

HARRY D. LEES, et al
PLAINTIFFS

VS.

A. E. BURGESS, et al
DEFENDANTSCIRCUIT COURT, TENTH JUDICIAL
CIRCUIT OF ALABAMA
EQUITY DIVISION

CASE NO. CV 80 504-672 WCB

FINAL DECREE

At a pre-trial of this cause at which were present all parties or their counsel of record, it was determined, after an agreement by counsel, that this cause should be referred to a Special Master because of numerous and intricate matters of accounting between the parties, and Honorable Charles Cleveland was appointed, by agreement of counsel, to act as Special Master to conduct the accounting and to make his recommendations founded thereon. After a lengthy hearing before the Special Master, the Special Master filed his "Report And Recommendations Of The Special Master" and the said Report laid over for the filing of objections. Objections were duly filed and briefed and the Court heard oral arguments in support of the objections.

In his Report, the Special Master set forth the pleadings and issues in the case and dealt with and made recommendations upon the numerous counts in the Bill of Complaint and the Counterclaim and made extensive findings to support his conclusions and the suggested amounts which he determined should be made the basis for the entry of judgment awards by this Court.

The Court finds that because of the length of the findings of the Special Master and the fact that they deal with great particularity and exactitude with the matters involved, it is both expedient and proper that the Court enter the following decretal orders which are final and determinative of all the issues posed by the pleadings.

Accordingly, it is CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court as follows:

ONE: The "Report And Recommendations Of The Special Master" as filed by him in the cause are hereby adopted, in toto, by the Court and included in and made a part of this Final Decree.

Julard, Pope & Whisman
2326 Highland Ave.
Bham, Ala. 35205

Page Two
Final Decree
Case No. CV 80 504-672 WCB
Lees, et al v. Burgess, et al

TWO: A judgment is hereby entered in favor of Harry D. Lees against Burgess Mining and Construction Company in the amount of TWENTY ONE THOUSAND THREE HUNDRED EIGHTY THREE and 16/100 DOLLARS (\$21,383.16), with interest at the rate of 6% per annum from October 26, 1977.

THREE: A judgment is hereby entered in favor of Harry D. Lees against A. E. Burgess, C. R. Burgess and Burgess Brothers, a partnership composed of A. E. Burgess and C. R. Burgess, in the amount of SIXTEEN THOUSAND FOUR HUNDRED SIXTY AND 60/100 DOLLARS (\$16,460.60), with interest at the rate of 6% per annum from October 26, 1977.

FOUR: Judgment is entered in favor of Harry D. Lees against A. E. Burgess in the amount of NINE THOUSAND FOUR HUNDRED FIFTY ONE AND 83/100 DOLLARS (\$9,451.83), with interest at the rate of 6% per annum from October 26, 1977.

FIVE: A judgment and award is hereby rendered in favor of the Special Master, Honorable Charles Cleveland, against the Defendants, separately and severally, as an interim fee for services rendered in this matter in the amount of TEN THOUSAND DOLLARS (\$10,000.00); and said judgment shall be due and paid irrespective of any appeal that may be taken by any party.

SIX: The costs of court in this cause are taxed against the Defendants, Burgess Mining and Construction Company, A. E. Burgess, C. R. Burgess, and Burgess Brothers, a partnership composed of A. E. Burgess and C. R. Burgess, jointly and severally, for which let execution issue.

DONE and ORDERED this 15th day of September, 1982.

W. C. Barber
CIRCUIT JUDGE

cc: Charles Cleveland, Attorney
Max Pope, Attorney
Frank Bainbridge, Attorney

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
EQUITY DIVISION

HARRY D. LEES, et al,)	
)	
Plaintiffs,)	
)	
vs.)	CASE NO.
)	CV 80 504-672 WCB
)	
A. E. BURGESS, et al,)	
)	
Defendants.)	

REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER

Charles Cleveland, Special Master in the above styled case, submits this report and recommendations.

Robert S. Gordon was initially appointed as Special Master on December 18, 1980, but because of Mr. Gordon's illness, Charles Cleveland was appointed Special Master on July 20, 1981, with the same duties, rights, and instructions.

PLEADING AND ISSUES

The complaint, as amended, was filed on behalf of Harry D. Lees and Davis, Terrell, Killian and Associates, a partnership (DTK) as plaintiffs vs. A. E. Burgess, C. R. Burgess, Burgess Brothers, a partnership (Burgess Brothers), and Burgess Mining and Construction Corporation (Burgess Mining). The complaint is framed in nineteen counts that allege various misdeeds by the defendants in their dealings with DTK, and claim compensatory and punitive damages on behalf of DTK and Lees.

In their answer, the defendants deny the material allegations of the complaint, and contend that Lees does not have

COURT'S EXHIBIT

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authority to file this suit on behalf of DTK and that the suit must be maintained by the individual partners. Burgess Mining filed a counterclaim, alleging that DTK was indebted to it as a result of various transactions, and demanded judgment against Lees for his distributive shares as a partner.

Lees denied the allegations of the counterclaim and filed a third-party complaint against the other partners of DTK, alleging that in the event it was determined that he was liable to Burgess Mining, the other partners were liable to him in accordance with their respective shares in DTK. Third-party defendants were A. E. Burgess, A. E. Burgess, Jr., Charles R. Burgess, W. J. Davis, Charles E. Henderson, M. L. Killian, B. M. Lackey, James M. Phillips, W. E. Prescott, III, A. J. Ryan, Thomas H. Terrell, Harold L. Wilson, Reynolds D. Whatley, Lawrence J. Woodall, Jr. and Ben F. Robinson.

A stipulation by the parties is attached as a part of this report.

COUNSEL OF RECORD

The plaintiffs are represented by Clifford Fulford and Max Pope of the firm of Fulford, Pope and Minisman. The defendants are represented by Frank M. Bainbridge and William O'Neal Whit, Jr. of the firm of Bainbridge and Mims. The third-parties defendants were not represented and did not participate in these proceedings.

HEARING

A hearing was held at the Jefferson County courthouse and testimony was taken by the Special Master, beginning on July 20, 1981 through July 28, 1981. The proceedings were recorded by Jackson Shores, Jr., the court reporter. No transcript was ordered by the court and one has not

been prepared.

WITNESSES

Witnesses who testified were:

Wayne Wetty, CPA, with H. L. Raymond and Company
Hasbrook Haynes, CPA with H. L. Raymond and Company
William M. Meadows, formerly employed by DTK
Harry Lees, plaintiff
Clarence Blair, president of Black Diamond Coal Company
Hubert Davis, salesman with Simmons Machinery Company
W. J. Davis, an accountant formerly with Burgess Mining
William E. Prescott, an attorney and former executive
vice-president of Burgess Mining.
Calvin Jones, a lessor of coal mining rights to DTK
Dalton Splaun, CPA with Mackel, Splaun and Tindall
A. E. Burgess, defendant
M. L. Killian, an engineer formerly with Burgess Mining
Raymond Hardesty, formerly with Burgess Mining

EXHIBITS

A schedule of the exhibits that were offered and received in evidence is attached. The exhibits are filed with the court with this report. Numbers or letters in parenthesis in this report refer to exhibit numbers.

BRIEFS

After testimony was taken, both parties filed briefs outlining their contentions. The briefs are filed with the court with this report.

FINDINGS OF FACT

The Special Master makes findings of fact as follows:

Preliminary Findings

1. Burgess Mining is a substantial coal strip

mine operator that has been in business for a number of years. Its principal stockholder and chief executive officer is A. E. Burgess. In the summer of 1974, Burgess decided to form a partnership composed of some of Burgess Mining's key personnel to operate a strip mine. The purpose was to provide additional compensation to employees of Burgess Mining selected by A. E. Burgess.

2. A. E. Burgess contacted Harry Lees and discussed with him the proposed operation. Lees was retired at that time and was not an employee of Burgess Mining. He had been in the strip coal mining business in Alabama for a number of years. He had been an owner-operator of a small operation and had worked for larger companies. He and A. E. Burgess were friends and had known each other for a long time. They were partners in the coal mining business in 1947 and 1948. Lees operated a small strip mine in partnership with Johnny Crim until he retired in 1973. Burgess offered Lees a partnership interest in the proposed partnership, if he would be the superintendent of mine operations.

3. In September of 1974, there was an organizational meeting at Burgess Mining offices attended by several of the proposed partners, including Lees. A. E. Burgess was not present at this meeting. He had previously outlined his plans to Prescott, the administrative vice-president of Burgess Mining. Prescott reviewed these plans with those present. A written agreement of the partnership, subsequently prepared by Prescott and dated September 2, 1974, was executed by W. J. Davis, T. H. Terrell, M. L. Killian, E. W. Lackey, J. M. Phillips, A. E. Burgess, C. R. Burgess, A. E. Burgess, Jr., W. E. Prescott III, H. D. Lees and C. E.

Henderson. (A-1) Two amendments dated March 1, 1976 were signed by all of the partners adding as partners; H. L. Wilson, L. A. Woodall, Ben F. Robinson and A. J. Ryan. (A-3; A-4) All of the partners, except Lees, executed an amendment dated January 19, 1977, adding R. D. Whatley as a partner. (A-5) Lees was not informed of this amendment and did not agree to it. The name given the partnership was "Davis, Terrell, Killian and Associates" (DTK).

4. None of the partners invested any initial capital in DTK. DTK borrowed \$115,000.00 with which to begin business. At least \$10,000.00 was borrowed from A. E. Burgess and \$94,000.00 from Burgess Mining. All of it was repaid with interest during 1975.

5. The partnership agreement provided that decisions would be made by a majority of the partners. However, except for the organizational meeting and one other meeting in September of 1977, no formal meetings were held prior to dissolution. No minutes were kept of any meeting. Except for the partnership agreement itself and the amendments recited above, no decision of the partnership was ever made or ratified by a majority of the partners as provided in the agreement. From time to time, various members of the partnership met informally at Burgess Mining office and discussed partnership affairs, and occasionally partnership affairs were discussed at social gatherings with some of the partners. At an informal meeting, when Lees was not present, some of the partners selected Prescott as the managing partner of DTK. However, A. E. Burgess effectively controlled the business affairs of DTK and made its major business decisions.

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6. DTK operated a strip mine at three different locations near West Blocton, Alabama, from January 1975 until October of 1977. The mines were in the Thompson seam until August 1976, the Atkins seam until December, 1976, and the Allis-Jones seam thereafter. DTK operated under the state permit issued to Burgess Mining until it was issued its own permit on December 1, 1975.

7. Lees was in charge of the mining operations and received a salary from DTK from the time it began mining until he retired in December of 1976. All of the other partners were employees of Burgess Mining, and none of them received any salaries from DTK.

Management Fee

8. DTK did not have an office. All of its management functions, except operations at the mines, were performed by Burgess Mining personnel. For example, A. E. Burgess, chief executive officer of Burgess Mining, took care of sales, determined mine locations, and made the major business decisions of DTK. W. E. Davis, accountant for Burgess Mining, did the monthly financial reports for DTK. T. H. Terrell, who was A. E. Burgess' son-in-law and assistant secretary for Burgess Mining, handled weight tickets, royalties, and insurance for Burgess Mining and DTK. M. L. Killian, an engineer and vice-president of Burgess Mining in charge of construction and mining, did some prospecting and engineering work for DTK. W. E. Prescott, administrative vice-president and general counsel for Burgess Mining, prepared the partnership agreement and amendments and dealt with government agencies on behalf of DTK. All of these services were performed in the normal course of their employment with Burgess Mining

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and without any additional expense to Burgess Mining. Some of these services were normally performed by Burgess Mining for its customers as a courtesy and had been furnished to Lees and John Crim without charge. Burgess Mining also paid Lees salary prior to January 1975 while he was prospecting for DTK.

9. Monthly statements showing the earnings of DTK were prepared by Burgess Mining personnel and distributed to the partners. Prior to the statement for December 1975, none of the statements showed any expense for management fees, and there had been no agreement for payment of any such fees.

10. When the year end statement for 1975 was being prepared, A. E. Burgess told Terrell and Prescott to devise a formula for a management fee. They suggested a management fee based upon a proration of certain items of overhead expense incurred by Burgess Mining in proportion to the tons of coal mined by DTK and Burgess Mining. Terrell and Prescott selected the items of overhead which in their judgment related to coal production and excluded those items they determined related to other activities of Burgess Mining. A. E. Burgess agreed to the formula and instructed Davis to use it in preparation of DTK's financial statements. The computation for the year of 1975 amounted to \$110,857.00, which was included in the year end statement, and paid by DTK to Burgess Mining.

11. When Lees received the year end statement for 1975, he confronted A. E. Burgess and objected to the charge of a management fee. He also voiced his objection to some of the other partners.

12. Beginning in January, 1976, an estimated management

fee was shown as an expense in the monthly statements. Computations based on the formula were made for the year ending 1976 and in the statement for October 31, 1977 in the amounts of \$122,384.00 and \$95,406.41, respectively. However, there was a lack of consistency in the items of overhead used in the computations. For example, a contribution made by Burgess Mining to its pension trust was used in 1975, but not in 1976 or 1977. Interest paid by Burgess Mining was not used in 1975, but was used in 1976 and 1977. Subsequently, the management fee was recalculated on a more consistent basis. The amounts of the original calculations were paid by DTK to Burgess Mining. According to the recalculation, DTK owes Burgess Mining an additional \$7,524.13 for 1975; \$28,417.66 for 1976; and \$13,239.76 for 1977. (AG-24)

13. There is testimony in the record that overhead in the strip mining business in Alabama generally ranges from 10% to 20% of sales or from \$2.00 to \$3.00 per ton of coal produced. The amounts charged DTK, even using the recalculation set out above, is less than either \$2.00 per ton or 10% of DTK's sales. Lees testified that he could have operated a single pit operation with only nominal overhead. The monthly statements of DTK show that some items which may be considered overhead such as insurance and taxes, were paid by DTK.

Equipment

14. In the preliminary meetings in July and August of 1974, A. E. Burgess and Lees discussed the equipment that would be needed by the proposed partnership. A. E. Burgess told Lees that he had purchased a 2400 Lima Dragline, but had not taken delivery. There was no written memorandum of the agreement between A. E. Burgess and Lees relative to the

equipment. Lees understood from their conversations that the equipment was to be purchased by DTK on lease sale contracts, but A. E. Burgess had no such understanding. Lees attempted to get financing for the Lima Dragline at his bank but was unable to do so, and was later advised by A. E. Burgess that financing had been arranged.

15. On August 10, 1974, Burgess Mining signed a lease with Thompson Tractor Company to rent a Caterpillar 988 Dystred Wheel Loader (front-end loader) for \$4500.00 a month. Its value was stated in the lease as \$75,000.00 (N-1) The document was a straight lease without any provision for purchase. However, it was the custom of the lessor to permit the lessee to purchase the equipment at its stated value, after making adjustments for finance charges and taxes and giving credit for rent paid as if there had been a lease sale contract. On March 11, 1976, the front end loader was invoiced to Burgess Mining by Thompson Tractor Company. The invoice shows a sale price of \$75,000.00. After adjustment for the finance charges, taxes and credit for \$90,000.00 in rent previously paid, Burgess Mining was given a net credit of \$5,407.08. (N-2)

16. In the fall of 1974, A. E. Burgess and Charles Burgess formed a partnership known as "Burgess Brothers". Its only income was rent paid by DTK for equipment and the reason for its formation was to obtain title of the equipment rented by DTK.

17. Plaintiff's exhibit Q-1 is a lease dated October 18, 1974, between Thompson Tractor Company and Burgess Brothers for the lease of a Caterpillar D8K tractor (Bulldozer). The rent was \$5,000.00 a month and the stated value of the bulldozer was \$137,995.00. It appears from the document that Lees signed it on behalf of Burgess Brothers. However, Lees

testified that the name "Burgess Brothers" was not on the document when he signed it. He understood that he was signing it on behalf of DTK. There is no evidence that he ever had any authority to sign any document on behalf of Burgess Brothers. On October 18, 1974, Thompson Tractor invoiced the bulldozer to Burgess Brothers. After adjustments the balance due was \$20,504.19.(Q-2)

18. On December 18, 1975, Burgess Brothers purchased a 2400 Lima Dragline (Dragline) from Simmons Machinery Company for a purchase price of \$447,281.06.(R-1) It was financed by a promissory note to Allied Financial Corporation for \$400,000, payable in 59 payments of \$6,666.67 and a final payment of \$6,666.47.(R-2)

19. On December 31, 1974, Terrell signed a month-to-month lease on behalf of DTK agreeing to rent the front end loader, bulldozer and dragline from Burgess Brothers for rent of \$6,000, \$7,000, and \$12,500 respectively. There is no provision in this lease for DTK to acquire title.(O) Burgess gave Prescott instructions as to the terms of the lease and it was drafted by Prescott. Subsequently, Charles Burgess and Prescott requested A. E. Burgess to reduce the rent paid by DTK and a new lease was executed on April 1, 1977, showing the rent for the three items as \$2,500, \$2,500, and \$12,500 respectively.(P) Mr. Lees was not aware of either of these documents until after DTK was dissolved. DTK did not have any obligation to purchase either of these items of equipment. However, while they were used by DTK, they had stickers identifying them as belonging to DTK.

20. A comparision of the total cost to Burgess Mining and Burgess Brothers and the total rent paid by DTK is as follows:

	Costs to BM or BB	Rent paid by DTK
Front End Loader	\$ 84,592.11	\$179,500.00
Bulldozer	158,499.19	209,000.00
Dragline	<u>447,281.06</u>	<u>425,000.00</u>
	\$690,372.36	\$813,500.00

21. A comparison of monthly payments by each is as follows:

	By DTK to BB Prior to 4/1/77	By DTK to BB After 4/1/77	By BB or BM
Front End Loader	\$6,000.00	\$2,500.00	\$4,500.00
Bulldozer	7,000.00	2,500.00	5,000.00
Dragline	12,500.00	12,500.00	6,666.67

22. There is expert testimony in the record that the fair market value of the three pieces of equipment as of October 26, 1977, was within the following ranges:

Front End Loader	\$ 55,000	-	\$ 60,000
Bulldozer	75,000	-	82,500
Dragline	525,000	-	575,000

23. There is expert testimony in the record that a reasonable monthly rental rate for the equipment on a short time basis was within the following ranges:

Front End Loader	\$ 4,000	-	\$ 5,000 per shift
Bulldozer	5,000	-	6,000 per shift
Dragline	10,000	-	12,500 per shift

24. Burgess Brothers took investment credits on its federal income tax returns for the three pieces of equipment as follows: 1975 - \$20,573.40; 1976 - \$23,691.19; and 1975 - \$32,588.20. DTK did not take the investments on its federal income tax returns. The taking of such credits by Burgess Brothers would not prejudice the right of DTK to such credits if it is entitled to such credits. However, even if DTK had taken such credits they would have been due to be recaptured on the dissolution of DTK.

25. DTK purchased some other equipment, rented some from Burgess Mining, and leased some from others. Also, there was some exchange of the use of equipment between

DTK and Burgess Mining for which no payment was made. For example, the front end loader described above was used extensively by Burgess Mining and DTK used a lowboy belonging to Burgess Mining without payment. (EX 20).

26. After the dissolution the remaining equipment of DTK, excluding any interest in the front end loader, bulldozer and dragline, was sold to Burgess Mining for its book value of \$92,878.00.

Coal Sales And Washer Loss

27. On June 10, 1971, Black Diamond Coal Mining Company entered into a contract to purchase coal from Burgess Mining. (AG-12) The coal was washed by Black Diamond at its West Blocton washer. The initial base price was \$5.52 per ton of coal with an adjustment based upon the amount of loss as a result of washing. There was a bonus of 7 cents per ton for every one percent under twenty percent of washer loss, and a penalty of 7 cents per ton for every one percent above twenty percent washer loss. Also, Black Diamond paid the Alabama severance tax and the royalties due the United Mine Workers of America. On August 1, 1974, Black Diamond increased the base price to \$18.80, with a bonus of 25 cents per ton for every one percent under twenty-five percent of washer loss, and a penalty of 25 cents per ton for every one percent over twenty-five percent washer loss. In January of 1975, the base price was increased to \$20.46 with the penalty and bonus for washer loss remaining the same. (AG-5)

28. When DTK began mining in January 1975, its coal was shipped to the Black Diamond washer. The washer separated the coal from rock, clay, dirt and high ash material. The reduction in weight because of the removal of these items

is called "washer loss". After being weighed, DTK's coal was co-mingled with Burgess Mining coal and washed. Black Diamond made monthly weight reports to Burgess Mining, showing the amount of coal received from each pit, including DTK's pit, the amount of coal washed, and the percentage of washer loss of all the coal washed that month. (27)

29. When Burgess Mining received the monthly weight reports from Black Diamond, Terrell and Davis computed the washer loss in dollars for the DTK coal from the information on the report. The computations assumed that Burgess Mining coal and DTK coal each had the same percentage of washer loss as the percentage for their coal combined. Black Diamond then paid Burgess Mining and DTK separate checks for the purchase of coal each month.

30. Black Diamond resold the coal it purchased from Burgess Mining to DTK to United States Steel Company. In June of 1976, United States Steel terminated its contract with Black Diamond and contracted with Burgess Mining for its coal. A formal contract was executed between United States Steel and Burgess Mining on November 1, 1977. (11) It provided for a base price of \$31.38 for washed coal and a bonus or a penalty based upon moisture and ash content, but no adjustment for washer loss. It provided that United States Steel would reject any coal that did not conform to certain specifications for ash and sulfur content, and a quality known as the free swelling index. (FSI) The contract required Burgess Mining to produce a specified amount of washed coal per month and contained other requirements and restrictions.

31. After July 1, 1976, Burgess Mining purchased all of the coal produced by DTK and resold it to United States Steel. (U-2) However, DTK continued to deliver the coal to Black Diamond's

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washer, where it, along with other coal produced by Burgess Mining, was washed on a tonnage basis paid by Burgess Mining.

32. In the summer of 1976, DTK began mining on the Atkins seam. This is a coal seam around 48 inches thick. The bottom 6 inches is good coal with low ash content and good FSI rating. A middleman of 3 to 6 inches is clay and dirt. The upper 30 inches is a low grade steam coal. A. E. Burgess wanted DTK to mine this seam because of the quality of the bottom layer. However, mining the Atkins seam produced a higher washer loss than when mining from other seams. After DTK began mining the Atkins seam, A. E. Burgess began complaining to Lees about excessive dirt in the coal.

33. On instructions from Burgess, Prescott devised a formula for the price to be paid by Burgess Mining to DTK designed to force Lees to produce cleaner coal. The formula provided for a base rate of \$20.46 per ton, with a penalty of \$1.02 for each one percent of washer loss over twenty percent and no bonus. Charles Burgess computed the percentage of washer loss each month and reported it to Terrell, who prepared summaries of coal sales from DTK to Burgess Mining. Also, after July 1, 1976, DTK paid the Alabama severance tax and United Mine Workers of American royalties which had previously been paid by Black Diamond.

34. When Lees received the July 1976 monthly statement in August, showing the computations under the revised formula, he complained to A. E. Burgess and to some of the other partners. In September of 1976, there was a meeting of some of the partners in Charles Burgess' office in which Lees was present, but A. E. Burgess was not. (G) However, A. E. Burgess had advised some of the other partners that were present that DTK would be out of business unless it stopped

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shipping dirty coal. No action was taken at this meeting and no minutes were kept. When Lees complained to A. E. Burgess about the price Burgess Mining was paying DTK for the coal, Lees told him he was quitting. Burgess requested him to stay and train a replacement - which he did. Lees retired as mine superintendent of DTK on December 31, 1976, and was replaced by William M. Meadows, who was not a partner of DTK.

35. At the request of Charles Burgess, A. E. Burgess agreed to adjust the price paid to DTK so that the penalty was not effective until the washer loss was over twenty-five percent, with the other factors remaining the same. This change was effective January 1, 1977. On July 1, 1977, United States Steel increased the base price paid to Burgess Mining. A. E. Burgess then increased the base price Burgess Mining paid DTK from \$20.46 to \$21.46. For sales to Black Diamond, DTK has bonuses in 1975 of \$41,939.12 and \$31,869.61 in 1976. For sales to Burgess Mining it incurred penalties in 1976 of \$245,006.01 and in 1977 of \$44,588.37. (EX 1 & 2)

36. Black Diamond operated a sampling program, used to test the effectiveness of its washer and for other internal purposes. On occasion while the trucks were being weighed, a shovel full of coal from the top of the load was put in a separate box for each pit from which Black Diamond received coal. There was a separate box for the pit operated by DTK. Each week, the contents of the box were mixed and a five pound sample taken to Black Diamond's laboratory, where it was tested for various purposes, including washer loss. These tests did not conform to ASTM standards, which are generally accepted standards for testing in the industry. However, the

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tests did conform to usual practices in the southeast for the purpose of inhouse testing for which tests were done. Exhibit 4 is Black Diamond's weekly lab reports of these tests for DTK coal. These reports indicate that the DTK coal had a higher washer loss than that shown by the procedure used for determining payment. Using the results of these reports and the formulas for pricing that were used DTK would owe Burgess Mining \$1,192,008.08. (EX-5) These reports were based upon an inadequate number of samples and were not routinely made known to DTK or Burgess Mining. They were never used, or intended to be used, for computation of payment.

37. A comparison of washer loss adjustment actually used by DTK and the adjustments that would have been made had the contract with Black Diamond continued, is set out in EX AG-4. Had the Black Diamond agreement continued Burgess Mining would be indebted to DTK for washer loss adjustments in 1976 of \$236,809.40 and in 1977 of \$27,871.41. In addition, DTK paid severance taxes that would have been paid by Black Diamond of \$2,678.80 in 1976 and \$8,395.42 in 1977 (AG-2) and UMWA royalties of \$33,936.11 in 1976 and \$72,774.00 in 1977.

38. The percentage of washer loss as shown on the books and records of DTK and used in computing payments from Black Diamond and Burgess Mining accurately reflects the actual percentage of washer loss incurred by the coal produced by DTK.

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Royalties

39. From January 1975 to March of 1976, DTK mined at a location leased from Calvin Jones. A. E. Burgess negotiated the lease and DTK paid royalties to Jones of \$2.00 per ton. After March of 1976, DTK mined on property that had existing leases in the name of Burgess Mining. DTK paid whatever royalty Burgess Mining was obligated to pay. Terrell computed the amounts and advised Davis, who paid them. Some of the leases had been in existence for a long time and provided for royalties lower than the current rate. There is expert testimony in the record that a reasonable royalty for these leases when DTK mined them would be ten percent of the selling price - five percent to the owner of mineral rights; and five percent to the owner of the surface rights. If DTK paid 10% of sales as royalty it would owe Burgess Mining an additional \$180,138.12. (X)

40. On May 26, 1977, Burgess Mining filed suit for a declaratory judgment against Southern Electric Generating Company to determine its rights under certain agreements relative to rights of Burgess Mining to mine coal on property of SEGCO and SEGCO's termination of the agreements. (23) On April 14, 1978, this suit was settled by Burgess Mining agreeing to pay \$43,452.35 as additional royalty for coal mined from June 27, 1977 through March 31, 1978, and \$16,462.41 severance tax. Some of this coal may have been mined by DTK, but DTK was not a party to the lawsuit, or the agreements which were the subject matter of the lawsuit, and was not consulted relative to the settlement.

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Ammonia Nitrate

41. From time to time DTK used ammonia nitrate from Burgess Mining's inventory. It was charged to DTK at the bulk rate paid by Burgess Mining. Had DTK purchased it in small quantities on the open market it would have had to pay more than was charged. (21)

Inspection Of DTK's Books

42. In the summer of 1977, accountants employed by Lees were permitted to examine the records of DTK, Burgess Mining, and Burgess Brothers. Defendants' Exhibits 30 and 31 are reports of their examination. On June 22, 1977, A. E. Burgess wrote Lees, refusing further examination. (B) The examination by Lees' accountants were extensive and there is no evidence of injury to Lees because of A. E. Burgess' refusal to permit further examination.

Lees' Distribution Rights

43. The parties have stipulated that Lees withdrew as a partner of DTK on October 26, 1977, and the partnership dissolved on October 27, 1977. They also have stipulated that under the terms of the partnership agreement Lees "is entitled to receive for his partnership interest 1/18 of the net profits that may have been earned between the date of the latest annual accounting of the partnership and the date of his withdrawal together with any other accumulated profits standing to the credit of H. D. Lees as then withdrawn."

44. There were 11 partners in 1975 and insofar as Lees rights are concerned, 15 in 1976 and 1977. Under this stipulation and under paragraph 16(a) of the partner-

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ship Lees' share of any adjustment to the profits or losses of DTK would be 1/11 in 1975, 1/15 in 1976, and 1/18 in 1977.

45. The books and records of the partnership show a balance as of December 31, 1976, in Lees' capital account of \$5,216.13. The books show credits for earnings during the year of \$4,502.20 and \$2,947.00, and a cash withdrawal of \$3,231.50, leaving a net balance in his account as of the dissolution of the partnership of \$9,451.83.(AH) All of the remaining funds and assets of DTK have been expended or paid out at the direction of A. E. Burgess.

CONCLUSIONS AND RECOMMENDATIONS

In accordance with the foregoing findings of fact and the testimony and evidence presented to me, I make the following findings and recommend to the court:

1. The defendants permitted the plaintiffs' accountants to make extensive examinations of DTK's books and records. Although A. E. Burgess denied further examination on June 22, 1977, reasonable access to the books and records had been permitted, and the relief requested by the plaintiff in COUNT ONE should be denied.

2. The pricing arrangements by which Burgess Mining paid DTK for coal was determined solely by A. E. Burgess, and was not an arm's length transaction. Neither Lees nor DTK is bound by the arrangement. The basis on which DTK sold coal to Black Diamond as it related to washer loss, severance taxes and UMWA royalties was fair and reasonable at the time DTK sold to Black Diamond and was also a fair and reasonable basis for determining price when DTK sold coal to Burgess Mining. The plaintiffs are

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entitled to the relief prayed for COUNTS TWO, THREE and FOUR against Burgess Mining for the difference between what was actually paid and the amounts that would have been paid, had the Black Diamond arrangement continued. Burgess Mining is not entitled to recover on the claims set out in paragraph 6 of its counterclaim. The amounts due DTK by Burgess Mining for these adjustments are as follows:

	1976	1977
Washer Loss	\$236,809.40	\$27,871.41
Severance tax	2,678.80	8,395.42
UMWA Royalties	<u>39,936.11</u>	<u>72,774.00</u>
	\$279,424.31	\$109,040.83

3. DTK and Lees are not bound by the arrangements for payment for management fees. However, Burgess Mining performed substantial services for DTK and is entitled to reasonable compensation for them. The formula devised by Terrell and Prescott is a reasonable basis for determining the amounts due. The items included in the recapitulation shown on Exhibit AG-24 relate to coal production and the amounts shown by the recapitulation are fair and reasonable. As this amount is in excess of the amounts actually charged, the plaintiffs' claims in COUNT FIVE should be denied and Burgess Mining is entitled to recover on its counterclaim. The amounts due from DTK to Burgess Mining for management fees are:

1975	-	\$ 7,524.13
1976	-	28,417.66
1977	-	13,039.76

4. The plaintiffs contend that DTK should have acquired title to the three pieces of equipment described in COUNTS SIX, SEVEN and EIGHT. However, under paragraph 19 of the stipulation, Lees rights are determined by paragraph 16(a)

of the partnership agreement. Any equity DTK may have had in the equipment is not included in the amounts due under paragraph 16(a) and the issue of title or equity in the equipment is moot as to Lees. However, DTK and Lees are not bound by the rental arrangements that were made. Burgess Brothers is entitled to a reasonable rent for the use of the equipment. Under the circumstances in this case, the rent agreed to by A. E. Burgess, Charles Burgess, and William Prescott on April 1, 1977 is a reasonable rental rate for the use of the equipment for the entire time it was used by DTK. Therefore, DTK is entitled to a refund of rent from Burgess Brothers, A. E. Burgess and Charles Burgess as follows:

	1975	1976	1977
Front End Loader	\$42,000.00	\$42,000.00	\$10,500.00
Bulldozer	54,000.00	54,000.00	13,500.00
Dragline	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>
	\$96,000.00	\$96,000.00	\$24,000.00

5. At the time A. E. Burgess made decisions on behalf of DTK with either Burgess Mining or Burgess Brothers, he had no intent to defraud and his activities were not such that would justify the imposition of punitive or exemplary damages. The plaintiffs are not entitled to recover on their claims set out in COUNTS NINE, TEN, ELEVEN, TWELVE, THIRTEEN, FOURTEEN, FIFTEEN, SIXTEEN, SEVENTEEN, EIGHTEEN, and NINETEEN.

6. It was the intention of the parties at the time, that DTK pay the same royalties that Burgess Mining paid and Burgess Mining is not entitled to recover on its claim for additional royalties set out in paragraph 2 of its counterclaim.

7. On various occasions Burgess Mining used equipment of DTK's and DTK used equipment of Burgess Mining. Except where charges were made, there was no intent to charge rent and the uses offset each other. Any materials purchased by DTK from Burgess Mining, including ammonia nitrate, were paid for at a reasonable price. Burgess Mining is not entitled to recover on any of the remaining claims in its counterclaim.

8. All of the partners except Lees have released the defendants from claims relative to DTK. (I-1 thru I-14, M). The controversy in this case is essentially between Lees and the defendants. Any judgment rendered on behalf on DTK and derivatively for Lees would be a useless step transaction. Therefore, it is recommended that any judgment rendered by the court be made directly on behalf of Lees and against the appropriate defendants for his proportionate interest in the partnership. In accordance with paragraph 16(a) of the partnership agreement and paragraph 19 of the stipulation, Lees would be intitled to his proportionate share of any adjustments as follows:

1975 - 1/11
1976 - 1/15
1977 - 1/18

9. A recapitulation of the accounts of DTK and Burgess Mining and DTK and Burgess Brothers in accordance with these recommendations would adjust the income of DTK, and Lees share of the adjustment for each year is as follows:

<u>Burgess Mining</u>	1975	1976	1977	Total
Coal Sales(¶2)	-0-	\$279,424.31	\$109,040.83	
Less Management fee(¶3)	\$-7,524.13	-28,417.66	-13,039.76	
	(\$ 7,524.13)	\$251,006.65	\$ 96,001.07	
	x 1/11	x 1/15	x 1/18	
	(\$ 684.01)	\$ 16,733.78	\$ 5,333.39	\$21,383.16

Burgess Brothers

Total

Equipment Rental	\$ 96,000.00	\$ 96,000.00	\$ 24,000.00	
	<u>x 1/11</u>	<u>x 1/15</u>	<u>x 1/18</u>	
Lees' share	\$ 8,727.27	\$ 6,400.00	\$ 1,333.33	\$16,460.60

10. Judgment should be entered in behalf of Harry D. Lees against Burgess Mining and Construction Company in the amount of \$21,383.16, with interest at the rate of six percent per annum from October 26, 1977.

11. Judgment should be entered in favor of Harry D. Lees against A. E. Burgess, C. R. Burgess and Burgess Brothers, a partnership composed of A. E. Burgess and C. R. Burgess in the amount of \$16,460.60, with interest at the rate of six percent per annum from October 26, 1977.

12. Judgment should be entered in favor of Harry D. Lees against A. E. Burgess in the amount of \$9,451.83, with interest at the rate of six percent per annum from October 26, 1977.

13. The Special Master requests a judgment and award rendered in his favor against the defendants, separately and severally, as an interim fee for services rendered in this matter to the date of this report in the amount of \$10,000.00. Said judgment should be ordered paid irrespective of any appeal that may be taken by any party.

14. The court cost of this action should be taxed against the defendants, Burgess Mining and Construction Corporation, A. E. Burgess, C. R. Burgess, and Burgess Brothers, a partnership, composed of A. E. Burgess and C. R. Burgess, jointly and severally, for which let execution issue.

15. This report is ordered to lie over ten days

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for any written objections by either party.

THIS REPORT RENDERED on this the 22nd day of February,
1982.


Charles Cleveland
Special Master

CERTIFICATE OF SERVICE

I certify that on this day I have served a copy of
the foregoing to Frank Bainbridge, William O'Neal Whitt, Jr.,
Clifford Fulford, and Max Pope, by placing same in the United
States mail, postage prepaid.

This the 22nd day of February, 1982.


Charles Cleveland

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SM #1
7/20/81

HARRY D. LEES, et al.,)
Plaintiffs,)
v.)
A. E. BURGESS, et al.,)
Defendants,)
and)
BURGESS MINING &)
CONSTRUCTION CORPORATION,)
Counter-Plaintiff,)
v.)
HARRY D. LEES,)
Counter-Defendant.)

CIVIL ACTION CV80 504-672 WCB

STIPULATION FOR HEARINGS BEFORE SPECIAL MASTER

For the purposes of the hearing of this civil action before Robert S. Gordon, Esquire, Special Master, the undersigned attorneys for the parties stipulate as follows:

1. Davis, Terrell, Killian & Associates (hereinafter "DTK") is a general partnership which was formed on September 2, 1974. W. J. Davis, T. H. Terrell, M. L. Killian, B. W. Lackey, J. M. Phillips, A. E. Burgess, C. R. Burgess, A. E. Burgess, Jr., W. E. Prescott, III, H. D. Lees, and C. E. Henderson were original partners of DTK. On March 1, 1976, H. L. Wilson, L. A. Woodall, Jr., and Ben F. Robinson, Jr., became partners as of January 1, 1976. A. J. Ryan became a partner of DTK as of April 1, 1976. On January 19, 1977, all of the then partners of DTK except Lees executed an amendment to the Partnership Agreement for R. D. Whatley to become a partner of DTK as of January 1, 1977.

2. Lees was in charge of the actual mining operations of DTK from the time it began mining coal until December 31, 1976, when he terminated his employment. Lees drew a salary for his work for DTK. He was the only partner to draw a salary from DTK. Lees remained a partner of DTK until October 26, 1977, on which date he withdrew from DTK as a partner. DTK was dissolved by consent of all the partners as of October 27, 1977, on October 27, 1977.

3. The defendant Burgess Mining & Construction Corporation (hereinafter "Burgess Mining") is a corporation, and the defendant A. E. Burgess owns a majority of its stock.

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4. Burgess Brothers is a general partnership composed of the defendants A. E. Burgess and C. R. Burgess.

5. DTK leased from Burgess Brothers a used Caterpillar 988 Dystred Wheel Loader, Serial Number 87A5317 (hereinafter the "Front End Loader"), a new Caterpillar D8K Tractor with certain accessories (hereinafter the "Bulldozer"), and a new Lima Model 2400-B Dragline, Serial Number 3704-1 (hereinafter the "Dragline").

6. Beginning on July 1, 1976, and continuing through October 27, 1977, DTK sold most of the coal it mined to Burgess Mining. The percent in which a bonus or penalty was to be determined was reduced to 20% from the 25% used by Black Diamond when DTK sold its coal to Black Diamond. Beginning on January 1, 1977, through October 27, 1977, the percent in which a bonus or penalty was to be determined was raised to 25%.

7. Burgess Brothers on its federal income tax returns claimed an investment tax credit on the equipment it leased to DTK.

8. Mackle, Splawn & Tindall, Certified Public Accountants, conducted an audit of the books and records of DTK. The opinion letter is dated February 28, 1978. A true and correct copy of their audit is marked Exhibit "L" and attached to the amended Complaint filed herein. Said firm of Certified Public Accountants have been and still are the accountants for Burgess Mining, Burgess Brothers, A. E. Burgess and C. R. Burgess.

9. Burgess Mining paid for washing the coal which DTK sold to Burgess Mining.

10. The only written contracts or agreements which DTK had with Burgess Mining, Burgess Brothers, A. E. Burgess or C. R. Burgess were the leases on the Front End Loader, the Bulldozer and the Dragline.

11. The equipment listed on Page 8 of the audit conducted by the firm of Mackle, Splawn & Tindall, Certified Public Accountants, was purchased by Burgess Mining for the amount of the book value (\$92,878.00) shown on said Page 8.

12. The partners of DTK borrowed \$115,000.00 on promissory notes in 1975 to start its mining operation. Said notes and interest due thereon were paid in 1975.

13. T. H. Terrell, a partner of DTK, is a son-in-law of A. E. Burgess.

14. C. R. Burgess, a partner of DTK, is the brother of A. E. Burgess.

15. A. E. Burgess, Jr., a partner of DTK, is the son of A. E. Burgess.

16. All the partners of DTK except Lees were employees of Burgess Mining during the time they were partners of DTK.


17. The funds of DTK shown by the audit performed by Mackle, Splawn & Tindall, and the other proceeds received as a result of the sale of the equipment shown on Page 8 of said audit have been expended.

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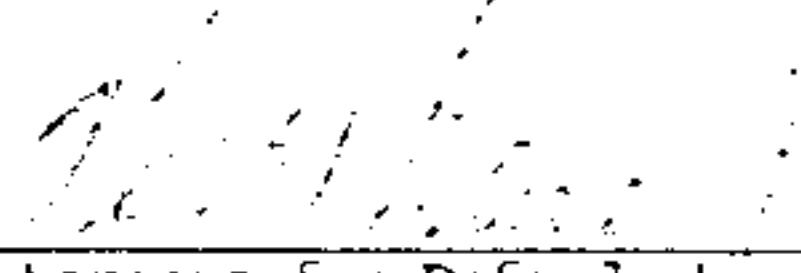
18. Each of the exhibits attached to and made a part of the Amended Complaint filed July 14, 1980, is a true copy of the original and may be offered in evidence subject to any objections except authentication and that the exhibit is not an original.

19. H. D. Lees withdrew as a partner of DTK on October 26, 1977. Under the terms and conditions of Paragraph 16(a) of the Agreement of Partnership dated September 2, 1974, H. D. Lees is entitled to receive for his partnership interest 1/18 of the net profits that may have been earned between the date of the latest annual accounting of the partnership and the date of the his withdrawal together with any other accumulated profits standing to the credit of H. D. Lees as then unwithdrawn.

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PLAINTIFFS' EXHIBITS

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A-2	Notice of Partners
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A-5	Amendment 1/19/77
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C	Letter to A. E. Burgess from Lees 7/12/77
D	Letter to Lees from A. E. Burgess 7/27/77
E	Letter to A. E. Burgess from Lees
F	Letter to partners from Lees 10/5/77
G	Letter to partners from W. E. Prescott 10/21/77
H	Letter to partners from Lees 10/26/77
I-1	Release of A. E. Burgess 12/15/77
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I-3	Release of Charles R. Burgess 12/15/77
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I-5	Release of Charles E. Henderson 12/15/77
I-6	Release of M. L. Killian 12/16/77
I-7	Release of B. W. Lackey 12/15/77
I-8	Release of James M. Phillips 12/15/77
I-9	Release of W. E. Prescott, III
I-10	Release of A. J. Ryan
I-11	Release of Thomas H. Terrell 12/15/77
I-12	Release of Harold L. Wilson 12/ /77
I-13	Release of R. D. Whatley 12/16/77
I-14	Release of Lawrence A. Woodall
J	Letter to Lees from Prescott 12/22/77
K	Letter to Pope from Wm. Whitt, Jr.

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M	Letter from Burgess to Robinson 3/3/80
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N-2	Thompson Tractor Invoice to Burgess Mining 3/11/76
O	Lease contract - Burgess to partnership 12/31/74
P	Lease contract - Burgess to partnership 4/1/77
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Q-2	Invoice to Burgess Bros. from TT 1/26/77
R-1	Invoice to Burgess Bros. from Simmons 12/17/74
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U-2	Summary of U.S. Steel Records
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Z	Cash Receipts - 1976
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AB	Coal Related Income - 1976
AC	Coal Related Income - 1975
AD	Royalty Expense - 1975
AE	Cash Reciepts
AF-1	Royalties
AF-2	Summary of Royalties 1975-76
AF-3	Analysis Adjustment - Sales & Washer Expense
AF-4	Sales Price Adjustment
AF-5	Analysis of Sales & Royalties - 1976
AF-6	Analysis of Sales & Royalties - 1975
AF-7	Summary <u>Equipment</u> Rent
AF-8	Reclamation Expense
AF-9	Parts and Repairs Expense 1976

AF-10	Parts & Repairs Expense 1975
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AF-12	Misc. Expense 1976
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AF-15	Comparison Items Used In Expense
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AF-17	Mechanics Salary 1976
AF-18	Summary Tax Returns -Burgess Bros.
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AG-3	UMWA Royalties - 1976-77
AG-4	Coal Sales & Washer Loss 1975-76-77
AG-5	Effect of Washer Adjustment
AG-6	Schedule of Washer Adjustment -last half 1976 and all of 1977
AG-7	Sustained
AG-8	Washer Loss -DKT
AG-9	Memo of Conversation with Davis
AG-10	Procedure for calculation Washer Loss
AG-11	Letter agreement Black Diamond & Burgess Mining 1974
AG-12	Agreement Burgess Mining & Black Diamond
AG-13	DTK Tax Return - 1975
AG-14	DTK Tax Return - 1976
AF-15	DTK Tax Return - 1977
AF-16	Audit Report Mackle, Splawn & Tindall
AG-17	IRS Code Sec. 46(d)(3) & Reg. Investment Credit
AG-18	2 leases - Burgess & DTK - Equipment
AG-19	Analysis Equipment Rental Income 1975 -
AG-20	Cash Flow Equipment Rental 1975-1977

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AG-22	Documents on Wheelloader
AG-23	Documents on D8K Tractor
AG-24	Comparison of Overhead Costs Used & Corrected re: Management Costs to DTK
AG-25	Memo re: Gross Profits
AG-26	Sustained
AG-27	Series of Schedules - Coal Summaries
AG-28	Monthly financial statements - 1975
AG-29	Monthly financial statement - 1976
AG-30	Monthly financial statements - 1976
AG-31	Letter from Haynes to Fulford 7/6/81
AG-32	Formula For Washer Loss
AH	Ledger of partner account
AI-1	Summary of Front End Loader 1975
AI-2	Summary of Front End Loader 1976
AI-3	Summary of Front End Loader 1977
AF-1	Hauling Records - Time Records
AJ-2	Summary of AJ-1
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AK-3	Request for Admissions
AK-4	Amended Response to Request for Admissions
AL-1	Deposition of C. L. Pletz
AL-2	Exhibits re: Depo of C. L. Pletz
AM	ASTM Standards
AN	Black Diamond Records - Washer
AO	Black Diamond Daily Mine Reports
AP	Sustained
AQ	Deposition of Prescott
AR	Chart
AS	DX 5 with changes by Fulford

AT-1	Lees Tax Return - 1975
AT-2	Lees Tax Return - 1976
AT-3	Lees Tax Return - 1977
AV	Schedule by Cliff & Max AJ-1
AW	Schedule
AX	Net Worth June 1977

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2	Original Calculations washer adjustment
4	Black Diamond Lab Reports
5	DTK Washer bonus - loss schedules
6	DTK Washer Bonus - revised
11	U. S. Steel Contract - Burgess Mining
19	Haul Road Maintenance Charge
20	Schedule of Lowboy Hauling
21	Schedule of Nitrate Billings
22	Royalty Analysis
23	Complaint - Burgess Mining v. Sou. Electric
24	Settlement - Burgess Mining v. Sou. Electric
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30	Letter from Raburn to Pope 6/16/77
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33	Per Ton Overhead
34	Washer Loss - Schedule
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The State of Alabama
JEFFERSON COUNTY

CIRCUIT COURT,
TENTH JUDICIAL CIRCUIT OF ALABAMA
IN EQUITY

I, the undersigned, as Register of the Circuit Court, Tenth Judicial Circuit of Alabama, do hereby certify that the foregoing contains a full, true and correct copy of the instrument herewith set out as appears of record in said Court.

Witness my hand and seal of said Court, this the 28th day of September 19 82.

James L. Coker, Register.
By: Wilson
Deputy Register.

REGISTER-75

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Thomas W. Landon, Jr.
CLERK OF COURT

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