i]t should be emphasized that the prohibition against discrimination applies not only to the operator but to any other person directly or indirectly involved." Therefore, it is obvious that UMWA may be included as a respondent in an action brought by a miner pursuant to section 105(c)(3) of the Act because UMWA, under the Act, is a "person" who is prohibited from discriminating against a miner.

Section 105(c)(3) ends with the sentence: "Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a)". Section 110(a) states that "[t]he operator of a coal or other mine * * * who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which shall not be more than $10,000 for each such violation." The term "operator" is defined in section 3(d) of the Act as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." [Emphasis supplied.]

Article 1A, sections (g), (h), and (i) of the NBCWA deal with B-E's right to contract out to persons other than UMWA such work as transportation of coal, repair and maintenance work, rough grading and mine reclamation work, leasing or subleasing of coal lands, and construction work, including the erection of mine tipples and sinking of mine shafts or slopes. Those provisions prohibit B-E from contracting to others such work "unless all [UMWA] Employees with necessary skills to perform the work are working no less than 5 days per week" and provided such contracting out is "consistent with the prior practice and custom of the Employer at the mine." The UMWA, therefore, by restricting B-E's right to contract out construction and other work at the mine, makes itself an "independent contractor performing services" at the mine and makes UMWA an "operator" within the meaning of section 3(d) of the Act. Since UMWA is an operator, it may, of course, be assessed a civil penalty under section 105(c)(3) of the Act if a violation of section 105(c)(1) is found to have occurred in this proceeding.(FOOTNOTE.5)

Although, as indicated above, D30's reply brief (p. 2) claims that it is "patently ridiculous" for Mullins to claim that UMWA is an "operator" under the Act, D30 does not give any reason for making that assertion. My holding that UMWA is an operator under the Act is perfectly consistent with the definition of "operator" in section 3(d) of the Act. My holding is supported by United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 547 (1980) because, in that case, the union filed a grievance to protest the fact that the employer had laid off 19 union employees who were no longer needed after the employer began to contract to other companies certain maintenance work which had formerly been done by union employees. B-E's mine involved in this proceeding was closed for economic reasons from October 1984 to January 2, 1985 (Tr. 80). It is not idle speculation to believe that UMWA would resist any attempt on the part of B-E to lay off any union employees so that construction or other types of work could be contracted to other parties.

For the reasons given above, I find that UMWA, including Local 1468 and District 30, were properly made respondents in this proceeding and that UMWA may be assessed a civil penalty for a violation of section 105(c)(1).

The Issue of Whether Article XVII(i)(10) of the NBCWA Should Be Declared Null and Void as Being Contrary to Public Policy and Part 90 and Section 105(c)(1) of the Act

Before I rule on the issue of whether article XVII(i)(10) of the NBCWA should be declared null and void, I should note that my authority is only that which is given to me by the Act and the Commission. The only issue which I am authorized to consider in this proceeding is whether respondents discriminated against Mullins in violation of section 105(c)(1) of the Act. In Local Union No. 781 v. Eastern Associated Coal Corp., 3 FMSHRC 1175, 1179 (1981), the Commission noted that it does not "unnecessarily thrust [itself] into resolution of labor or collective bargaining disputes" but that it is "occasionally obligated to examine the parties' collective bargaining agreement" in order to determine the issues raised in a particular case. Mullins' complaint in this proceeding necessarily requires me to examine article XVII(i)(10) of the NBCWA because UMWA's interpretation of that provision caused Mullins to lose his job as dispatcher and precipitated the filing of the complaint which is now before me (Stipulation Nos. 10 through 13).

The Supreme Court held in W.R. Grace & Co. v. Local 759, 461 U.S. 757 (1983), that a court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract is better than the arbitrator's, but the Court also stated that a court may not enforce a collective-bargaining agreement which is contrary to public policy. In Hurd v. Hodge, 334 U.S. 24 (1948), the Court stated:

> The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.

334 U.S. at 34-35. Since, as I hereinafter shall demonstrate, article XVII(i)(10) discriminates against miners who work on a nonproducing crew and otherwise restricts the application

of Part 90, all in violation of section 105(c)(1) of the Act, I believe that a federal court would have the power to declare article XVII(i)(10) null and void as being contrary to public policy which, in this case, is a Federal statute.

Inasmuch as I do not have the authority to declare article XVII(i)(10) to be null and void, I shall briefly note at this time only that article XVII(i)(10), by its very terms, is in violation of section 105(c)(1) of the Act, because, among other things, it permits a miner to exercise his Part 90 rights only once to ask for a job which is vacant, whereas Part 90 allows a miner to reexercise his Part 90 rights as many times as he may wish to do so. Article XVII(i)(10) also discriminates against Part 90 miners by distinguishing miners having pneumoconiosis on a producing crew from miners having pneumoconiosis on a nonproducing crew and by affording the former a preferential right to obtain jobs which the latter are prohibited from obtaining--all in violation of section 105(c)(1) which specifically states that "no person shall * * * in any manner discriminate against * * * any miner * * * because such miner * * * is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101". Article XVII(i)(10) even recognizes in its last sentence that it discriminates against Part 90 miners by stating that "[t] his section is not intended to limit in any way or infringe upon the transfer rights which [Part 90] miners may otherwise be entitled to under the Act." [Emphasis supplied.]

The Issue of Whether UMWA and D30 Discriminated Against Mullins by Maintaining in an Arbitration Proceeding that B-E's Giving the Dispatcher's Job to Mullins Was Contrary to the Provisions of Article XVII(i)(10)

Section 105(c)(1) of the Act provides, in pertinent part, that "[n]o person shall * * * in any manner discriminate against * * * or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner * * * because such miner * * * is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101." Mullins is "the subject of medical evaluations and potential transfer under a standard published pursuant to section 101" because 30 C.F.R. 90.1 specifically states that "[t]his Part 90 is promulgated pursuant to section 101 of the Act and supersedes section 203(b) of the Act." It is undisputed that Mullins was notified by MSHA on August 5, 1980, that he had "enough pneumoconiosis to be eligible for transfer under the [Act] to a less dusty job in the mine (where the concentration of respirable dust is not more than 1.0 milligram per cubic meter of air, or

to an area with the lowest concentration attainable below 2.0) if you are not already working in such area" (Exh. 4).

It is also undisputed that MSHA notified B-E on August 29, 1980, that Mullins was required to be transferred to a position in an atmosphere of no more than 1 milligram unless the position which he then held was within 1 milligram or less (Exh. 5). On September 29, 1980, B-E notified MSHA that it was unnecessary to transfer Mullins because the position of repairman first class which he then held did not expose him to more than 1 milligram (Exh. 6).

After Mullins had subsequently obtained the position of electrician first class through application of his normal seniority rights under the NBCWA, an MSHA inspector issued Citation No. 952288 on September 15, 1981, alleging a violation of section 90.100 because the inspector had taken respirable dust samples which showed that Mullins' position of electrician first class was exposing him to a respirable dust concentration of 3.0 milligrams (Exh. 7). B-E wrote MSHA a letter on August 15, 1981, stating that it was of the opinion that the position of electrician first class could not be reduced to 1 milligram or less and that B-E had offered to transfer Mullins to a position having no more than 1.0 milligram of dust, but that Mullins had declined the offer, stating that he preferred to remain in the position of electrician first class. The letter further advised MSHA that a meeting had been held with Mullins on October 14, 1981, and that Mullins had stated that he recognized that he would be waiving his Part 90 rights by declining to accept B-E's offer to transfer him to a position having no more than 1 milligram of respirable dust (Exh. 8). The inspector terminated Citation No. 952288 on October 27, 1981, on the ground that Mullins had waived his Part 90 rights in order to continue working in the position of electrician first class (Exh. 23; p. 2).

Mullins continued working for B-E in the position of electrician first class until September 17, 1982, when he notified MSHA that he wished to reexercise his Part 90 rights to obtain the job of dispatcher (Exh. 9). Mullins also notified B-E that he was exercising his rights as a Part 90 miner to bid for the job of dispatcher (Exh. 10). B-E notified MSHA in a letter dated December 1, 1982, that Mullins had reexercised his Part 90 rights to bid for the position of dispatcher and that Norman Caudill, another union worker, had filed a grievance to protest B-E's having awarded the job to Mullins and that B-E could not at that time predict the outcome of the challenge (Exh. 12).

Mullins had obtained the position of dispatcher by relying upon Part 90 and article XVII, section (i), paragraph (10), of the NBCWA (Exh. 27) which has been quoted in full in footnote 3 on page 5 above. B-E's awarding the dispatcher's job to Mullins under paragraph (10) was challenged by Caudill who was another union worker but who did not have a letter from MSHA stating that he had pneumoconiosis. The winning argument advanced by Caudill and D30 before the arbitrator was that paragraph (10) allows only letterholders or Part 90 miners "on a production crew" to obtain a job over other miners who would, except for the provisions of article XVII(i)(10) and Part 90, be entitled to the job by application of normal seniority rules. Since Mullins' job of electrician first class was performed on the evening shift which was not a producing shift at B-E's mine, Mullins was not "on a production crew" and therefore D30 argued that Caudill ought to be awarded the job through application of normal rules of seniority because Caudill admittedly had about 3 more years of service than Mullins.

The arbitrator's ruling on the parties' arguments is contained in the last three paragraphs of the decision (Exh. 18, pp. 15-16):

> Notwithstanding the above, however, in my judgment the National Agreement allows only a "letterholder on any production crew" to exercise his letterholder privilege. The evidence indicated that Mullins was an electrician first class on the second shift and that the second shift was a maintenance shift and not a production shift. Consequently, Mullins could not exercise his letterholder privilege under the facts in this case. Although it might be argued that the parties did not intend for "production crew" to have such a restricted meaning, I must assume the parties included the language "letterholder on any production crew" for some specific purpose. This is especially true since Arbitration Review Board Decision 78-61 applies a restricted meaning to the term "produce."
>
> The fact that Mullins may have a separate remedy under the Federal Coal Mine Health and Safety Act of 1969 does not affect his remedy under the National Agreement. Although Mullins may have a legal right to be assigned to a job in a "less dusty area" under the aforesaid law, that right is recognized by the National Agreement i[n] a restricted fashion. While Mullins

> may have a continuing right to work in a less dusty area under the Federal Coal Mine Health and Safety Act of 1969, the National Agreement does not recognize such right under the facts in this case and my jurisdiction is limited by the four corners of the National Agreement.
>
> DECISION:
>
> For the reasons set forth in the foregoing discussion, it is my opinion that the grievance of Norman Caudill is well taken and, accordingly, the grievance is sustained. The Employer is hereby ordered to award the job of dispatcher on the second shift to the grievant.

It would be difficult to find a provision which is any more discriminatory than article XVII, section (i), paragraph (10), of the NBCWA. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY defines "discriminate" as making "a difference in treatment or favor on a class or categorical basis in disregard of individual merit." It is obvious that article XVII (i)(10) of the NBCWA, as interpreted by the arbitrator, makes "a difference in treatment" by allowing only letterholders or Part 90 miners on producing crews to obtain jobs which are associated with no more than 1.0 milligram of respirable dust. It can be argued, as respondents do, that a miner on a production crew is a distinction based on individual merit because such a miner is considered to be working in a face area where respirable dust concentrations are greater than they are on nonproducing crews who work on maintenance shifts as Mullins does. In this case, however, "individual merit" would seem to be determinable only on the basis of which miner has the worst case of pneumoconiosis. If that is used as the basis for determining "individual merit", it is certain that mere segregation into producing and non-producing crews would not be a justifiable way to determine merit because only a physician is qualified to examine x rays for the purpose of determining which miner has the most advanced case of pneumoconiosis. There is no indication that the arbitrator was a physician and even if he was, his expertise would have been useless in this case, because he awarded the job to Caudill who is not a Part 90 miner or letterholder.

Moreover, if production-crew Part 90 miners are to be given a preference because of a presumption that they are exposed to more respirable dust than Part 90 miners on a nonproduction crew, the facts in this proceeding rebut that presumption by showing that Mullins was exposed to at least

3.0 milligrams of respirable dust on a nonproduction crew, whereas section 70.100 of the Regulations requires respirable dust on a production crew to be maintained at not more than 2.0 milligrams. Consequently, not one of the reasons advanced by respondents to justify the discrimination against Mullins has any validity.

The first sentence of article XVII(i)(10) states that the normal seniority provisions do not apply if the job which is posted involves work in a "less dusty area" and one of the bidders is a letterholder or Part 90 miner. That sentence removed the dispatcher's job from a category open to bidding by Caudill because he is not a letterholder. If there had been a bidder for the job who was also a "letterholder on any production crew", the job would then have had to be awarded to him under the provisions of the second sentence of article XVII(i)(10). However, since there was not a "letterholder on any production crew" bidding for the job, the dispatcher's job was correctly awarded to Mullins because he was the only letterholder bidding for the job and that fact necessarily removed the job from normal seniority bidding provisions and made Caudill ineligible for making a bid for the job or challenging the award to Mullins. The second sentence of article XVII(i)(10) mandates that the position be given to the senior letterholder on a production crew only if such a Part 90 miner has made a bid for the job in the first instance. Therefore, D30 especially discriminated against Mullins in this proceeding by taking to arbitration a grievance filed by a non-Part 90 miner who was not entitled to bid for the job at all under article XVII(i)(10) of the NBCWA.

Section 105(c)(1) of the Act provides that "no person shall * * * interfere with the exercise of the statutory rights of any miner." Mullins notified both MSHA and B-E that he was reexercising his Part 90 rights to bid on the job of dispatcher. Respondents have argued at great length in this proceeding that Mullins was not entitled to the job of dispatcher under Part 90 because Part 90 only entitles a miner to work in an area of no more than 1.0 milligram of respirable dust and that Part 90 fails to give him a right to bid for a specific position. That contention has already been rejected in this decision by showing from MSHA's comments in the Part 90 rulemaking proceeding that a Part 90 miner should be able to seek a specific vacancy for any job which is to be performed in no more than 1.0 milligram of respirable dust.

Therefore, respondents are striving to obtain a ruling in this proceeding which is contrary to the intention of Congress when it inserted the provision in the Act granting miners having pneumoconiosis the right to transfer to a

position which does not expose them to more than 1.0 milligram of respirable dust. Congress provided for miners having pneumoconiosis to get out of excessive respirable dust with knowledge that it would affect application of normal rules of seniority for obtaining jobs (Part I of 1969 Leg. History, p. 1303). The 1977 history shows that Congress even changed the name of the branch of the agency which would be administering the 1977 Act from "Mining Enforcement and Safety Administration" to "Mine Safety and Health Administration" for the purpose of emphasizing that the Act was intended to safeguard miners' health as well as their safety (Leg. History, pp. 1316; 1365; 1368).

Article XVII(i)(10) of the NBCWA begins by purporting to be providing all Part 90 miners with the right to obtain jobs located in no more than 1 milligram of respirable dust and suspends normal seniority bidding for those positions if any Part 90 miner or letterholder bids for such a position. Then article XVII(i)(10) interferes with exercise of the Part 90 miners' statutory rights by reapplying seniority to exclude any qualified letterholder or Part 90 miner from obtaining a specific low-dust job if he is working on a nonproducing crew. It is the height of discrimination or interference with Part 90 miners' rights for article XVII(i)(10) to restrict the exercise of those rights only by miners "on any production crew". The Act makes no such distinction, Part 90 makes no such distinction, and section 105(c)(1) of the Act specifically prohibits the making of such a distinction.

Therefore, I find that UMWA, D30, and Local 1468 discriminated against Mullins in violation of section 105(c)(1) of the Act when they brought a grievance to arbitration and succeeded in obtaining an interpretation of article XVII(i)(10) of the NBCWA which resulted in an award of a job performed in no more than 1.0 milligram of respirable dust to a miner who did not have any Part 90 rights at all.

The Issue of Whether Mullins Was Engaged in the Protected Activity of Exercising His Part 90 Rights When He Invoked the Superseniority Provisions of Article XVII(i)(10) of the NBCWA

UMWA's initial brief (pp. 3-7), by arguing that Mullins was not engaged in a protected activity when he obtained the job of dispatcher, is considering one of the tests which the Commission has established for determining whether a discrimination complaint should be granted. In Jack E. Gravely v. Ranger Fuel Corp., 6 FMSHRC 799, 802 (1984), the Commission restated those principles as follows:

> Under the analytical guidelines we established in Secretary on behalf of Pasula v. Consolidation Coal Corp., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Corp. v. Marshall, 663 F.2d 1211 (3d Cir.1981), and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981), a prima facie case of discrimination is established if a miner proves by a preponderance of the evidence (1) that he engaged in protected activity and (2) that some adverse action against him was motivated in any part by that protected activity. If a prima facie case is established, the operator may defend affirmatively by proving that the miner would have been subject to the adverse action in any event because of his unprotected conduct alone. The Supreme Court recently approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., --- U.S. ----, 76 L.Ed2d 667 (1983). See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir.1983) (specifically approving the Commission's Pasula-Robinette test).

UMWA's initial brief (p. 3) begins its argument by incorrectly stating that the issue in this proceeding is "whether or not the superseniority provision in the 1981 NBCWA interfered with Mr. Mullins' exercise of his statutory rights under 30 C.F.R. Part 90". Congress specifically pointed out when it provided for the transfer of miners having pneumoconiosis to a position exposing the miners to no more than 1.0 milligram of dust that it had specifically included in section 105(c)(1) of the Act a provision prohibiting discrimination against miners who are "the subject of medical evaluations and potential transfer under a standard published pursuant to section 101" (Leg. History, pp. 611; 624). UMWA may not pick and choose which miners, who are the subject of medical evaluations and potential transfer, will be permitted to obtain jobs which will expose them to no more than 1.0 milligram of dust. Any Part 90 miner has a right to request that he be given a position in no more than 1.0 milligram of respirable dust.

It is wholly incorrect for UMWA to argue on page four of its initial brief that Mullins obtained the job of dispatcher under article XVII(i)(10) of the NBCWA rather than by exercising his Part 90 rights. As I have already made clear in this

decision, Mullins had a right to reexercise his Part 90 rights any time he wished to obtain a job which would expose him to no more than 1.0 milligram of respirable dust. The record contains copies of the letters which Mullins wrote advising MSHA and B-E that he was reexercising his Part 90 rights to bid for the job of dispatcher (Exhs. 9 and 10). It is incorrect for UMWA and the other respondents in this proceeding to argue that Mullins did not rely upon his Part 90 rights to obtain the job of dispatcher. As I have previously noted, article XVII(i)(10) has no application at all unless a bid is filed for a job in no more than 1.0 milligram of dust by a letterholder or Part 90 miner.

UMWA's initial brief (p. 7) attempts to justify the discrimination in article XVII(i)(10) against Part 90 miners on nonproducing crews by arguing that it could not obtain a provision in the NBCWA for all the Part 90 miners and had to settle for a provision giving the right to bid on jobs in low dust only to Part 90 miners on a producing crew. I shall note below some reasons for doubting the validity of that argument, but the reason that article XVII(i)(10) was written to discriminate against Part 90 miners on nonproducing crews is irrelevant in determining whether there was a violation of section 105(c)(1).

UMWA's initial brief (p. 6) claims that Mullins and B-E were unaware that article XVII(i)(10) is inapplicable to Part 90 miners working on a nonproducing crew until the arbitrator made a ruling to that effect in his decision issued April 15, 1983 (Exh. 18). B-E was one of the parties who signed the NBCWA. The credibility of UMWA's claim that it could only obtain a provision in the NBCWA favoring Part 90 miners on a production crew is severely weakened by its contention that B-E did not know that article XVII(i)(10) applies only to Part 90 miners on a production crew until the arbitrator explained the meaning of that article to it. Presumably, the mine owners are the parties to the contract who resisted making article XVII(i)(10) applicable to all Part 90 miners. It is, therefore, strange indeed that B-E awarded the dispatcher's job to Mullins, a Part 90 miner on a nonproduction crew, without realizing that it had interpreted the NBCWA to permit the very type of transfer which the mine owners had allegedly resisted providing for in the first instance when the NBCWA was originally negotiated.

UMWA's initial brief (p. 6) makes a peculiar use of the facts in this proceeding by arguing that if Mullins had really exercised his Part 90 rights when he sought the dispatcher's job, he would have accepted the alternate job of repairman which was offered to him by B-E when Caudill was awarded the job of dispatcher by the arbitrator. Part 90, as I have

previously shown, permits a miner to waive his Part 90 rights if the job offered to him is not suitable. Mullins believed that the repairman's job would expose him to more respirable dust than the electrician's job (Tr. 50). After all, Mullins contracted pneumoconiosis while working on a nonproducing section because he did not have pneumoconiosis when evaluated for that condition in 1974 (Exh. 1). He did not work on a producing section between 1974 and 1980 (Tr. 38-39). Nevertheless, he was advised in 1980 that he had contracted pneumoconiosis (Exhs. 3 and 5). He had been a repairman during that period and had developed pneumoconiosis while holding that position. Therefore, it is not surprising that he was reluctant to return to the very position which he believed to be responsible for the lung disease which he feels is deteriorating with time (Tr. 116).

An MSHA printout of "selected samples" filed by B-E on August 21, 1985, shows that Mullins was exposed to 3.0 milligrams of respirable dust on May 7, 1975, while working as a repairman, but that is the only sample out of 19 which indicates that Mullins' job as a repairman exposed him to more than 1.0 milligram of respirable dust. On the other hand, no one disputed Mullins' assertion that the area where he worked as a repairman was watered excessively only on the days when he was wearing a respirable-dust sampling device (Tr. 41; 66).

The first sentence of article XVII(i)(10) states that (Exh. 27):

> If the job which is posted involves work in a "less dusty area" of the mine (dust concentrations of less than one milligram per cubic meter), the provisions of this Article shall not apply if one of the bidders is an Employee who is not working in a "less dusty area" and who has received a letter from the U.S. Department of Health and Human Services informing him that he has contracted black lung disease and that he has the option to transfer to a less dusty area of the mine.

There is not a single word in the first sentence of article XVII(i)(10) which requires the Part 90 miner bidding on a specific job to be a Part 90 miner working on a production crew. Mullins was the only Part 90 miner who made a bid for the dispatcher's job. Therefore, I find that Mullins was engaged in a protected activity when he reexercised his Part 90 rights and made a bid for the dispatcher's job in accordance with section 90.3(e) of the Regulations and the first

sentence of article XVII(i)(10) of the NBCWA. I also find that Mullins met the first part of the test given by the Commission in its Gravely decision for proving a prima facie case of discrimination by showing that he was engaged in a protected activity when he requested that he be given the dispatcher's job because he was the only Part 90 miner who made a bid for the job.

The Issue of Whether Article XVII(i)(10) Interferes with Part 90 Rights of Nonproducing Miners

UMWA's initial brief (p. 8) makes an extension of its arguments previously discussed in the preceding portion of this decision. In none of the briefs filed by UMWA, D30, and B-E do they ever directly discuss the second part of the test given by the Commission in the Gravely case for determining whether a complainant has proven a prima facie case of discrimination. The second part of the test is that the complainant prove by the preponderance of the evidence that some adverse action against him was motivated in any part by that protected activity. Inasmuch as the preponderance of the evidence shows beyond any doubt that Mullins was removed from the dispatcher's job solely as a result of his having reexercised his Part 90 rights in order to get the job, there can be no finding other than that Mullins has proven a prima facie case of discrimination by UMWA, D30, and Local 1468 in this proceeding. In its Gravely decision, the Commission stated that if a complainant succeeds in proving a prima facie case, the respondent may defend by affirmatively proving that the complainant would have been subject to the adverse action in any event because of his unprotected conduct alone. The respondents have not attempted to make an affirmative defense by showing that Mullins would have been removed from his dispatcher's job in any event because of some unprotected activity because Mullins did not engage in any activity that is unprotected, especially of the kind that is normally relied upon by respondents in discrimination cases, such as refusal of a miner to obey an order to perform some nonhazardous type of work, or failure of a miner to report for work without being able to give a satisfactory reason for his absenteeism.

In fact, Mullins seems to be a very conscientious employee in every way and no one challenged his statement that (Tr. 96-97):

> I'm not a trouble maker, don't get me wrong. The company has been good to me. I started work--I had never been in the mines before . The length of time I've been with the company I think I've done pretty

> good. I worked myself up until I'm an electrician and I don't think nobody's got too many complaints about my work. And I think Mr. Collier [the mine superintendent] would verify that my job is pretty dangerous that I do. And my only argument was that I wanted fair treatment. * * *

The sole defense which all respondents raise to Mullins' complaint boils down to a claim that UMWA and the Coal Operators can agree to give a Part 90 miner on a producing section more benefits than a Part 90 miner on a nonproducing section and that such a contractual provision may not be held to be discriminatory because it does not take anything away from Part 90 miners on a nonproducing crew because they still have the same rights they always had before the contractual provision in article XVII(i)(10) favoring Part 90 miners on producing crews was negotiated. Specifically, as UMWA states in its initial brief (p. 11), the Part 90 miner on a nonproducing shift still is "entitled to transfer to an area of the mine where the average concentration of respirable dust is continuously maintained at or below 1.0 mg. per cubic meter of air."

The absurdity of the aforesaid argument--that article XVII(i)(10)'s giving Part 90 miners only on a producing crew the right to transfer to a specific job, while suspending normal seniority rights which might entitle non-Part 90 miners to bid for the job, does not discriminate against Part 90 miners on a nonproducing crew because the Part 90 miners on a nonproducing crew still have all the rights they always have had--may be illustrated if one recalls the gas-rationing days of a few years ago when there were long lines of motorists waiting for gas at most of the gasoline stations. In order to reduce the length of the lines on any given day, a rule was imposed in some areas that motorists with license numbers ending in an even number would be able to purchase gas on Mondays, Wednesdays, and Fridays, and that motorists having license numbers ending in odd numbers would be able to purchase gas on Tuesdays, Thursdays, and Saturdays. Most stations were closed on Sundays because they had no gas to sell and saw no need to be open. The aforesaid procedure caused no great complaint from the public and the lines at the gas stations were shortened as a result of the ruling.

A contrary situation would have prevailed, however, if the gas-rationing authorities had declared that only those motorists whose license numbers ended in even numbers would henceforth be permitted to purchase gas on any day and if they had also declared that the rule would not discriminate against motorists whose license numbers ended in odd numbers

because they would still be in the same position they were in before the rule was passed because they would still have all the gas in their tanks which they had before the rule was passed and that the rule in no way discriminated against them because it did not take away from them anything which they had at the time the ruling was made.

UMWA's initial brief (p. 11) states that "[t]he superseniority right accorded production crew miners by [article XVII(i)(10)] benefits those miners who have lost the greatest amount of respiratory function in the course of their labor." As I have previously noted, there is not one word of testimony in this proceeding which shows that miners' lungs on a producing crew are in worse condition than the lungs of miners on a nonproducing crew. MSHA's comments in its rulemaking proceeding stated that pneumoconiosis is irreversible (45 Fed.Reg. at 80763). Also as I have previously noted, a Part 90 miner would not be on a producing crew where dust is greater than 1.0 milligram and would not be in a position to bid for a job pursuant to article XVII(i)(10) unless he had done the same thing Mullins did, that is, waive his Part 90 rights in order to remain in a job which pays well but which would continue to expose him to respirable dust in the concentration of 2.0 milligrams permitted on a producing section. It should be recalled that Mullins was exposed to more than 3.0 milligrams of dust while working on a nonproduction crew (Tr. 47; Exh. 7). Consequently, there is absolutely no record support for UMWA's argument that the preferential treatment given to miners on a producing crew by article XVII(i)(10) is justified because miners on a producing crew "have lost the greatest amount of respiratory function in the course of their labor" (UMWA's brief, p. 11).

Mullins' initial brief cites several cases which show that miners on nonproducing crews contracted pneumoconiosis while performing jobs which were not on producing crews and which were, in fact, performed entirely in surface areas of mines. In Skipper v. Mathews, 448 F.Supp. 300 (M.D.Pa.1977), a miner was awarded black-lung benefits in factual circumstances showing that he had contracted pneumoconiosis from working in a shop to repair mine equipment "covered with coal dust". In Roberts v. Weinberger, 527 F.2d 600 (4th Cir.1975), a miner was awarded black-lung benefits in a factual situation showing that he had worked as a truck driver hauling coal from a strip mine to a tipple. In Adelsberger v. Mathews, 543 F.2d 82 (7th Cir.1976), a miner was awarded black-lung benefits in factual circumstances showing that she worked as a clerical employee who went beneath the tipple to direct the switching of grates and railroad cars. She also was responsible for weighing all the coal. In doing that kind of work, it was said that she was exposed to as much dust as the men who were working in the tipple.

All of respondents' initial briefs (D30, pp. 6-7; B-E, pp. 8-12; UMWA, pp. 4-5) fallaciously argue that a Part 90 miner may not bid on a specific job, but as I have previously stated, there is nothing whatsoever in the Act or Part 90 which restricts a miner from exercising or reexercising his Part 90 rights to get out of respirable dust in excess of 1.0 milligram by transferring to jobs located in less than 1.0 milligram only if those jobs which he or she seeks are unwanted by miners having more seniority than the miner with pneumoconiosis. Part 90 establishes certain minimum prerequisites which the operator must provide for the working environment of Part 90 miners, the primary one being that the miners' working environment may not exceed 1.0 milligram of respirable dust, but Part 90 at no place states that if a Part 90 miner asks that he be allowed to fill a vacancy in a particularly desirable job having the 1.0 milligram or less criterion, that the mine operator should deny that request just because some other miner with more seniority than the Part 90 miner has, wants that particular job.

One of the objections voiced by Congressman Erlenborn to the provision in section 203(b) of the 1969 Act [now Part 90] which requires that miners with evidence of pneumoconiosis be transferred to an area having no more than 1.0 milligram of dust, was that Congress did "not know what mischief we are playing with seniority rights in the unions when we give a man an option as to the place where he can work" (Part 1 of 1969 History, p. 1303). Therefore, Congress enacted section 203(b) with full knowledge that it might adversely affect seniority rights. Congressman Erlenborn also made it perfectly clear that miners other than those on production shifts are included among those who are exposed to excessive amounts of respirable dust when he stated as follows:

> One of the things that this report pointed out was a thing that apparently had not been recognized before, namely, that not all dust is generated at the working face of the mine. The ventilation air coming in behind the miner, in the passageway, in the halls, where the already mined coal is being taken out of the mine, picks up dust and brings it in to the working face, so that there is dust already present in the ventilation air that reaches the working face of the mine. Up until now most of us had the conception that all of the dust was created at the working face and all we had to do was get it away from the miner, but the very air that comes in to the working face, we understand now, has such a concentration of dust.

Part 1, 1969 Legislative History, p. 1303. Congressman Erlenborn's statement is supported by the testimony of both Mullins and Collier in this proceeding because Mullins believed that he was exposed to more than 1.0 milligram of respirable dust when he worked as a repairman on a nonproducing shift because he had to dig around in the dust when replacing parts along conveyor belts (Tr. 50). Collier similarly testified that the electrician's job on a nonproducing shift could not be reduced below 1.0 milligram of dust because of the practice of having the electricians blow coal dust out of electrical boxes (Tr. 132).

D30's reply brief (p. 4) states:

> My clients need no lectures from some attorney on their responsibilities to black lung victims. The United Mine Workers of America have fought for safer working conditions in this country for nearly a century. The UMWA lobbied for these federal mine safety laws that Mullins has abused. [Emphasis in original.]
>
> Mullins' Part 90 rights or health and safety are not issues in this case. Beth-Elkhorn offered to move Mullins to a less dusty job. Mullins' frivolous complaint has cost the UMWA, Beth-Elkhorn and the federal government money and resources that would have been better spent in efforts to remedy actual hazards to the health and safety of working miners.

It has not been my intention in this decision to be critical of UMWA for its efforts to bring about improved working conditions in coal mines, but I have no alternative but to show that article XVII(i)(10) of the NBCWA discriminates against Part 90 miners on nonproducing crews. Mullins had a right to take the action he did in filing the discrimination case in this proceeding and his doing so should not be categorized as an abuse of the mine safety laws.

At least one Congressman was critical of the role which UMWA played in obtaining black-lung benefits to miners at the time the 1969 Act was passed. Specifically, Congressman Heckler said:

> I am frank to state that one of the major reasons I became disenchanted with the top leadership of the United Mine Workers of America was the fact that down through the years they have exerted very little initiative and pressure toward improving the safety laws or regulations. Furthermore, even after the

> Farmington disaster, the top leadership of the United Mine Workers of America bluntly stated that in their judgment it would not be possible to enact any health protection or coal dust standard for the miners this year. Later, they took the same timid approach toward the enactment of compensation for victims of black lung. For a long time, they clung to the obviously gapping loophole provided by the Federal Coal Mine Safety Board of Review. These facts are a matter of record. * * *

Part 1, 1969 Legislative History, p. 1582. D30 should bear in mind that section 105(c)(1) also prohibits discrimination against a miner for having "filed or made a complaint under or related to this Act" or because he "has testified or is about to testify in any such proceeding."

Section 101(a)(7) of the Act provides that "where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned." [Emphasis supplied.] The use of the words "shall be" probably accounts for the following statement in MSHA's rulemaking proceeding:

> MSHA considered the appropriateness of providing for the mandatory transfer of miners who have evidence of pneumoconiosis. However, MSHA received several comments from labor and industry representatives expressing unanimous opposition to any mandatory transfer provisions. Commenters felt that a mandatory transfer program would create severe enforcement problems; create hostility towards the program, resulting in possible work stoppages; create distrust of MSHA; violate the confidentiality of the X-ray program by revealing information about a miner's medical condition; and decrease participation in the NIOSH medical surveillance program, depriving the miners of information about their health and depriving NIOSH of important epidemological data. In view of the possible problems with a mandatory transfer provision, the rule retains the option to exercise Part 90 rights and is intended to encourage more miners to exercise the option. However, MSHA will monitor participation rates over the next three years, and if the number of miners exercising the Part 90 option does not substantially increase, MSHA will reconsider the appropriateness of a mandatory transfer program.

45 Fed.Reg. at 80763-80764.

It is rather obvious that giving the miners the right to waive their Part 90 rights so as to remain working in an atmosphere which has more than 1.0 milligram of respirable dust is causing miners, such as Mullins, to avoid a transfer out of dust because of a dislike of the job which is offered to them or because they distrust the sampling methods which are being used to assure that they are not exposed in existing positions, or in positions to which they may be transferred, to more than 1.0 milligram of dust. If they were compelled to transfer to a job in an atmosphere of not more than 1.0 milligram of dust, they would not continue to work, as Mullins has done, in an atmosphere which may be exposing them to as much as 3.0 milligrams of dust.

MSHA may not be doing all that it should in connection with sampling the working environment of Part 90 miners because Mullins testified that he expressed to MSHA's inspectors his belief that B-E was excessively watering his working environment only on the days when he was wearing a respirable-dust sampler (Tr. 41; 66). Mullins stated that one of the inspectors agreed with him (Tr. 67). Mullins also made the allegation about excessive watering in his letter to Congressman Perkins (Exh. 15), but Mr. Ford answered the Congressman's letter by stating, among other things, that MSHA could take no action pertaining to Mullins' complaint about excessive watering because that was one of the ways that respirable dust may legally be reduced (Exh. 17).

On the other hand, section 90.300(a) requires the operator to submit a revised respirable-dust control plan if he changes his dust-control procedures in order to reduce the respirable dust in a Part 90 miner's working environment. In this proceeding, if an inspector agreed that Mullins' working environment was being maintained at no more than 1.0 milligram by excessively watering Mullins' working place only on the days when Mullins was wearing a respirable-dust sampler, then the inspector should have examined B-E's dust-control plan to determine whether the plan provided for the extensive watering that was being done when Mullins' working place was sampled. If the dust-control plan did not provide for the amount of watering which was being done when Mullins' working place was sampled, it would seem to be appropriate in such a case for MSHA to require that B-E submit a revision to its dust-control plan requiring extensive watering, and should have made certain that the revised plan was continually used on a daily basis so that Mullins would never have been exposed to more than 1.0 milligram of dust, as required by section 90.3(a) of the Regulations.

The discussion above is not meant to be critical of MSHA for its administration of the respirable-dust program because I am sure it is a very difficult aspect of the mine

health laws to regulate. It is also possible that MSHA performed the very acts which have been suggested above and that Mullins just failed to mention that in his testimony. Still, Mullins testified that he did not trust MSHA's administration of the Part 90 program (Tr. 57) and that may indicate that MSHA needs to devote more attention to the way the Part 90 program is being conducted than has been given to its efforts up to the present time.

The Court Cases Cited by Respondents Do Not Support Their Claims of Nondiscrimination in This Proceeding

D30's initial brief (pp. 11-12) argues that it was B-E's obligation to comply with the law by providing Mullins with a job in no more than 1.0 milligram of dust and to comply with the bargaining agreement by awarding the dispatcher's job to Caudill. D30 cites W.R. Grace & Co. v. Local 759, 461 U.S. 757 (1983), in support of the aforesaid contention, noting that the Supreme Court refused in that case to allow Grace to lay off senior employees in violation of a collective-bargaining agreement in order to hire minority workers to comply with Title VII of the Civil Rights Act. D30's reliance on the Grace case is misplaced because the result in Grace rested entirely on the fact that EEOC and Grace had entered into a conciliation agreement which was in conflict with the collective-bargaining agreement and the union, though invited, had declined to participate in the formation of the conciliation agreement. In such circumstances, the Court held that an arbitral award made pursuant to a collective-bargaining agreement ought to be honored and enforced by the courts. The Court, however, made it clear that collective-bargaining agreements need not be enforced when they are contrary to public policy by conflicting with a discrimination provision in a Federal statute, as article XVII(i)(10) of the NBCWA involved in this proceeding does. Hurd v. Hodge, 334 U.S. 24, 34-35 (1948).

UMWA's initial brief (p. 9) cites Goodin v. Clinchfield Railroad Co., 125 F.Supp. 441 (E.D.Tenn.1954), aff'd, 229 F.2d 578 (6th Cir.1956), cert. denied, 351 U.S. 953 (1956), in support of an allegation that article XVII(i)(10) can be considered to be unlawful discrimination against Part 90 miners on nonproduction crews only if that provision has been "crafted as a means of penalizing non-production crew members". Insofar as the issue of discrimination is concerned, the collective-bargaining agreement in Goodin pertained to a provision which required all conductors and trainmen to forfeit all seniority and retire from service upon attaining age 70. The court quoted from another judge's decision and stated that:

> compulsory retirement is not discriminatory in the sense that it affects only certain employees and not others. The compulsory retirement age of seventy years affects all employees alike in its ultimate results, since all employees, who live and remain with the carrier long enough, will some day reach the retirement age and will be obliged to leave their employment. True, some will feel its effectiveness immediately, whereas others will not feel its touch until some future, but ascertainable, time. That fact, however, does not militate against its present universal applicability.

125 F.Supp. at 446. The question in this proceeding is whether article XVII(i)(10) of the NBCWA is discriminatory under section 105(c)(1) of the Act. As I have already shown at great length above, article XVII(i)(10) does not affect all miners equally, as did the compulsory retirement provision in the Goodin case; therefore, Goodin has no application in this proceeding.

UMWA's initial brief (p. 9) cites Williams v. Pacific Maritime Association, 617 F.2d 1321 (9th Cir.1980), in support of its statement that a union "may negotiate for and agree upon contract provisions involving disparate treatment of distinct classes of workers * * * so long as such conduct is not arbitrary or taken in bad faith." The two groups of employees involved in the Williams case were all longshoremen with different qualifications who were to be promoted on the basis of four specific standards which were required to be applied uniformly and with no exceptions. In this proceeding, article XVII(i)(10) of the NBCWA grants preferences to miners on production crews but there is no difference whatsoever in their qualifications. They are all Part 90 miners who have been notified that they have pneumoconiosis and are entitled to work in an area exposing them to no more than 1.0 milligram of respirable dust. Moreover, Caudill was awarded the dispatcher's job in low dust even though he was not a Part 90 miner on either a producing or nonproducing crew.

Mullins' brief (p. 5) refers to Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944). In that case, the Court described a provision which was to be inserted in a collective-bargaining agreement which would have the effect of hiring only "promotable" firemen. By practice, only white firemen could be promoted to the job of engineer. As a result, all black firemen would ultimately have been excluded from service. The Court stated:

> Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is

> enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discrimination not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representatives to make such discriminations.

323 U.S. at 203. UMWA did not provide for relevant differences in preferring Part 90 miners on producing crews over Part 90 miners on nonproducing crews. Just as in favoring white firemen over black firemen, it is not possible to determine which Part 90 miner should be allowed to obtain a job in a low-dust area simply by classifying him as one who works on a producing shift instead of a nonproducing shift.

The case of Automotive, Petroleum & Allied Ind. v. Gelco Corp., 584 F.Supp. 514 (E.D.Mo.1984), cited on page seven of Mullins' brief, shows how UMWA and D30 discriminated against Mullins in this proceeding. In the Automotive case, the court granted a motion for summary judgment filed by an intervening miner who had been awarded a partsman's job on the basis of his qualification of having had 5 years of experience working in a parts department, whereas the union wanted to force the employer to arbitrate another employee's grievance in circumstances showing that the grievant had greater seniority than the employee who had been awarded the partsman's job, but who had had only 3 months of experience in a parts department. The court held that the union's decision to take the position of the grievant was irrational because it was not based on an "informed, reasoned judgment regarding the merits of the claims in terms of the language of the collective bargaining agreement." 584 F.Supp. at 516.

In this proceeding, D30 took Caudill's position without engaging in a reasoned judgment regarding the merits of Caudill's claims. Caudill's grievance initially challenged the accuracy of B-E's belief that Mullins' job could not be lowered to 1.0 milligram or less of respirable dust and also challenged the accuracy of MSHA's dust samples showing that Mullins was exposed to 3.0 milligrams of dust by arguing that Mullins' entire work place had not been sampled (Exh. 18, p. 2). In making that argument, Caudill made a collateral attack on the accuracy of MSHA's respirable-dust program because MSHA had issued a citation based on two samples showing that Mullins was exposed to an average of 3.0 milligrams of respirable dust (Exh. 7). B-E did not contest the accuracy of the citation.

As I have previously noted, the first sentence of article XVII(i)(10) suspends the normal seniority provisions for bidding on jobs located in no more than 1.0 milligram of dust if any Part 90 miner or letterholder on a producing or nonproducing shift bids for the job. Since Mullins was the only Part 90 miner bidding on the dispatcher's job, he was entitled to it, and seniority should not have been considered at all unless another Part 90 miner on a producing shift had made a bid for the job. Since Caudill was not a Part 90 miner or letterholder, he was not entitled to file a grievance for the job under the collective-bargaining agreement and UMWA discriminated against Mullins by taking Caudill's grievance to arbitration so that a miner who did not have pneumoconiosis at all could be awarded a job which had already been properly awarded to Mullins as the only Part 90 miner bidding for the job.

Indeed, it appears that the Supreme Court's statement in Vaca v. Sipes, 386 U.S. 171 (1967), is fully applicable to D30's and UMWA's action in this proceeding, that is, "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190.

UMWA's reply brief (pp. 3-4) attempts to justify its discriminatory treatment of Mullins in this proceeding by arguing that it has been given a "wide range of reasonableness" in negotiating collective-bargaining agreements as opposed to administering them. UMWA cited Ford v. Huffman, 345 U.S. 330 (1952), in support of that claim, but that case in no way supports UMWA's having negotiated the discriminatory article XVII(i)(10) involved in this proceeding. In the Huffman case, the collective-bargaining agreement required Ford to credit seniority for the time of employees who served in the armed forces subsequent to June 21, 1941, regardless of whether they had been employed by Ford prior to that time. Such crediting gave employees hired after June 21, 1941, but who entered the armed services during WWII and then returned to Ford, less seniority than persons who were hired after WWII but who had not previously worked for Ford at all. The Court noted that the Veterans' Preference Act of 1944 required the crediting of time served in the armed forces. The Court states that it:

> is not necessary to define here the limits to which a collective-bargaining representative may go in accepting proposals to promote the long-range social or economic welfare of those it represents. Nothing in the National Labor Relations Act, as amended, so limits the vision and

> action of a bargaining representative that it must disregard public policy and national security. Nor does anything in that Act compel a bargaining representative to limit seniority clauses solely to the relative lengths of employment of the respective employees.

345 U.S. at 342.

As I have already shown in this decision, UMWA, not B-E, is the party to the NBCWA which insisted on interpreting article XVII(i)(10) so as to exclude a Part 90 miner on a nonproducing crew from bidding on a job located in no more than 1.0 milligram of dust. Therefore, UMWA's claim that it could not negotiate a contract provision which would extend the right to bid on jobs in low dust to all Part 90 miners is not supported by the facts in this proceeding. In any event, UMWA in this proceeding, cannot rely upon the Huffman case in support of its having negotiated a discriminatory collective-bargaining agreement because UMWA was hardly promoting the "long-range social" welfare of Part 90 miners when it negotiated a provision which was designed to assist only Part 90 miners on a producing crew to get out of the dust which is gradually killing them, particularly when it is considered that Part 90 miners on a producing crew have to waive their Part 90 rights, just as Mullins did, in order to continue working on a producing crew where they are legally exposed to a working environment of up to 2.0 milligrams of respirable dust.

UMWA's reply brief (pp. 2-3) also relies upon Smith v. Hussman Refrigerator Co., 619 F.2d 1229 (8th Cir.1980), in support of its claim that it was fairly balancing the collective and individual rights of all the miners when it negotiated the NBCWA. UMWA's reliance on the Hussman case is misplaced because in that case, the court did find that the union had breached its duty of fair representation with respect to grievances arising under a modified seniority clause in a collective-bargaining agreement. The court stated that:

> The union's choice to process all grievances based on seniority discriminated against employees receiving promotions on the basis of merit. This conduct may be viewed as a perfunctory dismissal of the interests and rights of plaintiffs. The union simply failed to represent them in any way. The modified seniority clause specifically required balancing the interests of merit and seniority

> whenever Hussman deemed that the position warranted selection on the basis of merit.

619 F.2d at 1239. The court made a statement which is especially pertinent in this proceeding when it is considered that D30 supported Caudill's claim based entirely on his argument that he had been working for B-E for about 3 years longer than Mullins had.

> While we do not suggest that a union must hold internal hearings to investigate the merits of every grievance brought to it, in certain situations it may be inappropriate for a union to tie its own hands by blind adherence to a policy of favoring employees with seniority in order to avoid disputes between employees.

619 F.2d at 1240.

It is true, as D30 argues in its reply brief (pp. 3-4), that some disputes are properly resolved on the basis of seniority, but D30 incorrectly argues in its reply brief (p. 3) that Mullins tried to discriminate against his fellow workers who had more seniority than he did by trying to use article XVII(i)(10) of the NBCWA to get a job to which miners having more seniority than Mullins has were entitled. Even though D30 persuaded the arbitrator that Mullins was not entitled to the dispatcher's job under article XVII(i)(10), it is incorrect that Mullins tried to use that provision to discriminate against other miners with more seniority than he had. D30 has refused to face up to the plain facts in this proceeding, namely, that Mullins was a Part 90 miner who clearly was entitled to bid on the dispatcher's job under the first sentence of article XVII(i)(10).

If article XVII(i)(10) could not reasonably have been interpreted as B-E's superintendent did, so as to award the job to Mullins, this case would never have existed in the first instance. Moreover, as I have already noted in this decision, Congress knew that providing Part 90 miners with jobs in no more than 1.0 milligram of dust would necessarily interfere with the normal application of seniority to award jobs to employees with the greatest lengths of service. Under the arbitrator's decision, if Mullins had been a miner on a production crew, he would have been allowed to retain the job despite the fact that Caudill had 3 more years of service than Mullins. The discrimination, as D30 well knows, came from its insistence that seniority has to give ground only to Part 90 miners working on a producing crew. D30 and Caudill clearly discriminated against Mullins by invoking seniority to defeat the transfer to a

low-dust area of a Part 90 miner as was intended by Congress when it provided for such transfers in section 101(a)(7) of the Act.

B-E's reply brief (p. 4) cites United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 547 (1980), in support of its claim that B-E's action of removing Mullins from the dispatcher's job and awarding it to Caudill, in compliance with the arbitrator's decision, should be upheld because there is a strong Federal policy of promoting industrial stability through arbitration of labor disputes. The Supreme Court required the employer in the Warrior and Gulf case to arbitrate a provision in a collective-bargaining agreement despite the fact that the employer considered the dispute to involve a function of management. While it is true, as a general principle, that there is a Federal policy to the effect that industrial stability is promoted by arbitration of labor disputes, that stability should not be accomplished, as it was in this proceeding, by violating another Federal policy which requires that miners with pneumoconiosis be allowed to fill vacancies in jobs which are located in no more than 1.0 milligram of respirable dust.

B-E's reply brief (p. 5) cites Wynn v. North American Systems, 608 F.Supp. 30 (N.D.Ohio 1984), in support of its argument that B-E should not be required to defend its action of awarding the dispatcher's job to Caudill, instead of Mullins, because B-E was complying with an arbitral decision. In the Wynn case, a white and a black employee were both discharged for fighting on an assembly line. The discharge was made the subject of an arbitration proceeding and the arbitrator reinstated the white employee with full seniority but without any back pay or other benefits, but he upheld the discharge of the black employee on a credibility determination that the black employee had hit the white employee in the face which had caused the white employee to require treatment in a hospital. The black employee brought a discrimination action against the company in the district court under Title VII of the Civil Rights Act. The court granted the employer's motion for summary judgment on the ground that deference given to the results of arbitration awards, along with the Federal policy of promoting industrial stability by use of arbitration to settle labor disputes, should prevail over a person's independent right to enforce equal employment rights under Title VII.

B-E's reliance on the Wynn case is misplaced because this proceeding involves a Federal statute which expressly prohibits discrimination against miners who are "the subject

of medical evaluations and potential transfer under a standard published pursuant to section 101". That statute was designed to prevent the very type of discrimination which occurred in this proceeding. Furthermore, in article III(c) of the NBCWA, the parties state that they are in complete accord with the purpose of the Congress expressed in section 2 of the Act and that they "do hereby affirm and subscribe to the principles as set forth in such section 2 of the Act" (Exh. 27).

Section 2(a) of the Act, with which the parties say they are in full accord, provides that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner." Section 2(b) of the Act states that "deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines cause grief and suffering to the miners and to their families". [Emphasis supplied.] I do not understand how the parties can insert such noble goals in the first part of the NBCWA and then abandon those goals to pursue the course of action taken in this proceeding which resulted in giving the best job in low dust to a miner with undiseased lungs who had the most seniority.

The Issue of Whether B-E Discriminated Against Mullins by Complying with the Arbitrator's Award Instead of Insisting that It Was Precluded by Section 101(a)(7) of the Act and Part 90 from Complying

Mullins' brief (p. 9) asserts that B-E discriminated against Mullins by removing him from the dispatcher's job in compliance with the arbitrator's award of the job to Caudill. Mullins argues that the discrimination came about from the fact that section 101(a)(7) provides that "[w]here appropriate, the mandatory standard shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned." [Emphasis supplied.] Mullins notes that his removal from the job of electrician to a working place exposing him to no more than 1.0 milligram of dust had been accomplished when B-E assigned him to the dispatcher's job and that he should not have been removed from that job in compliance with the arbitrator's award because B-E was obligated to comply with the provisions of the Act rather than the provisions of the collective-bargaining agreement.

Mullins' argument which is summarized above raises a question very similar to that decided by the Supreme Court in W.R. Grace Co. v. Local 759, 461 U.S. 757 (1983), previously discussed in this decision for a different reason.

In the Grace case, the employer had entered into a conciliation agreement, to which the union was not a party, for the purpose of eliminating racial discrimination pursuant to Title VII of the Civil Rights Act. When Grace laid off some employees in order to comply with the conciliation agreement, those employees obtained an arbitral award of back-pay damages under the collective-bargaining agreement. A court held that the seniority provisions of the agreement could be modified to alleviate the effects of past discrimination. The union appealed and it was held that the agreement could not be modified without the union's consent and that Grace was obligated to arbitrate the grievances. Two arbitrators issued subsequent decisions, one finding that Grace was not obligated to comply with the first arbitration award since Grace was under a court order holding that the seniority provisions of the agreement did not have to be followed. The other arbitrator held that Grace was bound by the collective-bargaining agreement and was required to make the back-pay award. On further appeal, the Fifth Circuit held that the back-pay award had to be made. W.R. Grace Co. v. Local Union No. 759, 652 F.2d 1248 (1981). The Supreme Court upheld the Fifth Circuit's decision, noting that courts do not have authority to overrule arbitration awards simply because they may disagree with the decision reached by the arbitrator. The Court, as I have previously noted in this decision, held, however, that a collective-bargaining agreement, like the one in this proceeding, which is contrary to public policy by being in violation of a Federal statute does not have to be enforced.

The discussion of the Grace case above shows that B-E could have acted in good faith in complying with the arbitrator's award because, until the matter was presented in this proceeding, the holding of the Supreme Court in the Grace case would seem to require B-E to comply with the arbitrator's decision until such time as article XVII(i)(10) of the collective-bargaining agreement on which the arbitral ruling in this proceeding was based, has been found to be unenforceable as being contrary to the provisions of section 105(c)(1) of the Act.

There is, however, another Supreme Court case in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), which seems to support a finding that B-E should be held liable, along with UMWA, D30, and Local 1468, for the discrimination against Mullins which occurred in this proceeding. In the Hines case, some employees were discharged for dishonesty under an arbitral decision. The employees brought an action under section 301 of the Labor Management Relations Act claiming that the falsity of the charges could have been discovered by the union representatives with little

investigative effort because the motel clerk had billed the employees for their rooms at an excessive rate and had kept the difference between the billed rate and the actual rate. The district court granted summary judgment for the employer on the ground that the arbitral decision was final and binding, absent a showing of bad faith, arbitrariness, or perfunctoriness on the union's part. The court of appeals reversed as to the union because the facts showed that it had acted in bad faith or arbitrariness, but agreed that the action should be dismissed as to the employer unless it had been shown that the employer had acted in bad faith or in a conspiracy with the union. The Supreme Court reversed, holding that it was improper to dismiss the action as to the employer because, if the employees should be able to show a breach of duty by the union in providing fair representation, the arbitral award would be tainted and the employees would be entitled to an appropriate remedy against the employer as well as the union.

In this proceeding, while B-E properly awarded the dispatcher's job to Mullins under article XVII(i)(10) of the NBCWA, B-E also took the position that Mullins was not entitled to the dispatcher's job under Part 90 (Tr. 132) despite the fact, as I have already noted in this decision, there is nothing in Part 90 which prohibits a Part 90 miner from asking that he be allowed to fill a vacant low-dust position simply by reexercising his Part 90 rights. Therefore, B-E discriminated against Mullins by advising him in the first instance that he was not entitled to fill the vacancy in the dispatcher's job. It was clearly a job located in no more than 1.0 milligram of respirable dust and the comments in the Part 90 rulemaking proceeding show that several parties believed that Part 90 miners would be able to obtain some, if not all, of the best jobs in low dust simply because of their exercise or reexercise of their Part 90 rights. 45 Fed.Reg. at 80768 and section 101(a)(7) of the Act.

D30 represented Caudill and B-E represented Mullins before the arbitrator. The arbitrator's decision states that "[b]oth parties were ably represented and were given full opportunity for presentation of evidence and arguments" (Exh. 18, p. 3). Therefore, while it would appear that the arbitral decision involved in this proceeding is not "tainted" like the one at issue in the Hines case discussed above, it does not seem that Mullins was fairly treated after the dispatcher's job was awarded to Caudill by the arbitrator because Mullins testified that he argued before the arbitrator that he was entitled to the job under the Act and Part 90. The arbitrator held that he was bound by the NBCWA irrespective of any rights which Mullins might have under Federal law (Exh. 18, p. 15).

At the hearing held in this proceeding, counsel for D30 stated (Tr. 13):

> Now on the points of law in this case District 30 wants to make the point that even if the arbitrator in the labor case was wrong in holding that Mr. Caudill had that job, Mr. Mullins did not try to vacate that award or exercise the super seniority rights through the courts under the contract.

Mullins denied D30's claim that he had not tried to get the arbitrator's award reversed. He said that he attempted "to regain" his "rights as a Part 90 miner" because he felt that he had "been done wrong" (Tr. 51). He said that he asked D30's president and MSHA for help and wrote to the International Union trying to get someone to assist him in getting the arbitrator reversed, but no one would listen to his pleas (Tr. 50-51; 93). Counsel for UMWA wrote me a letter on March 2, 1984, in response to a letter in the nature of a prehearing order which I had sent to the parties. Attached to counsel's letter was a letter from UMWA's Deputy Director of Occupational Health to Mullins dated April 16, 1983. The first paragraph of that letter states as follows:

> This letter is in response to your letter of July 25 to President Trumka concerned with your experience as a Part 90 miner. There are two points that I want to make in this letter. First, your right to obtain the dispatcher's job at the Beth-Elkhorn mine has been denied by the Arbitrator on April 15. As far as I am concerned, that settles the matter and I do not think further discussion of that issue would be fruitful.

The letter from UMWA supports Mullins' claim that he had tried to get relief from the arbitrator's ruling from his own union before resorting to the discrimination complaint which he ultimately filed because no one in the union or elsewhere would listen to his contentions.

It is a fact that B-E and other coal operators are parties to the NBCWA. Since B-E was the only representative Mullins had before the arbitrator, it seems to me that it ought to have been interested enough in getting its position upheld to support Mullins in his efforts to get some authoritative ruling on why article XVII(i)(10) should not apply, or be modified to apply, to all Part 90 miners regardless of whether they are on producing or nonproducing crews.

As the Supreme Court stated in Conley v. Gibson, 355 U.S. 41, 46 (1957):

> The bargaining representative's duty not to draw "irrelevant and invidious" distinctions among those it represents does not come to an abrupt end, as the respondents seem to contend, with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement. [Footnotes omitted.]

Since B-E was a party to the NBCWA and was the party which represented Mullins before the arbitrator, it should have been willing to reexamine the NBCWA, along with UMWA, to determine why it should not be revised in order to permit all Part 90 miners to bid on vacancies in positions performed in less than 1.0 milligram of respirable dust. By simply taking the easy way out and acquiescing to an arbitrator's award with which it was in disagreement, B-E should be held liable for allowing the discrimination against Mullins to continue without making any effort to obtain a modification of article XVII(i)(10) to eliminate the discrimination.

Since the UMWA is responsible for representing all the miners, not just Caudill, it is unseemly for D30's counsel to come into this proceeding and criticize Mullins for not appealing the arbitrator's award in view of UMWA's position, expressed in the letter of April 16, 1983, to the effect that the arbitrator's decision had settled the matter and made further discussion unfruitful. Thus, while the arbitral award involved in this proceeding may not be as "tainted" as the one described in the Hines case discussed above, it is certain that UMWA has been most insensitive to Mullins' claims that his Part 90 rights were improperly restricted and rendered meaningless by article XVII(i)(10) of the NBCWA.

In view of the fact that no one in the union or in management would represent Mullins in his efforts to obtain some relief from the discrimination to which he was subjected by the interpretation given to article XVII(i)(10) by the arbitrator, I believe that it would be improper for me to hold that B-E was in no way responsible for the discrimination which I have found occurred when Mullins was

removed from the dispatcher's job in violation of section 105(c)(1) of the Act. For the foregoing reasons, I find that B-E discriminated against Mullins and should be required to share equally with the union (50% to be paid by B-E, 25% by UMWA, and 25% by D30 and Local 1468) in providing the monetary relief to which Mullins is entitled, as hereinafter ordered.

Relief Issues

Introduction

At the time the hearing in this proceeding was concluded, I did not require the parties to present evidence as to the relief issues of back pay and attorney's fees because I believed that the legal briefs which the parties were going to file would be even more persuasive than their oral arguments at the hearing and that I would find it necessary to deny Mullins' complaint. After I had received and read the parties' initial and reply briefs, however, I realized that they had not really explained how article XVII(i)(10) of the NBCWA could be found to be other than a revision of Part 90 miners' rights and therefore a violation of section 105(c)(1) of the Act. Since the Commission has held in such cases as Council of Southern Mountains, Inc. v. Martin County Coal Corp., 2 FMSHRC 3216 (1980) and Bobby Gooslin v. Kentucky Carbon Corp., 4 FMSHRC 1 (1982), that a judge may not issue a final decision as to which petitions for discretionary review may be filed until such time as he has awarded the complainant all the relief to which he is entitled, I issued on July 25, 1985, a procedural order requesting that the parties submit stipulations as to the relief issues of back pay, attorney's fees, and other expenses to which complainant might be entitled. The order also provided for the parties to advise me if they could not stipulate sufficient facts for me to determine all relief issues so that a hearing could be convened to consider those issues.

Only counsel for D30 filed a written response to the procedural order of July 25, 1985. His reply stated that he would not stipulate to anything and accused me of having prejudged the issues. Counsel for Mullins called me to state that she was trying to arrange a conference call to determine if the parties could reach a stipulation, but she failed to get back in touch with me until the time for answering the requests made in the procedural order had expired. Consequently, on August 29, 1985, I issued an order providing for a hearing to be held with respect to all relief issues. Counsel for D30 filed on September 23, 1985, a motion requesting that I recuse myself as the judge in this proceeding. The last section in this decision considers and denies D30's motion to recuse.

D30 also filed other pleadings in which it agreed to accept the facts which counsel for the other parties had agreed to submit with respect to back pay and attorney's fees. Counsel for UMWA filed on September 25, 1985, a response with respect to the relief issues; counsel for Mullins filed on September 30, 1985, a response to the relief issues, and counsel for B-E filed on October 18, 1985,(FOOTNOTE.6) a response to the relief issues. The filings by the parties amount to an agreement as to the basic facts of the days, including holidays, on which Mullins worked in his present position of electrician as compared with the days on which Caudill worked as dispatcher. The parties have also stipulated to the wages which Mullins and Caudill received. A few issues were left for me to decide, such as whether Mullins should be paid for the Saturdays and Sundays when Caudill worked as dispatcher even though Mullins did not work as electrician on many of those same Saturdays and Sundays. Those issues are hereinafter considered.

Calculation of Back-Pay Differential

The amount of back pay to which Mullins is entitled is complicated by the fact that when Mullins was removed from the position of dispatcher, effective May 1, 1983, he returned to his previous job of electrician. Therefore, Mullins is entitled to the difference between the wages he would have received had he continued to work as a dispatcher and the amount of pay which he actually received for working as an electrician. Mullins and the dispatcher both work on the evening shift from 4 p.m. to midnight and both receive a 30-cent evening shift differential. The dispatcher and the electrician also work on Saturdays and Sundays. When they do work on weekends, they are paid 1 1/2 times their regular rates for Saturday work and twice their regular rates for Sunday work.

B-E submitted a single sheet showing the amount the dispatcher (Caudill) received for working at the regular rates from Monday through Friday, the amount received for working Saturday, and the amount received for working Sunday. A similar sheet was submitted to show the amounts received by

Mullins for regular, Saturday, and Sunday work. A comparison of the amounts which B-E shows as being received by Mullins and Caudill for the period from May 1, 1983, through August 30, 1985, is set forth below:

	Regular	Saturday	Sunday	Total
Caudill	$62,703.20 (FN.7)	$24,888.32	$7,314.53(FN.9)	$94,906.05
Mullins	60,600.66	8,008.53 (FN.8)	767.62	69,376.81
Differential	$2,102.54	$16,879.79	$6,546.91	$25,529.24

B-E's wage computation is not explained in detail in that B-E simply multiplied the number of hours worked in each of several periods for regular, Saturday, and Sunday work by the applicable rates to arrive at the totals which have been given in the tabulation above. Mullins prepared a detailed calculation of the differential in pay received by Caudill as compared with the pay which he received. Mullins calculated the amount a dispatcher receives for a regular shift, the amount he receives for a Saturday shift, and the amount he receives for Sunday work. The dispatcher's rate is slightly less per hour than the electrician's rate, but the dispatcher works 8 3/4 hours per shift as compared with the 8 hours per shift worked by Mullins as an electrician. For each of the pay periods involved, Mullins simply subtracted the rate received by the dispatcher from the rate received by an electrician to develop a wage differential for the three types of shifts which pay different rates. Mullins does not show the hourly rates he used nor the calculation used by him to allow for the fact that the dispatcher was working 3/4 of an hour each shift more than the electrician was working.

Mullins does not show, for example, how he allowed for the fact that the dispatcher worked 3/4 of an hour past midnight each day (FOOTNOTE.10) and was presumably paid for that 3/4 hour at the Saturday rate or that the dispatcher, who worked most Saturdays, was presumably paid at the Sunday double rate for working 3/4 hour on Sunday. There is also apparently some

sort of Saturday and Sunday differential which B-E reflects in its calculations, but does not explain, except for the letters "SD" which appear in B-E's Saturday and Sunday calculations. The fact that Mullins and B-E used completely different methods to show the wage differential between Caudill and Mullins makes it impossible to find for certain which has used the most appropriate or accurate method of arriving at a back-pay differential. Although both B-E and Mullins appear to have taken into consideration the differential for regular, Saturday, and Sunday work, they arrive at figures which are considerably different. Mullins does not purport to show a total for Caudill's wages as compared with his wages, but the differential is given below:

Differential for regular time pay	$ 7,102.63
Differential for Saturday pay	10,853.74
Differential for Sunday pay	13,954.24
Total Back-Pay Differential	$31,910.61
Less pay ($2,298.88) received by Mullins for working as substitute dispatcher	$29,611.73

B-E's calculations do not provide any breakdown of the pay received by Mullins when he worked as substitute dispatcher. If B-E's differential, shown above, of $25,529.24 is reduced by the amount of $2,298.88 which Mullins received for working as substitute dispatcher, B-E's comparable differential would be $23,230.36.

I would be inclined to allow Mullins a back-pay differential of $23,230.36, but counsel for both UMWA and B-E say that Mullins refused to work on 21 Sundays and 7 Saturdays and that Mullins' refusal rate should be taken into consideration in trying to determine whether he would have worked as many Saturdays and Sundays as Caudill did if he had been the dispatcher. The letter submitted by Mullins' counsel states that the parties have agreed to stipulate as to the number of Saturdays and Sundays on which Mullins refused to work, but the letter objects to the use of a "refusal" rate in determining whether Mullins should be paid exactly the same amount which Caudill received for working on Saturday and Sunday.

Mullins could have presented a tabulation showing how many Saturdays and Sundays he actually worked during the period when he did hold the job of dispatcher. That would have gone a long way toward showing whether Mullins likes the work done by a dispatcher in an atmosphere of no more than 1.0 milligram of respirable dust sufficiently more than working as an electrician to indicate that he would have worked as many Saturdays and Sundays as Caudill did if the job he was

going to perform had been that of a dispatcher as opposed to an electrician. The parties elected to present the back-pay data by stipulation and arguments. In the absence of some information to show that use of Mullins' refusal rate would create an inequitable back-pay differential, I believe that UMWA and B-E have suggested an appropriate method for determining how much Mullins should be paid for not working the Saturdays and Sundays which were worked by Caudill. B-E submitted side-by-side comparisons of the days worked by Mullins and the days worked by Caudill. Examination of those comparisons shows that Caudill worked many more Saturdays and Sundays than Mullins did.

Mullins

Year	Saturdays Worked	Sats. Not Worked	Sundays Worked	Suns. Not Worked	Saturdays Refused
1983	6	29	0	35	12
1984	17	26	0	44	3
1985	22	12	2	32	0

Caudill

Year	Saturdays Worked	Sats. Not Worked	Sundays Worked	Suns. Not Worked	Saturdays Refused
1983	25	10	1	34	0
1984	43	5	8	41	0
1985 30	4	14	20	0	0
Total	98	19	23	95	0

During the back-pay period here involved of May 1, 1983, through August 30, 1985, there were 121 Saturdays and 122 Sundays, but B-E's mine was entirely or partially closed during the months of November and December of 1984. Caudill, the dispatcher, was called back on November 26, 1984, but Mullins, the electrician, was not called back until January 1, 1985. Therefore, the number of Saturdays on which Mullins could have worked must be reduced by 9 to 112 and the number of Sundays must be reduced by 9 to 113. Since Caudill was working throughout the month of December, the number of Saturdays on which Caudill could have worked must be reduced by 4 to 113 and the number of Sundays on which Caudill could have worked must be reduced by 4 to 118. The figures in the tabulations above show that Mullins worked on 40.18 percent of the 112 available Saturdays, whereas Caudill worked on 83.76 percent of the available Saturdays. Mullins worked on only 1.77 percent of the available Sundays, whereas Caudill worked on 16.11 percent of the available Sundays. Of course, the information provided by the parties does not show that Mullins, as an

electrician, was given an opportunity to work on as many Saturdays and Sundays as the dispatcher had that opportunity. Therefore, it is perhaps inappropriate to compare the Saturdays and Sundays Caudill actually worked with the Saturdays and Sundays actually worked by Mullins.

On the other hand, UMWA and B-E do not ask that Mullins' back-pay differential for Saturdays and Sundays be based on the actual number of Saturdays and Sundays he did work, but on the number of Saturdays and Sundays on which Mullins refused to work. Using Mullins' refusal rate for Saturday and Sunday work appears to be a fair method of determining whether Mullins would have worked as many Saturdays and Sundays as Caudill did if Mullins had been the dispatcher instead of Caudill.

The determination is not as simple as it might have been because of the fact that UMWA and B-E use somewhat different numbers for making their arguments. Moreover, the times on which Mullins refused to work on both Saturdays and Sundays have been stipulated to by counsel for Mullins, UMWA, and B-E. Therefore, I shall accept the numbers they have agreed upon despite the fact that B-E's side-by-side comparisons of the days worked by Mullins and Caudill show that Mullins refused to work on only 15 Saturdays as compared with the parties' stipulation of 21. The side-by-side comparisons do not show that Mullins refused to work on any Sundays, but the parties have agreed that Mullins refused to work on 7 Sundays.

Specifically, UMWA states that Mullins refused to work on 21 Saturdays and worked on 41 Saturdays, or refused to work 21 times out of 62 opportunities. B-E states that Mullins refused to work on 21 Saturdays and worked 43 Saturdays, or refused to work 21 out of 64 opportunities. On the other hand, B-E's side-by-side comparisons of the Saturdays worked by Mullins and Caudill show that Mullins worked on 45 Saturdays and that means that he refused to work 21 times out of 66 opportunities. No party has disputed the accuracy of B-E's side-by-side comparisons and I have used the information in those comparisons for nearly all purposes in determining the back-pay differential to which Mullins is entitled. Consequently, I think that the calculation of Mullins refusal rate for Saturday work should be based on the parties' stipulation that he refused to work on 21 Saturdays and on the information in the side-by-side comparisons showing that Mullins did work on 45 Saturdays. Using the most accurate figures available in the record, I find that Mullins refused to work 21 times out of 66 opportunities or 31.8 percent of the time. The side-by-side comparisons show that Caudill worked on 98 Saturdays, whereas Mullins worked on 45 Saturdays. Caudill, therefore, worked on 53 Saturdays when Mullins did not work. Applying

Mullins' working rate of 68.2 percent to Caudill's 53 Saturdays results in paying Mullins a back-pay differential for 36 of the 53 Saturdays worked by Caudill.

The side-by-side comparisons do not show that Mullins refused to work any Sundays, but counsel for Mullins, UMWA, and B-E have stipulated that Mullins worked 2 Sundays and refused to work on 7 Sundays, or that Mullins had a refusal rate as to Sundays of 78 percent, or should be entitled to be paid for 22 percent of the Sundays worked by Caudill but not worked by Mullins. UMWA states that Caudill worked 53 Sundays but B-E states that Caudill worked 21 Sundays on which Mullins did not work. B-E is correct because the side-by-side comparisons show that Caudill worked a total of 23 Sundays or 21 more than the 2 Sundays on which Mullins worked. Therefore, Mullins is entitled to be paid for 22 percent of 21 Sundays, or for 5 Sundays.

Using the side-by-side comparisons to make the above calculations results in my awarding Mullins back-pay differential for 2 more Saturdays than the 34 Saturdays to which UMWA agreed, but use of the side-by-side comparisons results in my awarding Mullins back-pay differential for 7 less Sundays than the 12 Sundays to which UMWA agreed. Inasmuch as Sundays involve pay at a rate twice as much as the regular rate, whereas Saturdays involve pay at one and one-half the regular rate, I do not believe that UMWA will find my calculations, based upon the side-by-side comparisons, to be objectionable.

While UMWA and B-E proposed an equitable method for determining the number of Saturdays and Sundays for which Mullins should be paid, they did not provide a method for translating those Saturdays and Sundays into an actual monetary amount. The easiest way to have done it would have been for me to award Mullins with pay at the dispatcher's rate for 36 Saturdays, but the Saturdays are spread over a period of 27 months and there is a gradual increase in the rates received by both Mullins and Caudill throughout that period. Moreover, B-E's calculations for Saturday and Sunday work do not show the exact amount paid for any specific Saturday or Sunday because B-E's calculations are based on the total number of hours worked in each graduated pay period by both Mullins and Caudill.

Mullins calculations, on the other hand, are based on a computation of the difference between the dispatcher's wages and the electrician's wages for a regular shift, a Saturday shift, and a Sunday shift, but Mullins does not explain how he arrived at the total amount for each type of shift. While UMWA, B-E, and D30 do not say that they agree with Mullins' method of showing the back-pay differential, they do not at any time say that his method is incorrect. All they object to is his having computed the differential so as to allow him to receive all the pay received by Caudill for working on

both Saturdays and Sundays even though Mullins did not work those same Saturdays and Sundays as an electrician.

It is obvious that Mullins and B-E are not far apart in the total differential between Mullins' and Caudill's wages for the period involved. The tabulations given at the beginning of this discussion of back pay show that Mullins obtained a pay differential for regular shifts of $7,102.63 and a differential for Saturday work of $10,853.74 or a total of $17,956.37. B-E's calculations show a differential for regular shifts of $2,102.54 and a differential for Saturday work of $16,879.79, or a total of $18,982.33. Consequently, there is only about $1,025 difference in the amount that B-E shows as having been paid to Caudill for regular and Saturday work and the amount which Mullins shows as having been paid to Caudill for regular and Saturday work.

The complex nature of B-E's calculations may be seen if one examines the total number of hours worked by Caudill on regular shifts and on Saturdays. The total of the hours worked by Caudill on regular shifts is 4,520 hours and the total for Saturdays is 1,190 hours. If one divides 1,190 hours by 8.75 hours per shift, the result is 136 Saturdays. That is an illogical result because the total period involves only 121 Saturdays and Caudill only worked 98 of those. The reason for the apparent discrepancy is that every time the dispatcher worked 8.75 hours, the 3/4 hour was worked after midnight and was paid at the Saturday rate even though the actual time was from 12:00 midnight to 12:45 a.m. on Tuesday through Saturday. Therefore, every time Caudill worked five so-called regular shifts, he was being paid at the Saturday rate for 3/4 hour each shift, but B-E's calculations simply include all time past midnight with the hours worked by Caudill on Saturdays.

If one takes the total hours (4,520) on which Caudill worked regular shifts and divides those hours by 8, he obtains a result of 565 days. If one multiplies 565 days by .75, the result is 423.75 hours. Those hours, when deducted from the 1,190 hours shown by B-E as having been worked by Caudill on Saturday leaves a total of 766.25 hours, or about 96 days as having actually been worked on Saturday which is very close to the 98 days on which Caudill did work on Saturday.

The above discussion shows why Mullins claims a differential for regular shifts which is much larger than the amount shown by B-E because Mullins' differentials are based on a calculation which includes an allowance for each shift of 3/4 hour paid at the Saturday rate, whereas B-E's calculations include all those 3/4-hour amounts in the payments

made to Caudill for working on Saturday even though those hours were not actually worked on Saturday, except, of course, the 3/4 hour worked after midnight on Friday of each week.

In view of the fact that the back-pay differential cannot be determined with any great precision and in view of the fact that it is impossible for me to determine exactly how either Mullins or B-E computed payment for any one specific Saturday, I believe that it is fair and reasonable for me to compute the amount to be paid to Mullins for 36 Saturdays on which Caudill worked, but Mullins did not, by using the Saturday dispatcher shift rate of $202.23 derived by Mullins for the period from October 1, 1984, through August 30, 1985. That multiplication ($202.23 x 36) results in an award of $7,280.28 for the 36 Saturdays which UMWA and B-E agree is appropriate.

Mullins did work a total of 45 Saturdays and should be paid the differential of $25.65 between the dispatcher's rate of $202.23 and the electrician's rate of $176.58 for Saturday work. That calculation results in a total of $1,154.25 which, when added to the above amount of $7,280.28, produces a back-pay differential for Saturday work totaling $8,434.53.

The discussion above as to the unexplained nature of B-E's calculations for Saturday work is also applicable to B-E's calculations of the amount which B-E shows as pay to Caudill for working on Sundays. To be consistent with the manner in which I have determined the back-pay differential for working Saturdays, I believe that Mullins should be paid at the dispatcher's shift rate of $268.92 for Sunday work as calculated by Mullins for the period from October 1, 1984, through August 30, 1985. As indicated above, Mullins is entitled to be paid for 5 of the Sundays on which Caudill worked but Mullins did not. That calculation ($268.92 x 5) produces an amount of $1,344.60. Since Mullins only worked on 2 Sundays, he is entitled to the Sunday differential of $33.48 for those 2 Sundays, or an amount of $66.96, for a total back-pay differential for Sunday work of $1,411.56. The reason that Mullins' claim of $13,954.24 for Sunday work is much larger than the amount I have allowed is that Mullins sought to obtain the amount paid to Caudill for all of the 21 Sundays on which Caudill worked but Mullins did not.

When it comes to the amount of back-pay differential which Mullins should receive for regular shifts, I believe that Mullins should be paid the amount that he claims of $7,102.63 because the differential which he uses is based on a calculation for an entire shift based on the graduated pay rates and on a calculation which includes the 3/4 hour worked after midnight as a part of the total amount paid to the dispatcher for 8 3/4 hours per shift.

There is an additional complexity in the way Mullins prepared his claim for back-pay differential. Mullins made a separate group of calculations to show the amount he was paid for vacation days and holidays as compared with the amount he would have received for those days if he had been working as the dispatcher. He shows a total differential of $1,524.22 for holiday and vacation pay, but he did not include that amount in the back pay he requests on the summary page accompanying his computations. The reason he does not include that amount is that he shows in his calculations for days he worked payment of a differential for days actually worked even though some of the days were holidays or vacation days. For example, Mullins claimed a differential for 22 days of regular shifts worked in January 1984 even though he actually worked only 18 of those days and received holiday or vacation pay for the remaining 4 days. Mullins did not explain the reason for computing the calculations as to holiday and vacation pay because he is not entitled to collect the wage differential twice. B-E included pay for holidays and vacation days as part of the hours for which both Mullins and Caudill were paid. Therefore, no special allowance has to be awarded in connection with holidays and vacation days.

D30 raised the issue that miners are paid at triple the regular rate when they work on their birthdays and D30 objected to payment to Mullins of a differential for any amount which might have been received by Caudill for working on his birthday if Mullins did not also work on his birthday. Mullins included the birthday differential with the differential for holidays and vacation days and he shows that both Caudill and he worked on each of the three birthdays involved in the period from May 1, 1983, through August 30, 1985. The total birthday differential for all three birthdays is only $48.36 and does not seem to have been claimed by Mullins because it is shown as part of the figure of $1,524.22 for holidays and vacation days. As indicated above, Mullins is not being awarded any amount for vacation, holiday, or birthday pay as a separate allowance.

The side-by-side comparison sheets submitted by B-E show that Mullins was laid off for economic reasons during the months of November and December 1984, but Caudill was called back to work on November 26, 1984, with the result that Caudill was paid for working 5 regular shifts in November, and for 22 regular shifts (including 2 holidays), 4 Saturdays, and 1 Sunday in December. If Mullins had been the dispatcher, he would have been paid for all those days at the rates received by Caudill. It is not possible to obtain the amount Caudill was paid for that period by using either Mullins' or B-E's figures. Therefore, I have calculated the amount as shown below. If my decision is affirmed

by the Commission so that the respondents are required to pay the amount I have calculated, the parties should feel free to compute the amount correctly if I have failed to take into consideration some obscure aspect of the calculations. I know, for example, that my calculations are slightly less than they probably should be in view of the fact that I have not added any amount for the Saturday and Sunday differential which is apparently paid by B-E when employees work on Saturday and Sunday.

As indicated in footnote 10 above, Caudill was paid for only 8 1/2 hours per shift on and after November 27, 1984, instead of 8 3/4 hours per shift for which the dispatcher was paid prior to that time.

November

November 26, 1984, involved being paid for 8 3/4 hours. That day was paid at the regular rate of $14.31 for 8 hours, or $114.48, and 3/4 hour at the overtime rate of $21.47, or $16.10, for a total of $130.58 for November 26, 1984.

The remaining 4 days were paid at the regular rate of $14.31 times 8 hours times 4, or a total of $457.92 plus 1/2 hour times the overtime rate of $21.47 times 4, or a total of $42.94, producing a grand total of $500.86 for the remaining 4 days. The total amount paid to Caudill for five regular shifts in November 1984 was $631.44.

December

22 regular shifts x $14.31 x 8	$ 2,518.56
22 x overtime rate of $21.47 x 1/2 hour	236.17
4 Saturdays x the Saturday rate of $21.47 x 8	687.04
4 x the Sunday rate of $28.62 x 1/2 hour	57.24
1 Sunday x the Sunday rate of $28.62 x 8.5 (FN.11)	243.27
Total for December	$ 3,742.28

Mullins' back-pay calculations show that he received payments totaling $2,298.88 by working as substitute dispatcher. Mullins appropriately subtracted that amount from the back-pay differential which he is claiming. I shall deduct that amount in determining the total amount of back-pay differential which is summarized below:

$ 7,280.28	-	Amount due Mullins for 36 of the 53 Saturdays worked by Caudill but not worked by Mullins.
1,154.25	-	Amount of differential due Mullins for the 45 Saturdays on which Mullins did work as an electrician.
1,344.60	-	Amount due Mullins for 5 of the 21 Sundays worked by Caudill but not worked by Mullins.
66.96	-	Amount of differential due Mullins for the 2 Sundays he did work as an electrician.
7,102.63	-	Amount of differential due Mullins for the regular shifts he did work as an electrician at less pay than that received by Caudill for the period from 5/1/83 to 8/30/85.
4,373.72	-	Amount due Mullins for the time Caudill worked in November and December 1984 before Mullins was called back to work after having been laid off for the months of November and December 1984.
$21,322.44	-	Total amount due Mullins before deduction of amount received by Mullins for working as substitute dispatcher.
2,298.88	-	Amount earned by Mullins for working as substitute dispatcher.
$19,023.56	-	Total back-pay differential to which Mullins is entitled.

Expenses

Mullins claims expenses totaling $1,946.68. Mullins' itemized list of expenses is divided into two parts consisting of such items as purchase of the transcript of the hearing, postage, meals, phone calls, and mileage. Those items are described in detail and appear to be adequately supported. No party has raised an objection as to their justification. Mullins does not show a separate total for those items, but they amount to $866.06. The second part of Mullins' claim for expenses consists of a request for lost time for trips made to MSHA's office in Pikeville, for meeting with his attorney, and for attending the hearing. Mullins shows that the total of those items amounts to $1,020.62, but there is a $60 error in his addition of those

amounts so that he should have derived a total of $1,080.62. Mullins' claim for lost time is well documented and appears to be reasonable and no party has specifically objected to any of those claims. They should be accepted.

One other expense item claimed by Mullins is not supported and should be disallowed. That is a claim of $500.00 as a "secretarial fee". The claim appears at the top of a page where Mullins begins a list of pay differential for holidays. Mullins' entire support for the claim is a two-line statement which reads as follows: "Omitted from the other estimate of pay differential and expenses was the secretarial fee of $500.00". Mullins does not show the number of hours the secretary worked or the number of pages he or she typed or give any information whatsoever to justify allowance of $500.00 for secretarial services. Mullins' back-pay claims and itemization of expenses constitute a total of 11 pages and those pages are marked as Exhibit A in the materials submitted by Mullins' counsel in response to my order requesting the parties to provide information for awarding Mullins any amounts which might be due him in this proceeding. It is unlikely that any secretary would charge $500.00 to type 11 pages.

The Commission held in John Cooley v. Ottawa Silica Co., 6 FMSHRC 516 (1984), that a judge should not award compensation in a discrimination case for items which are claimed without adequate support. It is a fact, however, that Mullins did not list any amount for secretarial help in the expenses which I have discussed above. A typist should not have to spend more than 8 hours to type all the materials which Mullins has written or supplied in connection with this proceeding. Mullins' attorney only seeks $20.00 an hour for the work performed by a law clerk. It would appear that $15 an hour for work performed by a typist would be a fair amount to allow. Therefore, I shall allow Mullins an amount of $120.00 ($15 x 8 hours) to reimburse him for obtaining the services of a typist in preparing the written submissions he has made in connection with this proceeding.

The expenses which are allowed are listed below:

~1886

$ 141.00	-	Purchase of transcript of hearing
53.70	-	Postage
48.00	-	Motel
63.11	-	Meals
282.25	-	Phone calls
278.00	-	Mileage
120.00	-	Typing
1,080.62	-	Lost time
$2,066.68	-	Total amount allowed for expense reimbursement

Attorney's Fees

No party has objected to the amount claimed by Mullins' attorney for her time and that of a law clerk, along with the associated expenses, which were involved in representing Mullins in this proceeding. I have carefully checked all the figures shown in the itemized list of expenses and labor and have found no errors.

The amount claimed for such items as telephone calls, copying, postage, mileage, motel room, and meals is $439.33. The amount claimed as expenses by the law clerk is $40.00.

Mullins' attorney lists a total of 56.40 hours of time for conferences, preparation of the brief, and replies to various orders. She asks payment at the rate of $50.00 per hour, or an amount of $2,820.00. Mullins' attorney also describes 186 hours of work done by her law clerk in research and writing of the brief filed on Mullins' behalf. She claims $20.00 per hour for the law clerk's work, or an amount of $3,720.00.

All charges for expenses and labor are reasonable in every respect and should be approved as summarized below:

$2,820.00	-	Attorney's charge for 56.4 hours at $50.00 per hour
439.33	-	Attorney's expenses
3,720.00	-	Law clerk's charge for 186 hours at $20.00 per hour
40.00	-	Law clerk's expenses
$7,019.33	-	Total for attorney's fees and expenses

B-E's Argument Based on the Adams Case

B-E's letter (p. 2) filed on October 18, 1985, argues that even if Mullins should not have been removed from the

job of dispatcher on May 1, 1983, he would still not be entitled to the dispatcher's job after a realignment which occurred on October 31, 1984. B-E supports its argument that Mullins is not entitled to pay for the job of dispatcher after October 31, 1984, by enclosing as a part of its back-pay submission a copy of an arbitrator's decision which held that another employee named Ray Adams was not permitted to retain the job of janitor over another employee because Adams sought to retain his job of janitor under article XVII(i)(10) of the NBCWA. The arbitrator held that Adams could not be permitted to retain the job of janitor because he had previously exercised the superseniority provisions of article XVII(i)(10) and that article specifically provides that it may not be relied upon by a miner more than once in his lifetime. I have already held in this decision that article XVII(i)(10) is a discriminatory provision which cannot be used to deprive a miner of a job in no more than 1 milligram of dust and I see no reason why the "one-time" discriminatory aspect of that section should be recognized as a basis to deprive a Part 90 miner of a position in no more than 1 milligram of dust any more than article XVII(i)(10)'s provision that a Part 90 miner is not entitled to a specific position in no more than 1 milligram of dust because he happens to be working on a nonproducing shift rather than a producing shift. Moreover, the arbitrator noted on pages 14 and 15 of his decision that he was dealing only with the job-bidding provisions of the NBCWA and that Adams had rights under the provisions of Part 90 [which he referred to as the 1969 Act] which were outside the purview of his authority to consider.

Additionally, in the Adams case, there were two jobs as janitor on the midnight shift and one of them was eliminated in a realignment. In this case, Caudill has retained the job of dispatcher up to the present time so that the facts in the Adams case are different from those in this proceeding.

In any event, it would be inconsistent with my rulings in this decision for me to find that a miner's exercise of his Part 90 rights can be reduced to a once-in-a-lifetime right by a contractual provision. That sort of restriction on Part 90 rights is just as discriminatory as article XVII(i)(10)'s provision that Part 90 rights apply to miners working on a producing shift but not to miners working on a nonproducing shift. As hereinbefore indicated, I find that Mullins should be paid the differential in wages between the dispatcher's job and his electrician's job from May 1, 1983, when he was removed from the job of dispatcher, to the date on which payment is made, if my decision is upheld by the Commission.

Order To Cease and Desist from Further Discrimination

Mullins' counsel requested, as part of the relief sought in this proceeding, that an order be entered requiring respondents to cease and desist from any and all discrimination activities directed toward Mullins for his having exercised his Part 90 rights as well as his rights under section 105(c) of the Act.

There is evidence showing that D30 is extremely hostile toward Mullins for having brought this discrimination case. During cross-examination, it was quite obvious that counsel for D30 was upset with Mullins because he would not settle the issues and withdraw his complaint (Tr. 84-86; 88). In his reply brief (p. 4), D30's counsel referred to Mullins' complaint as being "frivolous" and as having "cost the UMWA, Beth-Elkhorn and the federal government money and resources that would have been better spent in efforts to remedy actual hazards to the health and safety of working miners."

In such circumstances, there is every possibility that D30 will use subtle and overt methods to retaliate against Mullins for having brought the instant discrimination case. Therefore, I shall include a provision in the order accompanying this decision that all respondents refrain in the future from discriminating in any way against Mullins or other miners who invoke the rights which are granted to them by Part 90 and denied by article XVII(i)(10) of the NBCWA.

Civil Penalty Issues

Although respondents have complied with my request that they provide me with enough information to permit assessment of civil penalties, it has never been my practice to assess civil penalties in a discrimination case pending a determination as to whether the Secretary of Labor is required in a case initiated under section 105(c)(3) of the Act to propose a penalty before such a penalty is assessed. Milton Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2048, n. 11 (1983).

Inasmuch as the issues in this proceeding are almost entirely legal in nature, including the question of whether UMWA, D30, and Local 1468 may be assessed civil penalties, I believe that it is especially appropriate in this case to deter the assessment of civil penalties until the legal questions have been resolved by the Commission or the courts.

~1889

Consideration of District 30's Motion To Recuse

Counsel for D30 filed on September 23, 1985, a motion asking that I recuse myself as the judge in this case on grounds of "bias, prejudgment of the merits, and ex parte contact with the complainant." The affidavit submitted in support of the motion shows that the alleged bias and ex parte contacts occurred either before the hearing or during the hearing. Yet counsel for D30 filed initial and reply posthearing briefs on the merits of Mullins' complaint without ever at any point in his briefs making a claim that I was so biased against D30 that I would be unable to render an impartial decision. Finally, on September 23, 1985, more than 6 months after the alleged prejudicial statements or actions had occurred, counsel for D30 filed his untimely motion to recuse.

The motion to recuse does not purport to have been filed under any statutory basis, such as 29 C.F.R. 2700.81 or 28 U.S.C. 144,(FOOTNOTE.12) but it is untimely under either of those statutory provisions. Section 2700.81 of the Commission's rules provides as follows:

> (b) Request to withdraw. Any party may request a Commissioner, or the judge (at any time following his designation and before the filing of his decision), to withdraw on grounds of personal bias or disqualification, by filing promptly upon discovery of the alleged facts an affidavit setting forth in detail the matters alleged to constitute grounds for disqualification. [Emphasis supplied.]

> (c) Procedure if Judge does not withdraw. If the Judge does not disqualify himself and withdraw from the proceeding, he shall so rule upon the record, stating the grounds for his ruling and shall proceed with the hearing, or, if the hearing has been completed, he shall proceed with the issuance of his decision, unless the Commission stays the hearing or further proceedings by granting a petition for interlocutory review.

On July 25, 1985, I issued an order in which I indicated that I would probably decide the issues raised in this proceeding in favor of the complainant, but I pointed out that the Commission had held in Council of Southern Mountains v. Martin County Coal Corp., 2 FMSHRC 3216 (1980), that a judge could not issue a "final" decision as to which petitions for discretionary review could be filed until the judge had provided as a part of his decision all of the relief to which the complainant is entitled, including back pay and attorney's fees. That order suggested that the parties might be able to stipulate enough facts pertaining to back pay and attorney's fees to enable me to award Mullins all the back pay and attorney's fees to which he was entitled. The order also requested that the parties provide me with a date on which they could attend a hearing on the relief issues if they could not agree upon stipulations. Counsel for D30 responded to the order by stating that D30 would not stipulate to anything. D30's response did not provide me with a date for a hearing and accused me of having prejudged the issues and of having been unduly considerate of Mullins' position. The response did not, however, move that I disqualify myself.

Since the parties did not seem able to stipulate as to back pay and other matters, I issued on August 29, 1985, an order providing for a hearing on the relief issues of back pay and attorney's fees and some of the criteria pertaining to civil penalties. Thereafter, on September 23, 1985, D30 filed the aforementioned untimely motion to recuse. Section 2700.81(c) of the Commission's rules shows that a motion for recusal should be made as soon after occurrence of the alleged disqualifying acts as possible in order to avoid the expense of a hearing and the time and expense involved in writing a decision in the event the judge disqualifies himself or is disqualified by the Commission after granting an interlocutory appeal. I had already written the first 54 pages of this decision pertaining to the merits of the case, and they had been typed in final form, before D30 filed its motion asking me to disqualify myself.

Although court cases on the subject of motions for disqualification are based on some provision of Title 28 of the United States Code, the reasons given by the courts for requiring prompt filing of motions to recuse are the same as those indicated in section 2700.81(c) of the Commission's rules. In re International Business Machines Corporation, 618 F.2d 923 (2d Cir.1980), for example, held that a motion for disqualification was untimely and stated that "[a] major practical reason for the timeliness requirement is that the granting of a motion to recuse necessarily results in a waste of the judicial resources which have already been invested in the proceeding". 618 F.2d at 933.

In United States v. Daley, 564 F.2d 645, 651 (2d Cir.1977), a motion to recuse was held to have been untimely filed because the motion was not made until after the trial had been held despite the fact that defendant was aware of the judge's alleged prejudicial acts at the time the trial was held. In Smuck v. Hobson, 408 F.2d 175 (D.C.Cir.1969), the court held that a motion to recuse was untimely filed when it was filed on the 14th day of a trial and 2 weeks after the trial judge had made a statement "purportedly showing that the trial judge had prejudged the merits of the defendant's prospective motion for judgment." 408 F.2d at 183. In Refior v. Lansing Drop Forge Co., 124 F.2d 440 (6th Cir.1942), the court held that a motion to recuse was untimely because the statute "does not permit a litigant, after he has knowledge of the alleged bias or prejudice of the trial judge and without notice, to go forward in the cause before filing such affidavit after the facts of disqualification are known to him." 124 F.2d at 445. In Scott v. Beams, 122 F.2d 777 (10th Cir.1941), the bases for the motion to recuse were some events which occurred during the last 2 days of the trial. The court held that the motion was untimely because it was filed 2 "months after the bias and prejudice of the court became apparent. That is too late." 122 F.2d at 789.

In addition to having been untimely filed, the motion to recuse, when considered on its merits, fails to allege any truthful facts showing bias or prejudice against D30. The affidavit submitted by D30's counsel purports to find prejudgment or bias because of a statement which I made on pages 35 and 36 of the transcript:

> Well I didn't think before I had this discussion with Counsel that Mr. Mullins could be other than right, both legally and factually, but I guess Mr. Heenan hasn't been in this work all this time for nothing and I think he has

> pretty much convinced me that legally maybe Mr. Mullins doesn't have too good a case, but I haven't made up my mind for certain. I'm just letting you see that you had a better case than I thought you had, Mr. Heenan. That's what makes these cases interesting I guess. If they weren't close questions we wouldn't have hearings and we wouldn't have contested cases.
>
> I think at this point we can go ahead and have Mr. Mullins testify, then Mr. Ward and Mr. Heenan can ask him any questions that they want to, and then we can hear for the first time what he thinks about all of these things that he has been hearing the attorneys expound on. I'm sure he's not too pleased with a lot of these arguments, just as I wasn't when they started out. I thought they were somewhat frivolous when we started but actually they seem to have a little more merit to them than I first anticipated. We've been going an hour, suppose we take a little break at this point and then we'll start out with Mr. Mullins.

The other basis given in D30's affidavit for my alleged prejudice against it is that I stated, at the close of the hearing, after I had set dates for the filing of briefs, words to the effect that I would give complainant all the "help" I could under the Act.

The portion of my statement on pages 35 and 36 which D30 claims is evidence of prejudice toward D30 is that I referred to D30's arguments as being "somewhat frivolous". Despite my unflattering description of D30's arguments, I have discussed them in detail in this decision, have considered them fully, and have given the reasons for my belief that they do not overcome the discrimination which is prohibited by section 105(c)(1) of the Act. D30 also contends that my statement at pages 35 and 36 shows that I am not able to render an impartial decision in this case because I had prejudged the merits of D30's arguments before the hearing was held. I have been hearing and deciding cases under the discrimination provisions of both the 1969 and 1977 Acts for more than 13 years and I have formed tentative legal opinions as to the validity of cases filed under those provisions after I have read each of the discrimination complaints which have been assigned to me.

The courts have uniformly rejected a claim of a judge's having formed legal opinions as a basis for the grant of a

~1893
motion to recuse. In Re J.F. Linahan, 138 F.2d 650 (2d Cir.1943), contains one of the most interesting discussions on the fact that a judge cannot avoid having legal opinions. The court in that case stated:

> Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, "bias" and "partiality" be defined to mean the total absence of pre-conceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are pre-judices. Without acquired "slants", pre-conceptions, life could not go on. Every habit constitutes a pre-judgment; were those pre-judgments which we call habits absent in any person, were he obligated to treat every event as an unprecedented crisis presenting a wholly new problem he would go mad. Interests, points of view, preferences, are the essence of living. Only death yields complete dispassionateness, for such dispassionateness signifies utter indifference. * * * An "open mind", in the sense of a mind containing no preconceptions whatever, would be a mind incapable of learning anything, would be that of an utterly emotionless human being, corresponding roughly to the psychiatrist's descriptions of the feeble-minded. * * *
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> **********
>
> [A judge] must do his best to ascertain [the witnesses'] motives, their biases, their dominating passions and interests, for only so can he judge of the accuracy of their narrations. He must also shrewedly observe the strategems of the opposing lawyers, perceive their efforts to sway him by appeals to his predilections. He must cannily penetrate through the surface of their remarks to their real purposes and motives. He has an official obligation to become prejudiced in that sense. Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions. [Footnotes omitted.]

138 F.2d at 651.

In Hortonville School District v. Hortonville Ed Assn., 426 U.S. 482 (1976), the Supreme Court held that "mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker." 426 U.S. at 493. In F.T.C. v. Cement Institute, 333 U.S. 683 (1948), the court stated that it was aware of no decision by the court which "would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law." 333 U.S. at 703.

D30's motion to recuse is accompanied by a 15-page memorandum which consists primarily of a response to my order providing for hearing on the relief issues of back pay and attorney's fees. I do not believe that I am required to debate any further or answer the personal matters discussed by D30's counsel in much of that memorandum. Suffice it to say that a large part of that memorandum is devoted to rearguing the merits of D30's position. I have considered each of D30's arguments in detail in the first 55 pages of this decision and it is not necessary for me to restate my disposition of those contentions.

On page 6 of that memorandum, however, D30's counsel makes the following utterly false accusations:

> There was a great deal of ex parte contact and personal involvement by the ALJ in this case long before District 30 was ever served with a complaint. The complainant provided the ALJ with the information the ALJ used to draft the detailed "proposed findings"in the order of June 21, 1984.(FOOTNOTE.13) [Tr. 10]. The proposed findings are detailed and drafted exclusively from the complainant's point of view. They evidence the obvious prolonged ex parte contact resulting in bias.

The truth of the matter is that I have had only three telephone conversations with complainant. The first one occurred on January 28, 1985, when complainant stated that he

could not agree with one of the stipulations proposed by counsel for the parties and requested that I schedule his case for hearing. D30's counsel states on page 10 of his memorandum that he "is not concerned with the casual contact of the complainant's phone call on January 28, 1985, requesting a status report." The second phone call was made shortly after complainant received a copy of my order providing for hearing on the relief issues dated August 29, 1985. In the second phone call, complainant apologized for his attorney's failure to respond to my order of July 25, 1985, which also pertained to relief issues. Additionally, he asked me what he was supposed to do at the hearing and I told him the hearing would not deal with the merits of his case in any way and would be devoted exclusively to back pay and the other matters discussed in my order of August 29, 1985. Finally, I received a call from complainant on October 2, 1985. On that occasion, he wanted to discuss a letter which I had written to D30's counsel on September 26, 1985, providing him with a copy of anything in the official file which D30 might not have and a description of all phone calls between me and counsel for the parties and complainant. I refused to discuss anything with complainant on October 2, 1985, other than to inform him that the letter of September 26, 1985, did not constitute my final action with respect to the motion to recuse.

D30's counsel provided me with a copy of the Commission's order in James M. Clarke v. T.F. Mining, Inc., 6 FMSHRC 1401 (1984), in which the Commission referred to "a prohibited ex parte telephone conversation with counsel for the operator." [Emphasis supplied.] If D30's counsel had read the Commission's decision in James M. Clarke v. T.F. Mining, Inc., 7 FMSHRC 1010 (1985), he would have found the definition of an "ex parte communication" given on page 1014 of that decision, as set forth in the Administrative Procedure Act, 5 U.S.C. 551(14), to be "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding". 7 FMSHRC at 1014 [Emphasis supplied.] All three of the phone calls I have received from complainant have been in the nature of status-report inquiries because Mullins has always asked questions pertaining only to the status of his case.

Section 2700.82 of the Commission's regulations prohibits "ex parte communication with respect to the merits of any case" between a judge and the parties to a proceeding. At no time has Mullins ever discussed the merits of his case with me. Therefore, the claim by D30's counsel that I have engaged in "a great deal of ex parte contact" is absolutely false. Moreover, all of the materials used by me in drafting the 13

proposed stipulations which I mailed to the parties on June 21, 1984, were based on letters written by or received by Mullins and a copy of an arbitrator's decision decided in D30's favor which resulted in the filing of Mullins' complaint in this proceeding. All of those materials were supplied by Mullins in response to a routine deficiency letter sent to Mullins by Chief Judge Merlin before this case was ever assigned to me. The first telephone call received by me from Mullins occurred on January 28, 1985, after the parties had already agreed upon the stipulations of fact which are set forth and explained on pages one to seven of this decision. Counsel for D30 agreed at the hearing that those stipulations correctly state the facts (Tr. 7; 11; 169) and my decision (pp. 9-17) shows that I have adhered to the stipulations and have rejected Mullins' conflicting testimony in which he endeavored to establish that Stipulation No. 16 is incorrect.

Section 2700.81(b) pertaining to requests that a judge disqualify himself provides for the affidavit to set forth "in detail the matters alleged to constitute grounds for disqualification." In United States v. Haldeman, 559 F.2d 31 (D.C.Cir.1976), cert. denied, 431 U.S. 933 (1977), the court stated that an affidavit requesting disqualification should be strictly construed and must be definite as to time, place, persons, and circumstances. Assertions merely in the nature of conclusions are not enough, nor are opinions or rumors. D30's counsel is so uncertain about his alleged charges of ex parte communications between me and Mullins that he declines even to mention them in his affidavit, much less state when they occurred or what they dealt with. It is not surprising that D30's counsel fails to provide the kind of information which the court said was necessary in the Haldeman case because no prohibited ex parte communications have ever occurred between me and complainant or any other party to this proceeding.

I am not entirely sure what bias D30's counsel attributes to me because I am supposed to have told Mullins at the completion of the hearing that I would give him all the help I could in making my decision in this case. Perhaps I should have used the word "consideration", but the point of the statement was that I had heard a lot of arguments which, at the time, made me doubt whether I could grant his complaint. He looked rather forlorn at the completion of the hearing and I thought that a word of encouragement was appropriate. In any event, that statement, whatever it was, was made in the presence of counsel for all parties who had attended the hearing after they had been given notice of the hearing. Therefore, it certainly was not a prohibited ex parte communication and counsel for D30 could have objected to it at the time if it disturbed him, but he said nothing about that or

any other action or statement by me until 6 months after the hearing had been concluded and he had been advised that my decision in this case would probably be in Mullins' favor.

On the basis of the discussion above, I find that the motion to recuse was untimely filed and that it fails to state any truthful grounds whatsoever which would require me to disqualify myself as the judge in this proceeding. No sense of accomplishment is achieved by rendering a decision in this case after having been wrongfully accused of as many unwarranted claims as have been made by D30's counsel in this proceeding, but I am reminded of the case In re Union Leader Corp., 292 F.2d 381, 391 (1st Cir.1961), cert. denied, 368 U.S. 927 (1961), in which the court stated, "[t]here is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is."

The Other Parties' Position Regarding the Motion To Recuse

Counsel for Mullins filed a letter on September 30, 1985, in which she objected to the grant of D30's motion to recuse. Counsel for UMWA filed a letter on September 25, 1985, in which he stated that UMWA would not take a position pertaining to the motion to recuse filed by D30 and that he would prefer to think that I had reached my decision in this case for reasons other than bias.

Counsel for B-E filed a statement in opposition to the granting of the motion to recuse. It is four pages long and contains 13 paragraphs with which, not surprisingly, I agree in every respect. B-E's statement in opposition to the grant of the motion is so well stated that I considered quoting it as my total response to the motion because it is a better piece of writing than I can do, but I believe that the Commission would like for me to address the erroneous nature of the motion, as I have done above, so as to point out the lack of merit to the false accusations made in the motion and the memorandum submitted in support of the motion.

WHEREFORE, it is ordered:

(A) The discrimination complaint filed by Jimmy R. Mullins in Docket No. KENT 83-268-D is granted based on the finding herein that Mullins was unlawfully removed from the position of dispatcher on the 4-p.m.-to-midnight shift at the No. 26 Mine of Beth-Elkhorn Coal Corporation by an interpretation of article XVII(i)(10) of the National Bituminous Coal Wage Agreement which is unenforceable because it discriminated against Mullins in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 by

causing him to be removed from the position of dispatcher after he had been awarded that position by virtue of his having exercised the rights granted to him by Part 90 of Title 30 of the Code of Federal Regulations.

(B) Complainant's motion to supplement the amended complaint to name Local 1468 as a party is granted.

(C) As hereinbefore explained in detail, respondents shall provide Mullins with the relief provided below:

(1) Reinstate Mullins to the position of dispatcher on the 4-p.m.-to-midnight shift from which he was removed.

(2) Pay Mullins a back-pay differential of $19,023.56 and expenses associated with bringing this action in the amount of $2,066.68 together with interest computed in accordance with the Commission's decision in Milton Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2053 (1983). The back pay has been computed as of August 30, 1985, and will continue to accumulate, along with interest, until date of payment and Mullins' reinstatement.

(3) Pay Mullins' attorney an amount of $7,019.33 as charges for work done and expenses incurred in representing Mullins in this proceeding. Additional attorney's fees will, of course, have to be awarded if the Commission grants petitions for discretionary review and Mullins' attorney performs additional work with respect to the grant of review by the Commission, assuming this decision is affirmed.

(4) All respondents shall cease and desist from any and all discriminatory activities directed toward Mullins for his having exercised his Part 90 rights and having filed the discrimination complaint in this proceeding.

(D) The untimely motion filed on September 23, 1985, by District 30 requesting that the judge recuse himself is denied for the reasons hereinbefore given.

Richard C. Steffey
Administrative Law Judge

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FOOTNOTES START HERE:-

~Footnote_one

1 In an order issued June 21, 1984, in this proceeding, I noted that I would state in my final decision in this case that the arbitrator should be eliminated as a respondent in this action. He had been named as a respondent in the complaint filed by Mullins with MSHA under section 105(c)(2) of the Act, but his

counsel properly excluded him as a respondent when she filed the amended complaint. Thomas v. Consolidation Coal Co., 380 F.2d 69 (4th Cir.1967), cert. denied, 389 U.S. 1004.

~Footnote_two

2 Earl R. Pfeffer, Esq., did not enter an appearance at the hearing, but filed initial and reply briefs on behalf of the International Union, United Mine Workers of America.

~Footnote_three

3 (10) If the job which is posted involves work in a "less dusty area" of the mine (dust concentrations of less than one milligram per cubic meter), the provisions of this Article shall not apply if one of the bidders is an Employee who is not working in a "less dusty area" and who has received a letter from the U.S. Department of Health and Human Services informing him that he has contracted black lung disease and that he has the option to transfer to a less dusty area of the mine. In such event, the job in the less dusty area must be awarded to the letterholder on any production crew who has the greatest mine seniority. Having once exercsied his option, the letterholder shall thereafter be subject to all provisions of this Article pertaining to seniority and job bidding. This section is not intended to limit in any way or infringe upon the transfer rights which letterholders may otherwise be entitled to under the Act.

~Footnote_four

4 All subsequent references to the legislative history will simply refer to the page number of the volume in which the history was reprinted. Unless otherwise indicated, all references will be to the history of the 1977 Act.

~Footnote_five

5 The court issued its decision in Old Dominion Power Co. v. Raymond Donovan and FMSHRC, --- F.2d ----, 6th Cir. No. 84-1942, on September 18, 1985, after I had completed this portion of my decision. The court excluded Old Dominion from coverage under the Act because it did not have a "continuing presence at the mine" so as to come within the Act's definition of an "operator" since Old Dominion's "only presence on the [mine] site is to read the meter once a month and to provide occasional equipment servicing" (slip opinion, p. 12). UMWA has a "continuing presence at the mine" and is therefore not excluded by the holding of the court in Old Dominion from coverage as an "operator" under the Act.

~Footnote_six

6 The letter submitted by B-E's counsel requested that the parties submit "any exceptions, additions or deletions to the" back-pay information prepared by B-E "no later than ten days from the date of this letter." The applicable 10 days expired on October 28, 1985, and I have received no responses from any party with respect to the back-pay information submitted by B-E.

Mullins called my office on October 28, 1985, but I declined to listen to or talk to him. Counsel for Mullins filed on November 4, 1985, a motion for a 10-day extension of time within which to file a reply to B-E's submissions. I issued an order on November 4, 1985, denying the motion.

~Footnote_seven

7 B-E made an error of $1,000 in adding the amounts for Caudill's regular rates, but the error was corrected in arriving at the total of $94,906.05.

~Footnote_eight

8 B-E made an error of $1,000 in determining Mullins' wages for the period 3/7/84 through 6/6/84 and the total for Saturday wages must be corrected by $1,000 and that increases Mullins' total wages for the period by $1,000.

~Footnote_nine

9 B-E made an error of $9.00 in Caudill's wages for Sunday work for the period of 6/7/84 through 9/30/84, but the error was corrected when B-E arrived at its total of $7,314.53 for Sunday work.

~Footnote_ten

10 Caudill was paid for only 8 1/2 hours per shift on and after November 27, 1984.

~Footnote_eleven

11 Mullins computed the dispatcher's Sunday shift as paying an amount of $268.92, but I cannot ascertain how he determined that large an amount unless there is some sort of Sunday differential which accounts for the difference between my figure of $243.27 and his computation of $268.92. Since 1/2 hour is worked after midnight on Sunday, it is possible that the 1/2 hour is paid at the normal overtime rate of $21.47, but that would make the amount even less than the $243.27 shift payment I have calculated above.

~Footnote_twelve

12 Section 144 of the United States Code provides as follows: "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days after the beginning of the term at which

the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

~Footnote_thirteen

13 In contrast to the claims made by D30 with respect to my proposed stipulations, counsel for B-E filed a response to the order which stated as follows:

Enclosed is Respondent Beth-Elkhorn Corporation's Response to the Order of June 21, 1984. The effort to reduce this case to basic facts and legal issues is greatly appreciated. We believe that the meeting of counsel, which we proposed in the enclosed response, could be very helpful in simplifying and expediting the case.