

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.	:	
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	:	
	:	
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.	:	
	:	
	:	
	:	
G.V. SOPHNER, et al.,	:	Case No. 74-914
Claimants,	:	
v.	:	
PENN CENTRAL,	:	
Carrier.	:	

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**PRE-ARBITRATION BRIEF OF PENN CENTRAL TRANSPORTATION COMPANY**

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I. INTRODUCTION

As a precursor to the merger between the New York Central Railroad (“NYC”) and the Pennsylvania Railroad (“PRR”) on February 1, 1968 that resulted in the formation of Penn Central Transportation Company (“Penn Central”), the NYC and PRR entered into the Merger Protective Agreement of 1964 (“MPA”), effective January 1, 1964. The MPA is a collective

bargaining agreement which afforded certain merger protections to union employees of the NYC and PRR.

The Claimants in this case, however, are not entitled to benefits under the MPS for four reasons. These reasons operate in the disjunctive -- any one of these reasons eliminates the claims:

- (1) The Claimants were furloughed or allegedly adversely affected not as a result of the merger, but as a result of the decline in passenger ridership through the CUT, a passenger facility,
- (2) The Claimants failed to report for work as required and are thus barred from receiving benefits under the MPA by the decision in Augustus v. Surface Transportation Board, 2000 U.S. App. LEXIS 33966 (6<sup>th</sup> Cir. 2000) (“Augustus”),
- (3) The Claimants failed to exercise their seniority rights in compliance with the express terms of the MPA, and
- (4) Even assuming *arguendo* that some Claimants eventually reported for work, the Claimants have failed to establish that they have been adversely affected with respect to their compensation, as they have no records of what their base salary was as well as no records reflecting that they made less than their base salary in any year post-merger.

To establish their claims at the arbitration, the Claimants must carry the initial burden of proving the above four elements to be entitled to benefits under the MPA. As Penn Central will conclusively demonstrate at the arbitration, however, the Claimants were not adversely affected **as a result of the merger**, they failed to report for work in a timely manner, they failed to exercise their seniority rights to available positions, and they have no financial records supporting their claims that they have been adversely affected as to their compensation. Hence, the Claimants are not entitled to benefits under the MPA.

## II. PROCEDURAL HISTORY

Claimants seek benefits under the MPA, alleging that they were adversely impacted as a result of the merger. In 1969, three of the four cases at issue were filed by railroad workers against Penn Central and their unions in the United States District Court, 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. The following year (June 21, 1970) Penn Central filed for reorganization protection under Section 77 of the Bankruptcy Act of 1898, as amended, as case number 70-347 in the United States District Court, Eastern District of Pennsylvania (the “Reorganization”). Pursuant to the Bankruptcy Act, all litigation against Penn Central was automatically stayed. Accordingly, Claimants filed a Motion in the Penn Central Reorganization Court seeking leave to proceed in the Northern District of Ohio. The Reorganization Court granted this leave subject to retaining, in the Reorganization Court, exclusive jurisdiction to enter and enforce any judgment Claimants might be entitled to.<sup>1</sup>

This limited leave granted by the Reorganization Court provided that the Claimants must proceed consistent with orders entered in the Reorganization including the Consummation Order and related orders approving the Reorganization Plan as well as the general rules governing bankruptcy law, which establish that (1) the Reorganization Court has exclusive jurisdiction to enforce any judgment Claimants may obtain against Penn Central, (2) Claimants have asserted claims against only Penn Central and have not and may not assert claims against the Reorganized Company that emerged from the Penn Central bankruptcy, (3) Claimants cannot enforce any

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<sup>1</sup> In August, 1972, the Knapik claimants sought leave from the bankruptcy court to continue with their claims against Penn Central herein, and the bankruptcy court granted limited leave. In October 1974, the Sophner claimants filed their action against their union and Penn Central in the Northern District of Ohio as Case No. 74-914. They too were granted limited leave by the bankruptcy court to continue their action in the Northern District of Ohio. Accordingly, the bankruptcy court retains exclusive jurisdiction to enter and enforce any judgment against Penn Central in this matter.

judgment Claimants may obtain with respect to Penn Central against the Reorganized Company that emerged from bankruptcy, and (4) Claimants are not entitled to interest on any of their claims. In October 2007, Counsel for Penn Central sought stipulations of these basic principles established decades ago by the Reorganization Court. To Penn Central's astonishment, however, Claimants refused to stipulate and acknowledge any of the foregoing principles. Instead, the Claimants made it very clear that they intended to relitigate these principles in this arbitration and possibly elsewhere. As a result of Claimants' disavowal of the principles established by the Reorganization Court, Penn Central was forced to file a Petition with the Reorganization Court to seek enforcement of its prior orders. On November 28, 2007, Judge Fullam of the Penn Central Reorganization Court, conducted a hearing and again reiterated the fundamental principles that govern and control the scope of this arbitration:

1. the Reorganization Court has exclusive jurisdiction to enter and enforce any decision by the Arbitration Panel;
2. claims have only been asserted against Penn Central and cannot be asserted against the Reorganized Company;
3. Claimants cannot enforce any judgment against the Reorganized Company; and
4. Claimants are not entitled to interest on any of their claims

Judge Fullam's Order reinforced these basic principles and stated that "any judgment which may result from that litigation may be enforced only if specifically hereafter authorized by this Court."

### III. ISSUES PRESENTED

A. Are the Claimants precluded from receiving benefits under the MPA because they cannot prove they were furloughed or allegedly adversely affected as a result of the merger

rather than as a result of the decline in passenger ridership through the CUT, a passenger facility?

B. Are the Claimants precluded from receiving benefits under the MPA by the Sixth Circuit's decision in Augustus due to their failure to report to work?

C. Are the Claimants precluded from receiving benefits under the MPA due to their failure to exercise their seniority rights in compliance with the express terms of the MPA?

D. Are the Claimants precluded from receiving benefits under the MPA because they can produce no records or evidence to establish their base salary prior to the merger and their salary post-merger as explicitly required by the MPA?

#### IV. STATEMENT OF FACTS

##### A. PARTIES

The Claimants are thirty-two individual railroad workers formerly employed by Cleveland Union Terminals Company ("CUT") having entered the service of the CUT on various dates between 1926 and 1951. The CUT was owned by several railroads utilizing the terminal operations but controlled by the NYC, which was a 93% owner of the CUT. Pursuant to the authority of the Interstate Commerce Commission, the NYC was merged into the PRR to form Penn Central on February 1, 1968, and the CUT became a subsidiary of Penn Central by virtue of the change in name of the parent. On July 11, 1969, CUT was merged into Penn Central by agreement.<sup>2</sup>

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<sup>2</sup> On April 1, 1976, the railroad assets of the Penn Central were conveyed to Conrail, an entity created by the Regional Rail Reorganization Act of 1973, 45 U.S.C. §701 et. seq., whereupon employees of the Penn Central were offered employment with Conrail.

## B. APPLICABLE AGREEMENTS

### Merger Protection Agreement

By prior rulings establishing the law of the case<sup>3</sup>, the MPA is applicable to each of the claims asserted herein, and each Claimant must prove his right to recover under its provisions to be entitled to any arbitration award. By the unambiguous terms of the MPA, an employee is entitled to benefits thereunder **only** if he is adversely affected as a result of the merger. If an employee was adversely affected as a result of some other reason, that employee is **not** entitled to benefits under the MPA. Claimants here cannot demonstrate that they were adversely affected or furloughed **as a result of the merger**. Rather the voluminous, undisputed evidence is that the Claimants were furloughed or adversely affected as a result of the undeniable decline in railroad passenger business that affected Penn Central nationwide and the Cleveland Union Terminal specifically. This decline resulted in Penn Central's filing for bankruptcy reorganization within two years of the merger<sup>4</sup>. This decline resulted in an Act of Congress chartering the Consolidated Rail Corporation to whom Penn Central was legally required to, and did, convey not only its passenger, but also freight, railroad business within six years.

On November 16, 1964, in anticipation of the merger, the PRR and the NYC executed the MPA with the Brotherhood of Railroad Trainmen and the General Chairmen of the several Grievance Committees of the Brotherhood of Railroad Trainmen ("BRT") having jurisdiction over the representation of trainmen, including freight and yard service employees of the PRR, the NYC and the CUT. The MPA was effective January 1, 1964, and extended the protection afforded to employees under the Washington Job Protection Agreement of 1936 ("WJPA") in the

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<sup>3</sup> Judge Lambros Opinion and Order of November 29, 1979, pp. 2, 4-5; Interim Award, p. 3.

<sup>4</sup> Judge Lambros termed it the "collapse and bankruptcy of the resulting [from the merger] Penn Central Railroad". [Opinion and Order, p. 1].

event of a merger. The MPA afforded employees certain benefits to assure that covered employees would not be deprived of employment or placed in a worse position with respect to their employment **as a result of the merger**. Indeed, the very title of the MPA – the *Merger Protection Agreement* – clearly demonstrates its purpose and applicability. If an employee who was adversely affected as a result of the merger complied with all the requirements of the MPA, the protections extended for the duration of their employment with Penn Central, as opposed to the five year post-merger protection provided by the WJPA.

#### Top and Bottom Agreement

In the 1960s, the union sought to create new job opportunities for the CUT employees by negotiating an agreement which would give the CUT employees job opportunities in the Cleveland Freight Yard (“Freight Yard”). [Judge Lambros 1976 Ruling at 19-25]. The BRT successfully negotiated a contract with the NYC to acquire seniority rights on the Freight Yard roster for the CUT employees. *Id.* This was the Top and Bottom Agreement of February 16, 1965 executed by and between the NYC, the CUT and the BRT representing the yard service employees of both the NYC and the PRR.

This Agreement did not modify or affect the exclusive seniority rights which CUT employees had on the CUT roster. [1976 Ruling, at 5, 7] Instead, the Top and Bottom Agreement gave CUT employees the right to bid on jobs on the Freight Yard roster, thereby acquiring for them a right to bid for jobs in an area where they previously had no such preferential bidding rights. [1976 Ruling, at 7]. This Agreement was not as a result of the merger but rather in anticipation of it. CUT employees were not *adversely* affected by the Top and Bottom Agreement, freely negotiated by their union, but rather received benefits which they otherwise did not have. The decline in railroad passenger business that adversely affected

passenger service at the CUT did not impact freight service at the Freight Yard. The union properly<sup>5</sup> sought to protect its members against the declining passenger business by negotiating seniority for them at the Freight Yard.

For purposes of bidding on jobs in the Freight Yard, Claimants were given a common seniority date of September 10, 1964, for obtaining Freight Yard jobs. This Agreement further provided:

All furloughed employees on present separate seniority rosters will be recalled to service before new men are employed. Cleveland Union Terminals Company yardmen recalled from furlough for assignments, including the extra list, in the New York Central Cleveland Freight Yard territory must report for service within fifteen (15) days of the date notified by U.S. mail at their last known address or forfeit all seniority in both territories.

[Top and Bottom Agreement, Section 6].

The status of CUT employees as employees of NYC was completely irrelevant to the Top and Bottom Agreement because the CUT employees retained the exclusive seniority rights they had on the CUT roster, and on the Freight Yard roster, the CUT employees acquired the September 10, 1964 seniority date. The Top and Bottom Agreement did not take away their prior seniority rights but, rather, conferred additional seniority rights to bid for jobs in the Freight Yard, an area in which they previously had no preferential bidding rights. Indeed, Judge Lambros found that “in those two areas it [was] immaterial whether or not they [were] New York Central employees in definition.” [1976 Ruling at 7] Their seniority rights would have been the same even if they were to be defined as NYC employees who were covered by the MPA.

The Top and Bottom Agreement, read together with the MPA, is therefore dispositive of the claims by the Knapik claimants. Their seniority was not adversely affected as a result of the

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<sup>5</sup> Indeed, Judge Lambros long ago ruled that the Claimants’ causes of action against their union failed as a matter of law.

merger, the necessary predicate to MPA benefits, but rather by the continuing decline in railroad passenger business. Accordingly, the claims of the Knapik Claimants must be denied not only because they were furloughed due to declining passenger business but also because they refused to report to work upon receiving recall notices for the Freight Yard based on the seniority conferred upon them by the Top and Bottom Agreement.

#### July 1969 Agreement

On July 11, 1969, a further agreement was executed expanding the CUT employees' work rights. In that agreement, the train service employees of the CUT were expressly made subject to all terms and conditions of the MPA effective August 1, 1969, without prejudice to Penn Central's position in similar disputes with employees of other subsidiaries. Under this agreement, CUT yard service employees who had CUT seniority dates prior to February 16, 1965 were given preferential bidding rights for all assignments allocated to CUT based upon their CUT seniority date upon the agreed ratio of 65.1% - 32.4% - 2.5%. They were given secondary rights to assignments allocated to NYC men based on their September 10, 1964 seniority in the former NYC freight yard territory as established by the agreement of February 16, 1965 and they were to stand for service in Penn Central seniority District Ohio No. 4 on the basis of their September 10, 1964 seniority date in that district.

The merger of the NYC and the PRR was consummated on February 1, 1968. As of that date, the Claimants' seniority status was as follows:

1. They had primary seniority rights as of February 1, 1968 throughout Penn Central Seniority District No. 4 – Ohio.
2. They had prior seniority rights as of September 10, 1964, on assignments allocated to the Prior Right New York Central Cleveland Terminal (Yard) Seniority District.
3. They had prior, prior seniority rights as of the date of their employment with the Cleveland Union Terminals Company

on assignments allocated to the prior, prior Right Cleveland Union Terminal Seniority District.

VI. ARGUMENT

A. The Party Who Alleges That There Has Been a Breach of a Collective Bargaining Agreement Bears the Whole Burden of Proof on the Issue.

The Claimants allege that Penn Central breached the terms of the MPA, a collective bargaining agreement, by depriving them of compensation provided for therein. In return for the benefits provided for in the MPA, the Claimants were required to exercise their seniority to the fullest extent and mark up for work as required by the applicable agreements, when called upon to do so. In order to establish their claims, the Claimants have the burden of showing that they are entitled to benefits under the MPA. The Claimants must prove they were adversely affected, as a result of the merger, and they fully exercised their seniority rights in compliance with the applicable agreements. In addition, the Claimants must provide evidence of what their base salary was and prove that they made less than that salary in any month post-merger. The Claimants must prove the above elements in order to show that Penn Central breached the MPA by denying them their alleged entitlement to benefits thereunder. None of the Claimants will be able to meet this burden.

It is well-established law that the party who alleges that there has been a breach of a collective bargaining agreement bears the “whole burden of proof” on the issue. International Brotherhood of Electrical Workers Local No. 683 Pension Trust, et al. v. Advantage Enterprises, Inc., et al., 813 F. Supp. 592, 598 (S.D. Ohio 1993) *citing* United Steelworkers of America, et al. v. North Bend Terminal Co., 752 F.2d 256, 261 (6<sup>th</sup> Cir. 1985). In Advantage Enterprises, Inc., Plaintiffs alleged that Defendant breached a collective bargaining agreement in relation to the termination of a pension plan upon the closing of Defendant’s facility. Both Plaintiffs and

Defendant had given different meanings to provisions within the collective bargaining agreement which gave rise to the action. In holding that both sides had reasonably interpreted the terms of the collective bargaining agreement, the court nevertheless ruled against the party bearing the burden of proof. The court then held that “the party who alleges that there has been a breach of a collective bargaining agreement bears the ‘whole burden of proof’ on the issue.” *Id.* at 598. As with the Plaintiffs in Advantage Enterprises, Inc., since the Claimants are alleging breach of a collective bargaining agreement, they bear the “whole burden of proof” in establishing such breach. In order to satisfy their “whole burden of proof” in establishing that Penn Central breached the MPA, the Claimants must demonstrate: (1) they have been adversely as a result of the merger, (2) they reported for work in compliance with the decision in Augustus, (3) they exercised their seniority rights in compliance with the existing agreements, and (4) that they made less than their baseline salary in any month post-merger. There can be no recovery by the Claimants unless they meet their burden of proof on **each and every one of these issues**. As will be demonstrated by Penn Central at the arbitration, the Claimants’ complete lack of evidence on all of these issues will result in a failure of the Claimants to meet their “whole burden of proof.”

B. Claimants Were Adversely Affected by a Dramatic Decline in Rail Passenger Traffic Into and Out of the CUT, Not By the Merger.

1. Claimants Are Required To Prove That They Were Adversely Affected as a Result of the Merger to Recover Any MPA Benefits.

The MPA is clear and unequivocal – any benefits thereunder are contingent upon a showing that railroad employees were “adversely affected” as a result of the combination of the two railroads. This is demonstrated by the very title of the document – “Agreement For

Protection of Employees in Event of Merger of Pennsylvania and New York Central Railroads.”

This underlying and unifying concept is reiterated several times throughout the MPA and its attachments. The third paragraph of the MPA 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 employes** represented by the labor organization parties hereto. (emphasis added)

Two paragraphs later the MPA quotes Section 5(2) of the Interstate Commerce Act<sup>6</sup> --

“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 the carrier or carriers by railroad affected by such order being in a worse position** with respect to their employment . . .” (emphasis added)

Further on the first page, in section 1(a), the MPA continues:

[U]pon consummation thereof the provisions of the Washington Job Protection Agreement of 1936 . . . shall be applied for the protection of all employes of Pennsylvania and Central . . . who may be **adversely affected** with respect to their compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto **incident to approval and effectuation of said merger** . . .(emphasis added)

The WJPA is expressly incorporated into the MPA, “shall be applied for the protection of all employes of Pennsylvania and Central,” and is attached as Appendix A to the MPA. The WJPA states:

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<sup>6</sup> Revised and recodified as 49 U.S.C. § 11323 - § 11326. As pertains here, the statutory provisions apply to the “consolidation or merger of the properties . . . of at least 2 rail carriers into one corporation . . . .” 49 U.S.C. § 11323(a)(1). See also WJPA, § 2(a) (“The term ‘coordination’ as used herein means joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities.”)

[T]he fundamental scope and purpose of this agreement 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** . . . [F]luctuations, rise and falls and changes in volume or character of employment brought about solely by other causes are not . . . covered by or intended to be covered by this agreement. (emphasis added)

WJPA, § 1.

The intent behind the WJPA and the MPA is clear; they seek to provide protection to employees who may be adversely affected as a result of the merger. Thus, Claimants in this case are required at the threshold to demonstrate that they were furloughed from their positions or were otherwise adversely affected as a result of the merger. They have failed, and will fail at the arbitration, to do so.

The phrase “adversely affected” has been considered in a number of arbitration awards. Amtrak Arbitration Committee, UTU v. UP (August 19, 1972) Neutral M.M. Rohman, (holding that extra board firemen, who remained on the extra board and were not adversely affected at the time of the transaction, are not entitled to a displacement allowance on account of the extra board being abolished four months later); New York Dock Railway and Brotherhood of Railway, Airline and Steamship Clerks, Special Board of Adjustment No. 915, April 22, 1983, Neutral N.H. Zumas, (holding that benefits were not payable as the elimination of positions of the employees was due to decline in business.) Amtrak Arbitration Committee UTU v. L&N (February 2, 1973) (Chairman C.R. Roadley) (holding that brakeman on freight extra board, who were cut from the extra board, were not affected employees as the reduction of the extra board was due to “other causes”); Amtrak Arbitration UTU v. GTW, (June 23, 1972) Neutral M.M. Rohman, (holding that an employee who remained on the extra board, and therefore, was not

adversely affected when fifteen passenger conductors and brakeman positions were eliminated as a result of the transaction did not later become entitled to a displacement allowance when he was furloughed due to a decline in the freight business.)

These awards hold that a claimant for benefits under a protective agreement must establish that he was “adversely affected” by the merger. In other words, a claimant is required to demonstrate that he lost his employment or was otherwise placed in a worse position as a result of the merger. On this issue the burden of proof rests squarely upon the claimant to establish that he is entitled to what he claims. Special Board of Adjustment, May 25, 1988, in Missouri-Kansas-Texas Railroad Company and United Transportation Union, Chairman and Neutral N.H. Zuman. 1 at 14. Claimants in this case are thus required at the threshold to demonstrate that they lost their positions or were otherwise placed in a worse position as a consequence of the merger.

To date, the Claimants have failed, and will fail at the arbitration, to show, either through documents or testimony, that they were **adversely affected as a result of the merger**. Claimants themselves have admitted that “[o]ne of the goals of the merger was to maximize efficiency and to consolidate operations of the two carriers.” (Opposition Brief, p. 9). Yet these perceived efficiencies, which are indeed standard components of mergers and consolidations, have nothing to do with the CUT. The Claimants cannot show a critical element to meet their burden, that specific facilities were consolidated resulting in excess employees, which would result in some employees--including themselves--becoming adversely affected. The CUT was a NYC passenger facility and did not involve PRR employees or a consolidation of NYC and PRR rosters. The consolidation in no way touched or affected the CUT because there were never any PRR employees, jobs or positions at the CUT.

In other words there was no redundancy between PRR jobs and NYC jobs at the CUT. Consequently, no redundant jobs were eliminated at the CUT in order to maximize efficiency. The Claimants' jobs at the passenger facility CUT were not adversely affected by the combination of the PRR with the NYC, but due to the decline in rail passenger ridership. The decline in passenger ridership through the CUT was not a result of the merger but had occurred and continued to occur before, during and after the merger.<sup>7</sup> Claimants cannot refute Penn Central's statistics showing this decline in passenger ridership. More senior PRR employees did not take NYC employees jobs at the CUT. Adverse effects were not the result of expected efficiencies of combination (such as eliminating redundant positions) but rather the decline in sustainable passenger traffic at the facility. The decline in rail passenger business, which was completely unrelated to the merger, reduced the number of positions needed at the CUT producing adverse effects on Claimants, not the merger, and is, therefore, not within the purview of the MPA. Since the Claimants will not be able to establish that they were adversely affected by the merger the foregoing awards mandate that their claims must be denied at the arbitration.

2. The Claimants Were Furloughed As A Result Of The Decline In Rail Passenger Ridership.

Although it is Claimants' burden of proof to demonstrate that they were adversely affected as a result of the merger, a burden for which they have failed in discovery to make even a prima facie showing, Penn Central will provide compelling statistical evidence that any adverse effect was caused by the decline in the volume of passenger trains at the CUT, the passenger facility where the Claimants worked.<sup>8</sup> It is undisputed that the decline in passenger ridership at

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<sup>7</sup> See *Weinman Affidavit*

<sup>8</sup> See *Weinman Affidavit*

the CUT was completely unrelated to the merger.<sup>9</sup> It is extremely well-documented and a historical fact that by the 1940's, automobiles, buses, trucks, and planes became full-fledged competitors to railroads. During this time, and through the 1960 era, the increasing shift to alternate modes of transportation for passenger travel drastically accelerated the already declining revenue of railway operations in the United States. As a result, rail passenger yards across the nation, and in particular the Northeast Corridor, felt the devastating effects of the public policy shift to other, more convenient modes of transportation.

As the rail passenger business declined nationally, the corresponding effects were felt at the CUT, a rail passenger facility. The resulting reduction of connecting passenger trains at the CUT offered Cleveland passengers fewer and fewer travel options during this sharp decline.<sup>10</sup> From 1949-69, the number of NYC trains using the CUT declined from 61 to 12, with a 42% drop in services from the previous year in 1967.<sup>11</sup> By 1971, there were but 11 trains using the CUT.<sup>12</sup> This greater than 200% attrition rate for train usage left the New York Central with a large employee and asset overhead cost that was crippling operations at the CUT. Train movements at the CUT declined by over 50% between 1961 and 1967.<sup>13</sup> While the number of trains using the CUT declined, so did their frequency. In 1961, 47 trains passed through the CUT on a daily basis, and by 1967, only 16 trains moved through the CUT daily.<sup>14</sup> This decline in trains and daily train movement impacted the average number of employees needed at the CUT. In 1961, the CUT had just over 550 employees.<sup>15</sup> By 1971, there were roughly 60

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<sup>9</sup> *Weinman Affidavit*, ¶ 2.

<sup>10</sup> *Weinman Affidavit*, ¶ 2h.

<sup>11</sup> *PTSI Report on Passenger Trains at Cleveland Union Terminal*, September 2007, PCC003896. ("PTSI Report").

<sup>12</sup> *Weinman Affidavit*, ¶ 2i.

<sup>13</sup> *Weinman Affidavit*, ¶ 2i.

<sup>14</sup> *Weinman Affidavit*, ¶ 2i.

<sup>15</sup> *Weinman Affidavit*, ¶ 2i.

employees providing services.<sup>16</sup> The diminution of trains using the CUT during this period resulted in less employees needed to deal with the few trains that remained.

It is clear from the foregoing undisputed facts that the CUT, a passenger yard, experienced a substantial decline in rail passenger traffic between 1949 and 1971. This decline directly impacted the operations at the CUT, which resulted in less available work and fewer employees needed to cope with the decrease in passenger trains. Hence, it is clear that the merger played no role in these Claimants either being furloughed or otherwise adversely affected. The reason that there were less positions needed at the CUT or the decision to furlough any employees was based on the amount of passenger traffic flowing through the CUT at that time, which was minimal. By 1968, when many of these Claimants were furloughed or claim to have been adversely affected, there were only 11 trains using the CUT, and just over 100 employees.<sup>17</sup> Between 1945 and 1960, NYC lost over \$500 million in passenger operations, and it is obvious that this precipitous decline continued into the late 1960 era, thereby creating the necessity for Amtrak.<sup>18</sup> Indeed Judge Lambros was even prepared to take judicial notice of the fact that there was a general decline in the passenger service which meant that an end was coming to the passenger service jobs.<sup>19</sup> What is more, the decline was precipitous.<sup>20</sup> Hence, the undisputed, material facts are clearly dispositive on this issue, and there is no evidence to rebut these facts.

C. The Claimants Failed To Report For Work As Required By Existing Agreements And Are Thus Barred From Receiving Benefits Under The MPA By The Sixth's Circuit's Decision In Augustus.

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<sup>16</sup> *Weinman Affidavit*, ¶2i.

<sup>17</sup> *PTSI Report*, bates labeled as PCC003904 & PCC003907.

<sup>18</sup> *Alfred Pearlman Position Statement*, bates labeled as PCC003555 & PCC003556.

<sup>19</sup> *1976 Ruling* at 33; *1975 Opinion* at 3.

<sup>20</sup> *1975 Opinion* at 3.

The Sixth Circuit has already decided the issue of whether or not a claimant who failed to report to work can recover under the MPA. In Augustus, the Court held:

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.**

Augustus at 14 and 16. (emphasis added) This holding is binding on the Claimants in this litigation and represents the controlling law of this case. The decision in Augustus is controlling precedent which binds this Arbitration Panel, and thereby precludes those claimants who **failed** to report to work within the established timeframe from receiving benefits under the MPA.

Claimants concede, as they must, that they did not report to work when notified to do so. They may attempt to avoid the consequences of Augustus by arguing that although they failed to report to work when notified, the Sixth Circuit really meant to hold that claims were precluded only if an employee “never reported to work.” They may argue that because some Claimants **eventually** reported to work -- after several notices -- their claims are not precluded by Augustus. This argument is absurd and stands black letter law on its head. A party cannot change an unfavorable decision by inserting words into a Court’s holding. The Sixth Circuit explicitly stated “that petitioners failure to report to work precluded their recovery under the MPA.” The Sixth Circuit clearly did not hold that an employee could escape preclusion if he “eventually” reported to work whenever he felt like reporting.

The Claimants in Knapik failed to report for work as required under existing agreements and are barred from receiving benefits under the MPA by the Sixth Circuit’s decision in Augustus. By notice dated February 21, 1968,<sup>21</sup> the Knapik claimants were advised that they

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<sup>21</sup> This Notice and the May 2, 1969 notice and subsequent correspondence are submitted herewith.

were being furloughed effective February 25, 1968 and that they “ha[d] rights in the Cleveland Freight Yard Territory by virtue of [the] agreement effective February 16, 1965 [Top and Bottom Agreement] and may stand for employment in the Freight Yard Territory.” They were specifically instructed to “immediately contact General Yard Master D.J. Weisbarth,” in this regard. *Id.* Claimants were thus notified that there were positions available to them in the Freight Yard under the Top and Bottom Agreement.

**It is undisputed that all of the Knapik Claimants refused to accept the available positions and to report for service pursuant to this furlough notice.** This failure to respond to a notice of available work precludes them from benefits under the MPA, pursuant to Augustus, as they **failed to report for work** within the established timeframe. In Brotherhood of Railway and Steamship Lines, Freight Handlers, Express and Station Employees v. Pacific Electric Railway Company, (Referee Bernstein), the referee observed that the primary purpose of the WJPA was “to cushion the economic distress of employees who try but are unable to obtain a position.” *Id.* at 57. With this guiding principle in mind, the referee held that, if an employee “has an opportunity for full-time employment in categories in which he has established seniority before he goes off the payroll, he has the obligation to accept it.” The claimant was denied the benefits because, before he lost his prior position, there was a position for him on the extra board assignment which he could have taken but refused. *Id.* at 58. Thus, like the employees in the Pacific Electric Railway case, Claimants here had opportunities for employment in the Freight Yard before they went off the payroll but they refused to report for work at the Freight Yard when notified of available positions.

Accordingly, all those Claimants who did not report to the Freight Yard pursuant to the furlough notice are disqualified from receiving benefits under the MPA. These Claimants had an

obligation to immediately accept available work, but they simply refused to do so. Again, as the Sixth Circuit ruled in Augustus: “[t]he 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.”

The Claimants also did not comply with the terms of the Top and Bottom Agreement, which contrary to Claimants’ assertions, is a controlling agreement in this case. Their failure to comply with the requirements under the Top and Bottom Agreement also bars these Claimants from receiving benefits under the MPA. Like the merger agreements discussed in the foregoing arbitration awards, the MPA clearly requires that an employee mark up for available work and to obtain all available positions “in accordance with existing rules or agreements.” As indicated by Arbitrator Lieberman in his award in Railroad Yardmasters of America v Chesapeake & Ohio Railway Co. & Seaboard Coast Line Railroad Co., March 6, 1981, such language “does not restrict the exercise of seniority to a particular agreement. . . .” Id. at 5. One of the existing agreements in this case at the time in question was the Top and Bottom Agreement. Section 6 of that Agreement provides:

All furloughed employees on the present separate seniority rosters will be recalled to service before new men are employed. Cleveland Union Terminals Company yardmen recalled from furlough for assignments, including extra list, in NYC Cleveland 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.

It is well settled that, in the absence of full compliance with a recall notice, the recalled employee will suffer the consequences of failure to comply with the notice provided for in the relevant agreement. For example, in American Airlines Inc. Air and Transport Workers Union of America, No. 83 AAR 0039 Docket No. 6, p. 75, February 14, 1983 (Arbitrators Ives, Georges), the applicable agreement required a laid off employee to respond within five days of

the postmark of the recall notice and to be ready to return to work within fifteen days of the notice. The grievant failed to respond within the required period because he was on vacation. As a result, the employer notified the grievant that he had forfeited his re-employment and seniority rights. Despite the grievant's lack of actual knowledge of the recall within the five-day period specified, the arbitrators denied the grievance, holding that the employer's decision was consistent with the contract language. Similarly, in Stroh Brewery Co., 92 LA 930 (William J. Berquist, April 3, 1989), an arbitrator found that in light of the "clear, unambiguous and unequivocal" language of the recall notice, an employee who responded to a recall notice within three days, rather than 24 hours, of receiving the notice as required by the applicable agreement was held to have been properly regarded as a "voluntary quit" under that agreement.

The question of whether there has been full compliance with a recall notice is a question of contract interpretation. Where the contract language is clear and unambiguous as to how the recall notice is to be complied with and as to the consequences of failure to comply with the recall notice, courts and arbitrators have no option but to enforce the agreement. Local 337 of International Brotherhood of Teamsters v. Faygo Beverages, 609 F. Supp. 769, 771 (E.D. Mich. 1985).

In the instant case, the language of the Top and Bottom Agreement is clear, unequivocal and unambiguous. It specifically provides that CUT employees recalled from furlough are to "report for service within fifteen days of the date notified by U.S. mail." Furthermore, the agreement clearly provides that, if an employee does not report within fifteen days of the date notified by U.S. mail, he "forfeit[s] all seniority in both territories." Id. Failure, therefore, to comply with a recall notice terminates seniority and disqualifies an employee from receiving

benefits under the MPA.<sup>22</sup> The only excuse the Claimants give for failing to report to the Freight Yard upon receipt of the February 21, 1968 furlough notice is that they would have lost years of seniority. This is simply not true. The Top and Bottom Agreement did not take away any seniority or vested rights which the Claimants had. Under the Top and Bottom Agreement, the Claimants retained their seniority position on the CUT roster, namely their dates of hire. However, while in the Freight Yard territory, they acquired the right to bid for jobs in that area with a September 10, 1964 seniority date, a right which they previously did not have. [1976 Ruling at 7-10]. Thus while other employees went to the Freight Yard as new employees, Claimants went to the Freight Yard with a September 10, 1964 seniority date. Furthermore, an employee has no inherent right in the date of hire as his true seniority date in the context of a vested property right, which was affirmed by Judge Lambros who held that:

[My] view of the law with respect to seniority rights clearly demonstrates that seniority rights can only be created by contract or by statute. One does not, absent a contract or absent a statute so providing, have any inherent right to a particular seniority date. The date of hire is not necessarily controlling unless of course it is so provided by contract or statute.

[1976 Ruling at 4] Therefore, Claimants had no inherent right to their true date of hire as their seniority date, and could not use this as an excuse for their failure to report to work at the Freight Yard. Upon receipt of the furlough notice requesting the Claimants to report to the Freight Yard in compliance with the recall provision of the Top and Bottom Agreement, the Claimants were obligated to report for service within fifteen days of receipt of that notice. It is undisputed that none of the Knapik Claimants reported for work at the Freight Yard within this established timeframe and as a result, they forfeited all seniority rights that they had. This failure to respond

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<sup>22</sup> Although Claimants previously sought to circumvent the fatal implication of the Top and Bottom Agreement for their claims by arguing that the agreement was “secretly negotiated” by the union which represented them and that they were not aware of this agreement at the time it was entered into, this argument is of no avail. Judge Lambros has already ruled that this agreement is valid. [1976 Ruling at 17].

to Penn Central's recall notice disqualifies the Claimants from receipt of benefits under the MPA.

Penn Central did not have any obligation to provide subsequent notices of recall to the Claimants. Stroh Brewery Co., supra (employee who responded to a recall notice within three days, rather than 24 hours, of receiving the notice as required by the applicable agreement was held to have been properly regarded as "voluntary quit" under that agreement). Consequently, the Claimants were in breach of the MPA after they failed to mark up for employment following the first February 21, 1968 furlough notice. It is legally irrelevant that several Claimants did return to work after subsequent notices, dating over a year after their furlough in February 1968. The Claimants simply chose not to respond to the February 21, 1968 furlough notice, by seeking available work in the Freight Yard. Their complete failure to respond to this notice and "immediately contact General Yardmaster D.J. Weisbarth" to stand for available jobs, disqualifies the Claimants from receiving benefits under the MPA.

Thus, the Claimants in Knapik failed to report to the Freight Yard as requested in the February 21, 1968 notice within the requisite timeframe as established by the Top and Bottom Agreement. The Sixth Circuit's decision in Augustus is controlling and precludes them from recovery under the MPA.

D. The Claimants Failed To Exercise Their Seniority Rights Under Existing Agreements And Thereby Forfeited Their Rights To Benefits Under the MPA.

The MPA provides that an employee must fully exercise his or her seniority rights as a condition precedent to receiving the benefits the MPA provides to employees "deprived of employment" or placed in a "worse position with respect to compensation, rules, working

conditions, fringe benefits or rights and privileges pertaining thereto” as a result of the merger.

MPA Section 1(a). The MPA provides that:

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

MPA Section 1(b). (emphasis added)

The foregoing language is clear, unequivocal and unambiguous. An employee who fails to comply with his part of the bargain under the MPA by failing to obtain a position available to him through the exercise of seniority rights in accordance with existing rules or agreements, will not be considered as “deprived of employment” or placed in a “worse position” with respect to his employment. In substance, therefore, the MPA provides that an employee who fails to obtain a position available to him by exercising his seniority disqualifies himself from benefits available under the Agreement. The MPA thus imposes an affirmative obligation upon covered employees to exercise their seniority to the fullest extent possible under existing agreements in order to obtain available positions, and makes the full exercise of a covered employee’s seniority rights a condition precedent to eligibility for benefits under the MPA.

Arbitration awards which have considered Section 1(b) have emphasized the obligation of employees to exercise their seniority for available positions as a condition precedent to their eligibility to any MPA benefits. In Award No. 2 of Special Board No. 776 in Penn Central Transportation Company and Brotherhood of Railroad Signalmen, (quoted with approval in Award No. 25, Case of Public Law Board No. 1376 dated May 24, 1976, Penn Central

Transportation Company and Brotherhood of Railway Airline and Steamship Clerks), it was held:

Simply stated, the . . . agreement plainly intended that if an employee . . . was entitled to the guarantee . . . such employee would be required to obtain the best position from the standpoint of compensation, that his seniority would permit. Failing to do so, an employee could not be considered as having been deprived of employment.

Significantly, in Penn Central Transportation Company and Brotherhood of Railway Airline and Steamship Clerks, *supra*, the claimant exercised his seniority to a lower rated position instead of remaining with his assignment because he did not want to move with his headquarters. His suggestion that he acted in good faith by not moving and thereby requiring the Penn Central to incur expenses and that the Penn Central had previously taken the position that his conduct was permissible, was rejected by the Board, finding that there was nothing in the MPA which permitted his conduct “regardless of the amount of consideration exhibited by an individual employee.” *Id.* at 5.

The foregoing interpretation accords with previous arbitration awards interpreting similar provisions in other protective agreements. These awards underscore the imperative obligation imposed upon employees to exercise their seniority rights to the fullest extent possible in order to obtain available positions.

Similarly, in Erie-Lackawanna Railroad Co. v. John D. Everett, (Referee Coffey), an employee whose position was abolished elected not to exercise his seniority in accordance with implementing agreements adopted pursuant to the WJPA so as to obtain other available positions for which he was qualified. As a result, he was continued on the appropriate roster as furloughed. However, because he failed to return to service in accordance with the working agreement after being notified of a position for which he was eligible, he was held not to be entitled to benefits under the WJPA. *Id.* at 80.

Arbitration awards interpreting similar provisions in other employee protective agreements have also held consistently that such provisions require employees to exercise their seniority rights to the fullest extent possible to obtain available jobs in order to qualify for benefits under such an agreement. Like those cited above, these decisions hold that failure to exercise seniority rights in order to obtain an available position disqualifies an employee from the benefits under the employee protective agreement.<sup>23</sup>

The foregoing awards reaffirm that the MPA requires that employees must exercise their seniority to the fullest extent possible and obtain the highest paying positions available in order to qualify for benefits under the MPA.

The Claimants in Knapik and Sophner have failed to demonstrate that they fully exercised their seniority rights in compliance with the terms of the MPA and are, therefore, precluded from receiving any benefits provided for therein. None of the Claimants in Knapik exercised their seniority rights, which they acquired under the Top and Bottom Agreement, at the Cleveland Freight Yard when they were told to do so in the February 21, 1968 furlough notice. All of these Claimants waited for substantial periods of time, ranging from four months to over a year, to attempt to exercise their seniority at the Freight Yard. The Claimants cannot put forth any evidence demonstrating that they even attempted to exercise their seniority rights at the Freight Yard. They simply chose not to exercise their rights acquired under the Top and Bottom

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<sup>23</sup> See, e.g., Railroad Yardmasters of America v. Chesapeake & Ohio Railway Co. & Seaboard Coast Line Railroad Co., March 6, 1981 (Lieberman Arbitrator) (interpreting merger protection agreement based on WJPA to require employee to exercise his seniority rights under all existing agreements, rules and practices to obtain a position, even if this requires a return to a different craft, in order to retain protected status under protective agreement); and Vanderberg v. Consolidated Rail Corp., Special Board of Adjustment No. 876, February 5, 1976 (Edgett, Neutral) (requiring employees to exercise seniority, within their seniority district, to maintain status as active employees and to receive protective allowances under Regional Rail Reorganization Act, even where exercise of such seniority might have required a change in residence); Cincinnati Union Terminal Co. v. Brotherhood of Railway, Airline & Steamship Clerks, Amtrak Arbitration Committee, July 13, 1973 (Referee M.M. Rohman) (holding that “where a displaced employee fails to exercise his seniority rights to secure another position carrying a rate of pay and compensation equal to or in excess of his previous rate, then the benefits provided by the applicable merger protection agreement do not apply”).

Agreement, and must face the consequences of their inaction. This failure to exercise their seniority rights in compliance with the MPA and the Top and Bottom Agreement results in a forfeiture of their seniority rights and corresponding disqualification from benefits provided for in the MPA.

Similarly, the Claimants in Sophner claim to have been adversely affected as to their compensation under the terms of the MPA, but have not demonstrated their compliance with the requirements of the MPA to be entitled to the benefits provided for therein. The Claimants in Sophner have provided Penn Central with virtually no documents through discovery. The only documents Penn Central has received that relate to the Claimants in Sophner are incomplete Railroad Retirement Board records. There are so many gaps and holes in these records that they prove nothing. While the Claimants allege to have been adversely affected as to their compensation (which is not reflected in their Railroad Retirement Board records), they have provided **no evidence** that they complied with the terms of the MPA and exercised their seniority rights to all available positions to which their seniority would entitle them to. The Claimants' unfounded allegations are compounded by their inability to demonstrate that they exercised their seniority rights to available positions. The Railroad Retirement Board records provided by the Claimants do not reflect whether or not a Claimant exercised his seniority rights continuously, each working day, as required by the MPA. If a Claimant is alleging that he was adversely affected as to his compensation, he is under a duty to show that he complied with the terms of the MPA and fully exercised his seniority rights. The Claimants in Sophner, through their complete lack of evidence, have failed to meet their burden of proving that they exercised their seniority rights and are not entitled to benefits under the MPA.

The Claimants in Watjen and Bundy held clerical positions at the CUT, and allege that they were deprived of employment with Penn Central as a result of the merger. The Claimants seek entitlement to lump sum separation allowances, which is an alternative to receiving a coordination allowance under the existing agreements. However, these Claimants failed to exercise their seniority rights, which is a condition precedent to receipt of a lump sum separation allowance, and are thereby disqualified from receiving benefits under the MPA.

Entitlement to a lump sum separation allowance under the MPA is based upon an employee's eligibility to receive a coordination allowance as articulated in the WJPA. Section 7(a) of the WJPA states that “[a]ny employee of any of the carriers participating in a particular coordination who is **deprived of employment as a result of said coordination** shall be accorded an allowance (hereinafter termed a coordination allowance), based on length of service.” (emphasis added). Under Section 7(c) of the WJPA, “[a]n employee shall be regarded as deprived of his employment and entitled to a coordination allowance...when the position which he holds on his home road is abolished as result of coordination and he is unable to obtain by the exercise of his seniority rights another position on his home road or a position in the coordinated operation.” The language is clear, in order to become eligible for a coordination allowance the employee must meet the following criteria: 1) be deprived of employment, 2) the deprivation of employment must be as a result of the merger, and 3) the employee must exercise his seniority rights to any other position, either on his home road or anywhere within the merged company. Further, Section 9 of the WJPA states that “any employee **eligible to receive a coordination allowance** under section 7 hereof, may, at his option at the time of coordination, resign and accept in a lump sum a separation allowance.” (emphasis added) Therefore, an employee must be “eligible to receive a coordination allowance” in order to be entitled to the

option of receiving a lump sum separation allowance. As stated above, to be eligible to receive a coordination allowance, he must be deprived of employment as a result of the merger, and he must exercise his seniority rights to any other position which his seniority would entitle him to.

The Claimants in Watjen and Bundy are claiming that they are entitled to lump sum separation allowances, but were never paid such allowances by Penn Central. However, the Claimants failed to exercise their seniority rights by attempting to mark up for available jobs, which disqualifies them from receiving any benefits under the MPA. Furthermore, all of the Claimants were given an option of, if they could not obtain other available jobs, remaining in Penn Central's employ as a utility employee which would have resulted in gainful employment. Each of the Claimants received notice on January 10, 1969 that their positions were being abolished because the work they were performing was transferred to locations outside of Cleveland. The notice further stated:

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.<sup>24</sup>

The language in the notice comports with the requirements under the MPA and WJPA. The employees were required to exercise their seniority rights by marking up for available jobs prior to becoming eligible for a lump sum separation allowance. An employee becomes eligible for a separation allowance only if he exercises his seniority by marking up for available positions, and only if he fails to obtain such positions does he become eligible for a separation allowance. Hence, exercising seniority rights is a condition precedent to benefits under the MPA. Based on

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<sup>24</sup> This Notice and the subsequent correspondence are submitted herewith.

their correspondence with Penn Central requesting separation allowances, the 6 Claimants in Watjen and Bundy believed that since their positions had been abolished and Penn Central did not “offer” to allow them to follow their jobs, that they were automatically entitled to a lump sum separation allowance.

It is also clear from the Claimants’ requests that they did not attempt to exercise their seniority rights prior to making their requests and therefore are disqualified from receiving any benefits under the MPA. For example, on January 28, 1969 (just 18 days after receipt of the job abolishment notice), in response to the notice from Penn Central, Claimant Thomas O’Neil wrote that “in the absence of the merged company to offer me an election to follow my work or to resign in lieu of making the requested transfer, I am formally requesting the lump sum separation allowance.” On January 16, 1969 (just 6 days after receipt of the job abolishment notice), Claimants Robert Watjen and Phillip Franz sent identical letters to Penn Central in response to the transfer notice, stating: “ I wish to advise that I do not want to follow my work to the S.R.A. in Chicago, Ill. I choose to take my separation allowance.” The other 3 Claimants sent out similar letters to Penn Central requesting a lump sum separation allowance.

These Claimants were under a duty to exercise their seniority rights to any “position in the coordinated operation,” i.e., Penn Central, as a condition precedent to eligibility for a lump sum separation allowance. Section 7(c) of the WJPA. In their correspondence, the Claimants state the reasons for requesting the lump sum separation allowance with statements such as “I do not want to follow my work” and “in lieu of making the requested transfer.” These are not valid bases for entitlement to separation allowances under the WJPA. For one, the Claimants were not requested to transfer with their job. The notice clearly states “your position is being abolished as the work you are now performing is being transferred,” and does not request the employee to

transfer. Additionally, the only basis upon which an employee would be entitled to a separation allowance is if he is deprived of employment, and if through the exercise of his seniority rights he is unable to obtain any position within Penn Central, only then would he meet the requirements for a lump sum separation allowance. It is clear from their correspondence that the Claimants believed simply because their jobs were transferred, that they were entitled to a lump sum separation allowance.

That is not the case. They were required to exercise their seniority rights to another position but failed to do so. The Claimants also refused to accept the position of utility employee, which is a disqualification under Section 7(c)(1) of the WJPA, as the job of utility employee was “a position in the coordinated operation,” and the Claimants’ refusal of such position does not leave them deprived of employment under the WJPA. Since the Claimants declined to accept the position of utility employee, they were not deprived of employment, and are not entitled to benefits under the MPA. This position is supported by the decision in Erie-Lackawana Railroad Company v. Alexander Marino, (Committee Decision), which involved an employee who had advised the Carrier that he did not desire to bid on available positions because he had previously submitted a request for severance pay. However, the committee held that, by refusing to accept regular employment, the Claimant forfeited any possibility of receiving a lump sum separation allowance under the WJPA, as there were then positions available to him under the applicable implementing agreement. Id. at 84.

The Claimants failed to comply with the requirements under both the MPA and WJPA, and are not entitled to any benefits under such agreements. The Claimants in Watjen and Bundy not only failed to exercise their seniority rights to available positions, but they refused to accept the position of utility employee which was offered to them in their furlough notices. This refusal

to exercise their seniority rights and accept available work is factually identical to the claims brought before the Sixth Circuit in Augustus. The Claimants in Watjen and Bundy, like those in Augustus, refused to accept positions available to them in the exercise of their seniority rights, and are thus barred from receiving benefits under the MPA.

E. Claimants Are Not Entitled To Benefits Under The MPA Because They Have No Wage Or Salary Records That Prove They Made Less Money Post-Merger Than They Did Pre-Merger

A Claimant is not entitled to benefits under the MPA unless they demonstrate, along with other factors, that they were “placed in a worse position with respect to compensation.” MPA Section 1(b). Thus, Claimants in Knapik and Sophner must demonstrate that they earned less than their base salary under Appendix E of the MPA. The Claimants will fail to demonstrate this critical element at the arbitration as all of the Claimants do not even know what their base salary was. The only way to determine a Claimants base salary is by reference to his compensation during the “base period” which comprises the twelve months preceding May 16, 1964, in accordance with Appendix E of the MPA. Claimants have not, and will not, be able to demonstrate what their base salary was because they have not kept their own wage and salary records which relate to this litigation. However, in an attempt to show that the Claimants earned less than their unknown base salary, and thus adversely affected as to their compensation, the Claimants may offer a smattering of W2’s and Railroad Retirement Board records. On the basis of only these woefully incomplete documents, they may ask this Arbitration Panel to find that they made less than their unknown base salary and that therefore they are entitled to benefits under the MPA. But, the Claimants cannot be found to have been adversely affected with respect to their compensation if they are not able to prove that they made less post-merger than their base salary, pre-merger.

Thus, the Claimants' inability to produce the amount of their base salary makes it impossible to determine if an employee has been adversely affected as to their compensation. Since the base salary is not reflected in W2's or Railroad Retirement Board records, no probative value can be placed on these financial documents. The Claimants in Knapik and Sophner claim to have been adversely affected with respect to their compensation, yet provide no basis to prove such allegations. Once again, the Claimants bear the "whole burden of proof" on this issue, and are not entitled to benefits under the MPA unless they satisfy this burden. Advantage Enterprises, Inc., et al., 813 F. Supp. at 598. This burden entails demonstrating that that they have been "adversely affected with respect to their compensation." MPA Section 1(a). However, the Claimants have not, and will not be able to, put forth a shred of evidence showing what their base salary is. This is critical to each Claimant's case because if he cannot prove the amount of his base salary, he cannot meet his burden of proving that he made less than that amount in any month during his employment with Penn Central. The only way to show entitlement to a displacement allowance is to provide what their base salary was in accordance with Appendix E of the MPA, and then show that they made less than the divisible amount in any month subsequent to the merger. The Claimants in Knapik and Sophner have failed to show both. Each Claimant should have been well aware of what his salary was between May 16, 1963 through May 16, 1964, which is not reflected in either W2's or Railroad Retirement Board documents, as it was imperative to their rights under the MPA. It is impossible to determine if a Claimant made less than his baseline salary if the baseline salary is unknown.

Instead of producing the relevant documents, which should be in the Claimants possession since it is their burden of proof, they rely on the expert report of Dr. Rosen to establish that they were adversely affected as to their compensation. However, Dr. Rosen's

arbitrary calculation of damages is incorrect and does not comport with the proper calculation of benefits under the MPA. Dr. Rosen utilizes a generic “forecasted wage” formula which allegedly shows what the average carman or trainman made in the corresponding year. Dr. Rosen then compares that number with earnings from the Claimants’ Railroad Retirement Board records for that year to determine if a Claimant experienced a loss. What the report does not state is that displacement allowances are calculated monthly, not yearly as Dr. Rosen suggests. It is completely irrelevant that a Claimant made less in any year as compared to a generic “forecasted wage” formula as the Claimants suggest. Once more, the Claimants in Sophner and Knapik are basing their entire claims, i.e., that they have been adversely affected with respect to their compensation, solely upon Dr. Rosen’s misleading and incorrect wage calculations.

Not only are Rosen’s calculations misleading, they have absolutely no probative value because they are not based on the MPA contract language. Rosen literally makes up a formula and calculation that is nowhere in the agreement. As such, Rosen’s calculations must be disregarded in their entirety.

The Claimants’ allegations are nothing more than baseless assertions with no evidentiary support which would entitle them to benefits under the MPA. The Claimants are required to prove: (1) what their base salary was and (2) they made less than the divisible amount of the base salary in any month post-merger in order to qualify for benefits under the MPA. The Claimants have not, and will not, be able to prove any of the above requirements.

## VII. CONCLUSION

The Claimants do not have viable claims against Penn Central because the Claimants will not be able to meet each element of their burden of proof. In order to establish that they are entitled to benefits under the MPA, the Claimants must each prove: (1) they were furloughed or

adversely affected as a result of the merger; (2) that they reported for work in compliance with the rule of law set forth by the Sixth Circuit in Augustus; (3) that they exercised their seniority rights in compliance with the express terms of the MPA; **and** (4) that they were adversely affected with respect to their compensation. The Claimants' complete lack of evidence will result in their failure to prove any of the above elements, let alone prove each of the elements which is necessary for any recovery.

Even after Penn Central attempted to obtain this evidence from the Claimants through discovery, the Claimants provided no evidence to support their allegations. Listed below, for each Claimant, are the documents and testimony which Claimants have supplied to Penn Central from over thirty years of litigation which relate to the Claimants' base salary and their purported exercise of seniority rights in accordance with the MPA:

NAME	BASE SALARY	EVIDENCE REGARDING <i>AUGUSTUS</i> AND REPORTING FOR WORK ISSUE
Jack Acree <i>Knapik Claimant</i>	None provided by Claimant	Affidavit of Wife, Mary Acree, which does not state whether or when Mr. Acree reported for work after being furloughed. Without providing specific months in which he was adversely affected as to his compensation and that he fully exercised his seniority during those months, Mr. Acree has not met his burden of proving that he was entitled to a displacement allowance under the MPA.
Edward Benko <i>Knapik Claimant</i>	None provided by Claimant	Testimony of Raymond Beedlow stating that Mr. Benko reported for work in 1969, a year after the merger. (1990 Arb. Dig. at 31) Mr. Benko was required to report to work immediately and to exercise his seniority to the fullest extent possible after being furloughed, pursuant to the holding in <u>Augustus</u> and the requirements under the Top and Bottom Agreement. His failure to exercise his seniority rights and to report for available work within the requisite 15 days from receipt of the notice disqualifies him from benefits under the MPA.
Kenneth Day <i>Knapik Claimant</i>	None provided by Claimant	Testimony of Raymond Beedlow stating that Mr. Day went back to work at the Freight Yard "several months" after he was furloughed. (1990 Arb. Dig. at 48) Mr. Day was required to report to work immediately after being furloughed, not "several months" later, pursuant to the holding in <u>Augustus</u> and the requirements under the Top and Bottom Agreement. His failure to exercise his seniority rights and to report for available work within the requisite 15 days from receipt of the notice disqualifies

		him from benefits under the MPA.
Harvey Doran <i>Knapik Claimant</i>	None provided by Claimant	Affidavit of Walter Potosky stated that Mr. Doran was furloughed in February 1968 and did not report for work until December 1969. (Potosky Affidavit at 3) Mr. Doran was required to report to work immediately and to exercise his seniority to the fullest extent possible after being furloughed, pursuant to the holding in <u>Augustus</u> and the Top and Bottom Agreement. His failure to exercise his seniority rights and to report for available work within the requisite 15 days from receipt of the notice disqualifies him from benefits under the MPA.
Joseph Gastony <i>Knapik Claimant</i>	None provided by Claimant	None provided by Claimant.
George Gentile <i>Knapik Claimant</i>	None provided by Claimant	None provided by Claimant.
George Norris <i>Knapik Claimant</i>	None provided by Claimant	None provided by Claimant.
Christ Steimle <i>Knapik Claimant</i>	None provided by Claimant	Mr. Steimle's affidavit states in a conclusory fashion that he reported for work in the Freight Yard without giving the month or year when he first reported for work after being furloughed. (Steimle Affidavit at 2) The Claimants were required to fully exercise their seniority rights by reporting for work and responding to recall notices, pursuant to the holding in <u>Augustus</u> and the Top and Bottom Agreement. Without providing specific months in which he was adversely affected as to his compensation and that he fully exercised his seniority during those months, Mr. Steimle has not met his burden of proving that he was entitled to a displacement allowance under the MPA. His failure to exercise his seniority rights and to report for available work within the requisite 15 days from receipt of the notice disqualifies him from benefits under the MPA.
Clarence Tomczak <i>Knapik Claimant</i>	None provided by Claimant	Affidavit of Wife, Miriam Tomczak, which does not state whether or when Mr. Tomczak reported for work after being furloughed. The Claimants were required to fully exercise their seniority rights by reporting for work and responding to recall notices, pursuant to the holding in <u>Augustus</u> and the Top and Bottom Agreement. Without providing specific months in which he was adversely affected as to his compensation and that he fully exercised his seniority during those months, Mr. Tomczak has not met his burden of proving that he was entitled to a displacement allowance under the MPA. His failure to exercise his seniority rights and to report for available work within the requisite 15 days from receipt of the notice disqualifies him from benefits under the MPA.
Frank Uher <i>Knapik Claimant</i>	None provided by Claimant	Affidavit of Wife, Hermine Uher, which does not state whether or when Mr. Uher reported for work after being furloughed. The Claimants were required to fully exercise their seniority rights by reporting for work and responding to recall notices, pursuant to the holding in <u>Augustus</u> and the Top and Bottom Agreement. Without providing specific months in which he was adversely affected as to his compensation and that he fully exercised his

		seniority during those months, Mr. Uher has not met his burden of proving that he was entitled to a displacement allowance under the MPA. His failure to exercise his seniority rights and to report for available work within the requisite 15 days from receipt of the notice disqualifies him from benefits under the MPA.
William Billinsky <i>Sophner Claimant</i>	None provided by Claimant	None provided by Claimant.
Joseph Crtalic <i>Sophner Claimant</i>	None provided by Claimant	None provided by Claimant.
Paul Foecking <i>Sophner Claimant</i>	None provided by Claimant	None provided by Claimant.
John Gallagher <i>Sophner Claimant</i>	None provided by Claimant	In his deposition, Mr. Gallagher did not know of any dates he reported for work or how often he exercised his seniority rights. (Gallagher Depo. at 20) He believes he was furloughed in 1962 and reported for work immediately thereafter. (Gallagher Depo. at 27) However this is irrelevant considering that the MPA was not entered into until 1964, and the merger did not occur until 1968. Without providing specific months in which he was adversely affected as to his compensation and that he fully exercised his seniority during those months, Mr. Gallagher has not met his burden of proving that he was entitled to a displacement allowance under the MPA.
Gus Janke <i>Sophner Claimant</i>	None provided by Claimant	None provided by Claimant.
Joseph Jarabeck <i>Sophner Claimant</i>	None provided by Claimant	None provided by Claimant.
Edwin Kochenderfer <i>Sophner Claimant</i>	None provided by Claimant	None provided by Claimant.
Robert Schreiner <i>Sophner Claimant</i>	None provided by Claimant	None provided by Claimant.
Patrick McLaughlin <i>Sophner Claimant</i>	None provided by Claimant	None provided by Claimant.
Robert McNeely <i>Sophner Claimant</i>	None provided by Claimant	In his deposition, Mr. McNeely stated that he ceased working at the CUT in 1967, prior to the merger. (McNeeley Depo. at 15) He then reported to Rockport "a couple of months" later. (McNeeley Depo. at 15) Mr. McNeely reaffirms Penn Central's position that these Claimants were furloughed as a result of the decline in passenger service by stating that he lost his position due to the "end of the passenger trains." (McNeeley Depo. at 15) Further, Mr. McNeely was required to fully exercise his seniority to available jobs immediately upon being notified of available jobs, not "a couple of months" later. His failure to fully exercise his seniority rights, disqualifies him from benefits under

		the MPA.
Andrew Novotny <i>Sophner Claimant</i>	None provided by Claimant	In his deposition, Mr. Novotny does not remember when he was furloughed. (Novotny Depo. at 17) He believes he was furloughed for about week when he reported to Collinwood, where he worked for a week or two before reporting to Rockport. (Novotny Depo. at 19) Mr. Novotny states that he made about the same amount of money at Rockport as he did when working for the CUT. (Novotny Depo. at 20) Without providing specific months in which he was adversely affected as to his compensation, Mr. Novotny has not met his burden of proving that he was entitled to a displacement allowance under the MPA. Mr. Novotny admits that he made "about the same amount of money" at Rockport as he did at the CUT, showing that he was not adversely affected.
Martin Opalk <i>Sophner Claimant</i>	None provided by Claimant	None provided by Claimant.
Louis Pentz <i>Sophner Claimant</i>	None provided by Claimant	None provided by Claimant.
Paul Scuba <i>Sophner Claimant</i>	None provided by Claimant	None provided by Claimant.
George Sophner <i>Sophner Claimant</i>	None provided by Claimant	None provided by Claimant.
Peter Sowinski <i>Sophner Claimant</i>	None provided by Claimant	None provided by Claimant.
Phil Franz <i>Watjen Claimant</i>	N/A	Job abolishment notice on January 10, 1969 and Mr. Franz' request for a separation allowance just six days later on January 16, 1969. In his deposition, Mr. Franz testified that after his job was abolished on January 10, 1969, he requested his severance pay and did not indicate that he exercised his seniority rights to available positions upon receiving the job abolishment notice. (Franz Depo. at 14) In order to be entitled to a severance allowance, the Claimant must prove that he fully exercised his seniority to available jobs. The Claimants have put forth no evidence that Mr. Franz exercised or even attempted to exercise his seniority and is therefore not entitled to a severance allowance.
Thomas O'Neil <i>Watjen Claimant</i>	N/A	Job abolishment notice on January 10, 1969 and Mr. O'Neil's request for a separation allowance on January 28, 1969 which does not indicate that he exercised his seniority rights to available positions upon receiving the job abolishment notice. In order to be entitled to a severance allowance, the Claimant must prove that he fully exercised his seniority to available jobs. Claimants have put forth no evidence that Mr. O'Neil exercised or even attempted to exercise his seniority and is therefore not entitled to a severance allowance.
Robert Watjen	N/A	Job abolishment notice on January 10, 1969 and Mr. Watjen's request for a separation allowance just six days later on January

<i>Watjen Claimant</i>		16, 1969 which does not indicate that he exercised his seniority rights to available positions upon receiving the job abolishment notice. In order to be entitled to a severance allowance, the Claimants must prove that he fully exercised his seniority to available jobs. Claimants have put forth no evidence that Mr. Watjen exercised or even attempted to exercise his seniority and is therefore not entitled to a severance allowance.
Anna Mae Wuliger <i>Watjen Claimant</i>	N/A	Job abolishment notice on January 10, 1969. In order to be entitled to a severance allowance, the Claimant must prove that she fully exercised her seniority to available jobs. Claimants have put forth no evidence that Ms. Wuliger exercised or even attempted to exercise her seniority and is therefore not entitled to a severance allowance.
David Bundy <i>Bundy Claimant</i>	N/A	Job abolishment notice on January 10, 1969 and his subsequent correspondence requesting a severance allowance on February 28, 1969. In order to be entitled to a severance allowance, the Claimant must prove that he fully exercised his seniority to available jobs. Claimants have put forth no evidence that Mr. Bundy exercised or even attempted to exercise his seniority and is therefore not entitled to a severance allowance.
James Feldscher <i>Bundy Claimant</i>	N/A	Job abolishment notice on January 10, 1969 and his request for a severance allowance on January 26, 1969 which does not indicate that he exercised his seniority rights upon receiving the job abolishment notice. In order to be entitled to a severance allowance, the Claimant must prove that he fully exercised his seniority to available jobs. Claimants have put forth no evidence that Mr. Feldscher exercised or even attempted to exercise his seniority and is therefore not entitled to a severance allowance.

Penn Central will present ample and compelling evidence that the Claimants were not furloughed or otherwise adversely affected as a result of the merger, but as a result of the precipitous decline in rail passenger traffic. Claimants have not produced one shred of evidence to rebut this evidence and will not be able to do so at the arbitration proceedings.

Penn Central will demonstrate that the Claimants in Knapik have failed to put forth any evidence demonstrating that they reported for work at the Freight Yard within the established timeframe under the Top and Bottom Agreement, as instructed to do pursuant to the February 21, 1968 furlough notice. This failure to report for work in compliance with the decision in Augustus results in their disqualification from benefits under the MPA.

All Claimants have failed to put forth any evidence demonstrating that they exercised their seniority rights in compliance with the existing agreements. The Claimants in Knapik and Sophner have not shown that they complied with the terms of the MPA and exercised their seniority rights to all available positions during the months they claim to have been adversely affected, resulting in their non-compliance with the requirements under the MPA. Furthermore, the Claimants in Watjen and Bundy failed to exercise their seniority rights to available positions and also declined to accept the position of utility employee, thereby disqualifying themselves from benefits under the MPA.

The Claimants in Knapik and Sophner will also not be able to prove that they were adversely affected within the meaning of the MPA. The Claimants will not be able to establish what their base salary was, and thus will not be able to prove that they made less than the divisible amount of their base salary in any month post-merger. The Claimants' inability to prove that they have been adversely affected with respect to their compensation disqualifies them from receiving benefits under the MPA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing Pre-Arbitration Brief was sent on December 3, 2007 by email transmission (except for Mr. Goldfarb) to:

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