

**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
	:	

**REPLY BRIEF IN SUPPORT OF PETITION OF PENN CENTRAL
TRANSPORTATION COMPANY AND AMERICAN PREMIER UNDERWRITERS,
INC. TO ENFORCE ORDER NO. 4349**

The Penn Central Transportation Company (“PCTC” or the “Debtor”) and American Premier Underwriters, Inc. (“APU” or the “Reorganized Company”) submit this reply in further support of their petition (the “Petition”) to enforce order No. 4349. The Petition was necessitated because, despite this Court’s clear instructions to Claimants during a telephone conference on November 28, 2007 and November 29, 2007 Order, Claimants continue to refuse to even acknowledge – let alone follow – this Court’s instructions. Specifically, Claimants continue to reject this Court’s admonishments that: (1) Claimants cannot recover interest; (2) it is this Court, and this Court alone, that has exclusive jurisdiction to enter and enforce an arbitration award, if any; and (3) Claimants may assert their claims only against PCTC, not the Reorganized Company.

This reply addresses the following six points raised by Claimants in their responding papers: (1) Claimants are not entitled to interest on their claims; (2) the Petition is ripe for this Court’s review; (3) this Court has the equitable power to enforce its prior Orders; (4) no Court has ever held that PCTC or APU has “unclean hands” for the purposes of seeking relief from the Reorganization Court; (5) Claimants may only recover against PCTC and not APU, the Reorganized Company; and (6) this Court should exercise its exclusive jurisdiction over this

matter following the conclusion of the arbitration.

Claimants forced PCTC and APU to seek relief from this Court for the second time in as many months because Claimants continue to dispute and ignore the instructions of this Court, the application of the governing law, prior agreements between the parties, Orders issued by this Court, the Plan approved by this Court, and other laws and agreements governing the Reorganization including, but not limited to:

- Section 77 of the Bankruptcy Act of 1898, specifically providing for the exclusive jurisdiction of the court in which the bankruptcy is filed;
- Stipulations between the parties approved by the Court in Document Nos. 5,383 and 8,600;
- the Amended Plan of Reorganization of the Debtor, dated March 17, 1978 (the "Plan"), specifically § 2.1 and Ex. 1 of the Plan providing for "Estimated employee labor Claims";
- the Consummation Order and Final Decree (the "Consummation Order"), specifically Section 7.02 enjoining any action against the Reorganized Company;
- the Regional Rail Reorganization Act of 1973 ("RRRA"), specifically Section 211(h), regarding railway operating expenses and Section 743(b) and the Final System Plan formulated by the United States Railway Association ("USRA") providing for the transfer from PCTC to the Consolidated Rail Corporation ("Conrail") of all facilities and equipment required to operate the railroad including employee personnel files;
- Order No. 4349 allowing pending arbitration to proceed in the United States District Court for the Northern District of Ohio "subject to the conditions set forth in [Document Nos. 5,383 and 8,600]" and ordering that judgment to be enforced "only if specifically hereafter authorized by this Court" ; and
- the statements made by this Court during the telephone conference on November 28, 2007 regarding the exclusive jurisdiction of this Court, the unavailability of interest on Claimants' claims, and the inability of Claimants to proceed against the Reorganized Company, APU.

PCTC and APU do not ask this Court to rule that Claimants may not make claims under the Merger Protection Agreement ("MPA"); PCTC and APU only seek relief on the issue of *how* Claimants may proceed to liquidate their claims consistent with the Reorganization and the Orders of the Reorganization Court. So far, it has been Claimants' adamant position that they

are not required to proceed in conformance with any of the above-referenced laws, Orders, Agreements, and Plan. Petitioners are merely attempting to bring order to this 40-year litigation and apply the principles set forth and enforced by this Court throughout the Reorganization and as recently as the telephone hearing held by this Court on November 28, 2007 and this Court's November 29, 2007 Order.

I. Claimants Are Not Entitled to Interest Because Their Claims Are Governed by Section 2.1 and Exhibit 1 of the Plan.

As this Court instructed during the telephone conference on November 28, 2007, Claimants are not entitled to interest on their claims. The Court's instructions were based, of course, on the PCTC Plan of Reorganization that was carefully crafted pursuant to Section 77 of the Bankruptcy Act of 1898. The vigor with which Claimants continue to reject the Court's instructions may not be contemptuous, but it certainly, at a minimum, betrays their ignorance of the Bankruptcy Act of 1898 and the PCTC Plan.

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"). The Plan contemplated payment of the claims at issue in this matter as "Section 211(h)" Claims. *See* Plan § 2.1; Plan, Ex. 1, "Estimated employee labor Claims." Reference to Exhibit 1, page 133 of the Plan, shows that these "Estimated employee labor Claims" were classified and provided for through the Reorganization. As this Court is aware, Section 211(h) of the RRRRA authorized the USRA to loan money to Conrail to pay certain of the PCTC's accounts payable, with Conrail and/or USRA to hold the highest priority for any unpaid balances of § 211(h) advances. Nothing in the language of the approved Plan provides for the recovery of interest on these claims.

Indeed, claims falling into this category 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 interest and penalties, in light of the United States' highest priority liens and Section 211(h).

In support of their position that the arbitration panel should decide the issue of whether interest is awardable without reference to the fundamental principles of the Reorganization, Claimants rely principally on a 1996 Bankruptcy Court decision from this district regarding the dischargeability of punitive damage and interest awards on an admittedly nondischargeable compensatory damage award for a fraud claim. *In re Clayton*, 195 B.R. 342, (Bankr. E.D. Pa. 1996). This case is not controlling for two critical reasons. First, *In re Clayton* was decided under very different provisions of the bankruptcy laws. *In re Clayton* involved a determination of dischargeability in a Chapter 7 liquidation under the Bankruptcy Act of 1978 and not a determination of the amount of a claim in a Railroad Reorganization under Section 77 of the Bankruptcy Act of 1898. The dischargeability provisions of Chapter 7 clearly do not apply to a Railroad Reorganization and the interpretation of which cannot supersede the clear language of the Plan, which was approved by this Court after notice and hearing. Second, the claim at issue in *In re Clayton* was a pre-petition *judgment* for fraud not a pre- and post-petition *claim* for interest under a contract. The claimants in *In re Clayton* had already received a judgment before the bankruptcy filing unlike here, where it is yet to be determined whether Claimants are entitled to anything. Here, Claimants are not entitled to interest under the clear provisions of the Plan and it would be wasteful and inefficient to re-litigate this issue over and over again.

Indeed, under the Bankruptcy Act of 1898, it is well-settled and clear that no interest is allowed on post-petition claims. *City of New York v. Saper*, 336 U.S. 328 (1949); *Sexton v. Dreyfus*, 219 U.S. 339, 344 (1911).

The other cases cited by Claimants are inapposite for the same two reasons. See *In re Stelweck*, 86 B.R. 833, (Bankr. E.D. Pa. 1995) *overruled on other grounds* (*Grogan v. Garner*, 111 S. Ct. 654, 659 (1991)) (determining dischargeability of alleged claim for penalties under False Claims Act in Chapter 7 bankruptcy); *In re Shapiro*, 188 B.R. 140, 148 (E.D. Bankr. 1995) (declining to exercise discretion to determine amount of tax claim in Chapter 7 no-asset bankruptcy); *In re Kelly*, 163 B.R. 27, 33 (Bankr. E.D.N.Y. 1993) (determining dischargeability of claim for fraud in Chapter 7 bankruptcy).

Moreover, PCTC does not contend that interest is “never” allowed in bankruptcy proceedings (Resp. Br. at pp. 10-11), just that, in this case, the Plan provided for payment of the subject claims in a certain manner that did not include interest.

Claimants make two final last-ditch arguments that this Court should reject based on the explicit language of the Plan. First, Claimants contend that the Court must evaluate a “full record” because “allowance of interest is a rule of equity”, suggesting that the Court needs to evaluate the entire Reorganization to determine how other MPA claims were treated. (Resp. Br. at pp. 10-14). However, the Plan sets forth exactly how these claims should be treated: as 211(h) claims for which interest is not allowed. This Court approved the Plan, is intimately familiar with it, and needs to review nothing further in order to rule on this Petition.

Second, Claimants argue that this Court’s intervention will somehow interfere with labor agreements under Section 77(n) of the Bankruptcy Act of 1898. In support of this contention, Claimants discuss a series of cases in an attempt to illustrate the unremarkable proposition that bankruptcy courts cannot change or reject labor agreements. (Resp. Br. at pp. 18-21.) Petitioners are not, however, suggesting that this Court change or modify the MPA. If Claimants can prove that they are entitled to benefits under the MPA – which, it is clear from the arbitration

proceedings that they cannot – PCTC will be required to pay such claims in accordance with the Plan. Nothing in the MPA or the Plan, however, entitles Claimants to receive interest on their claims.

II. The Petition is Ripe for this Court's Review.

It is difficult to imagine an issue more ripe for review by this Court than the present controversy regarding the fundamental principles of law that govern Claimants' claims. Since October 24, 2007, Claimants have consistently and constantly expressed their disagreement that the bankruptcy laws and Reorganization principles set forth by this Court apply to their claims against PCTC. As this Court is aware, Petitioners have been forced to seek relief from this Court on no less than two occasions to prevent this action from proceeding in the wrong direction. Now, Claimants suggest that Petitioners are seeking relief based on "future, contingent events" (Resp. Br. at p. 9); however, it is undeniable that the controversy between Claimants and Petitioners is very much alive and at issue. From October 24, 2007 through the present, Claimants have persisted in their position that the law, Agreements, Orders, and Plan of this Court do not apply to their claims. Indeed, in their responding papers, Claimants continually argue that they will enforce the judgment in the Northern District of Ohio (Resp. Br. at p. 10) and that some unspecified "court of competent jurisdiction" may also enforce any judgment. (Resp. Br. at p. 14). Given the Claimants' repeated refusal to accept and acknowledge this court's exclusive jurisdiction, Petitioners are forced to ask this Court to enjoin enforcement of an arbitration award, if any, in a court other than this Court.

III. This Court Has the Equitable Power to Enforce its Prior Orders.

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). Moreover, Section 2a(15) of the Bankruptcy Act of 1898 provided bankruptcy courts with the power to “[m]ake such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act.” 11 U.S.C. § 11(a)(15) (repealed).

On August 17, 1978 this Court entered the Consummation Order and Final Decree (the “Consummation Order”). 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” Further, 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.” Last, 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.”

Claimants’ citation to Rule 65 of the Federal Rules of Civil Procedure and the standard for succeeding on a preliminary injunction or temporary restraining order, Resp. Br. at pp.14-15, do not control whether this Court has the power to enforce its own Orders. *In the Matter of Penn Central Transp. Co.*, 596 F.2d 1127, 1148-49 (3d Cir. 1979). Very clearly, the provisions of the Bankruptcy Act of 1898 and the Consummation Order give this Court the power to enforce its own orders.

IV. No Court Has Held that PCTC and APU Have “Unclean Hands” for the Purposes of Enforcing the Orders of this Court.

Claimants argue that PCTC and APU are not entitled to an injunction because “Penn Central has already been found to have unclean hands based upon its prior efforts in delaying this litigation.” This argument is not only legally untenable but is also unsupported by the facts. Petitioners merely seek to have this Court apply and enforce applicable law, its prior Orders, the agreements of the parties, and the Plan. Second, Penn Central was *not* found to have unclean hands that prevent it from seeking relief in this Court. Rather, in its February 18, 2005 opinion regarding the reinstatement of the present claims, Judge Oliver held that PCTC could not assert the defense of laches because

...Defendant does not come with clean hands. In assessing the causes of delay over the past five years, the Court concludes...that Plaintiffs are no more responsible than Penn Central for the delay. ... Defendant Penn Central seeks an equitable remedy of laches, but it bears *at least as much responsibility as Plaintiffs* for the recent delay in these cases.

(Ex. F. to Resp. Br. at p. 8) (emphasis added). The incomplete excerpt cited by Claimants mischaracterizes the opinion by citing it for the proposition that a Court legally found PCTC at fault for the delay in this matter and now PCTC can never seek equitable relief.

Furthermore, this proposition is inaccurate. Indeed, Claimants waited more than four years after

the Sixth Circuit's decision in *Augustus v. Surface Transp. Board*, 2000 WL 1888805, No. 99-3014 (6th Cir. 2000) to seek to reinstate their claims.

Neither PCTC nor APU did anything to prevent Claimants from moving to reinstate. Indeed, the four-year delay was in large part tactical on the part of Claimants. During these four years, Claimants were attempting to have PCTC and the National Mediation Board agree to reconvene the arbitration proceedings before a new panel instead of the original panel, generally referred to as the Blackwell Panel, because the Blackwell Panel had ruled against them. That ruling was affirmed by the Sixth Circuit in *Augustus*. After Claimants were unsuccessful with PCTC and the National Mediation Board, Claimants sought a hearing on their motion to reinstate their claims. The District Court ruled that Claimants need not be before the Blackwell Panel.

In addition to the four-year delay described above, Claimants caused a delay of two more years by arguing that there should be four separate arbitration panels to hear their claims. PCTC argued that one panel was consistent with the District Court's original order requiring arbitration and obviously much more consistent with the principles of efficient and economical administration of justice. The District Court ultimately ordered four arbitration panels. After months of wrangling, the parties finally agreed upon and formed four panels. After an initial meeting of the panels to establish discovery and other deadlines, Claimants changed their position, telephoned PCTC and asked that the claims be presented to but one panel. Although a bit perplexed and annoyed at the waste of time and money, PCTC agreed in order to move this matter toward finality.

The entire matter was heard by one panel from December 10-13, 2007. The record is now closed. Post-hearing briefing will be complete by the end of February 2008, with a decision expected in March or April. The entire transcript of the Arbitration Hearing is attached as

Exhibit A.

V. Claimants May Only Proceed Against PCTC and Not APU, the Reorganized Company.

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.

Claimants suggest that APU attempts to “add a last-sentence request for an advisory opinion protecting it from liability.” (Resp. Br. at 1.) This is wrong. PCTC and APU have maintained throughout this litigation that APU, as the Reorganized Company, cannot be subject to any suits based upon a claim against PCTC. The plain terms of the Consummation Order mandate that Claimants cannot seek to enforce any judgment against APU.

VI. Relief Requested.

The arbitration proceeding is now closed and a decision will be rendered in March or April 2008. It is clear from any review of the arbitration record, attached as Exhibit A, that the panel can only enter an award denying the claims of all Claimants. It is now time for this Court

to bring an end to this 40-year litigation through the exercise of its exclusive jurisdiction.

WHEREFORE, Petitioners respectfully request that this Court enter an order in the form attached, enforcing Order No. 4349 and any other and further relief this Court deems necessary.

Respectfully submitted,

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Dated: January 4, 2008

CERTIFICATE OF SERVICE

I, Leigh Ann Fierro, hereby certify that on January 4, 2008, I caused a true and correct copy of the foregoing Reply Brief in Support of Petition of Penn Central Transportation Company and American Premier Underwriters, Inc. to Enforce Order No. 4349 to be served upon the following by e-mail and by U.S. mail, postage prepaid:

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