

UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA

In the Matter of	:	In Proceedings For
PENN CENTRAL TRANSPORTATION	:	the Reorganization
COMPANY,	:	of a Railroad
	:	
Debtor	:	No. 70-347
	:	

*PROPOSED*  
ORDER

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2007, upon consideration of the Petition of Penn Central Transportation Company and American Premier Underwriters, Inc. to Rescind Leave and Enforce Prior Orders, and any response thereto, it is hereby ORDERED that the Petition is GRANTED and leave granted by this Court in Document Numbers 5383 and 8600 is hereby REVOKED.

BY THE COURT:

\_\_\_\_\_  
Hon. John P. Fullam, U.S.D.J.

**UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA**

In the Matter of	:	In Proceedings For
PENN CENTRAL TRANSPORTATION	:	the Reorganization
COMPANY,	:	of a Railroad
	:	
Debtor	:	No. 70-347
	:	

**PETITION OF PENN CENTRAL TRANSPORTATION COMPANY AND  
AMERICAN PREMIER UNDERWRITERS, INC.  
TO RESCIND LEAVE AND ENFORCE PRIOR ORDERS**

The Penn Central Transportation Company (“PCTC” or the “Debtor”) and American Premier Underwriters, Inc. (“APU” or the “Reorganized Company”)<sup>1</sup> file this petition (the “Petition”) seeking rescission of this Court’s leave to allow claims by various railroad workers (the “Claimants”) against PCTC under the Merger Protection Agreement of 1964 (“MPA”) to proceed in arbitration in the United States District Court for the Northern District of Ohio.<sup>2</sup> This Petition is necessitated because, after nearly 40 years of litigation and Claimants’ own agreement, Claimants now disavow the application of certain critical Orders this Court established to administer the PCTC Reorganization. For example, Claimants refuse to stipulate to the following fundamental principles, which are expressly set forth in this Court’s Orders and approved Plan:

- (1) this Court has exclusive jurisdiction to enforce any judgment Claimants may obtain against the Debtor;
- (2) Claimants have asserted claims only against the Debtor for damages under the

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<sup>1</sup> The new company that emerged from reorganization, Penn Central Company, changed its name to APU on March 25, 1994.

<sup>2</sup> These claims are now set for arbitration on December 10, 2007

MPA and related agreements;

- (3) Claimants have not and may not assert claims against APU, the Reorganized Company that emerged from the PCTC Reorganization;
- (4) Claimants cannot enforce any judgment Claimants may obtain with respect to the Debtor against APU, the Reorganized Company; and
- (5) Claimants are not entitled to prejudgment interest on any of their claims.

Claimants refuse to abide by these basic, well-established principles. Instead, they intend to re-litigate all of these issues. Claimants have repeatedly refused to so stipulate because they adamantly and vociferously disagree with these principles and want to obtain decisions and rulings in other Courts that contradict these principles. For example, they have submitted expert reports in the arbitration proceedings to support a claim of more than \$10 million in interest. This Court should grant the Petition to avoid inconsistent adjudications on all of these matters, to remain consistent with the PCTC Reorganization proceedings and to assure that all parties to the Reorganization proceedings are treated as originally contemplated.

## **I. FACTUAL BACKGROUND**

### **A. The Merger Protection Agreement of 1964 (“MPA”).**

1. The Pennsylvania Railroad (“PRR”) and the New York Central Railroad (“NYC”) began exploring a merger of their rail lines in the early 1960s as a means to consolidate their operations in the face of precipitous declining passenger rail ridership.

2. The PRR, the NYC, and the union representing the Brotherhood of Railroad Trainmen (the “Union”) entered into the Merger Protection Agreement in 1964, which provided certain rights to railroad workers who might be adversely affected as a result of the merger.

3. On February 1, 1968, the merger of PRR and NYC created PCTC.

4. In 1969, railroad workers filed three of the four cases at issue against PCTC and

their unions in the United States District Court for the Northern District of Ohio: (1) the Knapik action, Case No. C69-722; (2) the Watjen action, Case No. C69-675; and (3) the Bundy action, Case No. C69-947 (collectively, the "Labor Claims").

5. On June 21, 1970, the Debtor filed its petition for reorganization in this Court.

**B. The 38-Year Procedural History of the Labor Claims.**

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6. In 1971, the District Court for the Northern District of Ohio (Judge Thomas Lambros) granted summary judgment to the union and PCTC on all the Watjen and Bundy claims. The Sixth Circuit affirmed judgment as to the union but reversed as to PCTC, holding that the Claimants had not failed to exhaust their administrative remedies. See Bundy v. Penn Central Co., 455 F.2d 277 (6<sup>th</sup> Cir. 1972).

7. On March 21, 1973, the Knapik Claimants and the Trustees of the Debtor entered into a Stipulation that was approved by this Court agreeing that the Knapik Claimants could proceed with their claims against the Debtor in the United States District Court for the Northern District of Ohio, provided that "no judgment which may hereafter be entered in said civil action shall be enforced except as hereinafter authorized by this Court" (the "Knapik Stipulation," Doc. No. 5383). A true and correct copy of the Knapik Stipulation is attached as Exhibit "A."

8. In October 1974, while this Reorganization was pending and apparently without prior authorization of this Court, the 16 Sophner claimants filed their case against PCTC and their union in the Northern District of Ohio, Case No. 74-914.

9. On February 21, 1975, the Sophner Claimants and the Trustees of the Debtor entered into a Stipulation that is identical to that which was agreed to by the Knapik Claimants. The Sophner Claimants and the Trustees of the Debtor agreed that the Sophner Claimants could proceed with their claims against the Debtor in the United States District Court for the Northern District of Ohio, provided that "no judgment which may hereafter be entered in said civil action

shall be enforced except as hereinafter authorized by this Court.” The Stipulation was approved by this Court (the “Sophner Stipulation,” Doc. No. 8600). A true and correct copy of the Sophner Stipulation is attached as Exhibit “B.”

10. In 1976, Judge Thomas Lambros conducted a bifurcated trial in Knapik and directed a verdict in favor of the union.

11. In 1979, Judge Lambros dismissed all four actions, referring them to binding arbitration under the Railway Labor Act, 45 U.S.C. § 157. The Court further ordered that the same panel hear each case in order of complexity, beginning with Knapik. No party appealed this order.

12. In 1983, an arbitration decision was issued in Knapik in favor of PCTC, holding that reporting for work was a condition precedent to eligibility for benefits under the MPA. The Claimants appealed this decision.

13. Judge Lambros resumed jurisdiction and, in 1985, vacated the arbitration award based solely upon “the appearance of partiality” of the neutral chairman of the arbitration panel finding him to be “too closely lined with one side.”

14. In 1990, a new arbitration panel was established for Knapik, headed by the neutral arbitrator, Fred Blackwell. The arbitrators rendered a decision in Knapik concluding that none of the 17 claimants was entitled to benefits. The Claimants filed an appeal to the Surface Transportation Board (“STB”), the successor to the Interstate Commerce Commission.

15. In 1998, the STB issued its decision, concluding that the seven Knapik claimants who admitted never reporting to work were not eligible for benefits. The STB affirmed the panel’s decision that “the refusal of these Claimants to accept said available work...constituted a failure to comply with the Section 1(b) provision in the MPA that requires covered Employees to

accept available work in order to qualify for benefits; hence, said refusal of work resulted in the Claimants becoming ineligible for MPA benefits.”

16. However, the STB vacated the arbitrators’ decision with respect to the 10 Knapik employees who had allegedly reported for work. The STB stated that it was vacating the arbitrators’ decision but not affirmatively finding that Claimants were eligible for compensation. The STB further stated that, on remand, the parties may resolve the dispute among themselves or seek additional arbitration.

17. In 1999, the seven claimants who were determined ineligible for MPA benefits filed an appeal to the Sixth Circuit seeking review of the STB’s decision.

18. In 2000, the Sixth Circuit upheld the STB’s decision that the seven Knapik claimants who did not report for work were ineligible for benefits. These claims were, therefore, finally dismissed. The Sixth Circuit’s decision also governs claims by any other Claimants who failed to report for work. See Augustus v. Surface Transp. Board, 2000 WL 1888805, No. 99-3014 (6th Cir. Dec. 22, 2000), attached hereto as Exhibit “C.”

19. In 2004, after doing nothing for several years, Claimants moved to reinstate all four cases.

20. In 2005, Judge Solomon Oliver, Jr. of the Northern District of Ohio<sup>3</sup> reinstated the four cases for the limited purpose of ordering the parties to arbitration.

21. Arbitration is set to begin on December 10, 2007.

**C. The PCTC Reorganization, Approved Plan and Critical Orders.**

22. On June 21, 1970, the Debtor filed its petition for reorganization in this Court under Section 77 of the Bankruptcy Act of 1898, as amended (Bankruptcy No. 70-347).<sup>4</sup>

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<sup>3</sup> Judge Lambros had since retired.

<sup>4</sup> After PCTC filed for reorganization in 1970, the United States Congress enacted the Rail Passenger Service Act of

23. Section 77 of the Bankruptcy Act of 1898 provided that: “[a]ny railroad corporation may file a petition stating that the railroad corporation is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization.... If the petition is so approved, the court in which such order approving the petition is entered *shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor* and its property wherever located. The railroad corporation shall be referred to in the proceedings as a ‘debtor.’” 11 U.S.C. § 205 (repealed) (emphasis added).

24. On August 17, 1978, after notice and hearing, this Court confirmed the Amended Plan of Reorganization of the Debtor, dated March 17, 1978 (the “Plan”).

25. The Plan contemplated payment of the claims at issue in this matter as “Section 211(h)” Claims.<sup>5</sup> See Plan § 2.1; Plan, Ex. 1, “Estimated employee labor Claims.” Nothing in the language of the approved Plan provides for the recovery of interest on these claims.

26. In fact, claims of this nature are not entitled to interest pursuant to the Bankruptcy Act. Moreover, claims of this nature did not receive interest when liquidated during the PCTC Reorganization proceedings. See *e.g.* Memorandum and Order No. 2921 and 2922. There, this Court allowed the Trustees of the Debtor to compromise post-petition tax claims, exclusive of

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1970, 45 U.S.C. §§ 501-669 (“Rail Passenger Service Act”), which created the National Railroad Passenger Corporation (“Amtrak”) to provide rail passenger services. Pursuant to the Rail Passenger Service Act, PCTC entered into an agreement with Amtrak, effective May 1971, whereby Amtrak assumed responsibility for PCTC’s inter-city passenger services and used PCTC’s physical plants, equipment, and personnel. Thereafter, the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§ 701-794, as amended (“Rail Act”), provided for the transfer from PCTC to the Consolidated Rail Corporation (“Conrail”) of the facilities and equipment required by Conrail and Amtrak and included provisions whereby Amtrak could acquire ownership or leasehold interests in the Northeast Corridor for inter-city passenger service. On April 1, 1976, pursuant to the Final System Plan formulated by the United States Railway Association (“USRA”), § 743(b) of the Rail Act, and Special Orders issued by the Reorganization Court, PCTC transferred most of its trackage, equipment, real estate and personnel, and other records to Conrail. Personnel associated with commercial transportation of goods became employees of Conrail at this time and their personnel records property of Conrail. That same day, Conrail reconveyed title of PCTC’s inter-city passenger services to Amtrak. As a result of the USRA, PCTC ceased and no longer existed as an operated railroad as of April 1, 1976.

<sup>5</sup> Section 211(h) of the Rail Act authorized the USRA to loan money to Conrail to pay certain of the Debtor’s accounts payable, with Conrail and/or USRA to hold the highest priority for any unpaid balances of § 211(h) advances.

interest and penalties, in light of the United States' highest priority liens and Section 211(h). A true and correct copy of the Memorandum and Order No. 2921 and 2922 is attached as Exhibit "D."

27. On August 17, 1978 this Court entered the Consummation Order and Final Decree (the "Consummation Order").

28. Importantly, the Consummation Order enjoins any suits against the Reorganized Company, APU, for any claims against the Debtor. Section 7.02 states, in pertinent part:

*Injunction.* All persons. . . wherever situated, located or domiciled are hereby permanently restrained and enjoined from instituting, prosecuting or pursuing, or attempting to institute, prosecute or pursue any suits or proceedings, at law or in equity or otherwise, against the Reorganized Company. . . or their successors or assigns. . . directly or indirectly, on account of or based upon any rights, claim or interest of any kind or nature whatsoever which any person. . . may have in, to or against any of the Debtors. . . and from interfering with attaching, garnishing, levying upon, enforcing liens against or upon, or in any manner whatsoever disturbing any portion of the property, real, personal or mixed, of any kind or character, on or at any time after the consummation date in the possession of the Reorganized Company. . . and from interfering with or taking steps to interfere with the Reorganized Company. . . or the operation of the properties or the conduct of the business of the Reorganized Company. . . by reason of or on account of any obligations incurred by any of the Debtors. . . except the obligations imposed on the Reorganized Company. . . by the Plans and this Order or reserved for resolution or adjudication by this Order.

29. The Consummation Order also reserves specifically the exclusive jurisdiction of this Court over matters relating to the Consummation Order and the Plan.

30. Section 7.04(c) of the Consummation Order provides that this Court has exclusive jurisdiction "[t]o consider and act in the matter of any proof of claim against any of the Debtors or claim for administration expenses against any of the Debtors or Trustees, including, without limitation, an action to deny any such claims, to adjudicate the amount or the validity thereof, to

classify such claims, to provide for the satisfaction of such claims and to approve settlements of any such claims . . . .”

31. Section 7.04(g) provides this Court with exclusive jurisdiction to “consider and act on any application for instructions with respect to the distribution of funds...in connection with this Order and the Plans, to construe this Order and the Plans as to matter which may require interpretation or construction and which are not dealt with in this Order and to consider and act upon any matter as to which jurisdiction is reserved by this Order.”

32. Section 7.04(i) states that this Court has jurisdiction to “take such further action and to enter such further orders as may be necessary to . . .put into effect and carry out this Order and the Plans and all other orders relative thereto entered by this Court and to prevent interferences herewith.”

**D. Claimants’ Recent Disavowal of the Application of the Orders of this Court.**

33. On October 24, 2007, counsel for all parties had a two-hour conference call to discuss the upcoming arbitration. Ninety minutes of that call was devoted to a discussion of the impact and import of the PCTC Reorganization and the Orders of this Court on the arbitration. See e-mails recapitulating the October 24, 2007 discussion and several subsequent discussions, attached as Exhibit “E.”

34. During the course of this conference call, counsel for PCTC was astonished to learn for the first time that Claimants did not agree with several fundamental principles set forth by this Court in the Consummation Order, the Plan, and Claimants’ Stipulation as well as the applicable bankruptcy laws. See Ex. E.

35. In the October 24 conference call, counsel for the Claimants (Carla Tricarichi, Mark Griffin and Randy Hart, all from different law offices in Cleveland, Ohio) vociferously and adamantly maintained that:

- a) This Court did not have exclusive jurisdiction to enter and enforce any judgment against PCTC;
- b) The Claimants could enter and enforce judgments in courts other than this Court;
- c) Despite the fact that they have never named or sued APU, the reorganized company, they could enforce and collect any judgment they obtained from the reorganized company;
- d) Prejudgment interest could be added to any judgment they obtained. Indeed during discovery in the arbitration proceeding, Claimants produced an expert report in support of their claim for more than \$10 million in interest.

36. Counsel for PCTC was astonished to hear these arguments and positions and cited counsel for the Claimants to the prior Stipulations by the Claimants, the prior Orders of the Court and black-letter bankruptcy law, all of which contradicted and undermined Claimants' arguments.

37. Counsel for PCTC went further in order to prevent the necessity of this Petition. In order to alleviate this unexpected disagreement and clarify the governing Orders relating to the arbitration, on November 1, 2007, counsel for PCTC provided Claimants with a set of proposed stipulations. See Ex. E.

38. Counsel for Claimants responded by demanding the legal basis for each stipulation, despite the fact that at least one of the legal bases is Claimants' own stipulation. See Ex. E.

39. On November 8, 2007, counsel for PCTC provided counsel for Claimants with the legal support for each of the seemingly non-controversial stipulations. See Ex. E.

40. As explained on the first page of Exhibit E, counsel for Claimants offered a number of excuses for refusing to stipulate as requested by PCTC. None of those excuses addressed the merits of the stipulation.

## II. LEGAL BASIS FOR RELIEF

41. As set forth in Section C above, this Court has exclusive jurisdiction to enforce any judgment Claimants may obtain against the Debtor under Section 77 of the Bankruptcy Act, Section 7.04 of the Consummation Order, and by Claimants' own admission in the Knapik Stipulation and the Sophner Stipulation.

42. Given the current disagreement by Claimants over fundamental principles set forth by this Court in the Reorganization proceedings, this Court should rescind the leave it approved in the Knapik and Sophner Stipulations to allow Claimants to proceed in another jurisdiction and reassert jurisdiction over this matter.

43. If Claimants persist in their unsupported arguments and succeed, there will be inconsistent adjudications that fly in the face of the well-established bankruptcy principles set forth and enforced in this Court. Indeed, Claimants' claims will be placed ahead of all other creditors that were forced to participate in the Reorganization proceedings. In addition, Claimants are attempting to expand alleged liability beyond the original defendant (PCTC) to the Reorganized Company, which company was given a fresh start without any such exposure. All of this and more is inconsistent with the Reorganization Court Proceeding.

WHEREFORE, Petitioner respectfully requests that this Court enter the attached order, rescinding its leave for Claimants to proceed in another jurisdiction, and any other and further relief this Court deems necessary.

Respectfully submitted,

BLANK ROME LLP



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Attorneys for Petitioners,  
PENN CENTRAL TRANSPORTATION COMPANY  
and AMERICAN PREMIER UNDERWRITERS, INC.

**CERTIFICATE OF SERVICE**

I, Leigh Ann Fierro, hereby certify that I caused a true and correct copy of the foregoing  
Petition of Penn Central Transportation Company and American Premier Underwriters, Inc. to  
Rescind Leave and Enforce Prior Orders to be served upon the following by e-mail and by U.S.  
mail, postage prepaid:

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LEIGH ANN FIERRO



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# Exhibit A

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

5283

In the Matter of : In Proceedings for the  
: Reorganization of a  
PENN CENTRAL TRANSPORTATION : Railroad  
COMPANY, :  
: Debtor : No. 70-347

STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between counsel for Michael J. Knopik, et al, plaintiffs in a civil action against Penn Central Transportation Company, et al, formerly pending in the United States District Court for the Northern District of Ohio, Eastern Division, and being action No. C69-722 on the docket of said Court, and counsel for the Trustees of the Debtor, that the aforesaid civil action may be reinstated on the docket of said Court and may continue to a conclusion in said Court. Provided, however, this stipulation shall not be construed as a waiver of any defenses which the Debtor or its successor Trustees may have in such civil action, and provided further that no judgment which may hereafter be entered in said civil action shall be enforced except as hereinafter authorized by this Court.

TRICARICHI, CARNES & KUBE

Michael R. Kube  
Michael R. Kube

Ralph W. Pickard  
Ralph W. Pickard, Attorney for Trustees

Dated: March 20, 1973

APPROVED this 26<sup>th</sup> day of March, 1973.

John P. Fullam  
John P. Fullam, District Judge



# Exhibit B

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

8600

In the Matter of : In Proceedings for the  
: Reorganization of a  
PENN CENTRAL TRANSPORTATION : Railroad  
COMPANY, :  
Debtor : No. 70-347

STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between the attorney for SOPHNER, et al., plaintiffs in a civil action against Penn Central Transportation Company, pending in the United States District Court for the Northern District of Ohio, Eastern Division, and being action No. 74-914 on the docket of that Court (the Action), and the attorney for the Trustees of the Debtor, that the Action may continue to a conclusion in that Court. Provided, however, this stipulation shall not be construed as a waiver of any defenses which the Debtor or its Trustees may have in the Action, and provided further that no judgment which may hereafter be entered in the Action shall be enforced except as authorized by this Court.

TRICARICHI, CARNES & KUBE

By Michael R. Kube  
Michael R. Kube

Carl Helmetag, Jr.  
Carl Helmetag, Jr.  
Attorney for Trustees

Dated:

APPROVED THIS 21<sup>st</sup> day of February, 1975.

John P. Fullam  
John P. Fullam, District Judge



C



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# Exhibit C

**H**Augustus v. Surface Transp. Bd.  
C.A.6,2000.

NOTICE: THIS IS AN UNPUBLISHED  
OPINION.(The Court's decision is referenced in a  
"Table of Decisions Without Reported Opinions"  
appearing in the Federal Reporter. Use FI CTA6 Rule  
28 and FI CTA6 IOP 206 for rules regarding the  
citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.  
Antonio AUGUSTUS; Raymond Beedlow; William  
Grady; Michael Knapik; Kathleen Kock, as personal  
representative on behalf of Mike McLaughlin;  
Michael Potosky, as personal representative on behalf  
of Walter Potosky; Pearl Tannenbaum, as personal  
representative on behalf of Sam Tannenbaum,  
Petitioners,

v.

SURFACE TRANSPORTATION BOARD; United  
States of America, Respondents;  
PENN CENTRAL CORPORATION, Intervenor.  
No. 99-3014.

Dec. 22, 2000.

On Appeal From the Surface Transportation Board.

Before MARTIN, Chief Judge; GUY and COLE,  
Circuit Judges.

#### OPINION

R. GUY COLE, JR.

\*1 Petitioners appeal a decision of the Surface  
Transportation Board affirming an arbitration panel's  
ruling denying benefits to Petitioners pursuant to a  
1964 railroad merger labor protection agreement. For  
the following reasons, we AFFIRM the decision of  
the Board.

#### I. BACKGROUND

This regrettably protracted dispute has been before  
this Court for only a fraction of its extended life. 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 Transportation  
Company ("Penn Central" or "Carrier"). On May 20,  
1964, the Brotherhood of Railway Trainmen ("BRT")  
and the two merging carriers entered into an

agreement for the protection of employees affected  
by the proposed merger. Only the two merging  
carriers signed this Merger Protection Agreement  
("MPA"), which made no reference to employees of  
any subsidiary companies owned by the two carriers.  
Under the MPA, affected employees were entitled to  
significantly greater benefits than required under  
then-prevailing railroad labor law.

Prior to the merger, the N.Y. Central owned 93% of  
the Cleveland Union Terminals Company ("CUT"), a  
passenger rail carrier subsidiary. Petitioners in this  
appeal were employed as yard workers at the CUT.  
On February 16, 1965, the N.Y. Central and the BRT  
negotiated an agreement in anticipation of the N.Y.  
Central's merger into the Penn Central. This so-called  
"Top and Bottom Agreement" granted CUT  
employees the right to work at a nearby N.Y. Central  
freight yard after the merger took effect. The  
agreement provided for the merger of the CUT  
employees' seniority roster into the existing N.Y.  
Central seniority roster. The CUT employees were to  
be placed at the bottom of the merged roster in the  
order of their seniority on the CUT, with a common  
seniority date of September 10, 1964, while the N.Y.  
Central employees retained their place on the roster  
in order of their dates of employment on the N.Y.  
Central. Inasmuch as all of the N.Y. Central  
employees were employed prior to September 10,  
1964, all of the N.Y. Central employees ranked above  
the CUT employees on the merged seniority roster.

The two carriers finalized their merger on February 1,  
1968. On February 21, 1968, Petitioners and other  
CUT employees were furloughed from their CUT  
jobs as part of a reduction in force on the CUT,  
effective February 25, 1968. The furlough notice told  
the CUT employees to "immediately contact" the  
N.Y. Central yardmaster for work in the freight yard,  
pursuant to the Top and Bottom Agreement.  
Petitioners never reported for work at the N.Y.  
Central freight yard and were discharged without  
compensation after failing to respond to a final notice  
to report dated December 15, 1969.

At the time Petitioners were furloughed, the BRT and  
the Carrier were in a dispute as to whether the MPA  
applied to employees of subsidiary railroads, like the  
CUT. The Carrier's position was that the agreement

applied only to employees of the two merging carriers, whereas the BRT argued that employees of subsidiaries were also covered under the agreement. The furloughed employees were fully aware of this dispute. The parties settled this dispute as to the CUT (but not as to other subsidiaries) by an agreement reached on July 11, 1969, under which the parties agreed that the MPA covered CUT employees.

\*2 The instant proceeding involves efforts by Petitioners to obtain labor protection benefits pursuant to the MPA. On September 15, 1969, seventeen claimants, all of whom were among the CUT employees furloughed in February 1968, brought suit in the United States District Court for the Northern District of Ohio alleging that the Carrier failed to provide benefits owing under the MPA. Ten of these claimants had reported to work at the N.Y. Central freight yard, whereas seven had not. By oral ruling issued on July 14, 1976, and a written decision issued on November 29, 1979, the district court ruled that all seventeen claimants were employees of the N.Y. Central and thus were covered by the labor protection provisions of the MPA. The district court further ordered the parties to submit to arbitration the question of whether the claimants had sufficiently complied with the MPA's requirements so as to warrant an award of benefits.

In 1992, an arbitration panel entered a decision finding all seventeen claimants ineligible for compensation under the MPA. The arbitration panel found that those claimants who *had* reported for work at the N.Y. Central freight yard failed to process grievance claims adequately, admitted their ineligibility for benefits, or lost work due to causes that were deemed by the panel not to trigger benefit payments. The arbitration panel further found that those claimants who *had not* reported to work at the freight yard did not have a reasonable basis for not reporting, and thereby failed to comply with the MPA's requirement that employees exercise their seniority rights to obtain available work.

All seventeen claimants appealed the decision of the arbitration panel to the Surface Transportation Board (the "Board"). In a decision issued December 2, 1998, the Board reversed the arbitration panel's decision with respect to the ten claimants who had reported to work following the February 1968 furlough; however, the Board summarily affirmed the panel's decision as to the seven claimants who had failed to report to work at the freight yard. Those

seven claimants who did not report to work now petition this Court to reverse the decision of the Board.<sup>FN1</sup>

<sup>FN1</sup> Penn Central filed a petition for judicial review of the Board's decision as it related to the ten claimants who had reported to work. The Board moved to dismiss Penn Central's petition on the ground that the Board's decision was not a final order, and, therefore, not ripe for review. Penn Central then filed a petition to voluntarily dismiss the case, which this Court granted. Consequently, only that portion of the Board's decision addressing the seven claimants who refused to report to work is at issue in this appeal.

## II. DISCUSSION

### A. Regulatory Framework

Railroads must obtain regulatory approval from the Board before consolidating or merging their properties. *See* 49 U.S.C. § 5(2) (1973), *revised and recodified at* 49 U.S.C.A. §§ 11323-11326 (*West Supp.2000*). As a condition for approval, the Board (previously, the Interstate Commerce Commission ("ICC"))<sup>FN2</sup> is required to protect the interests of affected railroad employees. *See id.* Specifically, the Board is required to impose conditions on any merger transaction such that employees are not placed in a worse position with respect to their employment for at least four years following the merger. *See id.*

<sup>FN2</sup> Pursuant to the ICC Termination Act of 1995, Pub.L. 104-88, 109 Stat. 803 (1995), the Surface Transportation Board is the successor agency to the ICC with respect to the issues presented in this case. Consequently, we use the terms "ICC" and "Board" interchangeably.

To give effect to such protective conditions, applicant rail carriers must negotiate an implementing agreement with their employees' unions before making any changes in operations that might affect the carriers' employees. *See id.* If the carriers and the union cannot reach an agreement voluntarily, the matter is submitted to arbitration, and the arbitrator will resolve the matter and set specific terms for implementation. *See id.* An arbitral decision regarding

labor protective conditions imposed by the Board may be appealed to the Board for review. *See* 49 C.F.R. § 1115.8 (1999).

## B. Standards of Review

### 1. The Board's standard of review

\*3 The Board must employ a deferential standard when reviewing the decision of an arbitration panel. The applicable standard, which was adopted by the ICC in the so-called "*Lace Curtain*" decision and subsequently codified in federal regulations governing the Board's review powers, limits the Board's review of arbitration decisions to "recurring or otherwise significant issues of general importance regarding the interpretation of [the Board's] labor protective conditions." *Chicago & Northwestern Transp. Co.-Abandonment-Near Dubuque & Oelwein, IA*, 3 I.C.C.2d 729, 735-36 (1987) ("*Lace Curtain*"), *aff'd sub nom. Int'l Bhd. Elec. Workers v. I.C.C.*, 862 F.2d 330 (D.C.Cir.1988). *See* 49 C.F.R. § 1115.8. The Board does not review "issues of causation, the calculation of benefits, or the resolution of other factual questions" in the absence of "egregious error." *Lace Curtain*, 3 I.C.C.2d at 735-36. "Egregious error" means "irrational," "wholly baseless and completely without reason," or "actually and indisputably without foundation in reason and fact." *See Am. Train Dispatchers Ass'n v. CSX Transp., Inc.*, 9 I.C.C.2d 1127, 1130-31 (1993) ("*ATDA*") (quoting *Loveless v. Eastern Airlines, Inc.*, 281 F.2d 1272, 1275-76 (11th Cir.1982)).

The ICC has elaborated on the *Lace Curtain* standard of review as follows:

Once having accepted a case for review, we may only overturn an arbitral award when it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or exceeds the authority reposed in arbitrators by those conditions.

*Delaware & Hudson Ry. Co.-Lease and Trackage Rights Exemption-Springfield Terminal Ry. Co.*, Finance Docket No. 30965 (Sub-No. 1) *et al.* (ICC served Oct. 4, 1990) at 16-17, *remanded on other grounds in Ry. Labor Executives' Ass'n v. United States*, 987 F.2d 806 (D.C.Cir.1993). Thus, the Board's review of an arbitration decision is limited to determining whether the award was procedurally fair and impartial. *See Atlantic Richfield & Co.-Control-Butte, Anaconda & Pacific R.R. &*

*Tooele Valley R.R.*, Finance Docket No. 28490 (Sub-No. 1) (ICC served March 2, 1988). Only when the arbitrator has committed "egregious error" may the Board vacate the arbitration award for substantive mistake. *Id.*

### 2. The Court's standard of review

This Court reviews decisions of the Board pursuant to a similarly deferential standard. Under the Administrative Procedure Act (the "APA"), courts may not set aside a decision of the Board unless it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law, or unsupported by substantial evidence. *See* 5 U.S.C. § 706(2)(A), (E); *Film Transit, Inc. v. I.C.C.*, 699 F.2d 298, 300 (6th Cir.1983). In determining whether the Board's decision was arbitrary or capricious, the court must consider whether the decision was based on a consideration of the relevant factors and whether there was a "rational connection between the facts found and the choice made." *Film Transit*, 699 F.2d at 300. In determining whether the Board's findings are supported by substantial evidence, we must ask whether the Board considered "such relevant evidence as a reasonable mind might accept as adequate to support the conclusion reached." *R.P. Carbone Constr. Co. v. Occupational Safety & Health Review Comm'n*, 166 F.3d 815, 818 (6th Cir.1999). Substantial evidence is thus more than a mere scintilla of evidence, but less than a preponderance of the evidence. *See id.*

### C. The Board Was Permitted To Affirm the Arbitration Panel's Decision Summarily

\*4 As a threshold matter, Petitioners argue that, because the Board summarily affirmed the arbitration ruling against Petitioners without supplying an independent explanation for its decision, the Board's ruling necessarily is arbitrary and capricious and must be reversed. Petitioners cite case precedent requiring the Board to provide a reasoned explanation for its decisions, such that a reviewing court has a basis for understanding the Board's action. *See, e.g., Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) (agency "must disclose the basis for its order" and "give a clear indication that it has exercised the discretion with which Congress has empowered it"); *Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 129 (2d Cir.1993) (a "reviewing court must be able to understand the basis of the agency's action so that it may judge the consistency of that action

with the agency's mandate').

It is true that the Board's decision did not independently address Petitioners' arguments but rather adopted by reference the reasoning of the arbitration panel. The Board was permitted, however, to affirm summarily the arbitrator's decision. *See City of Bethany v. F.E.R.C.*, 727 F.2d 1131, 1144 (D.C.Cir.1984) (holding that agency's summary affirmance of an administrative law judge's detailed and thorough decision was proper and provided an opportunity for intelligent review by the court). The APA "does not require an agency to furnish detailed reasons for its decisions so long as its conclusions and underlying reasons may be discerned with confidence." *Nat'l Treasury Employees Union v. Fed. Labor Relations Auth.*, 802 F.2d 843, 845 (6th Cir.1986) (citations and internal quotation marks omitted).

It is apparent that the Board was well aware of Petitioners' arguments when it affirmed the arbitration panel's decision. Indeed, the Board summarized the two principal arguments posed by Petitioners before affirming the panel's decision as it pertained to Petitioners. Inasmuch as the arbitration panel's decision fully addressed Petitioners' claims, we reject Petitioners' contention that the Board's failure to articulate an independent opinion for affirming the panel's decision constitutes reversible error under the APA.

#### D. The Board Properly Affirmed the Arbitration Panel's Ruling

Under the deferential standard of Board review set out in *Lace Curtain* and 49 C.F.R. § 1115.8, the Board may reverse an arbitration panel's decision only if: (1) the ruling failed to conform to the labor protective conditions imposed by the Board; (2) the ruling exceeded the panel's authority; or (3) the panel committed egregious error. Petitioners have failed to establish any of these criteria for overturning the arbitration panel's decision.

First, the arbitration panel's decision conformed with the labor protective conditions imposed by the Board. The applicable labor protective conditions imposed by the ICC in this case required the Carrier to abide by the terms of the MPA. The arbitration panel's ruling—that Petitioners' failure to report to work precluded their recovery under the MPA—was based

upon the express terms of the MPA. As the arbitration panel observed, section 1(b) of the MPA expressly required covered employees to accept available work in order to qualify for benefits. As there was no exception to this requirement under the MPA, there was no basis for finding that the arbitration decision failed to "draw its essence" from the applicable labor agreements, as Petitioners suggest. *See Delaware & Hudson Ry. Co.*, Sub-No. 1 at 16-17.

\*5 Petitioners argue that the arbitration decision was inconsistent with the law of the case as established by the district court's 1976 oral ruling. The district court's order, however, resolved only the question of the general entitlement of employees of subsidiary railroads to benefits under the MPA. The district court specifically reserved for arbitration the question of "whether or not there was ... compliance by [Petitioners] with the terms of that agreement so as to entitle them to benefits." Thus, Petitioners' law-of-the-case argument fails.

Petitioners' argument that the arbitration panel exceeded its authority is also without merit. The panel's decision with respect to Petitioners fell squarely within the decision-making authority granted to it by the ICC and the MPA. *See* 49 U.S.C. § 5(2) (1973), revised and recodified at 49 U.S.C.A. §§ 11323-11326 (West Supp.2000). The fact that the arbitration panel may have unnecessarily prolonged the arbitration process by requiring Petitioners to prove their status as employees covered by the MPA, as Petitioners' argue, is not evidence that the panel exceeded its authority in rendering its decision. Indeed, the panel decided the precise issue expressly reserved for arbitration under the district court's 1976 and 1979 orders.

Finally, the panel did not commit egregious error in deciding the merits of Petitioners' claims. As the Board points out, there was ample factual basis for rejecting Petitioners' argument that they risked waiving their rights under the MPA if they reported to work at the N.Y. Central freight yard. Moreover, the panel properly rejected Petitioners' argument that the carrier anticipatorily breached its contractual obligations under the MPA. The panel reasonably found that Petitioners' refusal to report to work was at their own peril, particularly in light of the numerous notices sent to Petitioners to report to work and the numerous warnings to Petitioners that they would forfeit their benefits if they failed to report.

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(Cite as: 238 F.3d 419, 238 F.3d 419 (Table))

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Furthermore, the panel was justified by ample record evidence in rejecting Petitioners' argument that the work at the N.Y. Central freight yard was not comparable to their previous work at the CUT.

There being no showing that the Board's determination was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, or unsupported by substantial evidence, *see* 5 U.S.C. § 706(2)(A), (E), this Court "is not empowered to substitute its judgment for that of the agency." *Simms*, 45 F.3d at 1003. Under the deferential *Lace Curtain* standard, we therefore find that the Board properly affirmed the arbitration panel's decision with respect to Petitioners.

### III. CONCLUSION

Accordingly, we AFFIRM the Board's decision.

C.A.6, 2000.  
*Augustus v. Surface Transp. Bd.*  
238 F.3d 419, 2000 WL 1888805 (C.A.6)

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# Exhibit D

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In the Matter of : In Proceedings for the  
PENN CENTRAL TRANSPORTATION : Reorganization of a  
COMPANY, : Railroad  
Debtor : Bky. No. 70-347

MEMORANDUM AND ORDER NO. 2921 and 2922

Re: Trustees' Proposed Compromise of  
Personal Injury and Tax Claims

FULLAM, J.

April 22, 1977

The Trustees of the Debtor have filed a proposed Plan of Reorganization. A major aspect of the Plan is the treatment accorded the very large highest priority administration claims of the United States. After extensive discussions, the United States and the Trustees agreed to a method for treating the Government's claims which adequately protects the interest of the United States, and also permits the Trustees to propose a plan now, rather than some undetermined number of years in the future. A condition of the agreement is that the Trustees offer to compromise certain tax and personal injury claims.<sup>1</sup> Before the Court are two petitions of the Trustees for authority to effectuate the compromise of those claims.

The first petition seeks leave to pay, in cash, all personal injury claims which have thus far been liquidated, or which may hereafter be liquidated within a period of 180 days (or such further period as the Trustees, in their discretion, may authorize,

1. The agreement was submitted for this Court's preliminary approval (Doc. No. 1176R), and after hearing I entered Order No. 2744 which granted such preliminary approval.

or this Court may direct); claims in excess of \$5,000 would be paid off in installments over a period of 18 months. It is estimated that approximately \$11,952,830 would be required for this purpose, \$3,460,124<sup>2</sup> immediately.

The second petition, which has engendered more controversy, seeks permission to extend to all state and local taxing authorities an offer to compromise all outstanding tax claims by paying, in cash, 50% of the unpaid taxes which have accrued since the filing of the reorganization petition. Each taxing authority would be completely free to refuse the settlement offer, in which case its claims would be dealt with in the Reorganization Plan. Since post-petition taxes aggregate approximately \$340 million, the maximum amount of cash which might be required to carry out the compromise settlement program would be approximately \$170 million.

The cash needed immediately to carry out both proposals would be obtained primarily by transfers from certain existing escrow accounts, including a \$50 million escrow account previously established in connection with matured trustees certificates, unrestricted funds of the estate, and accounts containing proceeds from sales of real and personal property. The deferred installments of the personal injury payments appear manageable from cash flow, as projected (for the most part, proceeds from future sales of property).

In addition to the United States Government, most of the secured creditors have supported both petitions. Certain leased line and equivalent interests have expressed either approval of, or neutrality toward, the merits of the Trustees' proposals, but object to the proposed allocation of the burden as among the various

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2. The additional amount necessary to satisfy unliquidated personal injury claims is estimated to be \$3 million. A significant number of personal injury claimants have filed their claims late. To the extent such claimants are permitted to participate, there will be an increase in the amount of funds necessary to carry out the present proposal.

possible sources of cash. The principal objections to the merits of both proposals were expressed by certain taxing entities, and by Amtrak.

Briefly, a number of taxing authorities object to the payment of any personal injury claims unless all tax claims are first paid in full; and they object to the proposed tax compromise program on a variety of grounds. These objections, which will be discussed in detail in Part IV below, range from assertions that all taxes should be paid in cash immediately, and that the existing restraints against enforcement of tax liens should now be lifted, to the assertion that the compromise proposal unfairly discriminates between taxing authorities in the same category, or unfavorably discriminates against taxing authorities which are precluded by state law from agreeing to compromise settlements. In addition, many of the taxing authorities contend that the merits of the treatment of tax claims in the proposed Plan of Reorganization should be addressed at this time, so that the taxing authorities will be in a position to decide whether or not to accept the proposed compromise. Amtrak urges that the Trustees' proposals unfairly favor the taxing authorities and personal injury claimants.

Hearings on both petitions were held on February 25, 1977. Because the relationship between the present petitions and the proposed Plan of Reorganization must be clearly understood, and because a large number of persons and entities legitimately concerned may not have a clear perception of the issues involved or of the context in which they arise, a complete and detailed analysis and discussion appears desirable, even at the risk of indulging in what those who have been intimately involved in these reorganization proceedings from the outset may consider repetition.

I. The Background and Current Status  
of the Reorganization Proceedings

Because the present petitions have their origin in the agreement between the United States and the Trustees, it is appropriate to review the course of these proceedings from the perspective of the United States involvement. It is fair to state that the role of the United States in the Debtors' reorganization is unprecedented. The Trustees' Reorganization Plan and the present petitions are at least as much a product of the involvement of the United States as of the underlying economic facts. The two primary legislative enactments through which the United States has participated in this case are the Emergency Rail Services Act of 1970<sup>3</sup> and the Regional Rail Reorganization Act of 1973, as amended.<sup>4</sup> (by RR Revitalization + Regulatory Reform Act/1976)

At the outset of the case, the Trustees were confronted with an unmanageable cash shortage which they were unable to alleviate through private-sector borrowing. In response to the imminent threat of cessation of rail operations, the Congress enacted the Emergency Rail Services Act of 1970. Under this Act, the Secretary of Transportation was authorized to guarantee trustees certificates. The guarantee permitted the Trustees to sell \$100 million of trustees certificates in the private market.<sup>5</sup> [In accordance with the Act, the trustees certificates were accorded the highest lien on the property of the estate.<sup>6</sup>]

Although there were some improvements in the financial

3. 45 U.S.C. §§606 et seq.

4. 45 U.S.C. §§701 et seq.

5. See In re Penn Central Trans. Co (Issuance of Trustees Certificates), 325 F. Supp. 302 (E.D. Pa. 1971).

6. The nature of the lien of the trustees certificates is discussed in In re Penn Central Trans. Co. (Columbus Option), 494 F.2d 270 (3d Cir. 1974) and In re Penn Central Trans. Co (Pennco Settlement Agreement), 358 F. Supp. 154, 175 (E.D. Pa. 1973).

results during the ensuing years, it became clear in 1973 that there could be no conventional reorganization, and that the Constitution required the termination of the Debtor's rail operations. Faced with this crisis, the Congress enacted the Regional Rail Reorganization Act, effective January 2, 1974. In broad outline, the RRRRA was quite simple. A planning agency, USRA, was to analyze the operation of all bankrupt rail carriers in the Northeast and select from those lines a new system which would eventually be profitable; the selected lines were to be conveyed to a new for-profit company - ConRail; and the bankrupt carriers were to be compensated for their property with stock of the new company. On April 1, 1976, Penn Central and the other bankrupt carriers conveyed their rail assets to ConRail, and ConRail has operated the properties since that time.

Compensation of the estates with stock of the new company and the method of establishing the value of the properties conveyed to ConRail presented fundamental problems. The Act dealt with the procedural aspects by creating a new Special Court which was to decide issues relating to the value of the properties conveyed and the compensation paid. In the event that the value of the stock was less than the value of the properties conveyed, the Special Court was authorized to enter a default judgment against ConRail. By definition, however, that default judgment would be virtually valueless. Constitutional challenges to the Act based essentially on the fact that the default judgment would be valueless were rejected by the Supreme Court on the theory that if a valueless default judgment were to be entered, the estates would have a Tucker Act remedy against the United States for the shortfall.

In February of 1976, Congress amended the RRRRA to provide that USRA was to issue to the bankrupt carriers certificates

7. Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).

of value guaranteed by the Secretary of Treasury.

The certificates are redeemable on December 31, 1987, or such earlier time as USRA may determine. In general, the certificates of value are a promise by the United States to pay to the holders the net liquidation value of the holders' conveyed property as found by the Special Court, less the value of the ConRail stock and any dividends paid thereon, as of the redemption date, together with interest.

The certificates of value, therefore, operate as a mechanism for reducing the likelihood that resort to the Tucker Act action in the Court of Claims will become necessary. It is important to note, however, that the certificates of value may or may not cover the compensation required by the Constitution, as determined by the Special Court; hence, an eventual Tucker Act action in the Court of Claims remains a possibility.

Implementation of the RRRRA presented another significant difficulty: continuation of rail operations from enactment date of the RRRRA until conveyance of the properties to ConRail. Even with the deferral of local taxes, leased line rents, and other operating expenses, the revenue from the operations of the bankrupt Northeast carriers was inadequate to meet operating expenses. Congress dealt partially with this cash problem. Under §215 of the Act, loans were made to the estates to do certain types of work which resulted in the upgrading of the carriers' property, and cash grants under §213 were available to meet unavoidable cash deficiencies. The funds appropriated for §§213 and 215 were less than the aggregate need of the bankrupt carriers. Therefore, the Trustees of each carrier were required to "cash manage." What this meant was that as the conveyance date approached, the bankrupt's payables were not paid. Of course, the effect of this was to place the burden of

8. Railroad Revitalization and Regulatory Reform Act of 1976 §610(b), 45 U.S.C. §746 (1976) (originally enacted as Pub. L. No. 94-210).

continued operations on the private sector, vendors of services and supplies. Congress in turn addressed this problem by adding §211(h) to the RRRRA.<sup>9</sup> Under §211(h), USRA was authorized to loan money to ConRail to pay certain of the Debtor's accounts payable. The estates are obliged to repay these §211(h) expenditures, and ConRail and/or USRA hold highest priority administration claims against the estates for the unpaid balances of §211(h) advances. The Trustees estimate that the estate's §211(h) obligations will be approximately \$290 million.

In connection with the implementation of §211(h) a dispute arose as to whether accrued vacation liabilities totaling approximately \$60 million were obligations of the estate that should be paid by §211(h) funds or obligations of ConRail as the successor employer. I held that ConRail was obligated to discharge the accrued vacation obligations.<sup>10</sup> While an appeal from that decision was pending, Congress amended the RRRRA to provide that vacation pay was an obligation of the estate.<sup>11</sup> Arguably then, an additional \$60 million will be added to the Trustees' §211(h) obligations. Moreover, the Trustees have defaulted on \$50 million in trustees certificates, and as a result the United States has honored its guarantee.<sup>12</sup> The total claim of the United States, which under the Emergency Rail Services Act and the RRRRA is entitled to be accorded first priority of all claims, is therefore between \$340 million and \$400 million. Arguably, some portion of this might be set off or "netted" against an eventual Tucker Act claim; but as to the major share thereof, the §211(h) advances, Congress has expressly proscribed setoffs.

9. Railroad Revitalization and Regulatory Reform Act of 1976 §606, 45 U.S.C. §721(h) (1976) (originally enacted as P.L. 94-210).
10. In re Penn Central Trans. Co. (In re Determinations Under §§211(h)(2) and 211(h)(3) of the Rail Act), 411 F. Supp. 1079 (E.D. Pa. 1976).
11. Rail Transportation Improvement Act §203, 45 U.S.C. §721(h)(1)(A)(iv) (1976) (originally enacted as P.L. 94-555).
12. See In re Penn Central Trans. Co. (Default on Trustees Certificates), 406 F. Supp. 907 (E.D. Pa. 1976).

The cumulative impact of the Government's involvement in this case has created an extraordinary situation. All the estate's rail-related property and equipment has been conveyed to ConRail free and clear of liens. It is this property which was the security for the vast majority of the estate's secured creditors, including taxing authorities. Although stock in ConRail and certificates of value will be paid to the Trustees for the rail assets, no matter when the value is determined, it is possible that the stock of ConRail will not reach a value equal to the value of the conveyed property at any time prior to the 1987 redemption date. In addition, because of the priority status of the Government's claim, money now held in escrow for the benefit of bondholders and taxing authorities as well as any additional money received from future sales of property is not available for use in connection with a plan or otherwise to pay creditors. Finally, if the Court of Appeals were to reverse this Court's holding that escrow funds were not "cash or other current assets" for the purpose of §211(h), the escrow funds would have to be used to satisfy the estate's §211(h) obligations.

Thus, from the standpoint of the other creditors (including particularly the tax claimants) the Government's involvement in this case can be seen as achieving the goal of protecting continued rail operations by exacting a high price, namely, subordination of other secured claims to the massive new debt obligations of the Government, unavailability of liquid resources for use in carrying out a plan of reorganization which would satisfy the claims of creditors, and potential deferral of the time when a reorganization plan could sensibly be proposed. Indeed, many of the taxing authorities have stressed these arguments in the present proceeding.

In apparent recognition of the potential unfairness inherent in the situation, [Congress has authorized the Secretary of Transportation to permit the use of escrow funds for purposes other than payment of the priority claims of the Government, pursuant to a plan of reorganization which, in the judgment of the Secretary, provides adequate protection for the interests of the United States.]<sup>13</sup> It was against this background that the negotiations between the United States and the Trustees have been carried out. [In general terms, the Plan provides that instead of receiving cash, the United States will receive various interest-bearing securities secured by specified assets of the estate.] The maturity dates of these securities vary, but would produce a result which the Trustees apparently find acceptable. The Secretary of Transportation has made the required finding that the proposed Plan, embodying this securities package, does adequately protect the interests of the United States.<sup>14</sup>

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13. 45 U.S.C. §721 (h) (4) (D) (ii).

14. The United States has, however, asserted an objection to the treatment in the Plan of certain of its other claims against the estate (Doc. No. 12765).

## II. The Proposed Plan

A review of the broad outlines of the Plan of Reorganization proposed by the Trustees is helpful to an understanding of the issues now before the Court. But it must be emphasized that, until the hearings on the proposed Plan have been held, no question concerning the fairness and equity of the proposed Plan, or its feasibility, can be addressed. Thus, nothing which is said herein concerning the proposed Plan is intended to express any view as to the merits of the proposed Plan, nor should it be so understood.

[The proposed Plan contemplates a surviving corporation which would own and manage assets in three broad categories: (1) the claim arising from the conveyance of the railroad assets to ConRail (the "valuation case"); (2) retained assets, many of which are to be sold over time pursuant to an asset-disposition program; and (3) the earnings of profitable subsidiaries which are to be retained as going concerns (primarily the Pennsylvania Company or "Pennco"). Securities to be issued by the reorganized company are designed to reflect these differences, in terms of both the source and the timing of ultimate payment; and are to be distributed to the creditors in accordance with the nature and priority of their respective interests as classified in the Plan.] The proposed distribution reflects certain proposed compromise adjustments of claims in addition to the Government compromise outlined above.

This is not the place to comment upon the objections to the Plan which have been expressed to date, except to note that a list of the formal objections together with a brief one- or two-sentence description of each objection covers more than 50 closely typed pages. It is fair to assume that the interested parties are actively preparing for the forthcoming hearings by further studying both the Plan and the objections in order to identify and classify

the genuinely disputed issues of fact and law which the Court will be called upon to resolve.

From the standpoint of each class of creditors, the overriding issues presumably will be whether (1) the compromise with the United States has presented an opportunity which should not be lost; (2) the Trustees' Plan accords fair treatment; and (3) if not, in the creditors' judgment what modification to the Plan is necessary to achieve fair treatment.

### III. The Status of Tax Claims

As of December 31, 1976, the Debtor's total unpaid liability for property taxes was \$326,905,906.18, and for unpaid corporate taxes \$54,276,289.91, making a total unpaid tax liability of \$381,182,276.09. Of these amounts, \$43,864,135.58 of property taxes and \$1,923,839.21 of corporate taxes, for a total of \$45,787,974.79, were regarded by the Trustees as constituting pre-bankruptcy obligations. Thus, according to the Trustees' records, \$335,394,301.30 was the amount of unpaid post-bankruptcy tax liabilities as of December 31, 1976. The amounts stated do not reflect interest or penalties; nor does the present record permit a breakdown as between taxes assessed against properties conveyed to ConRail and properties retained by the Debtor, nor as between properties owned in fee by lessors and property owned in fee by the Debtor, nor as between properties which have been sold in the course of reorganization and properties still owned by the Debtor's estate.

Because these tax liabilities have been imposed under a wide variety of state and local tax legislation, there may be minor variations in the precise nature and legal ramifications of these tax claims, but it seems safe to assume that at least the post-bankruptcy taxes rank as claims of administration. Presumably, also, the pre-bankruptcy tax obligations for the most part rank as

secured claims of some kind, and probably prime most other secured obligations. It should be noted, also, that the dividing line between pre-bankruptcy and post-bankruptcy tax liabilities may be difficult to draw in particular cases.

[Until now, the straitened circumstances of the Debtor's estate have not permitted payment of tax liabilities. Although the Trustees have recently petitioned this Court for leave to pay taxes on a current basis for the year 1977 and thereafter, there are insufficient free resources available to permit any significant payments of overdue liabilities, unless the settlement with the Government is carried out.]

It is true that, at the present time, there are substantial amounts of money on deposit in various escrow accounts controlled by the Trustees, and that, [to the extent that these] funds were derived from sales of real property, various taxing authorities have liens against the funds in the amount of the unpaid taxes attributable to those particular properties. But substantially all of these funds are also subject to other liens, and all are subject to the overriding lien held by the Government.]

It is also true that, at least with respect to taxes attributable to properties not conveyed to ConRail, liquidation would ultimately produce enough money to pay those tax claims in full.

[But, in bankruptcy, no one creditor or group of creditors, even administration-level claimants, can insist upon liquidation if re-organization is justified - a question which will be decided in connection with the Plan hearings. Moreover, an orderly liquidation would not provide payment in the immediate future.]

It also bears emphasis that, because of the novelty of the legislative approach to the problems generated by the bankruptcies

of the northeastern railroads, the Debtor's present situation is unique in the annals of bankruptcy. Thus, there are many potential opportunities for litigating novel questions of law, which might well preclude immediate satisfaction of tax claims. What is the impact of the RRRRA upon the "personal" liability of the Trustees for taxes? What are the implications of the marshalling doctrine in this context? What is the status of a tax claim secured by assets which are to be paid for in ConRail securities?

In short, the taxing authorities, notwithstanding the high ranking to which their claims entitle them, will have business judgments to make.

#### IV. Validity of Objections to the Tax Compromise Proposal

Some of the arguments advanced in opposition to the Trustees' tax compromise proposal are plainly lacking in merit and require no extended discussion. [ I am persuaded that the Trustees have the power to compromise claims, with the approval of the Reorganization Court; and that the Reorganization Court has jurisdiction and authority to permit such compromises. ] And I am not convinced that the alleged lack of legal authority under state law for some taxing entities to compromise tax claims is a valid reason for precluding other taxing entities under no such disability from compromising their tax claims if they wish to do so. If a particular taxing entity lacks legal authority to carry out the compromise proposal, it will presumably not accept the Trustees' offer. Assuming there may be taxing entities which would like to accept the Trustees' offer, but are precluded by state law from doing so, their complaints go to the efficacy of the state law in question, and not to the fairness or desirability of the Trustees' tax compromise proposal.

There are, however, more substantial objections which have been raised against approval of the Trustees' proposal. One such objection is the assertion that the offer is essentially unfair because it is discriminatory, and would result in unequal treatment of claimants in the same class. Another objection is that the offer is unfair because the taxing entities do not have a basis for informed judgment.

A. Discriminatory Impact

A few of the taxing entities charge that the Trustees' proposal is discriminatory because it contemplates payment in full of all post-petition tax claims which do not exceed \$10,000 in amount. I am persuaded that this is not a valid objection. The benefits to the estate from elimination of numerous small claims seem self-evident. Moreover, in view of the small amounts involved, offering such claimants a choice between accepting 50% and pursuing their claims under the Reorganization Plan would, as a practical matter, not give them much of a choice. The Trustees' proposal to pay these small claims in full conforms to the universal practice in such situations.

A more significant objection is that, since the Trustees would offer to pay 50% of post-petition taxes only in exchange for release of all tax claims, both pre-petition and post-petition, the offer would necessarily be more generous as to some claimants than others. Because of differences in local laws and tax collection practices, some jurisdictions have virtually no pre-petition tax claims, while others have substantial pre-petition tax claims. The record suggests, for example, that there are no claims for pre-bankruptcy real estate taxes in the District of Columbia or in the

States of Maryland, Kentucky and West Virginia. Only about 1% of the tax claims emanating from the State of New York are in the pre-bankruptcy category. At the other extreme, nearly one-third of the total tax claims arising in Indiana, and about 25% of the tax claims emanating from the State of Ohio, are in the pre-bankruptcy category. Thus, if Indiana were to accept the compromise offer, it would receive approximately \$14.8 million in exchange for release of claims totaling \$40.6 million, whereas Maryland would receive approximately \$6.1 million in exchange for releasing claims totaling \$12.1 million.

Stated otherwise, payment of 50% of the post-petition taxes would result in payment of 50% of all tax claims in some states, but would represent payment of only 36% or 37% in other states.

Everyone agrees that it would be impermissible for this Court to require similarly situated taxing entities to accept such disparate treatment, either in a plan of reorganization or otherwise. The Trustees point out, however, that any tax claimant which feels that the proposed settlement offer is unfair is at liberty to reject it.

The Trustees' insistence upon expressing the compromise offer in terms of payment of a portion of the post-petition tax claims is understandable, and sound. Only post-petition claims are clearly administration expenses. Ordinarily any attempt at this point to pay pre-petition taxes would give rise to a host of legal and practical problems. But it is difficult to quarrel with the converse proposition that, if the Trustees wish to deal only with post-petition taxes, they should not insist upon release of the pre-petition claims.

The argument can be made, of course, that if it is unfair to exact a larger give-up from some claimants than from others, in exchange for payment of 50% of post-petition taxes, it would also

be unfair to penalize those jurisdictions which were "efficient" in their tax collection practices by reducing the amount of post-petition taxes they would now collect, merely because they have no pre-petition taxes to give up.

One solution might be to remove the pre-petition tax claims from the settlement proposal altogether, leaving all taxing authorities free to pursue those claims under the Plan. But any such alteration would undoubtedly make the compromise proposal much less attractive from the Trustees' standpoint. It is apparent that a principal inducement to the Trustees in advancing their compromise proposal is the hope that they might thus eliminate a large number of claims in exchange for a manageable amount of money, thus simplifying matters considerably and helping to define the scope of the related features of the Plan itself.

Moreover, there is reason to believe that the Trustees' proposal was preceded by careful detailed analysis, and that it represents the considered judgment of a group of many knowledgeable persons as to the kind of proposal which might well be acceptable to a large number of tax claimants. In my view, it would be foolhardy for the Court to insist upon major changes in the compromise proposal as a condition of its approval. This is particularly true when the possible consequences of any such changes cannot now be evaluated. Questions of feasibility, as well as fairness, will be before the Court at the hearings on the Plan; until those hearings are held, major alterations of the context in which the Plan is being proposed should be avoided. Stated otherwise, the present record justifies the conclusion that approval of the Trustees' proposed tax compromise would not impair the feasibility of the proposed Plan of Reorganization, but does not justify the

conclusion that the compromise offer can be significantly expanded without impairing the feasibility of the proposed Plan.

The question remains, however, whether approval of the proposed compromise should be withheld because of the fact that the offer would require some tax claimants to give up considerably more than others in order to obtain immediate payment of one-half of the post-petition taxes. More specifically, the question as I see it is whether it is possible to achieve some mitigation of the gross disparity, without either penalizing the "efficient" tax collectors or substantially increasing the immediate cash impact of the compromise program. In short, the task of the Court is to reach an equitable result.

I am persuaded that the compromise proposal would be advantageous to the Debtor's estate, and that it would also be advantageous to the taxing authorities to have the opportunity to accept the compromise offer if they see fit. I am also persuaded that mathematically precise equality is neither possible nor necessary. I believe the fairest approach under all of the circumstances would be to exact concessions based upon averages.

If all of the outstanding tax claims were aggregated as a single claim, payment of one-half of the post-petition taxes would constitute payment of 44% of all taxes. By the same token, a hypothetical "average" tax claimant would, by accepting the Trustees' offer to pay one-half of the post-petition taxes, receive 44% of its total tax claim. By offering to pay one-half of all post-petition taxes, the Trustees would be according equal treatment to all tax claimants, insofar as immediate payment of administration claims is concerned. By adding to that offer, in each case, a sum of money sufficient to insure that no tax claimant who accepts the offer would receive less than 44% of the total of both pre- and post-

petition taxes, the Trustees would somewhat ameliorate the inequality in the concessions required of the taxing authorities, by insuring that no claimant, in order to avail itself of the compromise offer, would be required to give up more than the hypothetical "average" claimant.

On the basis of the figures set forth in the proposed Plan of Reorganization, it appears that the maximum additional amount of cash which would be required to carry out this modification of the compromise offer, assuming all taxing entities were to accept the modified proposal, would be approximately \$8.9 million. It seems unlikely, therefore, that this modification would impair the feasibility of the tax compromise proposal, or of the Plan itself. Needless to say, should this modification cause complications which make the compromise unacceptable to the Trustees, they are at liberty to make further application to the Court.

To summarize, then, I have concluded that if the compromise offer is to be made, the offer should be to the effect that, in exchange for release and discharge of all tax claims, the Trustees would pay 50% of the principal amount of post-petition taxes, or such amount of post-petition taxes as would cause the payment to equal 44% of the principal amount of all tax claims, whichever is greater.

#### B. Lack of Information

The objecting tax claimants contend that it is somehow unfair to permit the Trustees to make the compromise offer at this time, since they do not now know how this Court, or appellate courts, may rule with respect to the treatment of tax claims in the Plan of Reorganization. These objectors are clearly correct in asserting

that it would be easier to decide whether they would fare better by accepting the compromise proposal or by having their claims dealt with in the Plan of Reorganization, if they now knew for certain exactly what the outcome of the Plan proceedings will be. No doubt the Trustees, also, would be better able to gauge the attractiveness of the compromise offer if they knew for certain whether or not the Plan they have proposed will be approved and consummated without significant changes in the treatment of tax claims proposed therein.

But the point is that no one knows, or can know, at this juncture, what the final outcome of the Plan proceedings will be. [The entire thrust of the Trustees' compromise proposal is to make available an immediate-payment alternative for those who would prefer to avoid further litigation.]

Until the Court has held hearings on the proposed Plan, and has heard argument on the complex issues involved, it would be manifestly improper to express even a generalized or tentative view as to how tax claims should fare under the Plan, or as to the comparability of the present compromise proposal with the probable treatment of tax claims under the Plan. Indeed, even a recital of the uncertainties involved might be misunderstood as tending to suggest that the compromise offer should be accepted.

The parties are entitled to know, however, that this Court's target date for concluding hearings on the proposed Plan of Reorganization is the month of June 1977; that any and all objections to the proposed treatment of tax claims in the Plan of Reorganization will be carefully considered; and that this Court is sensitive to the need for expeditious decision. [Moreover, it is a safe assumption that none of the outstanding requests, whether expressed by formal petitions, or by response, brief, or oral argument,

to abrogate Order No. 1 or Order No. 70, or to take any other action which would mandate immediate payment of taxes or permit creditors to proceed with the collection of their claims, will be acted upon until the Plan hearings have been held. Beyond that, the uncertainties alluded to are not within the power of this Court to resolve at this time. Each claimant is free to assess the strengths and weaknesses of the arguments asserted in support of, and in opposition to, the proposed Plan and its treatment of tax claims, and the likelihood and probable duration of resort to the appellate process; to assess its own particular circumstances; and to exercise its own business judgment as to whether or not the proffered compromise should be accepted.

#### V. Antrak's Objections

The National Rail Passenger Corporation ("Antrak") has asserted objections to the tax proposal which differ from those already discussed. Before reaching the merits of Antrak's position, it is necessary to consider whether Antrak has standing to assert any form of objection to the tax proposal.

Antrak is not a direct provider of passenger service, but rather contracts with operating rail carriers for them to provide Antrak's passenger service. The Debtor performed such services for Antrak from May of 1971 until the conveyance of the Debtor's rail property to ConRail on April 1, 1976. Antrak has been pursuing a rather complex litigation strategy to assert certain claims allegedly arising from the Trustees' failure to meet their pre-conveyance contractual obligations. As part of this effort, Antrak presented to this Court a petition for enforcement of an award made by an arbitration panel, which determined that, during the period before conveyance of the rail system to ConRail, the Trustees had

failed to maintain certain passenger track at the level of utility required by the contract between the Trustees and Amtrak. The relief sought was in the nature of specific performance: an order requiring the Trustees to perform certain engineering services and to plan for, and thereafter carryout, certain large-scale track restoration. I denied Amtrak's request because the conveyance of the railroad to ConRail pursuant to the RRRRA rendered performance of track maintenance by the Trustees a legal and practical impossibility. See In re Penn Central Trans. Co. (Petition of Amtrak to Enforce Arbitration Award), 422 F. Supp. 67 (E.D. Pa. 1976).

Although I had no occasion at that time to decide whether Amtrak had a claim for damages, I did point to some possible obstacles to the successful assertion of any such claim: Before the arbitrators, Amtrak expressly disavowed any claim for damages; the causal relationship between the level of track maintenance and Amtrak's revenues might be difficult to establish; and the amount of money due the estate from Amtrak under the agreement would have been greater if the Trustees had spent the amount of money for track maintenance which Amtrak contended was necessary. By reiterating these potential infirmities, I do not mean to preclude Amtrak from asserting any claim it may feel is justified. The Third Circuit presently has under advisement Amtrak's appeal in that matter.

It would be difficult to conclude that Amtrak has standing to object to the tax compromise if the only basis for such objection is its alleged right to have the Trustees do heavy track work on ConRail's railroad. However, Amtrak now seems to be asserting that it has administration claims against the estate of approximately \$150 to \$170 million in contract damages (Docs. Nos. 12096, 12694).<sup>15</sup>

15. The claim apparently includes the specific segment of rail line involved in Amtrak's prior petition, as well as additional instances of alleged failure on the part of the Trustees to maintain the quality of the track and roadbed.

While the validity and amount of these claims has not yet been established, the reasonable course at this point is to accord Amtrak standing as an administrative claimant. Cf. Rule 8-306(a).

Amtrak's objection to the tax proposal differs from others in that Amtrak has not been afforded the opportunity to accept a similar compromise. Its position is essentially that no administration claim should be paid unless and until Amtrak also is paid. This position is simply without merit. The United States has not elected to include Amtrak within the compromise, and absent such consent of the Government it is not possible to require the Government to include Amtrak. Second, Amtrak's claims are not even liquidated. Amtrak's suggestion that the entire case await its pleasure is less than realistic. Finally, payment of the tax claimants will not prejudice Amtrak in any way. Indeed, the potential reduction of the tax claims by one-half would be to Amtrak's advantage. In sum, consummation of the tax proposal will not have an adverse effect on Amtrak's position. If and when Amtrak establishes that it has an administration claim, adequate provision can be made to satisfy its claim.

#### VI. The Proposed Settlement with Personal Injury Claimants

Unlike the tax claims discussed above, the claims for pre-bankruptcy personal injury (or death) do not rank as claims of administration. Ordinarily, these claimants would not be entitled to receive payment in cash unless and until all senior claims have been paid in full in cash or equivalent. Thus, approval of the Trustees' compromise proposal cannot be granted over the objections of senior claimants, unless it can be shown that the rights of the objectors would not be adversely affected.

In this case, most of the senior claimants have expressly consented to the Trustees' proposed compromise. The narrow question, therefore, is whether the interests of objecting senior claimants would be adversely affected by consummation of the Trustees' proposal.

It should be noted at the outset that, while pre-bankruptcy personal injury claims are generally regarded as mere unsecured pre-bankruptcy claims of general creditors, a strong argument can be made that the usual justification for such treatment - the normal risks assumed when one extends credit - does not apply to personal injury claims. These claimants stand alone among all of the creditors of the Penn Central in the sense that they neither voluntarily extended credit to the Debtor, nor occupied any other business relationship with the Debtor. As an abstract proposition, therefore, it is arguable that the claims of secured creditors should not necessarily be preferred in bankruptcy over these personal injury claims - particularly secured claims arising from credit extended after the personal injuries were sustained.<sup>16.</sup>

Congressional uneasiness with the normal treatment of personal injury claims in bankruptcy may be readily discerned in the 1976 amendments to §211(h) of the RRRA, and in the legislative history of those amendments. Indeed, it might not be much of an overstatement to hold that Congress has, in effect, recognized that claims for personal injuries and wrongful death are entitled to priority classification.

Be that as it may, I am persuaded that the settlement with the Government in the present case provides ample justification for permitting the Trustees to carry out their proposal. The amount of cash which would be paid to personal injury claimants

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16. Concepts of property interests as of the date of the bankruptcy petition were filed are, of course, important, but not always controlling; witness the treatment of employee claims.

under the Trustees' proposal is relatively small (approximately \$13 million), and would be more than offset by the monetary value of the deferral of the pay-out of the Government's claims. Thus, to carry out the Trustees' proposal as a condition precedent to the Government's agreement to defer its claim would impair neither the amount, form of payment, or timing of the satisfaction of the claims of the objectors.

#### VII. Source of Cash to be Used

For the reasons thus far discussed, I am satisfied that none of the objections expressed is sufficient to justify rejection of the proposed compromise settlements. The final question to be considered is whether consummation of the settlement proposals might impermissibly jeopardize valid liens held by any of the objectors. It is clear, of course, that if the Plan of Reorganization as presently proposed is ultimately approved and consummated, the present compromise proposals are entirely consistent with it, and would do no impermissible violence to vested lien rights. The problem is to insure that no such rights will be impaired by carrying out these compromise proposals now, notwithstanding the possibility that the reorganization may abort, or some alternative plan of reorganization may be adopted.

No difficulty arises with respect to the Government's all-encompassing liens, nor with respect to the liens of other secured creditors who are willing to have the compromise proposals carried out. The remaining objections fall into two general categories: (1) Some of the Secondary Debtors object to the use of escrowed funds derived from sales of leased line properties, and (2) some of the taxing authorities object to the use of escrowed funds against which they claim to have liens.

The record establishes that the personal injury settlement can be consummated without affecting these liens. With respect to the proposed tax compromise, the necessity for invading funds in either of the foregoing categories will depend upon how many of the tax claimants elect to accept the Trustees' offer.

It seems probable that these potential problems are more theoretical than real. More importantly, the record justifies the conclusion that, if necessary, the Trustees can adequately indemnify against impairment of leased line and tax lien interests in funds on deposit, should it appear that impairment is threatened. Adequate provisions for the protection of these interests will be included in the Order to be entered.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In the matter of : In Proceedings for the  
Reorganization of a  
PENN CENTRAL TRANSPORTATION : Railroad  
COMPANY, Debtor : Bky. No. 70-147

ORDER NO. 2921

AND NOW, this <sup>nd</sup>22 day of April, 1977, upon considera-  
tion of the "Petition of the Trustees to Pay Pre-Bankruptcy Personal  
Injury and Wrongful Death Claims" (Doc. No. 11766) ("Petition"), and  
responses thereto, after hearing thereon, and upon consideration of  
the Outline of Settlement with the United States of America given  
preliminary Court approval by Order No. 2744, it is hereby ORDERED  
that:

1. The Petition is GRANTED.
2. The Trustees are authorized to pay pre-bankruptcy  
personal injury and wrongful death claims as outlined in the Petition  
where such claims have been timely filed and liquidated within one-  
hundred-eighty (180) days from the date of this Order, or within  
such further period as the Trustees may allow pursuant to Paragraph 4  
of this Order, or as this Court may direct.
3. The Trustees are also authorized to pay pre-bankruptcy  
personal injury and wrongful death claims as outlined in the Petition  
where there now exists a dispute as to the timeliness of the filing  
of a claim but which is later determined by this Court to be timely  
filed.
4. Where a claimant is unable to liquidate a claim within

one hundred-eighty (180) days from the date of this Order, the Penn Central Trustees are authorized, for good cause shown, to extend the period within which a claim must be liquidated. The Trustees, upon request made at least thirty (30) days prior to the expiration of said one hundred-eighty (180) day period to Robert W. Watson, Proof of Claims Administrator, Suite 2610 IVB Building, 1700 Market Street, Philadelphia, Pennsylvania 19103, will furnish all such eligible claimants with a form for stating why the time should be extended in an individual case.

5. The Trustees shall serve a copy of this Order on:

- a. All parties customarily notified in these proceedings;
- b. The Secretary of Transportation and the Attorney General of the United States; and
- c. All persons, either personally or through their legal representatives, known to have filed a proof or proofs of claim against Penn Central for pre-bankruptcy personal injury or wrongful death.

  
\_\_\_\_\_  
J.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In the Matter of : In Proceedings for the  
PENN CENTRAL TRANSPORTATION : Recognition of a  
COMPANY, : Railroad  
Debtor : Oky. S. 70-347

ORDER NO. 2922

AND NOW, this 22<sup>nd</sup> day of April, 1977 upon considera-  
tion of the "Petition of the Penn Central Trustee for Authority  
to Compromise and Pay Real Estate and Other Taxes Referred Pursuant  
to Order No. 70" (Doc. No. 11767) (Tax Compromise Petition), the  
documents filed in support thereof, the Statements of Position filed  
by the various parties, the Petition of the City of Pittsburgh and  
other taxing authorities for modification of Order No. 70 (Docs.  
Nos. 10665, 10734, 10735, 10797) (Pittsburgh Petitions) and hearing  
having been held, it is hereby ORDERED that:

1. The Penn Central Trustees ("Trustees") are authorized  
to compromise and settle outstanding tax claims against Penn Central  
Transportation Company ("Penn Central"), the Secondary Debtors and  
the non-bankrupt leased lines by payment of 50% of the principal  
amount of post-petition taxes, or such amount of post-petition taxes  
as would cause the payment in each case to equal 44% of the principal  
amount of all tax claims, whichever is greater.

2. The Trustees are authorized to create a cash fund  
for the compromise and settlement of taxes pursuant to this Order  
(Tax Settlement Fund) from the following sources:

- a. Monies set aside in respect of defaulted trustees certificates pursuant to Order No. 2158.
- b. Escrow deposits relating to taxes owed by tenants of the estate.
- c. Proceeds of the sale of equipment deposited under Order No. 366.
- d. Funds of Manor Real Estate Co., including monies set aside pursuant to Order No. 1889.
- e. Penn Central Securities Litigation Settlement Fund set aside pursuant to Order No. 2050.
- f. Unrestricted funds of Penn Central Transportation Co. and various subsidiaries.

3. The Trustees' request for authority to draw upon the restricted and unrestricted funds of the respective leased lines for the creation of a Tax Settlement Fund, but only to the extent of 25% of the amount of post-reorganization taxes, exclusive of interest and penalties, due in respect of such leased lines, is DENIED, WITHOUT PREJUDICE to renewal of such request in the event money in excess of that made available under Paragraph 2 of this Order is necessary.

4. The Trustees shall keep an accounting of all restricted and unrestricted funds of the Penn Central which are used for the creation of the Tax Settlement Fund and of the amount of all outstanding tax claims settled pursuant to this Order, and shall make such accounting available to any interested party for inspection upon reasonable request.

5. In the event that a Plan of Reorganization for the Penn Central and the Secondary Debtors is not approved by this Court and consummated pursuant to the Bankruptcy Act by June 30, 1978, the Trustees shall begin to reimburse the segregated and escrowed accounts of the Debtor which had been used in the creation of the Tax Settlement Fund with the future cash flow of Manor Real Estate Co.

6. Any tax claimant wishing to compromise and settle its outstanding tax claims against the Debtor or leased lines shall so advise the Trustees, in care of Ernest R. Varalli, Controller, Suite 3200, IVB Building, 1700 Market Street, Philadelphia, Pa. 19103, in writing within 130 days of the date of this Order. The Trustees shall serve upon each tax claimant a form or forms upon which the tax claimants may advise the Trustees (1) of the amount of tax claims claimed to be due, and (2) that the compromise and settlement of such claims on terms specified in Paragraph 1 of this Order will be accepted as a full and complete satisfaction of all such claims against the Debtor and the leased lines.

7. The compromise and settlement of outstanding tax claims by and between the Trustees and any tax claimant pursuant to this Order shall constitute a full and complete settlement and satisfaction of all such tax claims against the Debtor and the leased lines, including all claims for interest and penalties, in respect of any period through and including December 31, 1976.

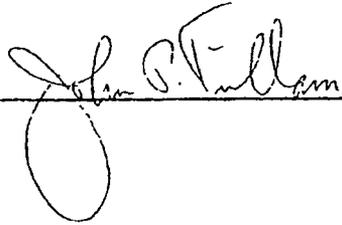
8. No claim against the Debtor or a leased line which is not compromised or settled pursuant to this Order shall be affected hereby, as to amount, priority or otherwise, pending the treatment of such claim in a Plan of Reorganization for the Debtor and the Secondary Debtors approved by this Court and consummated pursuant to the Bankruptcy Act.

9. The Pittsburgh Petitions for a modification of Order No. 70 are DENIED, WITHOUT PREJUDICE.

10. The Petition of the Penn Central Trustees and the Trustee of The Delaware Railroad Company and the Philadelphia,

Baltimore and Washington Railroad Company for Authority to Compromise and To Pay Certain Taxes Owed to the City of Wilmington, Delaware (Doc. No. 10810) is GRANTED.

11. Except as provided in this Order, the provisions of Order No. 70 shall remain in effect.

  
\_\_\_\_\_ J.

13021

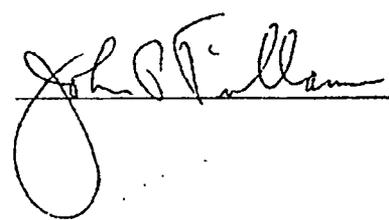
IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In the Matter of : In Proceedings for the  
PENN CENTRAL TRANSPORTATION : Reorganization of a  
COMPANY, : Railroad  
Debtor : Bky. No. 70-347

ORDER NO. 2926

AND NOW, this 27<sup>th</sup> day of April, 1977, it is ORDERED  
that "Memorandum and Order No. 2721 and 2922" filed this date is  
hereby amended, as follows:

On Page 5 of the Memorandum, at lines 22, 23, 25 and 26,  
the words "default judgment" are corrected to read "deficiency  
judgment."

  
\_\_\_\_\_ J.

13021



E



# Exhibit E

**Cronin, Holly**

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**From:** Cronin, Holly on behalf of Cloffi, Michael L.  
**Sent:** Friday, November 16, 2007 4:58 PM  
**To:** 'Ctricarichi@aol.com'  
**Subject:** RE: Stipulations

Carla,

Your refusal to stipulate as requested has forced PCTC to begin preparing for additional, needless litigation. The excuses you have provided for refusing to stipulate do not pass the red face test. Specifically:

1) Excuse No. 1, sent by email on November 6, 2007: You needed more information and wrote, "as to every stipulation please indicate the legal basis for each, supply the documents and page number(s) within each documents (sic) that support each proposed stipulation." This request was strange, because we all spent 90 minutes on October 24 discussing these issues. On October 24, I explained at great length the bases for our position with respect to the PCTC Reorganization and its implications for the arbitration. Nevertheless, we provided further explanation and documents on November 8.

2) Excuse No. 2, sent by email on November 13, 2007: "We are in the process of reviewing your proposed stipulations, which we received less than five days ago. we are currently responding to discovery due today and your summary judgment motion." You received the stipulations twelve days prior, not five as you claim. You had ample time to review the stipulations. Your pleadings list, as counsel for the Claimants, four different attorneys in four different law offices, one of them a very large and sophisticated firm. Someone must have the time to deal with clear and straightforward stipulations.

3) Excuse No. 3, sent by email on November 15, 2007: "We are sifting through thousands of documents which you sent to us two days ago." Simply not true. As we have repeatedly told you, the bases for our requested stipulations are simple and straight forward. The bases implicated only a few pages of documents, specifically: a) two one-page stipulations from 1973 and 1975, signed by Tincanich, Carnes & Kube and entered as an Order by the PCTC Reorganization Court that unequivocally establish the exclusive jurisdiction of the Reorganization Court; b) the PCTC Reorganization Court's Consummation Order and related orders and c) black letter principles of bankruptcy law. The "thousands of pages" you refer to have nothing to do with our proposed stipulations. They were sent to you in response to your discovery request in the arbitration for information about the financial affairs and filings of PCTC.

The truth of the matter is that we discussed with you the principles contained in our proposed stipulation in a lengthy conference call on October 24. You, Mr. Hart and your colleagues vociferously rejected all of these principles. You adamantly argued that: a) The PCTC Reorganization Court did not have exclusive jurisdiction to enter and enforce any judgment against PCTC; b) The Claimants could enter and enforce judgments in courts other than the PCTC Reorganization Court; c) Despite the fact that you have never named or used the reorganized company, that you could enforce and collect from APG any judgment you obtain; d) Reorganization interest could be added to any judgment you obtain. Quite frankly, we were astonished by your arguments because they contradict and seek to undo prior stipulations by your own firm. Tincanich,

11/16/2007

Carnes & Kube--and prior orders of the PCTC Reorganization Court. We were so astonished by your position that we thought it must have been the result of some mistake or misunderstanding on your part. Hence, we engaged in nearly four weeks of email exchanges in an effort to have you understand and agree to these principles as required by the prior stipulations of your firm, the prior orders of the PCTC Reorganization Court and black letter bankruptcy law. It is unfortunate that our efforts were unsuccessful and that additional litigation over these well-established principles will be necessary.

**Michael L. Cloffi**  
**Partner**  
**Blank Rome LLP**  
201 East Fifth Street, 1700 PNC Center  
Cincinnati, Ohio 45202  
Phone: (513)362-8701  
Fax: (513)362-8702  
[cloffi@blankrome.com](mailto:cloffi@blankrome.com)

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**From:** Ctricarichi@aol.com  
**Sent:** Thursday, November 15, 2007 5:04 PM  
**To:** Cloffi, Michael L.  
**Subject:** Stipulations

**Michael:**

We are sifting through the thousands of documents which you sent to us two days ago, although we requested them in our combined discovery requests sent to you in January 2007, to determine our position on your proposed stipulations.

Carla M. Tricarichi

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**From:** Cronin, Holly on behalf of Cloffi, Michael L.  
**Sent:** Wednesday, November 14, 2007 4:25 PM  
**To:** Ctricarich@aol.com; Groppe, Jason  
**Subject:** Stipulations

Carla,

We were hopeful that you would review the documents that we provided and agree to the stipulation as it only seeks agreement on items that are not opened for debate. We provided you with all the information that is required to evaluate the stipulations in a good faith effort agree on straightforward issues and to avoid unnecessary litigation costs. We do not understand why you require additional time to consider the stipulations and information we provided since we have discussed these issues for more than 90 minutes on October 24 and we sent the stipulations to you on November 1, not "five days ago." There is simply no good reason for further delay. In a last ditch effort to avoid unnecessary litigation, we will give you until the close of business on Thursday to respond to our proposed stipulation. If we do not hear from you, then we can only conclude that you will not agree to our proposed stipulation and are simply delaying your response.

**Michael L. Cloffi**  
**Partner**  
**Blank Rome LLP**  
201 East Fifth Street, 1700 PNC Center  
Cincinnati, Ohio 45202  
Phone: (513)362-8701  
Fax: (513)362-8702  
[cloffi@blankrome.com](mailto:cloffi@blankrome.com)

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**From:** Ctricarichi@aol.com  
**Sent:** Tuesday, November 13, 2007 2:40 PM  
**To:** Cloffi, Michael L.; Groppe, Jason  
**Subject:** Re: FW: Stipulations

**Michael:**

We are in the process of reviewing your proposed stipulations, which we received less than five days ago. We will respond shortly. Professor Steinglass has requested that stipulations be filed with the trial brief. As you know we are currently responding to Professor Steinglass' order regarding discovery due today and your summary judgment motion.

Thank you for your ongoing courtesies in this matter.

Very truly yours,

Carla M. Tricarichi

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**From:** Cloffi, Michael L.  
**Sent:** Monday, November 12, 2007 12:40 PM  
**To:** clricarichl@aol.com  
**Cc:** Groppe, Jason  
**Subject:** FW: Stipulations

Carla,

I did not see a response to this email. If I do not hear from you by the close of business tomorrow, November 13, I will assume that you refuse to stipulate to any of these 5 issues.

Michael Cloffi | Partner | Blank Rome LLP  
201 East Fifth Street, 1700 PNC Center | Cincinnati, OH 45202  
Phone: (513)362-8701 | Fax: (513)362-8702 | Email: [Cloff@BlankRome.com](mailto:Cloff@BlankRome.com)

From: Cronin, Holly on behalf of Cioffi, Michael L.  
Sent: Thursday, November 08, 2007 3:01 PM  
To: Ctricarich@aol.com  
Cc: Groppe, Jason  
Subject: RE: Stipulations

Carla,

I'm not sure what the confusion is. Our stipulations are clear and straightforward. I truly hope and assume your questions are made in good faith. Our efforts are geared towards judicial economy and efficiency and to prevent protracted litigation. In furtherance of these efforts, the basis for each of the stipulations is as follows:

- 1) Proposed Stipulation: The PCTC Reorganization Court has exclusive jurisdiction to enforce any judgment claimants may recover.

The Reorganization Court had exclusive jurisdiction pursuant to § 77 of the Bankruptcy Act for the rehabilitation of railroad debtors.

This included dealing with claims against the debtor (these claims include all claims through the Consummation of PCTC Reorganization).

Pursuant to the Consummation Order and Final Decree, the Reorganization Court reserved exclusive jurisdiction concerning PCTC's Reorganization (see 7.04 of the Consummation Order and Final Decree) (by separate email today we are sending you the PCTC Amended Plan of Reorganization, Opinion approving it, and Consummation Order and Final Decree)

The Reorganization Court has exercised such jurisdiction continuously after Consummation

The stipulations filed by Knapik and others during the Reorganization are consistent with the above and require "that no judgment which may hereafter be entered in said civil action shall be enforced except as hereinafter authorized by this Court."

- 2) Proposed Stipulation: Any judgment claimants may recover against Penn Central may only be enforced in the PCTC Reorganization Court.

See above points to stipulation one.

- 3) Proposed Stipulation: Claimants have asserted claims against PCTC only with respect to damages under the Merger Protection Agreement and related agreements.

The documents showing the root of the claim are reflected in the petition and other documents surrounding the Knapik and other stipulation referred to above.

All proceedings have flowed out of this above original history.

- 4) Proposed Stipulation: Claimants have not and indeed may not assert claims against American Premier Underwriters, Inc. ("APU") as the reorganized company that emerged from the PCTC bankruptcy.

Such claims are enjoined in the Consummation Order and Final Decree Section 7.02 Injunction, which provides in part:

"All persons...wherever situated, located or domiciled are hereby permanently restrained and enjoined from instituting, prosecuting or pursuing, or attempting to institute, prosecute or pursue any suits or proceedings, at law or in equity or otherwise, against the Reorganized Company...or their successors or assigns...directly or indirectly, on account of or based upon any rights, claim or interest of any kind or nature whatsoever which any person...may have in, to or against any of the Debtors...and from interfering with, attaching, garnishing, levying upon, enforcing liens against or upon, or in any manner whatsoever disturbing any portion of the property, real, personal or mixed, of any kind or character, on or at any time after the consummation date in the possession of the Reorganized Company...and from interfering with or taking steps to interfere with the Reorganized Company...or the operation of the properties or the conduct of the business of the Reorganized Company...by reason of or on account of any obligations incurred by any of the Debtors...except the obligations imposed on the Reorganized Company...by the Plans and this Order or reserved for resolution or adjudication by this Order."

No obligation incurred by the Debtor relating to your claims were reserved by the Plans and Order for the Reorganization Company.

As we discussed on 10/24/07, the case law is quite robust on this matter showing the Reorganized Company (here, APU) has no obligation to the Claimants.

- 5) Proposed Stipulation: Claimants are not entitled to prejudgment interest on any of their claims.

The claims asserted are provided for in the Plan, as approved after notice and hearing, on page 133 with no interest (the only interest to be paid was to the Government between the time the Government loaned the money pursuant to the Regional Railroad Reorganization Act § 211(h) to satisfy properly liquidated labor claims and the proceeds were received for the transfer of the PCTC rail assets to Conrail, which event has occurred).

Claims of the nature asserted are not entitled to interest pursuant to the Bankruptcy Act under which the PCTC Reorganization proceeded.

Claims of the nature asserted did not receive interest as liquidated during the PCTC proceeding.

Any question of interest is to be determined by the Reorganization Court (see above analysis).

We believe the foregoing to be compelling and dispositive of these issues. Accordingly, we would hope and expect that you will stipulate. If you will not stipulate, please tell us the reasons for refusing.

Michael L. Cloff  
Partner  
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201 East Fifth Street, 1700 FNC Center  
Cincinnati, Ohio 45202  
Phone: (513)362-8701  
Fax: (513)362-8702  
cloff@blankrome.com

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**From:** Ctricarichi@aol.com  
**Sent:** Tuesday, November 06, 2007 3:18 PM  
**To:** Groppe, Jason  
**Cc:** Cioffi, Michael L.  
**Subject:** Stipulations

Mr. Groppe:

With respect to the proposed stipulations you forwarded on November 1, 2007, as to every stipulation please indicate the legal basis for each, supply the documents and page number(s) within in each documents that support each proposed stipulation. If you are referring to the bankruptcy proceedings to which we were not parties and thus do not have pleadings and/or the orders for such proceedings, you must supply the documents in order for us to consider the stipulations. Mr. Cioffi's verbal representations of the alleged content of any such documents will not suffice.

Very truly yours,

Carla M. Tricarichi

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**From:** Groppe, Jason  
**Sent:** Thursday, November 01, 2007 1:53 PM  
**To:** Randy J. Hart  
**Cc:** ctricarich@aol.com  
**Subject:** RE: Proposed Stipulations

Randy,

You misunderstood my email of 10/29/07. The email was captioned "Stipulations Cited in Conference Call" not "Proposed Stipulations." One purpose of my email was simply to send to your side—as promised in our 10/24/07 conference call—the Stipulations signed by prior counsel for the claimants and entered by the PCTC Bankruptcy Court. The other purpose was to confirm claimants position as stated during the conference call on matters related to the Stipulations and the PCTC Bankruptcy Court.

Nevertheless your idea of entering into stipulations is a good one. Accordingly, we request that claimants stipulate as follows:

1. The PCTC Bankruptcy Court has exclusive jurisdiction to enforce any judgment claimants may recover.
2. Any judgment claimants may recover against Penn Central may only be enforced in the PCTC Bankruptcy Court.
3. Claimants have asserted claims against PCTC only with respect to damages under the Merger Protection Agreement and related agreements.
4. Claimants have not and indeed may not—given the applicable bankruptcy law we discussed on 10/24/07—assert claims against American Premier Underwriters, Inc. ("APU") as the reorganized company that emerged from the PCTC bankruptcy.
5. Claimants are not entitled to prejudgment interest on any of their claims.

*Jason*

Jason Groppe\*, Attorney | Blank Rome LLP  
201 East Fifth Street, 1700 PNC Center Cincinnati, OH 45202  
Phone: (513)382-8738 | Fax: (513)382-8787 | Email: Groppe@BlankRome.com

**From:** Randy J. Hart [mailto:rjh@hahnlaw.com]  
**Sent:** Wednesday, October 31, 2007 11:43 AM  
**To:** Groppe, Jason  
**Cc:** Ctricarich@aol.com; mark.d.griffin@gmail.com  
**Subject:** Proposed Stipulations

Jason

I am responding to your email of 10/29/07 to Carla Tricarich in which you ask (BT) to stipulate to the statements that you have made. Below I list your proposed stipulations followed by our response.

1. "Claimants are entitled to enforce any judgment they may recover in a court other than the bankruptcy court."

Response:

Is it your position that you are offering the above stipulation? If so, we would consider it. If you are asking us for our position on the subject, our response is that we will seek to enforce the judgment in any Court wherein jurisdiction may lie for such enforcement.

2. "Any judgment claimants may recover against the Penn Central Transportation Company ("PCTC") which is the only entity sued by claimants, can be collected from American Premier Underwriters, Inc. ("APU") under a theory that APU is the "successor" to PCTC."

Response:

Again, I don't know whether you are asking us to stipulate to your statement. If so, let me know and we will consider it. If you are asking for our position on this subject, it is that we will seek to recover from any entity permitted under the law.

3. "Claimants are seeking interest added to any base amount that may be awarded by the Arbitration Panel."

Response:

Claimants are not seeking to have anything added to their actual damages that they have suffered as a result of your client's conduct.

Sincerely,

Randy J. Hart  
3300 BP Tower  
Cleveland, OH 44139  
216-978-9150

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**From:** Groppe, Jason  
**Sent:** Monday, October 29, 2007 7:07 PM  
**To:** ctricarichl@aol.com  
**Subject:** Stipulations Cited in Conference Call  
**Attachments:** Knapik stipulation.pdf; Sophner Stipulation.pdf

Carla,

Attached are the stipulations we discussed during the conference call on October 23. The purpose of this email is to simply confirm your position stated during that call. Based on your statements on October 23, we understand your position to be that:

(1) claimants are entitled to enforce any judgment they may recover in a court other than the bankruptcy court;

(2) any judgment claimants may recover against The Penn Central Transportation Company ("PCTC"), which is the only entity sued by claimants, can be collected from American Premier Underwriters, Inc. ("APU"), under a theory that APU is the "successor" to PCTC;

(3) claimants are seeking to have interest added to any base amount that may be awarded by the Arbitration Panel.

Please confirm that our understanding of your position is correct.

*Jason*

Jason Groppe | Attorney | Blank Rome LLP  
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