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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 21989 (Sub-No. 4)[1]

PENNSYLVANIA RAILROAD COMPANY
− MERGER −
NEW YORK CENTRAL RAILROAD COMPANY
(Arbitration Review)

Digest:[2] The Board is upholding the arbitration award of approximately $13.4 million in labor protection benefits and interest to 32 claimants (or their survivors or other personal representatives) who were employed by the Penn Central Transportation Company before it ceased to exist as a railroad in 1976.

Decided: January 6, 2011

EXECUTIVE SUMMARY

When railroads merge, they enter into agreements with rail labor unions that govern how their mergers will be implemented. Disputes that arise under these "implementing agreements" are brought to arbitration. A party aggrieved by an arbitral decision may seek review at the Board, whose decisions are reviewable in court. The Board's review of an arbitrator's interpretation and application of an implementing agreement is generally deferential.

This case involves a protracted dispute that arose out of a merger that occurred more than 40 years ago. The matter has bounced back and forth between the courts, various arbitral panels, and, occasionally, the Board and its predecessor, the Interstate Commerce Commission (ICC). The dispute involves 4 different classes of claimants with different issues. All of the claimants suffered employment-related losses after the merger.

The central issue is whether the employee claimants have a right under their labor agreement to recover losses that were not solely due to, or directly caused by, the merger. A right to that level of labor protection would be unusual, particularly in agreements negotiated more recently. But carriers have sometimes entered into merger-related labor agreements that

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[1] This proceeding initially was mistakenly docketed as FD 35289.

[2] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

give their employees protections beyond those prevalent in the industry. In this case, the arbitrator found that the governing implementing agreements gave such added protection by providing wage guarantees for workers who were employed at the time of the merger even if their subsequent employment-related losses were not solely due to or directly caused by the merger. We are affirming that finding here. We also find reasonable the arbitrator's subsidiary finding that, if there were some minimal "nexus" requirement under the merger agreement, the claimants here did in fact establish a connection between their loss of employment and the merger.

Another important issue in this case is whether all of the claimants did all that was required of them to qualify for coverage under the merger protection provisions. The arbitrator found (1) that the carrier had the burden of proof to demonstrate that any of the claimants had failed to comply with the various work-related requirements and (2) that the carrier had failed to meet that burden. In addition, the arbitrator found record support that claimants made themselves available for work at appropriate times and exercised their seniority rights as well as they could given the carrier's actions. Thus the arbitrator found that claimants were eligible for benefits. We affirm the arbitrator's ruling on this issue as well.

Finally, in this decision we affirm the arbitrator's determination and methodology in calculating benefits and interest due, and we order further interest to cover the period between the arbitral award and this decision. We also reject the carrier's argument that the arbitrator was required to recuse himself from this proceeding because he had a professional relationship with the partner of one of the technical witnesses in this matter.

BACKGROUND

In 1962, the Pennsylvania Railroad Company and the New York Central Railroad Company (N.Y. Central) agreed to a merger that resulted in the formation of the Penn Central. In 1964, the carriers' unions and the two merging carriers entered into a merger protection agreement (MPA) for the benefit of employees.[3] The MPA provided considerably greater labor protection than the standard levels that applied under the pre-New York Dock formulas that were then in effect.[4] The MPA was signed by the unions and the two merging carriers alone and did not directly refer to any subsidiary carriers (for example, as pertinent here, the Cleveland Union Terminals Company (CUT), a subsidiary of N.Y. Central), but the MPA was eventually

[3] A copy of the MPA signed by the Brotherhood of Railroad Trainmen and the carriers appears in Penn Central's Petition for Review, Appendix vol. I, Ex. 100. The MPA is formally entitled an "Agreement for Protection of Employees in the Event of Merger of Pennsylvania and New York Central Railroads."

[4] To meet its obligation to provide employee protection under former 49 U.S.C. § 11347, which has been re-codified as current 49 U.S.C. § 11326, our predecessor agency, the ICC, adopted the benefit formula and procedure set forth in New York Dock Railway − Control − Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979) (New York Dock).

interpreted to apply to employees of all subsidiaries of the signing railroads.[5] The merger, which was approved by the ICC in 1966, was finalized on February 1, 1968.

The Claimants

This protracted dispute arose when four groups of former Penn Central railroad employees (collectively, Claimants) were denied labor-protection benefits under the MPA. Between 1969 and 1974, each of these groups filed a separate civil action in the United States District Court for the Northern District of Ohio (the District Court) against (1) the railroad, alleging that it had improperly deprived them of benefits under the MPA, and (2) the union representing them, alleging that it had failed to protect their interests. (The federal case docket numbers and titles appear on the title page of the arbitration decision, and we refer to each group of Claimants by the name of the lead plaintiff listed in each docket title, e.g., the "Knapik Claimants," the "Sophner Claimants," the "Watjen Claimants," and the "Bundy Claimants.")

As explained in greater detail in this decision, the Panel found that all Claimants suffered losses related to the implementation of the merger. The Knapik and Sophner Claimants were passenger-rail employees for CUT. The Knapik Claimants were initially furloughed but later recalled to work at a freight yard, where they often worked less than full time due to their new, far lower seniority status. The Sophner Claimants were not furloughed but suffered a loss of actual work due to their reduced seniority. Both the Knapik and the Sophner Claimants sought displacement benefits under the MPA. The Watjen and Bundy Claimants had worked as freight-rate clerks for N.Y. Central prior to the merger. After the merger, their work was transferred and they were not permitted to follow their work. Instead, Penn Central offered them jobs that did not fall within the scope of work for which the Watjen and Bundy Claimants had accumulated seniority. The Watjen and Bundy Claimants subsequently left these non-seniority jobs and sought separation allowances in lieu of displacement benefits.

The Carrier

In 1970, the Penn Central entered reorganization under the railroad-specific provisions of § 77 of the Bankruptcy Act, and in 1976 the great bulk of its assets were transferred to a new carrier, Consolidated Rail Corporation (Conrail). The bankruptcy estate of the Penn Central continued to survive as a non-railroad in possession of real estate holdings and rail lines that were not transferred to Conrail. In 1978, the non-railroad company emerged from bankruptcy and was renamed the "Penn Central Corporation." In 1994, the company changed its name to "American Premier Underwriters, Inc." We will continue to refer to petitioner as "Penn Central" because this proceeding has arisen out of events that took place when its predecessor was an operating railroad and this name has been used throughout this lengthy dispute.

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[5] By an agreement reached on July 11, 1969, the parties agreed to apply the MPA to CUT employees. The ICC subsequently held that the benefits of the MPA applied from the beginning to employees of all subsidiary railroads. Pa. R.R. − Merger − N.Y. Cent. R.R., 347 I.C.C. 536, 548-549 (1974).

Before Penn Central emerged from reorganization in 1978, the court supervising the reorganization ruled that the District Court litigation could continue but that no judgment could be enforced without its approval.[6] By oral ruling issued on July 14, 1976, and written decisions issued on November 29, 1979, the District Court dismissed the claim of inadequate union representation in each case but referred the issue of entitlement to benefits in each case to arbitration under the MPA.[7] In 1980, the parties negotiated an agreement to arbitrate the four cases in serial proceedings. Accordingly, the parties proceeded initially to arbitrate only the Knapik case, expecting that the outcome of that proceeding would provide guidance for resolution of the others.

The Knapik Arbitration

The original Knapik Claimants were 17 rail yard workers (called "brakemen") on the CUT. On February 16, 1965, the N.Y. Central and the Brotherhood of Railroad Trainmen negotiated an agreement (the "Top and Bottom Agreement") to allow CUT employees an opportunity to work at a nearby N.Y. Central freight yard by merging the CUT seniority roster with the pre-merger seniority roster for N.Y. Central employees who worked at the freight yard. The rosters were merged by placing the former CUT employees at the bottom of the merged roster with a common seniority date of September 10, 1964. The N.Y. Central employees who were already working at the freight yard were placed on the roster in order of their dates of employment on the N.Y. Central, and all of those dates preceded September 10, 1964.

Because they had been placed at the bottom of the merged freight-yard seniority roster, when furloughs became necessary, the Knapik Claimants were the employees who were furloughed, effective on February 25, 1968, shortly after the merger was finalized. The furlough notice told the furloughed CUT employees to "immediately contact" the freight yardmaster to "stand for" work in the freight yard under the Top and Bottom Agreement merging the rosters. None of the 17 original Knapik Claimants physically reported to the freight yard until 1969, when the carrier ended their furlough status and recalled them to work. Of the 17 original Knapik Claimants who were recalled to work at the freight yard in 1969, 10 of them physically reported to work, and 7 did not. Due to their low position on the merged seniority roster, the Knapik Claimants who physically reported to the freight yard in 1969 were sometimes unable to stay employed full time. The carrier refused to provide benefits under the MPA for any of the Knapik Claimants, even for the 10 employees who physically reported to the freight yard after their recall in 1969, arguing initially that the MPA did not apply to subsidiaries of the 2 merging carriers.

The Knapik arbitration was protracted. An initial arbitration panel met in 1983, but was subsequently disbanded. Another arbitration panel, chaired by Fred Blackwell (the Knapik

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[6] The decision of the reorganization court is discussed in the Award at 125.

[7] See Award 19. No union defendant participated in the arbitration over MPA benefits or has ever had any interest in its outcome.

panel), was convened in 1988. The panel held a 3-day oral evidentiary hearing in May 1990. Penn Central argued that the Knapik Claimants were ineligible for benefit payments because they: (1) failed to report to work at the freight yard within 15 days of the furlough notices; (2) failed to prove that they were adversely affected as a result of the merger; and (3) failed to prove their compensation losses in accordance with the requirements of the MPA. On June 22, 1992, the panel entered its decision, which was followed by issuance of a supplemental decision on July 16, 1994, and a dissenting opinion on August 25, 1994. The panel denied all of the claims for benefits, on the grounds that: (1) the 7 Claimants who were dropped from the roster after refusing to report for work at the freight yard when they were recalled from furlough status did not have a reasonable basis for their refusal and thereby failed to comply with requirements in the 1964 agreement that employees exercise their seniority rights to obtain available work; and (2) the remaining 10 Claimants, who reported for work after they were recalled, failed to process grievance claims adequately, admitted their ineligibility for benefits, or lost work due to causes other than the merger, such as business decline, physical incapacity, or voluntarily quitting work, and were thus ineligible for benefit payments.

On November 16, 1994, the Knapik Claimants filed an appeal of the Knapik panel's decision with the ICC, which docketed the appeal as Pennsylvania Railroad Company – Merger – New York Central Railroad Company (Arbitration Review), FD 21989 (Sub-No. 2). By decision served on August 1, 1996, in the (Sub-No. 2) proceeding, the Surface Transportation Board (the ICC's successor agency) denied the appeal, finding that Claimants' cursory appeal failed to define any issues for, or provide any evidence in support of, review. An appeal of this decision to the Court of Appeals for the 6th Circuit was dismissed by the court based on a stipulation that the Board would re-docket the appeal if the Claimants filed supporting documents. On April 17, 1997, the Claimants re-filed their appeal to the Board with supporting documentation, and the appeal was re-docketed as the (Sub-No. 3) proceeding.

The 1998 STB Decision

In its decision in (Sub-No. 3) served on December 8, 1998 (1998 STB Decision), the Board vacated the Knapik panel's decision in part and remanded the proceeding to the parties for further action consistent with its findings. The Board upheld the panel's denial of benefits for the 7 Knapik Claimants who did not report to work after they were recalled, and this aspect of the Board's decision was upheld by a court of appeals.[8] The Board also held, however, that the panel committed egregious error in finding that none of the 10 Knapik Claimants who reported for work was eligible for any benefits. Specifically, the Board rejected arguments that: (1) these Claimants had failed to pursue arbitration in a timely manner; (2) their failure to continue submitting claim forms showed that they did not believe that they were entitled to benefits; and (3) they lost work due to causes, such as business decline, physical incapacity, or voluntarily quitting work, that were deemed by the panel to excuse Penn Central from benefit payments. The Board reasoned that the record "provides no reason to find that claimants' losses were due to other causes that would excuse the carrier from paying benefits."[9]

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[8] See Augustus v. STB, No. 99-3014, 2000 WL 1888805 (6th Cir. 2000) (Augustus).

[9] 1998 STB Decision, at 7.

The issue involved in this latter finding – whether Claimants' losses resulted from the merger or from other causes that would not trigger benefit payments – has been referred to as "the causation issue," and the requirement to demonstrate that the merger was the sole cause of Claimant's losses has been referred-to as the "causation requirement." One of the important issues in the arbitration under review here − whether the MPA contains a causation requirement − was not considered by the Knapik arbitration panel. Therefore, the Board had no occasion to consider this issue in its 1998 STB Decision, reviewed in part by the Sixth Circuit in Augustus.

Resumption of Arbitration for all Claimants

After the parties were unable to agree on the resumption of arbitration, the District Court, Oliver, J., on February 18, 2005, ordered the parties to resume arbitration in all four cases simultaneously; reaffirmed his decision on April 28, 2005; and, on June 28, 2006, appointed Steven H. Steinglass, Esq., as the neutral arbitrator on the Panel in all four cases.[10] By letter dated October 29, 2007, Arbitrator Steinglass denied Penn Central's motion to remove him for an appearance of partiality.[11]

The Steinglass Award

On July 30, 2009, the Steinglass Panel issued a 181-page Award ("Steinglass Award" or "Award"), with Penn Central's nominee on the Panel dissenting. The Steinglass Panel held that all "thirty-two claimants [the Claimants from all 4 cases] (or their survivors or other personal representatives) are entitled to merger protection benefits."[12] The Steinglass Panel based this holding on its findings that: (1) the MPA protects otherwise eligible employees from employment-related losses even without proof that the merger was the proximate cause of those losses (Award 59-67); (2) Penn Central bears the burden of demonstrating that Claimants were otherwise ineligible for benefits due to failure to comply with the MPA's work-related requirements (Id. 51-54); and (3) Penn Central has failed to meet that burden (Id. 54). The Panel rejected Claimants' request for punitive damages, attorney fees, and costs, but found Claimants "entitled to prejudgment interest to compensate them for the loss of the use of the disputed funds."[13] Accordingly, each Claimant was individually awarded the benefits determined to be proper under the MPA plus pre-judgment interest at the prime rate compounded quarterly

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[10] Under National Mediation Board procedures, panels normally consist of 2 members nominated by the parties, and the 2 party-nominated members nominate a neutral member. Here, the court selected the neutral member, apparently because the party-selected members could not agree on a neutral.

[11] The letter appears in Penn Central Appendix vol. 4, at 2258. The motion appears in vol. 4, at 2272-2280.

[12] Award 4. See also Award 176-177.

[13] Id. 4. See also Award 177.

through December 31, 2007, amounting to a total for all Claimants of $13,453,504 ($564,820 in total benefits + $12,888,684 in total pre-judgment interest).[14]

The Appeal

On August 19, 2009, Penn Central filed with the Board, under 49 C.F.R. §1115.8, an appeal of the Steinglass Panel's Award and requested oral argument.[15] Penn Central argues that: (1) the Award fails to comply with the MPA because it ignores what Penn Central asserts is an "explicit and mandatory causation requirement" in the MPA; (2) Claimants were not entitled to benefits because their job losses were caused not by the merger, but by a decline in passenger-railroad service; (3) the Award erroneously imposes the burden of proving compliance with work-related requirements on Penn Central, rather than on Claimants, and Claimants did not meet this burden; (4) the Award grants damages based on a methodology that ignores the requirements of the MPA; (5) the award of prejudgment interest is not allowed by the MPA or the arbitration agreement entered into by the parties; and (6) the Award results from the bias of Arbitrator Steinglass based on a personal and professional relationship with the partner of Claimants' expert witness.

On October 30, 2009, Claimants filed their reply "Brief in Opposition" to Penn Central's appeal. Filed with Claimants' reply was a separate Appendix containing what Claimants refer to as material that was omitted from the Appendices submitted by Penn Central.

On November 17, 2009, Penn Central filed a reply to Claimants' reply, and on December 7, 2009, Claimants filed a motion to strike Penn Central's reply-to-a-reply.

PRELIMINARY MATTER

Claimants' motion to strike Penn Central's reply-to-a-reply, to which Penn Central did not respond, will be granted. Under 49 C.F.R. § 1104.13(c), replies to replies are prohibited. Penn Central has not shown good cause for, or even filed a request for, waiver under 49 C.F.R. § 1110.9. In any event, Penn Central's pleading simply reiterates facts and arguments that are already of record; it does not purport to submit new evidence or evidence of changed circumstances.

Penn Central's request for oral argument will be denied. The extensive record in this proceeding is more than sufficient for our review under our Lace Curtain standards as explained in our discussion below.

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[14] See Award 180-181. Claimants were asked to submit corrected claims information for Claimant Joseph Jarabeck. Award 178.

[15] Although Penn Central captioned its pleading a "Petition for Review," it is entitled to an "appeal of right" under § 1115.8, and we are treating the pleading as such.

DISCUSSION AND CONCLUSIONS

Under 49 C.F.R. § 1115.8, arbitration decisions are subject to an appeal of right, and the standards for review are provided in Chicago & North Western Transportation Co. − Abandonment – near Dubuque and Oelwein, Iowa, 3 I.C.C.2d 729 (1987), aff'd sub nom., International Brotherhood of Electrical Workers v. I.C.C., 862 F.2d 330 (D.C. Cir. 1988), popularly known as the "Lace Curtain" case. Under Lace Curtain, the Board reviews "issues of causation, the calculation of benefits, or the resolution of other factual questions" only for "egregious error."[16] An arbitrator commits egregious error whenever an award is "irrational, wholly baseless and completely without reason, or actually and, or indisputably without foundation in reason and fact."[17] This level of deference applies to the interpretation of an implementing agreement.[18] Otherwise, the Board will overturn an arbitral award only when it is shown that the award fails to draw its essence from the imposed labor conditions or that the Panel has exceeded the authority granted to Panels by those conditions.[19]

The deference we give to arbitrators assisting us in carrying out our responsibilities when they rule on disputes concerning New York Dock matters does not mean that our Lace Curtain review of arbitral awards is just a perfunctory exercise. Labor arbitrators, however, are experts in labor relations and, indeed, in the very sort of contract issues presented here. Therefore, we do not second-guess these arbitrators lightly and instead limit our review as noted above.

Applying Lace Curtain, we will affirm the Award. As explained below, Penn Central has not shown that the Steinglass Panel committed egregious error or exceeded its authority, or that its Award failed to draw its essence from the imposed labor protection conditions (here, the MPA). Indeed, under the circumstances presented here, the Panel's Award reasonably interpreted and applied the MPA to facts that occurred over 40 years ago.

Below we consider Penn Central's arguments. First, we address the central issue of causation. Second, we examine the burden-of-proof issue and other issues related to various work-related requirements under the MPA. Third, we consider issues raised regarding the calculation of benefits and interest. Finally, we explore the argument that Arbitrator Steinglass should have recused himself from the Panel.

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[16] Lace Curtain, at 735-36.

[17] Union Pac. R.R. v. STB, 358 F.3d 31, 37 (D.C. Cir. 2004) (quoting Am. Train Dispatchers Assoc. v. CSX Transp., Inc., 9 I.C.C.2d 1127, 1131 (1993).

[18] See, e.g., CSX Corp. – Control – Chessie System, FD 28905 (Sub-No. 29), slip op. at 6 n.9 (STB served March 14, 2008).

[19] Del. & Hudson Ry. − Lease & Trackage Rights Exemption − Springfield Terminal Ry., FD 30965 (Sub-No. 1), slip op. at 16-17 (ICC served Oct. 4, 1990), remanded on other grounds in Railway Labor Executives' Ass'n v. United States, 987 F.2d 806 (D.C. Cir. 1993).

Causation Issue

The principal issue in the arbitration proceeding was whether the MPA requires a claimant to demonstrate that his employment-related losses were solely and directly caused by the merger transaction. The Award found that such a showing is not required. Penn Central argues that the Award fails to comply with the MPA because it eliminates what Penn Central describes as the "explicit and mandatory causation requirement" in the MPA.

We disagree with Penn Central because the record, particularly the plain language of the MPA, supports the Steinglass Panel's holding that the MPA does not impose a causation requirement on Claimants. Penn Central focuses entirely on MPA section 1(a), a provision establishing a standard, base level of protection for all employees of the merging carriers − the protections accorded by the Washington Job Protection Agreement (WJPA).[20] Penn Central correctly points out, and Claimants themselves concede, that section 1(a) contains a causation requirement.[21]

But section 1(a) is not the only relevant provision, as the last line of section 1(a) states that, "… in addition to benefits set forth in the [WJPA]," the parties "further agreed" to the protections provided in MPA section 1(b),[22] which extend far beyond the base level of protection. Section 1(b), first unnumbered paragraph, which makes no reference to causation, provides an enhanced, attrition-type level of protection for "present employees" of the merging

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[20] The WJPA was negotiated by labor and management in 1936. Thereafter, the ICC incorporated the WJPA protection formula, with minor modifications, into labor protection conditions imposed in rail consolidation proceedings until 1979, when that agency, in New York Dock, combined those protections with other protections required by the Railroad Revitalization and Regulatory Reform Act of 1976.

[21] MPA section 1(a) provides as follows (emphasis added):

> (a) If, notwithstanding the opposition of the said labor organization, the Commission should approve the said merger, then upon consummation thereof the provisions of the Washington Job Protection Agreement of 1936 (a copy of which is attached hereto as Appendix A) shall be applied for the protection of all employes of the Pennsylvania and Central as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is consummated who may be adversely affected with respect to their compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto incident to approval and effectuation of said merger; provided, however, that in addition to benefits set forth in the said Washington Job Protection Agreement, it is further agreed as follows: (b) . . . .

[22] Id.

carriers, such as Claimants.[23] It states that, in exchange for taking employment with the new company, "none of the present employees of either of the said Carriers shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment."[24] The Steinglass Panel reasonably found that, under MPA section 1(b), Penn Central could not reduce or deny Claimants' benefits simply by showing that their adverse change of employment position was due to something other than the merger, such as a decline in passenger service, or a business decision unrelated to the merger. Rather, subject only to a few exceptions discussed in more detail later (5 percent business loss or emergency weather-type conditions), section 1(b) protected Claimants against loss of wages for as long as they were employed by the carrier.

The Steinglass Panel's interpretation of the language and structure of the MPA is strongly supported by precedent and contemporaneous opinion. As observed by the Panel, the ICC, in approving the merger in 1966 subject to the MPA, stated (emphasis added):

> It must be recognized that applicants have agreed to certain benefits greater than we have heretofore required of any section 5 applicant, e.g., the job-retention (attrition) and the limitations in reduction in force, which embrace protection from adverse effects <u>not causally connected with the merger</u>.[25]

As observed by the Panel, the ICC's interpretation of its labor protection imposed conditions was echoed in court proceedings[26] and the Newsletter of the New York Central Railroad.[27] The ICC's interpretation was also echoed in a 1965 speech by Penn Central's CEO Saunders.[28]

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[23] As found by the Panel, Claimants were all "present employees" for purposes of MPA section 1(b), and Penn Central has so stipulated. <u>See</u> Claimants' Reply, at 3 n.2; Award 52, citing Tr. 619-20 (stipulation).

[24] The entire text of the relevant portion of section 1(b) reads as follows:

> (b) On the date the said merger of Central into Pennsylvania is consummated the merged company will take into its employment all employees of Pennsylvania and Central as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is consummated who are willing to accept such employment, and none of the present employees of either of the said Carriers shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment.

[25] <u>Pa. R.R. – Merger – N.Y. Cent. R.R.</u>, 327 I.C.C. 475, 545 (1966).

[26] Award 65 (" … in the valuation proceeding concerning the sale of the Penn Central and its subsidiary, the Erie Lackawanna Railroad, the reorganization court recognized that the MPA had provided otherwise eligible employees with 'attrition' protection, …."), citing <u>In the Matter of the Valuation Proceedings Under Sections 303(c) and 306 of the Regional Rail Reorganization Act of 1973</u>, 531 F. Supp 1191, 1263 n.136 (<u>Valuation Proceedings</u>) (Special Ct.,

(continued . . .)

The Steinglass Panel also found support for its interpretation of the MPA in the forms that the carrier used to process claims for benefits.[29] As observed by the Panel, these claim forms did not require Claimants to demonstrate that their losses were due to the merger. Rather, the forms required Claimants to submit only the data necessary to demonstrate they had incurred a loss and its amount, and any objections had to be specified by the carrier on a part of the form that was to be filled in by the carrier only. Moreover, the Panel noted that, during the period in question, Penn Central had awarded more than $100 million to claimants who submitted requests for benefits using standard forms that made no reference to causation.[30]

Thus, the record contains substantial support for the Steinglass Panel's conclusion that "all the claimants are eligible for merger protection benefits even if they could not prove that their loss of employment was 'solely due to and resulting from such coordinations' within the meaning of §1(a) of the MPA,"[31] and we find no egregious error in this regard.

Notwithstanding its basic finding – that the MPA did not impose a causation requirement – the Panel, perhaps out of an abundance of caution, described what it called "at best, a modest causation requirement" on Claimants that could arguably require Claimants "to establish a nexus between post-merger coordinations and their loss of employment."[32] The Panel reasonably found that all Claimants did in fact establish such a nexus.

(. . .continued)
Reg'l Rail Reorganization Act of 1973, 1981). See also Bundy v. Penn Cent. Co., 455 F.2d 277, 280 (6th Cir. 1972) (describing Penn Central's position that the MPA provided "guaranteed employment for life in the absence of dismissal for cause.")

[27] Claimants' Reply, Appendix 1265-1 ("The agreement is based on the principle of 'attrition,' meaning that it preserves the employment of present employees except in case of their resignation, death, retirement, etc.")

[28] See Claimants' Reply 8 n.7, quoting from their Reply Appendix 1267-2 (emphasis added) ("These men are protected for life subject to retirement, death, resignation or discipline, and they can't lose their job for any reason."). The entire speech is not in the record, but excerpts appear in Penn Central's Appendix vol. 2, at 1266-1267 and in Claimants' Reply Appendix 1267-1 to 1267-4.

[29] Award 66. The claim forms of record appear in Penn Central's Appeal, Appendix vol. 3, tabs 57-61. Penn Central criticized these documents as hearsay and lacking foundation and authentication. The carrier, however, did not claim that they were fraudulent; and, as Arbitrator Steinglass ruled many times at the hearings, use of the rules of evidence applying in civil court trials is inappropriate in this type of administrative proceeding.

[30] Award 66-67, citing Valuation Proceedings, at 1291 n.176.

[31] Award 68.

[32] Award 67.

The Steinglass Panel does not explain why it undertook a nexus inquiry after having already reached its well reasoned conclusion that there was no causation requirement, and we find no basis for a nexus requirement in the record. The Panel's determination to delve into this sort of inquiry, however, was not egregious error. Rather, because the Panel's nexus findings do not alter its final determination that the Claimants were not disqualified from benefits under the MPA due to a failure to adequately demonstrate causation, the Panel's nexus inquiry is, at most, harmless error. In any event, the Panel's findings that the Claimants showed a nexus are supported by the record. For each group of Claimants, there is evidence describing the merged carrier's employment actions (furloughs, consolidation of offices, displacements, loss of seniority rights, etc.) that precipitated the claims. At the hearing, there was testimony from the surviving Claimants, or those who knew them, that can reasonably be held to link Claimants' losses to the actions taken by the carrier following the merger.[33] Indeed, it appears from the record that the Claimants in these proceedings have submitted considerably more proof of nexus than was required on the claim forms that were used to disburse $116.3 million in benefits that Penn Central did pay to other claimants. Penn Central provided no evidence to rebut Claimants' evidence that they were placed in a worse position after the merger was implemented.[34] In sum, whether or not it needed to go in this direction, the Panel reasonably found that Claimants established at least some nexus between their claims and the merger.

Finally, we address one particular aspect of the agreements *vis a vis* Penn Central's causation argument as it applies only to the Watjen and Bundy Claimants. An adversely affected employee, even though eligible for protection under MPA section 1(b), could nevertheless choose to forgo that attrition protection by leaving the carrier's employment and requesting a lump sum payment under MPA section 1(a).[35] The Watjen and Bundy Claimants chose to do this. Penn Central argues that because these claimants did not seek attrition protection under section 1(b), they should be subject to the causation requirements of MPA section 1(a). The

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[33] See, Tr. 90-254, 275-368, Appendix vol. 5 of Penn Central's Appeal; discussion in the Award 68-70. Similar testimony was taken in 1990 concerning the Knapik Complainants; and the Board, in 1998 STB Decision, at 7-8, held that this testimony was sufficient to justify benefit claims in the absence of any evidence to the contrary from the carrier.

[34] Other than to allege a decline in passenger-rail service, a defense that the Panel reasonably found to be unavailable to Penn Central, Penn Central has never pointed to any specific transaction or development other than the merger as being the "real" source of Claimants' losses. Cf. Rio Grande Industries – Control – S. Pac. Transp. Co. (Arbitration Review), FD 32000 (Sub-No. 12) (STB served Sept. 19, 2002), rev'd, Union Pacific R.R. v. STB, 358 F.3d 31 (D.C. Cir. 2004) (carrier alleged that job termination was due to an independent decision to outsource data processing work rather than the merger); Burlington N., Inc. – Control & Merger – St. Louis - S.F. Ry., FD 28583 (Sub-No. 24) (ICC served June 23, 1988) (carrier alleged that an employee's displacement was due to a sale of the line on which he worked rather than the merger); and S. Ry. – Control – Cent. of Ga. Ry., 317 I.C.C. 729 (1963) (carrier alleged that employees were adversely affected by internal technological improvements rather than the merger).

[35] Award 84.

Steinglass Panel, however, held that the overall intent of the MPA, considering both of its two major provisions (section 1(a) and section 1(b)) and their relationship to each other, was to grant enhanced benefits to all "present" employees.[36] Therefore, the Panel refrained from applying a strict causation requirement to the Watjen and Bundy Claimants merely because they were seeking the alternative, lump sum benefits available under MPA section 1(a), rather than the attrition-protection benefits available under MPA section 1(b).

While this interpretation of the two provisions may not be the only one that the Panel could have made, it is reasonable because it carries out the obvious intent of the drafters – to grant enhanced protections for all "present employees." This intent would have been frustrated if the Panel had, in effect, created two classes of "present" employees by relieving some of them from a causation requirement (those seeking attrition benefits) but not relieving others (those seeking separation payments). Therefore, we cannot find egregious error in the Panel's determination that these latter Claimants were also not subject to the causation requirements of MPA section 1(a). In any event, as the Steinglass Panel found (Award 170): (1) "[t]he Watjen and Bundy claimants loss of employment resulted from one of the anticipated post-merger activities – the further consolidation of accounting-related freight work" and (2) they "met . . . the putative strict causation requirement (if one existed) . . . ."

Passenger Service Decline Issue

Penn Central also argues that the Award should have found that Claimants were not entitled to benefits because their job losses were caused by a decline in passenger-railroad service rather than by the merger. This argument, of course, fails if we conclude, as we do, that the Panel reasonably found that the MPA did not contain a strict causation requirement. Nevertheless, as the Panel discussed the matter in some detail, we will address it here.

Pursuing its decline-in-passenger-service argument, the carrier submitted a study showing that Penn Central's passenger business was in a continuing state of decline. The Panel, while acknowledging the possible relationship between the merger itself and the carrier's passenger business decline (Award 63), found Penn Central's passenger-service-decline theory inconsistent with the MPA's overall intent to provide attrition benefits for employees without the need to demonstrate proximate cause. Because the Panel reasonably found that the MPA does not contain a causation requirement, we find this holding on passenger service decline reasonable.[37]

As the Steinglass Panel noted, there are provisions of the MPA that could permit the carrier to take adverse employment actions and avoid the otherwise generally applicable attrition protection, but those provisions actually support the Panel's view of the irrelevancy here of

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[36] See Award 61-62.

[37] Even if it were relevant as a general matter, Penn Central's study of passenger decline would be inapplicable to the claims of the Watjen and Bundy Claimants, who were rate clerks having no connection with passenger service.

passenger-service decline.[38] A portion of MPA section 1(b) specifically addresses the effect of future business decline, providing that if there is a 5 percent overall decline in rail service (not a passenger-service decline alone), then attrition protection will not apply to adversely affected employees. (Another portion contains a similar provision for actions based on emergency weather conditions.)[39] The Panel reasonably concluded that these provisions would have been superfluous if the parties to the MPA had intended to give the carrier an unfettered right to challenge compensation claims on the basis of a decline in passenger service without invoking the 5 percent overall business-decline provision. As observed by the Panel, the record contains no indication that Penn Central ever attempted to invoke these provisions to cite general business decline as a reason to justify the denial of attrition benefits to Claimants or any other group of employees.[40] Moreover, as the Panel noted, from 1968-1972 (the same period during which Claimants first began to suffer their losses, and during which an undisputed decline in passenger service was continuing), Penn Central timely paid out $116.3 million in protective benefits.[41] If Penn Central could have avoided this by claiming business decline, it presumably would have done so.

Work-Related Eligibility Issues

There is no dispute that under the MPA, a claimant is not eligible for benefits for losses to the extent that he fails to meet certain work-related requirements, in particular, if he: (a) is unavailable for service after displacement or dismissal;[42] (b) fails to obtain a position available to

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[38] Award 66.

[39] MPA section 1(b), fourth unnumbered paragraph provides the only path to force reduction due to business decline, allowing limited force reductions if there was an overall "decline in the merged company's business in excess of 5% …." In the fifth unnumbered paragraph, MPA section 1(b) allows further force reductions under "emergency conditions such as flood, snowstorm, hurricane, earthquake, fire or strike, ... "

[40] Award 66 n.57. The Panel cited 1998 STB Decision, slip op. at 8 ("Our examination of the hearing record, however, shows that the carrier made no effort whatsoever to identify specific periods of general business decline … that would justify nonpayment of benefits under section 1(b) of the agreement.")

[41] Valuation Proceedings, 531 F. Supp. at 1291 n.176.

[42] MPA section 1(b), Appendix E, third unnumbered paragraph, allowed an employee's benefits to be reduced for "voluntary absences to the extent that he is not available for service …." (Emphasis added.) Moreover, availability for service is implicitly required by MPA section 1(b), first unnumbered paragraph (emphasis added):

> (b) On the date the said merger of Central into Pennsylvania is consummated the merged company will take into its employment all employees of Pennsylvania and Central as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is consummated who are willing to accept such employment, ….

him in the exercise of his seniority rights;[43] or (c) is dismissed for cause or fails to work due to disability, discipline, resignation, death or retirement.[44] Penn Central argues that the Award erroneously imposes the burden of proving compliance with work-related requirements on Penn Central, rather than on Claimants, and Claimants did not meet this burden.

The Steinglass Panel reasonably held that Penn Central had the burden of showing that a Claimant failed to satisfy any of these work-related requirements.[45] The Panel allocated this burden to Penn Central for the following reasons: (1) MPA's work-related requirements are analogous to affirmative defenses in civil litigation (citing Fed. R. Civ. P. (8)(c));[46] (2) Penn Central was the party that would have the information needed to prove or negate compliance with the various work-related requirements;[47] and (3) the "special circumstances of this proceeding," including (a) Penn Central's primary responsibility for delaying the case;[48] (b) Penn Central's failure to produce employee personal records that it was required to maintain and had promised to produce;[49] and (c) Penn Central's inability to produce a knowledgeable witness to testify about the existence and handling of documents.[50] Moreover, as further explained below, the record strongly supports the Panel's conclusion that Penn Central has failed to meet its burden to demonstrate that any Claimant failed to satisfy any of these work-related requirements.[51]

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[43] See MPA section 1(b), fourth unnumbered paragraph (emphasis added):

> An employe shall not be regarded as deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits, or rights and privileges pertaining thereto in case of his resignation, death, retirement, dismissal for cause in accordance with existing agreements, or failure to work due to disability or discipline, or failure to obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements, ….

[44] Id.

[45] Award 51-54.

[46] Award 51-52. Under that rule, defendants must plead affirmative defenses and typically bear the burden of persuasion on those defenses.

[47] Award 53-54.

[48] Award 41-44.

[49] Award 48-49. The Panel noted that Penn Central had raised non-compliance with work requirements as a defense in the 1976 trial before Judge Lambros, who had identified it as a central issue for future proceedings, and that Penn Central has been aware of its record keeping burden that the STB imposed in 1998 STB Decision for at least a decade. Award 53-54.

[50] Award 55.

[51] Award 54 (all Claimants), 75-79 (Knapik Claimants), 79-81 (Sophner Claimants), 81-86 (Watjen/Bundy Claimants). The Panel also found "enough evidentiary support to conclude that all Claimants had established compliance with various work-related requirements." Id. 75.

Availability for Service. Throughout these proceedings, Penn Central has argued that the Knapik Claimants were not entitled to benefits because they did not report for work at the N.Y. Central Cleveland Freight Yard within 15 days after they were furloughed. We find reasonable, however, the Steinglass Panel's holding that the 10 furloughed Knapik Claimants did all that was required of them under the MPA when they accepted their recalls to work in 1969. As the Board found in 1998 STB Decision, there has been no showing that any actual work at the freight yard was available for the Knapik Claimants before they were recalled to work in 1969.[52] The MPA required furloughed employees only to make themselves "available for service" after their furlough; it did not require them to report physically to a location before work was available.[53] Moreover, Penn Central cannot credibly maintain that the Knapik Claimants were not available for service while the carrier was keeping them on the roster as furloughed employees.[54] Contrary to what Penn Central maintains,[55] and as the Panel found, the Sixth Circuit's decision in Augustus does not support Penn Central's view that the Knapik Claimants were required to report physically to the yard before there was any work for them to do.[56] Penn Central has submitted no evidence to demonstrate that any Claimant had a "voluntary absence" under the MPA. Also, even if the carrier had submitted such evidence, it would not have been grounds for permanent denial of all benefits under the terms of the MPA.[57]

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[52] In 1998 STB Decision, at 8, the Board found that, "The jobs for which the claimants were expected to 'stand' were not actual jobs." During the second round of arbitration, Penn Central did not attempt to challenge this finding by identifying work assignments at the freight yard that were turned-down by Knapik Claimants, either before or after their recall to work in 1969.

[53] Moreover, the Knapik Claimants were also subject to a separate February 16, 1965 supplementary agreement, entered into after the MPA became effective on January 1, 1964, known as the "Top and Bottom Agreement," which required furloughed CUT employees to report for service at the N.Y. Central Cleveland Freight Yard within 15 days of being "recalled from furlough for assignments," not within 15 days of their furlough.

[54] By noting when the employee was "furloughed," the time cards of the furloughed Knapik Claimants indicated that the employees were still on the roster until a notation to the contrary was made. Compare the time cards of the 10 Knapik Claimants who accepted recall [Claimants Appendix (2159-1)-(2159-83)] with the time card of Sam Tannenbaum (Penn Central Appendix 2161), one of the 7 furloughed Knapik Claimants who did not accept recall, whose time card listed him as "closed out" for having "failed to answer recall from furlough when recalled 5/16/69."

[55] Appeal 20, 22-25.

[56] The claims of the Knapik Claimants were not before the Sixth Circuit. As the Panel found, Award 76, "it is a stretch to treat the Sixth Circuit's affirmance of a Board decision rejecting the benefit claims of the 'never-reporting' Augustus claimants as fully applicable to the 'reporting' Knapik claimants."

[57] See MPA section 1(b), Appendix E, third unnumbered paragraph, which allows benefits to be reduced (not eliminated) for voluntary absences.

Need to Exercise Seniority. The Panel reasonably rejected Penn Central's argument that Claimants are ineligible for benefits because they failed to obtain a position available through exercise of their seniority rights. The record evidence shows that the Knapik Claimants exercised the reduced seniority rights that were available to them after the merger when they accepted their 1969 recall to work after their furlough.[58] The Sophner Claimants worked continuously for the carrier under the reduced seniority rights that were available to them after the merger, but at wages that were sometimes lower than their displacement-allowance guarantees under MPA.[59] In its appeal, Penn Central did not identify any instance where a Knapik or Sophner Claimant failed to mitigate his losses by accepting another position available through exercise of his seniority.

The seniority-exercise issue is more complicated for the Watjen and Bundy Claimants. These employees were freight-service rate clerks whose work was moved to other locations in 1969. The record evidence before the Panel shows that, after these Claimants were told that Penn Central would not permit them to bid for work in the new locations – i.e., did not permit them to exercise their seniority to follow their work to Detroit or Chicago – they sought to resign and obtain lump-sum separation allowances.[60] Penn Central, however, denied their requests for separation allowances and assigned them to "utility employee" jobs in Cleveland.[61] After a few months in their utility jobs, these Claimants resigned and continued to pursue their requests for separation allowances.

Penn Central argues that these Claimants are not entitled to separation allowances because they quit their utility jobs and were therefore not "deprived of employment" under WJPA section 7(c), which provides as follows:

> (c) An employee shall be regarded as deprived of his employment and entitled to a coordination allowance … when the position which he holds on his home road is abolished as a result of coordination, and he is unable to obtain by the exercise of his seniority rights another position on his home road or a position in the coordinated operation.

Penn Central interprets this provision to mean that, if these Claimants could not get positions on their home road by exercising their seniority rights, they could be required to accept any other

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[58] Award 77 n. 67 (citing STB 1998 Decision ("carrier produced no evidence at all that any of the conditions specified for refusing benefits in the [MPA] were satisfied for the 10 [Knapik] claimants who reported to the freight yard')).

[59] Award 79-81 and n. 60 and 61.

[60] Award 82-84.

[61] From the transcript, it appears that an employee assigned to a utility job could have been given a wide variety of tasks that were outside his craft and that could involve inferior working conditions. See, e.g., Tr. 214-215, 224-225, 228, 239-231, 233-235, 247-248.

("utility") jobs offered to them elsewhere on the merged system, even if the jobs did not involve the same type of work and opportunities for advancement in their craft as jobs obtained through the exercise of seniority.[62] Thus, according to Penn Central, these Claimants were not entitled to separation payments because they resigned from the utility jobs offered to them outside of their home roads.

The Panel did not dispute the applicability of WJPA section 7(c), but reasonably rejected the carrier's interpretation of this provision, accepting Claimants' view that the phrase "exercise of his seniority rights" also applies to whether a claimant was able to obtain a position available "in the coordinated operation." The Panel explained that the WJPA section 7(c) phrase "exercise of his seniority rights" must be read to modify both the "position on his home road" and "the position in the coordinated operation" since the specific reference to the employee's home road would be superfluous if the exercise of seniority rights only applied to the home road.[63] The result of the Panel's interpretation would be that Claimants are entitled to seek a lump sum separation payment under MPA section 1(b) because they were deprived of a position in the coordinated operation that required an exercise of their seniority rights. The Panel's interpretation is reasonable. Under Penn Central's interpretation, a carrier could abolish highly skilled positions at one location, force employees performing that work to move to another location where they would perform the least skilled work on the railroad, and deny these employees the right to take advantage of buyout provisions that apply when they cannot obtain work in their area of expertise. We find no egregious error in the Panel's conclusion that the MPA was not intended to work this way, and that the seniority requirement applied also to positions in the "coordinated operation."

Indeed, the Steinglass Panel's conclusion that, under WJPA section 7(c), seniority rules also apply to positions available "in the coordinated operation" is consistent with contemporaneous merger labor practice, which continues to this day, whereby the surviving carrier merges the seniority lists of the employees whose formerly separate operations will comprise a newly coordinated operation, and the affected employees bid on jobs at the newly coordinated operation by exercising their seniority. This labor practice was reflected in the WJPA's definition of the term "coordination" as referring to the individual actions, taken by the merging carriers, often at different times, to pool their "separate railroad facilities," such as the pooling of separate repair shops into a single main shop.[64] Under this definition, the

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[62] See Tr. 214-215, 224-225, where Claimant Franz described the skilled rate and bill auditing work that he performed before the merger and the punch-card machine work involved in the utility job that was offered to him after the merger.

[63] Award 85.

[64] See WJPA section 2(a): "The term 'coordination' as used herein means joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities." That the timing of the individual coordinations involved in a merger can differ is apparent from WJPA section 2(c): "The term 'time of coordination' includes the period following the effective date of a coordination during which changes

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"coordination" affecting these Claimants would be the pooling of their clerical work into its new locations; and the "coordinated operation" referred to in WJPA section 7(c) would take place at the new locations where the same work was to be performed. Because seniority rules applied at the new "coordinated operation" locations just as they did at the home road locations where work was performed before the merger, WJPA section 7(c) can reasonably be interpreted, as the Panel did, as requiring that both options available to the employee – employment on his home road or employment at the new location – involve an exercise of seniority.

The Panel reasonably found that the Watjen and Bundy Claimants satisfied the requirement in WJPA section 7(c) by attempting to exercise their seniority rights to obtain similar positions on the coordinated operation.[65] There was testimony that these Claimants attempted to follow their work to its new locations but that the carrier told them that it would not allow them to do this.[66] Penn Central did not attempt to rebut this testimony by pointing to any instances where any of these Claimants failed to accept a position available through exercise of their seniority, as required under the MPA. The lack of a seniority requirement for the utility jobs is confirmed by the notices sent to the clerical employees announcing that their jobs were being abolished, where the carrier distinguished between jobs that would require employee seniority to obtain, and the "utility employee" jobs to which they would be assigned if they were unable to exercise their seniority.[67] Because the utility jobs did not require exercise of their seniority, the Panel reasonably found that these Claimants were not required to accept them as a substitute for the work they were not permitted to follow.

In sum, we find no egregious error in the Panel's holding (1) that Penn Central had the burden to demonstrate that Claimants had failed to comply with the MPA's work-related requirements, and (2) that Penn Central failed to meet that burden.

Calculation of Benefits

Under Lace Curtain, we review a panel's calculation of benefits only for egregious error. The Panel accepted the calculations of Claimants' damage computation witness Dr. Harvey Rosen. Penn Central does not claim error in witness Rosen's mathematical calculations.[68] Rather, Penn Central argues that there was egregious error in the Panel's acceptance of (1) witness Rosen's calculation of benefits for the Knapik and Sophner Claimants under

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consequent upon coordination are being made effective; as applying to a particular employee it means the date in said period when that employee is first adversely affected as a result of said coordination."

[65] Award 83-86.

[66] Id. 83. See also Tr. 217-237.

[67] Id. 82-83.

[68] Penn Central had stipulated that Rosen was qualified to testify as an expert. Award 87 n.77.

unnumbered paragraph 3 of Appendix E, rather than WJPA section 6(c); (2) his use of certain data in applying the formulas that he used; and (3) his failure to account for voluntary absences. We disagree with Penn Central's arguments, for the reasons explained below.

MPA Benefit Formula. According to Penn Central, witness Rosen should have applied the WJPA formula to all claims, including claims for attrition benefits arising under MPA section 1(b). Specifically, Penn Central argues that under WJPA section 6(c), which it asserts should apply, the Knapik and Sophner Claimants should not have received displacement allowances for months when they were furloughed and thus performed no work for the carrier.[69]

We find reasonable the Panel's holding that the attrition benefits ("displacement allowances") sought by the Knapik and Sophner Claimants under MPA section 1(b) are to be calculated under unnumbered paragraph 3 of Appendix E, rather than WJPA section 6(c).[70] As

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[69] The full text of WJPA section 6(c) is as follows:

(c) Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last twelve (12) months in which he performed service immediately preceding the date of his displacement (such twelve (12) months being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by twelve, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee, and if his compensation in his current position is any less in any month in which he performs work than the aforesaid average compensation he shall be paid the difference**,** less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period.

[70] The full text of Appendix E, unnumbered paragraph 3 is as follows:

For purposes of determining whether, or to what extent, such an employe [appearing on the roster] has been placed in a worse position with respect to his compensation, his total compensation and total time paid for during the base period will be separately divided by twelve. If his compensation in his current position is less in any month (commencing with the first month following the date of consummation of the merger) than his average base period compensation (adjusted to include subsequent general wage increases[)], he shall be paid the difference less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average time paid for during the base period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the time paid during the base period; provided, however, that in determining compensation in his current position the employe shall be treated as occupying the position producing

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the Panel explained, Appendix E, which is attached to the MPA, consists of a negotiated "Memorandum of Understanding Re Employment Information to be Furnished Upon Request and Computations Respecting Compensation Due Operating Employes Under [the MPA]."[71] Paragraph 3 includes no language that suggests that furloughed employees receive no compensation for any month in which they perform no work (because the carrier did not give them work); rather, "voluntary absences" or failure to occupy a position granted by seniority are the only grounds for reduction in compensation. Penn Central's approach of applying the WJPA section 6(c) to the Knapik and Sophner Claimants would deprive unnumbered paragraph 3 of Appendix E of any application.[72]

Second, the Panel reasonably supported its conclusion that, even if the Knapik and Sophner Claimants had been subject to WJPA section 6(c), rather than unnumbered paragraph 3 of Appendix E, WJPA section 6(c) can reasonably be interpreted as providing benefits for furloughed employees as well as employees working reduced work hours.[73] Contract interpretations that lead to unreasonable or absurd results are not favored.[74] As the Panel found, Penn Central's interpretation "would produce the absurd result of denying all merger protection benefits to employees who had no work while providing possibly substantial benefits to employees who performed only minimal work."[75]

Data Used by Panel. Penn Central argues that the Panel committed egregious error by: (1) admitting and relying on annual earnings data when the MPA requires the use of monthly data; and (2) relying on base earnings guarantee information from sources other than those stipulated in the MPA. Under the circumstances, however, we find the Panel's approach reasonable. As the Panel explained in great detail, it used the best information available in light of Penn Central's failure to give Claimants the information it was required by the MPA to supply.[76] Where Penn Central documents were unavailable, the Panel relied on the best available

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the highest rate of pay and compensation to which his seniority entitles him under the working agreement and which does not require a change in residence.

[71] Award 87, 104.

[72] See Abraham v. Rockwell Int'l Corp., 326 F.3d 1242, 1255 (Fed. Cir. 2003) (citing Restatement (Second) of Contracts § 203(a) (1981) ("an interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect").

[73] Award 104-105.

[74] See Abraham v. Rockwell Int'l Corp., supra.

[75] Award 105.

[76] Award 91-107. We reaffirm our finding in 1998 STB Decision, at 7, that, "Claimants had no duty to administer the compensation scheme and to act as record keepers for that purpose." Under MPA section 1(b), unnumbered paragraph 3, the carrier was required to furnish

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evidence, such as annual railroad earnings information available from the Railroad Retirement Board (RR Board), which is charged under federal law with maintaining rail employees' earnings records.[77] Where reliable information was completely unavailable, for example when a Knapik or Sophner Claimant's post-merger annual earnings exceeded the maximum taxable earnings that the RR Board is required to report, witness Rosen assumed that no benefits were due the Claimants for the relevant year. Thus, witness Rosen interpreted such data in a manner likely to favor Penn Central.[78]

In particular, we see no error, much less egregious error, in the Panel's acceptance of witness Rosen's use of yearly, rather than monthly, data to calculate displacement allowances owed to the Knapik and Sophner Claimants. As the Panel found, Penn Central failed to give Claimants the monthly data to which they were entitled, the same type of monthly data that the carrier used to calculate benefits that it had timely paid to other affected employees.[79] The Panel noted that the use of yearly data worked to the disadvantage of the Claimants since Claimants would be eligible for benefits for any month in which their earnings fell below their monthly wage guarantee even if their average monthly earnings for the year exceeded the monthly wage guarantee.[80]

We also find reasonable the Panel's reliance on base earnings guarantees calculated for the Knapik Claimants by Penn Central.[81] Penn Central cannot credibly argue that the Panel committed egregious error by accepting the carrier's own calculations. Moreover, witness Rosen was forced to rely on the Penn Central's calculations because Penn Central failed to submit the primary wage data that Claimants needed to do their own calculations. Finally, as the Panel found, witness Rosen interpreted ambiguous Penn Central documents in a manner that favored Penn Central.[82]

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the information required to calculate protective benefits under MPA Appendix E. Because of this litigation, the carrier was on notice to preserve this information.

[77] Penn Central did not challenge testimony that the RR Board's information is viewed as reliable. Award 102.

[78] Award 91-92.

[79] Award 93, 95, 103.

[80] Id.

[81] Award 99-100. Penn Central's base earnings calculations for the Knapik Claimants were included in a 1990 letter to Claimant O'Neill, and were identical to wage information in personnel records that it provided .

[82] Award 92 n.84.

In accepting the evidence submitted by Claimants, the Panel correctly observed that the formal rules of evidence do not apply in arbitration proceedings.[83] In addition, the panel reasonably found that Penn Central's failure to maintain and produce relevant wage-guarantee and employee-earnings information − a responsibility imposed on Penn Central by the MPA − provided additional support for permitting use of a flexible approach to the proof of compensation.[84]

Voluntary Absences. Contrary to what Penn Central maintains, the Panel did not err in failing to adjust its award to account for voluntary absences. As discussed above, the Panel reasonably held that Penn Central bore the burden of proving any voluntary absences. Penn Central has failed to produce evidence of any such absences where employees were required to report under the MPA.

In sum, Penn Central has failed to demonstrate egregious error in the Panel's calculation of benefits.

Interest

Another issue here is whether employees should receive "interest." Nearly 40 years passed between loss and judgment, and the employees, not surprisingly, want an award of interest. The carrier objects to interest.

The Steinglass Panel granted pre-award interest to December 31, 2007, accepting witness Rosen's calculations based on the prime rate, compounded quarterly, and rejecting an alternate calculation of interest undertaken by witness Rosen based on Treasury securities. In addition, the Panel established a procedure for updating interest accruing from December 31, 2007, to the date of the Award (July 30, 2009). Under this procedure (the 20-day/10-day schedule), Claimants would have 20 days to update witness Rosen's calculations to allow for this additional interest, Penn Central would have 10 days to submit any objections, and the Panel would retain limited jurisdiction to resolve any disputes.[85] On its own motion, the Panel commented favorably on Claimants' entitlement to post-award or post-judgment interest if there were further delays in implementation, as follows:[86]

> The parties have not addressed the issue of post-judgment interest. We assume that any delay in implementing this award will entitle the claimants to post-judgment interest, *cf.* [28] U.S.C. 1961, at the federal statutory rate. In the event that the parties cannot resolve the issues involving post-judgment or post-award

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[83] Award 39, 55. See, e.g., 49 C.F.R. § 1108.8(d) (Arbitrators in STB proceedings are not bound by formal rules of evidence); Rule 28, Labor Arbitration Rules, American Arbitration Association ("conformity to legal rules of evidence shall not be necessary").

[84] Award 50, 99.

[85] Award 177-178.

[86] Award 116 n.95. See also Award 178.

interest, we assume its availability will be addressed by the courts that may be called upon to review or enforce this award.

The first issue before us is whether the Panel has authority to award interest. Penn Central argues that the Panel's award of interest was egregious error because neither the MPA nor the parties' second arbitration agreement[87] provides for interest. As the Panel found, however, the great weight of judicial and administrative authority supports the discretion of arbitrators to award interest, even where the underlying agreement does not specifically provide for interest.[88] Indeed, this agency's precedent supports the authority of arbitration panels to award interest. For example, in Burlington Northern Railroad – Control and Merger – St. Louis – San Francisco Railway, 6 I.C.C. 2d 352, 356-7 (1990) (Burlington NOR), the ICC reaffirmed its holding in Lace Curtain, at 736, that arbitration panels have the discretion to award prejudgment interest, subject to review for abuse of that discretion. Furthermore, in Delaware and Hudson Co. – Lease and Trackage Rights – Springfield Terminal Railway Company, FD 30965 (Sub-No. 4), slip op. at 11-12 (ICC served Sept. 29, 1995), the ICC granted post-award interest. Accordingly, we find that the Panel had the discretion to consider whether interest was appropriate here, regardless of whether interest was authorized under the MPA.

The second issue is whether there was egregious error in the Panel's exercising its discretion and awarding interest. We find that there was not. The statutory minimum labor-protection provision that was in effect when Claimants were experiencing their losses required that employees affected by a transaction may not be placed "in a worse position with respect to their employment,"[89] and the MPA itself contains this requirement.[90] As observed by the Panel, Claimants are entitled to be compensated for the delay in receiving benefits.[91] Indeed, Penn Central's approach would effectively require Claimants, or their lawful successors, to grant Penn Central an interest-free loan of the benefits that they should have begun to receive in the late 1960's. Moreover, denial of interest would substantially reduce the real (inflation adjusted) value of their benefits. Thus, the Panel's award of interest was reasonable because without interest Claimants would have been placed in a worse position with respect to their employment in violation of the MPA. In addition, we find reasonable the Panel's finding that an award of interest is further supported by, though not based on, the Panel's finding that Penn Central was far more responsible than Claimants for the 40-year delay in Claimants' receiving benefits.

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[87] The parties' first arbitration agreement was the generic one in the MPA. Penn Central referred to the parties' second (ad hoc) arbitration agreement as being a 1979 agreement, but it was actually signed in 1980 – see Penn Central's Appendix vol. 3, at 1337.

[88] Award 112-115, and cases cited therein.

[89] The labor protection provision that was then in effect was in § 5(2)(f) of the Interstate Commerce Act, and the no-worse-position requirement was carried forward in all subsequent statutory revisions.

[90] See MPA section 1(b), first unnumbered paragraph.

[91] See Award 115-116, where the Panel noted Claimants' need to be compensated for the "time that has elapsed since their denial of merger protection benefits."

Thus, Penn Central has failed to demonstrate that the Steinglass Panel committed egregious error by awarding interest.

Claimants are also entitled to interest for the period between the Steinglass Award and this decision for the same reasons that justify the Panel's award of prejudgment interest. The additional interest shall be calculated based on the prime rate compounded quarterly, the method chosen by the Panel.

Conflict of Interest

The final issue is whether Arbitrator Steinglass had a conflict of interest that warranted his recusal from the Panel. Penn Central argues that Arbitrator Steinglass had a conflict of interest because, during his tenure as Dean of the Cleveland State University Marshall School of Law, which ended on June 30, 2005, he socialized with Dr. John Burke and his wife, a law school alumna, and the law school accepted substantial donations from them. Because Dr. Burke was a business partner of witness Rosen, Penn Central maintains that Arbitrator Steinglass had an incentive to reward Dr. Burke and his wife for their generosity by accepting the testimony of witness Rosen. Citing decisions, such as Commonwealth Coating Corp. v. Continental Casualty Co., 393 U.S. 145, 150 (1968) (Commonwealth), where, according to Penn Central, courts warned against even the appearance of bias or conflict of interest in an arbitrator, Penn Central argues that this situation creates "an appearance of bias" that required Arbitrator Steinglass to recuse himself.[92]

In his letter declining to recuse himself, Arbitrator Steinglass rejected Penn Central's interpretation of Commonwealth as establishing an "appearance of bias" standard for recusal in the arbitration context. Steinglass noted that the majority in that plurality decision did not adopt that standard and that the Sixth Circuit has similarly rejected that standard.[93] Moreover, Steinglass concluded that neither his prior fundraising relationship with Dr. Burke nor his casual social relationship with him created an "appearance of partiality" that would require him to recuse himself even under that standard.

A party asserting evident partiality has the heavy burden to "establish specific facts that indicate improper motives on the part of the arbitrator."[94] As Justice White and Justice Marshall observed long ago, we do not expect arbitrators to recuse themselves solely because they have,

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[92] Appeal at 49.

[93] See Nationwide Mut. Ins. Co. v. Home Ins. Co., 429 F.3d 640, 646-647, 649 (6th Cir. 2005). There, applying the test of whether a reasonable person would conclude that an arbitrator was partial to one of the parties and rejecting an appearance-of-bias test, the court upheld an arbitration award that was challenged in part because one of the arbitrators had social contacts with one of the parties.

[94] Al-Harbi v. Citibank, 85 F.3d 680, 683 (D.C. Cir. 1996) (quoting Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993).

or have had, business or social relationships with the parties before them.[95] Nonetheless, when such relationships exist, we take very seriously, and scrutinize carefully, whether recusal is warranted.

Here, we find no evidence of evident partiality that would require Arbitrator Steinglass to recuse himself. When Arbitrator Steinglass left the law school a year before he was appointed to the panel, he lost any financial incentive that he could have had as Dean to benefit the law school by rewarding Dr. Burke's partner, witness Rosen. Arbitrator Steinglass' uncontroverted statement detailing the nature of his social interaction with Dr. Burke and his wife and with witness Rosen describes the relationship as involving primarily the fundraising and casual (non-intimate) events in which a law school dean (or former law school dean) would be expected to participate.[96]

In addition, any danger of bias is lessened by the minor role played by witness Rosen's testimony in the final outcome of this proceeding. Although witness Rosen is an economist, his testimony required him to act as an accountant, not as an economist interpreting data or as a source of underlying data. Witness Rosen mechanically calculated Claimants' individual monetary losses in a way that reflected their legal theory of the case, in particular, Claimants' view of the proper benefit formula and the most reliable data available.[97] Penn Central does not challenge the mechanical accuracy of witness Rosen's calculations. Rather, it objects to Claimants' legal arguments regarding the proper documentation of their losses and the propriety of awarding interest. Witness Rosen's testimony, however, was not the source or foundation of Claimants' legal arguments, and the Panel's well reasoned discussion of the conflicting legal arguments did not depend on witness Rosen's calculations. This makes it unlikely that the panel's acceptance of witness Rosen's testimony altered the outcome of this proceeding. Finally, because, as explained in great detail above, we find the Award reasonable, we reject Penn Central's argument that the Award is so irrational that it can only be explained as the result of arbitral bias.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

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[95] See, e.g., Kurke v. Oscar Gross & Son, 454 F.3d 350 (D.C. Cir. 2006) (citing "evident partiality" as among the four grounds upon which an arbitral award may be vacated, quoting the Federal Arbitration Act, 9 U.S.C. § 10(a)).

[96] According to Arbitrator Steinglass: (1) over a 10-year period, he had dinner with Dr. Burke and his wife on "three or four occasions"; (2) he also attended Dr. Burke's annual St. Patrick's Day Party at his home; (3) Dr. Burke and his wife attended the annual holiday party that Dean Steinglass hosted as part of the law school's outreach/development activities; (4) witness Rosen had never been to the Steinglass home, and Steinglass's only contacts with witness Rosen had been "two or three brief conversations at events at the Fuerst-Burke home" and at Dr. Burke's 70th birthday celebration party in March 2007. Arbitrator Steinglass' statement, Penn Central Appendix vol. 4, at 2264-2265.

[97] See Penn Central Appendix vol. 4, at 2268-2271 (Deposition of Harvey Rosen).

It is ordered:

1. Penn Central's appeal of the Steinglass Award is denied.

2. Penn Central's payment to Claimants of benefits due shall also include (1) interest accruing between July 30, 2009, the date of the Award, and the date of this decision (and further, as the courts may provide, to the date of payment).

3. Interest will be calculated using procedures consistent with the Steinglass Award, as modified by this decision.

4. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Nottingham, and Commissioner Mulvey.