

BEFORE THE ARBITRATION COMMITTEE
ESTABLISHED UNDER SECTION 1(e) OF THE
MERGER PROTECTION AGREEMENT OF NOVEMBER 16, 1964

MICHAEL J. KNAPIK, et al., : Case No. 69-722
 Claimants, :
 v. :
PENN CENTRAL, :
 Carrier. :
 :
 :

ROBERT WATJEN, et al., : Case No. 69-675
 Claimants, :
 v. :
PENN CENTRAL, :
 Carrier. :
 :
 :

DAVID C. BUNDY, et al., : Case No. 69-947
 Claimants, :
 v. :
PENN CENTRAL, :
 Carrier. :
 :
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G.V. SOPHNER, et al., : Case No. 74-914
 Claimants, :
 v. :
PENN CENTRAL, :
 Carrier. :
 :
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**PENN CENTRAL TRANSPORTATION COMPANY'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Penn Central Transportation Company ("Penn Central") submits the following Proposed Findings of Fact and Conclusions of Law:

I. The Three Issues Before This Panel Were Defined First by Judge Lambros And Then By The Sixth Circuit

1. This Panel was impaneled to determine whether any of the former railroad workers are entitled to any benefits under the Agreement For the Protection of Employees in the Event of Merger of Pennsylvania and New York Central Railroads (“MPA”) entered into in 1964 between the New York Central (“NYC”) and Pennsylvania (“PRR”) railroads and the unions representing their employees to protect employees from adverse job effects resulting from the merger of the two railroads, which was consummated on February 1, 1968.

2. There are three issues before this Panel for resolution based upon the evidence entered into the record at the arbitration in Cleveland on December 10-13, 2007:

- (1) Was each Claimant “placed in a worse condition with respect to their employment by reason of the merger?”¹
- (2) Has each Claimant “complied with the MPA’s requirements so as to warrant an award of benefits?”²
- (3) Has each Claimant “come forward with evidence to support the position that there was compensation loss to which they are entitled to payment?”³

3. Although there was but one arbitration, there are 32 separate Claimants before the Panel: 10 former brakemen, 16 former carmen, and 6 former rate clerks who worked at the Cleveland Union Terminal (“CUT”) on NYC trains. Each Claimant brought suit in his own

¹ 1976 Lambros Ruling (Claimants’ Exhibit 4) at 19.

² 1976 Lambros Ruling at 16; Augustus v. Surface Transportation Board, 2000 U.S. App. LEXIS 33966 (6th Cir. 2000) (“Augustus”) at *5.

³ 1976 Lambros Ruling at 35.

name and individual capacity. The Complaints they filed to commence the four actions in this litigation do not contain any class action, or other representative, claims.⁴

4. It is axiomatic that as first a plaintiff in the District Court and now a Claimant in this arbitration, each Claimant bears the burden of proof on each of the three issues. To be entitled to any recovery under the MPA, each Claimant must carry his own burden of proof by a preponderance of the evidence of record based upon the facts applicable to his claim and the law applicable to those facts. In multiple Plaintiff litigation such as this, “Plaintiffs cannot rely on the experience of their coworkers to support their individual claims.”⁵ Each Plaintiff must address his claim individually and submit supporting evidence on his specific claim in order to prove his case.⁶

5. Only 3 of the 32 Claimants testified at the hearing – Mr. Gallagher, Mr. Franz, and Mr. McNeeley by video deposition. None of them offered any testimony that the merger caused an adverse effect upon his employment. Indeed, Mr. McNeeley very honestly and openly testified to the opposite – his job was adversely affected by the decline in passenger trains, not the merger. None of them testified that he complied with the MPA’s requirements applicable to him to recover benefits. None of them testified about lost compensation resulting from the merger.

6. Only 5 other fact witnesses testified for the Claimants: James Knapik, the son a former claimant, Michael Knapik, who is no longer in this case; Virginia McNabb, the daughter of Claimant Norris; Anne Marie Pentz, the daughter of Claimant Pentz; Paul Scuba, the son of Claimant Scuba; and Anna Jo Bundy, the wife of Claimant Bundy. None of these 5 witnesses

⁴ See Complaints in Knapik, et al. v. Penn Central Co., et al., N.D. Ohio case no. 69-722; Sophner, et al. v. Penn Central Transp. Co., et al., N.D. Ohio case no. 74-914; Watjen, et al. v. Penn Central Co., et al., N.D. Ohio case no. 69-675; Bundy, et al. v. Penn Central Co., et al., N.D. Ohio 69-947.

⁵ Akines v. Shelby County Govt., 512 F. Supp.2d 1138, 1157 (W. Dist. Tenn. 2007).

⁶ Id.

had firsthand or factually competent testimony regarding whether the merger caused an adverse effect upon their relative or spouse's employment, whether their relative or spouse complied with the MPA's requirements applicable to him to recover benefits, or whether their relative or spouse lost compensation as a result of the merger. In short, none of them provided testimony to meet any of these 5 Claimants' burden of proof on the three issues in this case.

7. There was absolutely no fact testimony from or about the 24 other Claimants on any of the three issues before this Panel.

A. Evidence Presented at the Hearing on Issue #1 – That The Merger Was The Cause of any Alleged Adverse Affect on Each Claimant

i. Evidence of Adverse Employment Effect Caused By the Merger is an Element of Each Claimant's Burden of Proof

8. The full title of the MPA – the Agreement For the Protection of Employees in the Event of Merger of Pennsylvania and New York Central Railroads – demonstrates that its provisions were intended to protect only employees who were adversely affected by the merger.

9. The third paragraph of the MPA specifically states:

AND WHEREAS, it is the intent and purpose of Pennsylvania and Central . . . to effectuate the merger through unification, coordination and consolidation of their separate facilities, all of which will or may have adverse effect upon employees represented by the labor organization parties hereto.

Two paragraphs later, the MPA states:

As a condition to its approval . . . of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission . . . shall include terms and conditions providing that . . . such transaction will not result in employes of

⁷ MPA, first page.

the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment . . .⁸

10. The "WHEREAS" clauses in the MPA demonstrate that the scope and purpose of the MPA is to protect railroad employees in the event they are placed in a worse position as a result of the merger. The Sixth Circuit has held that "the role of prefatory language is to define the scope of a contract, and that is how it has been analyzed by the Ohio courts."⁹ In Aho, the Sixth Circuit held the prefatory "whereas" clause to be relevant in determining the scope of the contract.

11. The MPA is a contract and its language speaks for itself. It must only be interpreted within its four corners. Where as here contract language is clear and unambiguous on its face, rules of construction may not be used to go beyond the plain language of the contract to determine the rights and duties of the parties.¹⁰ The rule "does not operate to prohibit proof of terms of the agreement; instead it provides that parol terms are not terms of the agreement at all."¹¹

12. The MPA expressly requires that "the provisions of the Washington Job Protection Agreement of 1936 (a copy of which is attached hereto as Appendix A) shall be applied for the protection of all employes of Pennsylvania and Central as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is consummated who may be adversely affected with respect to their compensation, rules, working conditions,

⁸ Id.

⁹ Aho v. Cleveland-Cliffs, Inc., 219 Fed. Appx. 419, 423 (6th Cir. 2007).

¹⁰ Medical Billing Inc. v. Reich Seidelmann & Janicki, 212 F.3d 332, 336 (6th Cir. 2000); Brandon/Wiant Co. v. Teamor, 125 Ohio App. 3d 442, 447 (1998).

¹¹ Watkins & Son Pet Supplies v. The Iams Co., 254 F.3d 607,612 (6th Cir. 2001).

fringe benefits or rights and privileges pertaining thereto incident to approval and effectuation of said merger . . .”¹²

13. The WJPA, incorporated by reference in and an attachment to the MPA, permits employees to recover for compensation loss that occurred only as a result of the merger:

“[T]he fundamental scope and purpose . . . is to provide for allowances to defined employees affected by coordination . . . and it is the intent that the provisions of this agreement are to be restricted to those changes in employment in the Railroad Industry solely due to and resulting from such coordination. Therefore . . . fluctuations, rises and falls and changes in volume or character of employment brought about solely by other causes are not within the contemplation of the parties hereto, or covered by or intended to be covered by this agreement.”¹³

14. In his 1976 Ruling, Judge Lambros required the Claimants to demonstrate causation by framing their burden as: “[W]ere plaintiffs placed in a worse condition with respect to their employment by reason of the merger?”¹⁴

15. The Sixth Circuit has ruled that the MPA was “for the protection of employees affected by the proposed merger.”¹⁵ The Sixth Circuit’s interpretation of the MPA in Augustus is binding upon the Panel.

16. Claimants conceded in their own Complaints that in order to recover they had to prove that they were placed in a worse condition with respect to their employment because of the merger. The Knapik and Sophner Complaints both quote the identical causation language in the WJPA and state:

¹² MPA, § 1(a).

¹³ WJPA, § 1.

¹⁴ 1976 Lambros Ruling at 19.

¹⁵ Augustus at *2.

The Washington Job Agreement specifically provides for the payment of a scheduled separation allowance to “any employee of an of the carriers participating in a particular coordination who is deprived of employment as a result of said coordination . . .”¹⁶

Similarly, the Watjen Complaint states:

The Agreement [MPA] purports to give protection to employees in accordance with Section 5(2)(f) of the Act which provides that the effect of a merger as approved by the Commission “will not result in employees of the carrier or carriers of the railroad affected by such should be in a worse position with respect to their employment . . .”¹⁷

17. Failure to prove a causal relation between a claimed adverse employment effect and the merger bars any benefits under the MPA or WJPA.

ii. Claimants’ Failed to Produce Any Evidence Demonstrating They Were Adversely Affected As a Result of The Merger

18. The Knapik Claimants are ten individual brakemen formerly employed at the CUT. On February 21, 1968, the Knapik Claimants were advised by notices sent to them by certified mail (“Furlough Notice”)¹⁸ that they were being furloughed from their positions effective February 25, 1968. The mere temporal relationship between the date of the merger and the furlough letters without further evidence is not enough to meet any of the Knapik Claimants’ initial burden of proof that the merger was the proximate cause of compensation loss under the MPA.¹⁹

¹⁶ Knapik Complaint at 4; Sophner Complaint at 3.

¹⁷ Watjen Complaint at 5.

¹⁸ PCTC Exhibit 78.

¹⁹ Tuttle v. Metro. Gov’t of Nashville, 474 F.3d 307, 321 (6th Cir. 2007) (temporal proximity, standing alone, is insufficient to establish a causal connection for a retaliation claim); Bilow v. Much Shelist Freed Denenberg Ament & Rubenstein, P.C., 277 F.3d 882, 895 (7th Cir. 2001) (the mere fact that one event preceded another does nothing to prove that the first event caused the second); Kampmier v. Emeritus Corp., 472 F.3d 930, 939 (7th Cir. 2007) (temporal proximity, alone, is not enough to establish an essential element of the claim).

19. Only three Claimants testified at the hearing: Claimants Gallagher and Franz and Claimant McNeeley by videotape deposition. None of them provided any testimony establishing, or even relating to, a causal connection between the merger and any adverse effect upon his employment.

20. No other Claimant put forth any documentary or testimonial evidence establishing that he was adversely affected by the merger. None of the Claimants' witnesses provided any testimony establishing, or even relating to, a causal connection between the merger and any adverse effect upon any Claimant's employment. None of the Claimants' witnesses explained what it was about the merger that caused an adverse impact on any Claimant or the CUT generally. They made only bare conclusions about some Claimants being somehow worse off but nobody explained it.

21. The only evidence from the Claimants on this issue proves that they were not adversely affected by the merger, but by the decline in rail passenger traffic. For example, Claimant McNeeley testified:

Q: And did you work your entire career at the Cleveland Union Terminal?

A: No. Folded up in '67, the end of passenger trains.

* * *

Q: And in that period of time prior to when you actually ceased working there, were there less cars for you to inspect than in previous years?

A: Yes, because there are less trains coming in and that.

Q: And had that been for some period of time or was there a precipitous drop at some point?

A: Like I say, it was over a matter of months. You always believed it will last longer.²⁰

Claimants' witness Mr. Knapik, who worked at the CUT before the merger and continued with first Penn Central and then Conrail afterwards, testified on direct examination:

Q: And you were aware that there was a furlough at that time?

A: Yes.

Q: Do you know what happened to the jobs? Why was there a furlough at that time, do you know?

A: There was a decrease in the passenger service, I believe.²¹

22. Each Claimant failed to meet his burden of proving a causal connection between the merger and any alleged adverse effect upon him.

iii. Penn Central Put Forth Substantial Evidence Demonstrating That the Merger Had No Effect on the CUT and That The Claimants Were Furloughed or Otherwise Adversely Affected as a Result of the Merger

23. Penn Central put forth substantial and compelling evidence at the arbitration through the testimony and findings of expert Michael Weinman that (i) the merger between the NYC and PRR had no impact or effect on the CUT; and (ii) any adverse affect on an employee at the CUT was the direct result of the decline in rail passenger ridership, which was unrelated to the merger.

24. Mr. Weinman's testimony and findings conclusively established that all aspects of passenger train operations declined substantially at the CUT between 1949-1971. The yearly aggregate of trains using the CUT diminished from 35 to 11 in the ten years between 1961 and

²⁰ PCTC Exhibit 76 at 15, 21-22.

²¹ Arbitration Transcript at 109.

1971.²² The number of passenger cars decreased even more dramatically – from 231,936 to 0 – in the same time period.²³ The number of CUT employees diminished proportionately to the number of trains and passenger cars at the CUT.²⁴ In 1961, the CUT had just over 550 employees, and by 1971, there were only about 60 employees needed to provide services.²⁵ The profound decline in rail passenger traffic in the late 1960s and early 1970s resulted in the need to reduce the number of brakemen, carmen, and rate clerks needed at the CUT, all of which were positions held by Claimants.²⁶

25. Claimants did not offer any evidence at the arbitration to rebut Penn Central's evidence demonstrating the precipitous decline in passenger traffic at the CUT between 1949 and 1971.

26. Claimants did not offer any evidence at the arbitration to rebut Penn Central's evidence that the decline in passenger traffic at the CUT resulted in the need to reduce the number of brakemen, carmen and rate clerks at the CUT.

27. For example, Claimants did not produce one fact witness or one expert witness or one document that explained what it was about the merger as opposed to declining passenger traffic that adversely affected them.

28. Mr. Weinman demonstrated that the decline in passenger traffic, which originated in the 1940s and had an especially precipitous fall during the 1960s, was completely unrelated to the merger, as the decline began before, and continued after, the merger.²⁷

²² Arbitration Transcript at 529.

²³ Arbitration Transcript at 536.

²⁴ Arbitration Transcript at 534.

²⁵ Weinman Affidavit, ¶2i (PCTC Exhibit 2).

²⁶ Arbitration Transcript at 540 & 541.

²⁷ Arbitration Transcript at 536.

29. Mr. Weinman's findings and testimony conclusively established that the PRR had not served the Cleveland area with passenger trains for several years and, in fact, the PRR never used the CUT.²⁸ The perceived efficiencies which are standard components of mergers were completely irrelevant to what happened at the CUT because there was no redundancy between PRR operations and NYC operations.²⁹ Thus, when the NYC and PRR merged, there was no "combination" of personnel or other resources at the CUT. No NYC or CUT employee working at the CUT lost a job to a PRR employee either before or after the merger. Jobs at the CUT were not affected by the merger.

30. Claimants did not offer any evidence at the arbitration to rebut Penn Central's evidence establishing that the merger between the NYC and the PRR had no impact or effect on the CUT.

31. Penn Central's evidence demonstrates that the Claimants were furloughed or adversely affected not as a result of the merger, but as a result of the decline in rail service and passenger traffic at the CUT.

32. The Claimants' own witnesses testified that their job loss was caused, not by the merger, but by the decline in passenger service at the CUT. For example, Claimant McNeely testified:

Q: And did you work your entire career at the Cleveland Union Terminal?

A: No. Folded up in '67, the end of passenger trains.³⁰

²⁸ Arbitration Transcript at 538.

²⁹ *Id.*

³⁰ PCTC Exhibit 76 at 15.

Claimants' witness Mr. Knapik, who worked at the CUT before the merger and continued with first Penn Central and then Conrail afterwards, testified on direct examination:

Q: And you were aware that there was a furlough at that time?

A: Yes.

Q: Do you know what happened to the jobs? Why was there a furlough at that time, do you know?

A: There was a decrease in the passenger service, I believe.³¹

33 The only cause and effect relationship that has been proven in this case was between the decrease in passenger traffic at the CUT and the subsequent furloughs and decrease in available positions.

34. Claimants' lack of evidence on this issue is telling, especially given the fact that Penn Central's Motion for Summary Judgment fully disclosed its argument and evidence on this causation point. If there was evidence that the merger – as opposed to a decline in passenger traffic – adversely affected their jobs, Claimants should have presented such evidence at the hearing.

35. Because each Claimant failed to prove that he was placed in a worse condition with respect to his employment by reason of the merger, each Claimant failed to satisfy the first element of his burden of proof. Each claim of each Claimant for benefits under the MPA is denied.

B. Evidence Presented At the Hearing On Issue #2 – That Each Claimant Complied with The MPA's Requirements So As to Warrant An Award of Benefits

³¹ Arbitration Transcript at 109.

i. Each *Knapik* Claimant Failed to Adduce Any Evidence That He Complied With the MPA's Requirements

36. To prove entitlement to benefits under the MPA, each Knapik Claimant is required to prove that he complied with the requirements of the MPA so as to warrant an award of benefits.³²

37. The Furlough Notice sent to each of the Knapik Claimants advised them that they had “rights in the Cleveland Freight Yard territory by virtue of agreement effective February 16, 1965 [Top and Bottom Agreement] and may stand for employment in the Freight Yard territory. You should immediately contact Yardmaster D.J. Weisbarth.”³³

38. Pursuant to the terms of the Top and Bottom Agreement, trainmen who receive notices of available work in the “NYC Freight Yard territory must report for service within fifteen days of the date notified by U.S. Mail at their last known address or forfeit all seniority in both territories.”³⁴

39. The Furlough Notice was a notice of available work at the Freight Yard, and each of the Knapik Claimants was required to report to work at the Freight Yard within fifteen days of receipt of the Furlough Notice or he would forfeit all seniority in both territories, the CUT and the Freight Yard.

40. This “failure to report to work” was directly addressed by the Sixth Circuit in Augustus when the Court found that employees were to “‘immediately contact’ the N.Y. Central

³² 1976 Lambros Ruling at 16.

³³ PCTC Exhibit 78.

³⁴ PCTC Exhibit 97.

yardmaster for work in the freight yard, pursuant to the Top and Bottom Agreement” when they received the Furlough Notice.³⁵

41. The Sixth Circuit held that “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”³⁶ and the Claimants’ “refusal to report to work was at their own peril . . .”³⁷

42. The MPA, as definitively interpreted by the Sixth Circuit, required the Knapik Claimants to report to work at the Freight Yard within fifteen days of the Furlough Notice or they were precluded from recovery under the MPA.

43. None of the Knapik Claimants reported to work at the Freight Yard within fifteen days of receiving the Furlough Notice.³⁸ Claimants conceded this fact in their Post Arbitration Brief.³⁹

44. The record before this Panel is undisputed that each Knapik Claimant failed to report to work at the Freight Yard within fifteen days of the Furlough Notice.

45. Work was available at the Freight Yard and every Knapik Claimant could have reported to the Freight Yard and obtained a full-time job.⁴⁰

46. Contrary to Claimants’ assertion, the Surface Transportation Board has not made any findings regarding the Knapik Claimants binding upon this Panel. The STB explicitly stated “we will not affirmatively find that claimants are entitled to compensation but will remand the issue of the entitlement to compensation to the parties, who may attempt to resolve the issue

³⁵ Augustus at *3-4.

³⁶ Augustus at *14.

³⁷ Augustus at *16.

³⁸ PCTC Exhibits 18-27.

³⁹ Claimants’ Post Arbitration Brief, p. 22.

⁴⁰ Testimony of George Ellert, the assistant to the manger of labor relations at the CUT, 1990 Arbitration Transcript (Claimants’ Exhibit 34) at 149.

among themselves.”⁴¹ The STB was serving in an appellate capacity when reviewing the arbitration decision issued in the Knapik case by the 1990 panel. It is black letter law that an appellate court cannot make its own findings of fact.⁴²

47. Moreover, the 1998 STB decision was not a “final decision.” Penn Central appealed to the Sixth Circuit the portion of the STB decision reversing the arbitration panel’s finding that the Knapik Claimants who eventually returned to work were not eligible for benefits under the MPA. Penn Central dropped its appeal when the STB acknowledged that its decision was not a final decision: “The Board [STB] 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.”⁴³

48. Finally, but most importantly, the STB decision was made before and without the benefit of the Sixth Circuit’s definitive and binding interpretation of the MPA in Augustus. To the extent that the STB’s interpretation of the MPA is different from or contrary to the Sixth Circuit’s interpretation, this Panel must follow the Sixth Circuit.

49. Because each of the 10 Knapik Claimants failed to prove that he complied with the requirement that he report for work to the Freight Yard within the specified time, each of them failed to satisfy the second element of their burden of proof. Each claim of each Knapik Claimant for benefits under the MPA is denied.

⁴¹ Surface Transportation Board Decision, STB Finance Docket No. 21989, at 9 (1998).

⁴² Icicle Seafoods, Inc. v. Worthington, et al., 475 U.S. 709, 714 (1986) (Court of Appeals cannot make factual findings on its own); In re Marchiando, 13 F.3d 1111, 1114 (7th Cir. 1994) (an appellate court cannot make findings of fact); Sabah Shipyard SDN Bd. v. M/V Harbel Tapper, 178 F.3d 400, 410 (5th Cir. 1999) (such determinations may require further findings of fact, which an appellate court cannot make); Miller v. Mercy Hosp., Inc., 720 F.2d 356, 361 (4th Cir. 1983) (“the [appellate] function is not to find the ‘facts’ in the first instance, or to affirm or deny that the facts ‘found’ . . . are the ‘actual’ facts of the case.”).

⁴³ Augustus at *6

ii. Each *Sophner* Claimant Failed to Adduce Evidence Demonstrating That He Complied With The MPA's Requirements

50. The Sophner Claimants are sixteen brakemen formerly employed at the CUT, who filed suit against Penn Central in 1974 claiming entitlement to displacement allowances under the MPA.

51. In their Complaint, the Sophner Claimants allege that Penn Central placed them in a worse position by depriving them of employment as a result of the merger, and seek entitlement to benefits under the MPA.⁴⁴

52. To prove entitlement to benefits under the MPA, each Sophner Claimant is required to prove that he complied with the requirements of the MPA so as to warrant an award of benefits.⁴⁵

53. Under Section 1(b) of the MPA, "An employee shall not be regarded as deprived of employment or placed in a worse position with respect to his compensation . . . in case of his . . . failure to obtain a position available to him in the exercise his seniority rights."

54. Thus, as a condition precedent to entitlement to benefits under the MPA, each Claimant must adduce evidence demonstrating that he exercised his seniority rights to obtain all available work during months in which he claims a displacement allowance.

55. No Sophner Claimant has put forth any evidence proving that he exercised his seniority rights to obtain all available work during months in which he is claiming a displacement allowance.

⁴⁴ Sophner Complaint at 2-3.

⁴⁵ 1976 Lambros Ruling at 16.

56. Claimant Gallagher, the only Sophner Claimant to testify at the arbitration, did not provide testimony that he exercised his seniority rights to obtain all available work during the month in which he is claiming a displacement allowance. He did not address at all his compliance with the MPA's requirements in his testimony. Nor did Claimant Gallagher testify that any other Sophner Claimant exercised seniority rights to obtain all available work for any month for which a displacement allowance was sought. Claimant Gallagher in his testimony did not address at all any other Sophner Claimant's compliance with the MPA's requirements.

57. The only Sophner Claimant to provide testimony in support of his claim was Claimant Gallagher. No other Sophner Claimant testified or offered any competent evidence in support of his claim and no one else testified about them.

58. Because each of the 16 Sophner Claimants failed to prove that he complied with the MPA's requirements by exercising his seniority rights to obtain all available work during each month for which he sought a displacement allowance, each of them failed to satisfy the second element of their burden of proof. Each claim of each Sophner Claimant for benefits under the MPA is denied.

iii. Each *Watjen* and *Bundy* Claimant Failed to Adduce Any Evidence Demonstrating That He Complied With the MPA's Requirements

59. The Watjen and Bundy Claimants are six individual rate clerks formerly employed by the NYC who filed suit against Penn Central in 1969 claiming entitlement to lump sum separation allowances under the WJPA.⁴⁶

⁴⁶ See Watjen and Bundy Complaints.

60. The Watjen and Bundy Claimants all allege that they were deprived of employment with Penn Central, thereby entitling them to resign and receive lump sum separation allowances.⁴⁷

61. Entitlement to a lump sum separation allowance is contingent upon an employee's eligibility to receive a coordination allowance as articulated in the WJPA. Section 7(a) of the WJPA entitles employees who are "deprived of employment as a result of said coordination" to be eligible to receive a coordination allowance. Section 7(c) of the WJPA states that an employee can only be deprived of employment if he is "unable to obtain . . . another position on his home road or a position in the coordinated operation." Thus, to show entitlement to a lump sum separation allowance under the WJPA, each Watjen and Bundy Claimant must prove that he was deprived of employment and unable to obtain another position with Penn Central.

62. Each of these Claimants received written notice between January 10, 1969 and January 17, 1969 that his position as a rate clerk was being abolished because the work he was performing was transferred to a location outside of Cleveland.⁴⁸

63. The notice further stated that "under the provisions of existing agreements you have ten (10) calendar days in which to obtain a regularly assigned position available to you in the exercise of your seniority. If you fail to obtain a regularly assigned position within ten (10) calendar days you will become a utility employee subject to use by the Company in accordance with the terms of the Merger Implementing Agreement."⁴⁹

⁴⁷ Id.

⁴⁸ PCTC Exhibits 79, 84, & 88.

⁴⁹ Id.

64. After receiving these notices, as the Watjen and Bundy Claimants admit in their brief, all of them accepted a new position with Penn Central as a utility employee.⁵⁰

65. The position of utility employee was a “position in the coordinated operation” within the meaning of the WJPA and, as Claimant Franz testified, the new position was on the “home road.”⁵¹ Claimant Franz was the only Watjen or Bundy Claimant to testify at the arbitration.

66. As Claimant Franz admitted at the arbitration, the position of utility employee was a full-time job⁵² and carried the same rate of pay⁵³ as the Claimants’ former rate clerk positions.

67. No Watjen or Bundy Claimant was ever deprived of employment within the meaning of the WJPA because upon receiving a job abolishment notice, every Claimant was offered, and subsequently accepted, a comparable job as a utility employee with Penn Central.

68. The Watjen and Bundy Claimants all admit they then voluntarily resigned from their positions as utility employees with Penn Central, within a matter of months after accepting such position.⁵⁴

69. Because each of the 6 Watjen and Bundy Claimants failed to prove that he complied with the MPA’s requirements, specifically that he was deprived of employment under Section 7(a) of the WJPA, but instead voluntarily quit the equivalent position of utility

⁵⁰ Claimants’ Trial Brief, pp. 16 & 23.

⁵¹ Arbitration Transcript at 239.

⁵² Arbitration Transcript at 250.

⁵³ Arbitration Transcript at 240.

⁵⁴ Claimants’ Trial Brief, p. 24; Arbitration Transcript at 240.

employee, each of them failed to satisfy the second element of their burden of proof. Each claim of each Watjen and Bundy Claimant for benefits under the MPA is denied.

C. Evidence Presented At The Hearing On Issue #3 – That Each Claimant Prove That He Suffered Compensation Loss as Defined By the MPA and for Which the MPA Provided Entitlement to Payment

i. Dr. Rosen’s Testimony Was Not Competent Evidence of Compensation Loss

70. In his 1976 ruling, Judge Lambros ordered that “the plaintiffs now must come forward with evidence to support the position that there was compensation loss to which they are entitled to payment.”⁵⁵

71. Thus, in order to recover, each Claimant must first prove actual compensation loss post-merger, during every month in which he claims a displacement allowance.

72. Compensation loss and entitlement to displacement allowances must be proved under the terms and conditions of the MPA. Appendix E of the MPA expressly requires compensation loss and entitlement to displacement allowances to be calculated using Section 6(c) of the WJPA.

73. In his expert report, Dr. Rosen cited Section 6(c) of the WJPA as defining the displacement allowance: “The displacement allowance provided that: ‘if his compensation in his current position is less in any month in which he performs work than the aforesaid average

⁵⁵ 1976 Lambros Ruling at 35.

compensation he shall be paid the difference . . .”⁵⁶ This is a direct quote from Section 6(c) of the WJPA.

74. In his testimony at the arbitration, Dr. Rosen also acknowledged that Section 6(c) contains the proper formula for calculating displacement allowances.⁵⁷

75. Dr. Rosen failed to follow the required steps in Section 6(c) when calculating displacement allowances for each Claimant. Dr. Rosen’s failure to calculate displacement allowances according to Section 6(c) was demonstrated by the following facts:

- a. Dr. Rosen did not use the total compensation in the twelve months preceding displacement as the base period salary.⁵⁸
- b. Dr. Rosen did not divide separately the total compensation and total time paid by twelve to get the average monthly compensation and time paid for.⁵⁹
- c. Dr. Rosen did not make a month by month comparison of the monthly guarantee to the compensation of the Claimant in his current position.⁶⁰
- d. Dr. Rosen did not subtract compensation for any time lost on account of voluntary absences.⁶¹
- e. Dr. Rosen ignored and directly contradicted the language in Section 6(c) that an employee is entitled to the displacement allowance only “in any month in which

⁵⁶ Claimants’ Exhibit 9.

⁵⁷ Arbitration Transcript at 438.

⁵⁸ Arbitration Transcript at 454-455.

⁵⁹ Arbitration Transcript at 456-457.

⁶⁰ Arbitration Transcript at 458.

⁶¹ Arbitration Transcript at 459.

he performs work” by calculating a displacement allowance for Claimants in months in which they did not perform any work.⁶²

76. Instead of calculating displacement allowances in accordance with Section 6(c), Dr. Rosen stated that he based his calculations on Appendix E of the MPA.⁶³

77. Appendix E, however, explicitly requires displacement allowances to be calculated in accordance with the WJPA: “Employees not entitled to preservation of employment but entitled to the benefits of the Washington Job Protection Agreement pursuant to the provisions of Section 1(a) of the Protective Agreement shall be entitled to compensation in accordance with the provisions of the Washington Job Protection Agreement.” It is clear from this language that, to the extent an employee is entitled to compensation because he was placed in a worse position as to compensation, “lost” compensation shall be calculated “in accordance with the provisions of the Washington Job Protection Agreement.”

78. Dr. Rosen conceded this point both in his expert report dated July 30, 2007 and in his direct testimony.

79. In their Complaints filed nearly 40 years ago, the Claimants themselves conceded that any compensation they were entitled to had to be calculated in accordance with the WJPA.

The Knapik and Sophner Complaints both cite to the WJPA and state:

The Washington Job Agreement specifically provides for the payment of a scheduled separation allowance to “any employee of any of the carriers participating in a particular coordination who is deprived of employment as a result of said coordination . . .”⁶⁴

⁶² Arbitration Transcript at 459 & 475.

⁶³ Arbitration Transcript at 468, 473-476.

⁶⁴ Knapik Complaint at 4; Sophner Complaint at 3.

The Watjen Complaint states:

The Agreement of May, 1936, Washington, D.C., Appendix A (part of Labor Agreement) makes provision for "coordination allowances" in the event an employee is "deprived of employment" and "separation allowances" for those employees separated or terminated.⁶⁵

80. Appendix E was written to be consistent with Section 6(c) of the WJPA. As the second to last paragraph of Appendix E demonstrates,⁶⁶ it is simply a short summary of the more detailed calculation of compensation loss set forth in Section 6(c) of the WJPA. That calculation requires each Claimant to prove what his compensation was for the 12 months immediately preceding any adverse employment impact. No Claimant produced that evidence.

81. Dr. Rosen failed to properly calculate compensation loss for every Claimant. As a result, there is no competent evidence of record of compensation loss suffered by any Claimant, so that each of them failed to satisfy the third element of their burden of proof. Each claim of each Claimant for benefits under the MPA is denied.

⁶⁵ Watjen Complaint at 6.

⁶⁶ "For purposes of determining whether, or to what extent, such an employe has been placed in a worse position with respect to his compensation, his total compensation and total time paid for during the base period will be separately divided by twelve. If his compensation in his current position is less in any month (commencing with the first month following the date of consummation of the merger) than his average base period compensation (adjusted to include subsequent general wage increases), he shall be paid the difference less compensation for any time lost on account of voluntary absences to the extent he is not available for service equivalent to his average time paid for during the base period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the time paid for during the based period; provided, however, that in determining compensation in his current position the employe shall be treated as occupying the position producing the highest rate of pay and compensation to which his seniority entitles him under the working agreement and which does not require a change in residence."

ii. Claimants Failed to Introduce Evidence of Complete and Accurate Compensation; Railroad Retirement Board Records Are Incomplete, Unreliable and Not Proof of Actual Compensation

82. For any month in which he claimed a displacement allowance, a Claimant was required to prove what his base salary was in the twelve months prior to his displacement, what his compensation totals were post-merger, and that he made less than his base salary in that post-merger month.⁶⁷

83. No Claimant proved his compensation totals for the twelve months prior to his alleged displacement.

84. No Claimant proved his complete compensation total for each month in which he claimed a displacement allowance.

85. Dr. Rosen calculated displacement allowances on a yearly basis, not the monthly basis required by the WJPA, based on incomplete yearly compensation totals reported in the Railroad Retirement Board (“RRB”) records.⁶⁸ The plain language of the formula found in Section 6(c) of the WJPA allows a displacement allowance only if an employee earns less in any month in which he performs work.⁶⁹

86. Dr. Rosen improperly relied on RRB records as a source for calculating displacement allowances and failed to rely on actual compensation before and after the merger.

⁶⁷ Section 6(c), WJPA.

⁶⁸ Arbitration Transcript at 451 & Claimants’ Exhibit 9.

⁶⁹ Id.

87. Nothing in the MPA or WJPA allows the use of RRB records as a source for calculating displacement allowances.⁷⁰

88. Dr. Rosen admitted that the RRB records are imperfect and are not proof of total compensation.⁷¹

89. The RRB records are not proof of compensation and are not a reliable source for calculating displacement allowances.

90. Without evidence of his base salary in the twelve months prior to his displacement, his compensation in any month post-merger for which he seeks a displacement allowance, or that he made less than his base salary in any month post-merger for which he seeks a displacement allowance, there is no competent evidence of record of compensation loss suffered by any Claimant, so that each of them failed to satisfy the third element of their burden of proof. Each claim of each Claimant for benefits under the MPA is denied.

iii. Dr. Rosen Improperly Relied Upon an Irrelevant “Forecasted Wage Table” as Proof of Actual Compensation and Hours Worked

91. In calculating displacement allowances for the Sophner Claimants, Dr. Rosen “estimated the annual guarantee by assuming full-time employment”⁷² by utilizing a generic “forecasted wage table” illustrating what the average carman made, along with hours worked, in a given year.

⁷⁰ Arbitration Transcript at 477.

⁷¹ Arbitration Transcript at 451.

⁷² Claimants’ Exhibit 9.

92. Nothing in the MPA or WJPA allows the use of a “forecasted wage table” as a source for calculating displacement allowances.⁷³

93. The “forecasted wage table” is not proof of actual compensation or hours worked for any Sophner Claimant.

94. When relying upon the “forecasted wage table” Dr. Rosen assumed full-time employment for each of the Sophner Claimants and assumed that each Claimant was being paid at the prevailing carmen wage rate. There was no evidence adduced at the arbitration that each of these Claimants actually worked full-time prior to displacement or that each Claimant was being paid at the prevailing carmen wage rate.

95. The “forecasted wage table” is not proof of actual compensation or hours worked as required by the MPA and is not competent evidence for calculating displacement allowances. Without competent evidence of compensation loss suffered by any Sophner Claimant, each of them has failed to satisfy the third element of their burden of proof. Each claim of each Sophner Claimant for benefits under the MPA is denied.

II. There Is No Competent Evidence of Record to Support a Claim of Spoliation.

96. The Claimants allege that Penn Central spoiled documents related to this litigation, namely, their personnel records.⁷⁴

97. As plaintiffs who initiated three of these actions in 1969 and one in 1974, the Claimants themselves were obligated upon filing and thereafter to maintain their own documents to support their claims, including records of compensation such as W-2, income tax returns, and

⁷³ Arbitration Transcript at 478.

⁷⁴ Claimants’ Trial Brief at 58; Claimants’ Post Arbitration Brief at 46.

pay stubs. With very limited exceptions, Claimants failed to maintain these documents and introduce them into evidence at the arbitration.

98. Legal custody of all personnel files in the possession of Penn Central was conveyed to Conrail on April 1, 1976, by Act of Congress and Order of the Reorganization Court.⁷⁵ Thus, as of April 1, 1976, Conrail had legal custody of all personnel records and files, and Penn Central had no legal right to maintain the personnel records and files that they were ordered to convey.

99. Penn Central told the Claimants, in its discovery responses in February 2007, that legal custody of the personnel records was conveyed by Penn Central to Conrail on April 1, 1976.⁷⁶ The Claimants themselves knew that legal custody of their personnel files was transferred to Conrail.⁷⁷

100. While legal custody of the personnel files went to Conrail on April 1, 1976, the records never moved physical locations. As Claimant Gallagher testified at the arbitration, the personnel files remained in the car department upon their conveyance to Conrail, and the records are still at the car department today.⁷⁸

101. Contrary to Claimants' contentions, the personnel records they needed to prove their cases were preserved and available in the same place they had been at all time relevant to this long litigation, in the car department. As Claimant Gallagher testified:

Q: Mr. Gallagher, who kept the personnel files at the railroad, as far as you know?

⁷⁵ PCTC Exhibit 104.

⁷⁶ Defendant's Feb. 2007 Discovery Responses (Claimants' Exhibit 33).

⁷⁷ Arbitration Transcript at 143 and 211.

⁷⁸ Arbitration Transcript at 173, 209 & 211.

A: Car department had their own office. It was comprised of a clerk on each shift. The first shift had a chief clerk and a timekeeper and all that. They kept the records right there in the car department office.⁷⁹

Q: My question is, was the car department there when Penn Central was your employer, correct?

A: That's correct.

Q: And the car department with the records were there after Conrail took over, isn't that correct?

A: That's correct.

Q: The car department is still there today?

A: It's still there today.⁸⁰

102. The Claimants failed to use the Civil Rules and other means available to procure those documents from Conrail. That failure is not attributable to Penn Central.

103. There is no evidence of record that Penn Central spoiled any evidence. Indeed all of the evidence is to the opposite. The documents in the car department were never moved, destroyed or even touched by Penn Central.

III. Penn Central is Not To Blame For the Protracted Nature of This Litigation.

104. Claimants allege that Penn Central is to blame for the protracted nature of this litigation,⁸¹ yet they failed to offer any supporting evidence in the record demonstrating that Penn Central is responsible for such delay.

⁷⁹ Arbitration Transcript at 173.

⁸⁰ Arbitration Transcript at 209.

⁸¹ Claimants' Trial Brief at 42; Claimants' Post Arbitration Brief at 44.

105. The Claimants themselves have caused delay in this litigation since the Sixth Circuit decision in Augustus in 2000. After the decision in Augustus was rendered, the Claimants refused to agree that the remaining cases proceed before the Blackwell panel which conflicted with Judge Lambros' Order that "the same panel hear each case."⁸²

106. Claimants wrote a total of five letters to the National Mediation Board requesting lists of arbitrators in hopes of effectuating delay to ensure that the Blackwell panel would not be available.

107. During this time, Mr. Blackwell was ready and willing to resume the arbitration.

108. In 2005, after sitting on their Motion to Reinstate and Resume Jurisdiction for over seven years, the Claimants finally convinced Judge Oliver that all four cases "shall proceed simultaneously with four separate panels hearing each case."⁸³

109. However, after years of insisting on not one but four panels, Claimants' counsel contacted Penn Central's counsel in 2006 and announced that they agreed to all four cases being arbitrated in the same proceeding before one panel.

110. The Claimants also mischaracterize Judge Oliver's Order. Judge Oliver clearly recognized that no one party is solely to blame for the protracted nature of these proceedings. Judge Oliver concluded that neither side came with clean hands and stated "In assessing the causes of delay over the past five years, the Court concludes, based on Plaintiffs' letters calling for new mediation panels and a return to arbitration, that Plaintiffs are no more responsible than

⁸² Lambros 1979 Order (Claimants' Exhibit 6), p. 7.

⁸³ Order of April 28, 2005 (Claimants' Exhibit 25), p. 3.

Penn Central for 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.”⁸⁴

111. Judge Oliver further recognized that the lengthy duration was in part due to the parties exercising their respective rights: “The record shows that the case has been pending before various decision making tribunals . . . Plaintiffs were within their rights to appeal the arbitration findings, and have yet to receive a final ruling on the first case that went to arbitration. Further, Defendant has exercised its appeal rights in this case as well.”⁸⁵

112. As Judge Oliver indicated, and the record demonstrates, Penn Central is not to blame for the protracted nature of this litigation.

IV. The Claimants’ Arguments from “Penn Central’s Standard Forms” are Unavailing.

113. Claimants argue that what they call “Penn Central’s Standard Forms”⁸⁶ are relevant to their claims as evidence of how Penn Central administered MPA benefits.

114. The relevance of these forms is unsubstantiated by any evidence in the record.

115. The forms show payment of MPA benefits to Penn Central employees who did not work at the CUT or even in Cleveland.⁸⁷

116. There is no evidence in the record that any of the employees on the “standard forms” were similarly situated to any of the Claimants before this Panel.

⁸⁴ Order of February 18, 2005 (Claimants’ Exhibit 25), p. 8.

⁸⁵ *Id.* at 9.

⁸⁶ Claimants’ Post Arbitration Brief at 11.

⁸⁷ Claimants’ Exhibits 57-59.

117. Past MPA benefit payments paid to other former employees at other locations have no probative value as to whether the Claimants in this case have each proved they are entitled to benefits under the MPA based on their individual circumstances.

118. The “standard forms” were not authenticated or identified, a foundation was never laid, no evidence was submitted regarding who created them or who has had custody of them, and there is no evidence regarding their reliability, all of which are prerequisites for admissibility.

119. The only testimony provided relating to the “standard forms” is that of Claimants’ counsel. It is black letter law that “arguments made by counsel cannot be considered as evidence, [when] no evidence to support counsel’s statement was offered.”⁸⁸

120. The “standard forms” are unsubstantiated hearsay, taken out of context, and the conjecture of Claimants’ counsel as to what the forms show or what they mean has no evidentiary value.

121. Documents showing payment of MPA benefits to non-CUT employees is irrelevant to the claims before this Panel, and only underscores that Penn Central paid valid claims under the MPA.

V. The O’Neill Letter Is a Conrail Document And Not Binding on Penn Central.

122. The Claimants extensively rely on a document authored by Thomas O’Neil, a Conrail employee (“O’Neill Letter”), that contains purported wage guarantee calculations for the Knapik Claimants as proof of entitlement to displacement allowances under the MPA.⁸⁹

⁸⁸ Gemini, Inc. v. Ohio Liquor Control Comm., 2007-Ohio-4518, ¶ 11 (Ohio App. 2007).

123. Dr. Rosen based his entire calculation of displacement allowances for the Knapik Claimants solely on the unsubstantiated contents of the O'Neill Letter and did not calculate any such allowance himself.⁹⁰ There has been no showing of the reliability of the O'Neill Letter or that the calculations contained therein were reliable and accurate.

124. Dr. Rosen also relied extensively on the O'Neill Letter as proof of compensation for each Knapik Claimant, even though there was no evidence introduced as to the source of the calculations therein. Dr. Rosen admits in his expert report that wage information in a document is not "reliable [when] there was no source documentation to verify the accuracy of that information."⁹¹

125. The O'Neill Letter is a Conrail document, written on Conrail letterhead.

126. The O'Neill Letter makes no mention of Penn Central, and is not binding upon Penn Central.

127. The Claimants failed to introduce any evidence whatsoever to authenticate the O'Neill Letter or to prove the foundation requirements for its consideration.

128. The O'Neill Letter is not competent evidence of the wage guarantees set forth therein.

VI. No Pre-Award/Prejudgment Interest

129. The parties before this Panel negotiated two separate agreements that established and govern the arbitration. The first agreement for arbitration was the MPA signed in 1964. An entire section of the MPA specifically deals with arbitration procedures and expressly replaces

⁸⁹ Claimants' Exhibit 29.

⁹⁰ Arbitration Transcript at 435, 444.

⁹¹ Claimants' Exhibit 9 at 3.

the arbitration procedures set forth in the WJPA.⁹² This is the arbitration provision that Judge Lambros invoked to refer these actions to arbitration in 1979.⁹³ The MPA does not contain any authorization or allowance of pre-award interest. The second agreement was the Agreement For Arbitration signed in 1980 to implement Judge Lambros' referral of the four actions to arbitration. The Agreement For Arbitration does not contain any authorization or allowance of pre-award interest on any claim.⁹⁴

130. The longstanding rule in labor arbitrations is that pre-award interest is not granted if the underlying agreement containing the arbitration provision does not specifically authorize such an award.⁹⁵

131. The few cases cited by Claimants for exceptions to the longstanding rule are inapposite. There is not any evidence in the record of "egregious" conduct by Penn Central or "special circumstances" to permit deviation from the standard rule.

132. Even if any Claimant had met his three-issue burden of proof necessary for a monetary award, pre-award interest would not be granted.

⁹² See MPA, § 1(e).

⁹³ Lambros 1979 Order at 4-6.

⁹⁴ See 1979 Agreement For Arbitration, Claimant's Exhibit 24.

⁹⁵ Cincinnati Public Schools, 124 LA 143, 149 (2007) ("The Union's claim for pre-award interest on the back pay award is denied. There is no provision in the CBA for an award of pre-award interest. Arbitrators historically have not issued such remedial awards without an expressed contractual authorization."); Dobson Cellular Systems, 120 LA 929, 934 (2004) ("However, the Union's request for interest on the back pay award must be denied. Arbitrators traditionally do not award interest on back pay or other monetary awards where the contract does not provide for payment of interest."); Grou Cold Storage Inc., 119 LA 1464, 1466 (2004) ("At the hearing, the Union also requested pre-award owing to the eight laid off employees. The Arbitrator finds no provision in the collective interest on any amounts determined by the Arbitrator to be due and bargaining agreement that would allow the award of such interest.").

VII. No Attorney Fees

133. The MPA, which established and governs this arbitration, expressly provides that the parties shall bear their own expenses.⁹⁶ The MPA does not provide for an award of attorney fees to the prevailing party. No statute applicable to Claimants' claims provides for an award of attorney fees to the prevailing party.

134. "[I]t is well established that attorney's fees 'are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.'"⁹⁷ Claimants filed these cases in federal court: "In federal litigation, the American Rule generally precludes an award of attorneys' fees absent statutory authorization or an enforceable contractual fees provision."⁹⁸

135. This is an action for breach of contract under the MPA. "Attorney fees are generally not recoverable in contract actions. Such a principle comports with the 'American Rule' that requires each party in litigation to pay its own attorney fees in most circumstances."⁹⁹

136. There is not any evidence of record of delay attributable solely to Penn Central.

137. Only four Claimants before this Panel have provided *any* evidence of their attorney fees: Jack Acree, James Feldscher, Phillip Franz, and Robert McNeeley.¹⁰⁰ Although the underlying cases were filed in 1969 and 1974, these engagement contracts were not signed until September and October 2007 and are, therefore, not competent evidence to support an

⁹⁶ MPA, § 1(e) ("All other expenses shall be borne by the party incurring them.")

⁹⁷ Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters & Joiners of America, 456 U.S. 717, 721 (1982) (quoting Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967)).

⁹⁸ Golden Pisces, Inc. v. Fred Wahl Marine Constr., 495 F.3d 1078, 1081 (9th Cir. 2007) (citing Alyeska Pipeline Serv. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975)).

⁹⁹ Stonehenge Land Co. v. Beazer Homes Invests., L.L.C., 2008-Ohio-148, ¶ 34 (Ohio App. 2008); Kunkle v. Akron Mgmt. Corp., 2005-Ohio-5185, ¶ 30 (Ohio App. 2005) ("It is well-established that Ohio adheres to the 'American Rule,' which generally requires that each party involved in litigation shall pay his or her own attorney fees.")

¹⁰⁰ Claimants' Exhibit 54.

award of attorney fees. The remaining 28 Claimants have not offered any competent evidence to support an award of attorney fees.

138. Even if any Claimant had met his three-issue burden of proof necessary for a monetary award, attorney fees would not be awarded.

VIII. No Expert Witness Fees

139. An award of expert witness fees to any party is prohibited by the express provision in Section 1(e) of the MPA that “expenses shall be borne by the party incurring them.”

140. No statute applicable to Claimants’ claims provides for an award of expert witness fees to a party. The United States Supreme Court has held that unless a statute unambiguously permits a prevailing party to receive expert witness fees, they may not be awarded as costs.¹⁰¹ The Ohio Supreme Court has similarly ruled.¹⁰²

141. Expert witness fees are not awarded to any party.

IX. No Punitive Damages

142. “Punitive damages are not recoverable in an action for breach of contract.”¹⁰³ “The law is quite clear in Ohio that: ‘As a general rule exemplary damages are not recoverable in actions for the breach of contracts, irrespective of the motive on the part of defendant which prompted the breach. No more can be recovered as damages than will fully compensate the party

¹⁰¹ Arlington Central School Dist. Bd. of Education v. Murphy, 126 S.Ct. 2455, 2462 165 L.Ed.2d 526 (2006).

¹⁰² Moore v. General Motors Corp., 18 Ohio St.3d 259, 260 (1985) (“without statutory provision, a trial court should not tax an expert’s witness fee as costs”). See Gold v. Orr Felt Co., 21 Ohio App.3d 214, 216 (1985) (“Nor are we aware of any other source of authority which allows for an expert witness’ fee to be charged against the losing party.”).

¹⁰³ Ketcham v. Miller, 104 Ohio St. 372, syllabus ¶ 2 (1922).

injured.’ This has been the nearly universal rule for some time. No matter how willful the breach, ‘[p]unitive damages are not recoverable in an action for breach of contract.’”¹⁰⁴

143. Even if any Claimant had met his three-issue burden of proof necessary for a monetary award, pre-award interest would not be granted. There is not any evidence of record to support an award of punitive damages.

X. No Costs

144. An award of costs to any party is prohibited by the express provision in Section I(e) of the MPA that “expenses shall be borne by the party incurring them.”

145. Evidence closed at the conclusion of the arbitration hearing.

146. Claimants submitted an itemization of “expenses” for the first time with their post arbitration brief. No evidence was submitted at the arbitration or before as to the nature, necessity, or reasonableness of the itemized expenses.

147. The itemization of expenses submitted by Claimants with their post arbitration brief is stricken.

148. The two governing arbitration agreements expressly provide that the fees for the arbitrators are to be divided between the parties. The MPA specifically provides that the “compensation of the Chairman shall be borne equally by the parties to the proceeding” and contemplates that each side will pay for its appointed arbitrator.¹⁰⁵ The Agreement For Arbitration signed by the parties during the course of this litigation expressly provides “each member of the [arbitration] Committee shall be compensated by the party he is to represent. The

¹⁰⁴ Digital & Analog Design Corp. v. North Supply Co., 44 Ohio St.3d 36, 46 (1989).

¹⁰⁵ MPA, § 1(e).

compensation and expenses of the neutral person so selected or appointed shall be paid equally by the Employees and the Employer.”¹⁰⁶

149. “To shift any part of the arbitrator’s fee to the losing party, would constitute an impermissible amendment of the Agreement, and hence cannot be entertained.”¹⁰⁷

150. Expenses incurred to pay any arbitrator’s fee during the history of these actions are not awarded to any party.

151. Expenses incurred to pay for research are not awarded to any party.

152. Expenses incurred for copies or copying services are not awarded to any party.

153. Expenses incurred for consultants are not awarded to any party.

154. Expenses incurred for travel of counsel are not awarded to any party.

155. Expenses incurred for the appointment of a personal representative for any deceased Claimant are not awarded to any party.

Respectfully submitted,

/s/ Michael L. Cioffi

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¹⁰⁶ Claimants’ Exhibit 24, p. 2.

¹⁰⁷ Sonic Knitting Industries, Inc. 65 LA 453, 468 (1975).

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing Post-Arbitration Brief was sent on March 18, 2008 by email transmission (except for Mr. Goldfarb) to:

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