

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

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

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I. SUMMARY OF ARGUMENT

This case is a contract case. To prove their entitlement to any recovery, each Claimant must prevail on three contract issues. If a Claimant fails to meet his burden of proof on any one of the three, that Claimant may not recover. The three contract issues before this Panel were defined first by Judge Lambros and then by the Sixth Circuit. Judge Lambros framed the first

issue as: “[W]ere plaintiffs placed in a worse condition with respect to their employment by reason of the merger?”<sup>1</sup> In Augustus v. Surface Transportation Board, 2000 U.S. App. LEXIS 33966 (6<sup>th</sup> Cir. 2000) (“Augustus”), the Sixth Circuit articulated the second issue this way: “whether the claimants had sufficiently complied with the MPA’s requirements so as to warrant an award of benefits.”<sup>2</sup> The third issue is proof of compensation loss as defined and set forth in the Merger Protection Agreement of 1964 (“MPA”); in Judge Lambros’ words: “the plaintiffs now must come forward with evidence to support the position that there was compensation loss to which they are entitled to payment.”<sup>3</sup> As Judge Lambros and the Sixth Circuit made clear, Claimants have the burden of proof on each of these three issues.

None of the Claimants is entitled to any recovery because not one of them met their evidentiary burden on any, let alone all three, of the contract issues. The record in this case ties the Panel's hands. The record is clear and unambiguous. The record compels the Panel to deny the claims of each and every Claimant because each Claimant failed to prove by a preponderance of the evidence that he:

1) **was placed in a worse condition with respect to his employment by reason of the merger**

- No Claimant was "adversely affected" or placed in a worse condition *because of* the merger. Rather, the unrefuted evidence adduced during the arbitration is that the merger between the New York Central (“NYC”) and Pennsylvania Railroad (“PRR”) did not affect or have any impact on the Cleveland Union Terminal (“CUT”) at all. The CUT was a NYC

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<sup>1</sup> 1976 Lambros Ruling (Claimants’ Exhibit 4) at 19.

<sup>2</sup> Augustus at \*5.

<sup>3</sup> 1976 Lambros Ruling at 35.

passenger station and no PRR employees came to that station to displace, or take any available jobs from, any CUT employee.

- All of the Claimants were, however, adversely affected by the precipitous decline in passenger traffic through the CUT, as conclusively demonstrated by the unrebutted testimony of railroad expert Michael Weinman and as several of the Claimants themselves admitted. It is uncontested that this decline in passenger traffic was completely unrelated to the merger and was simply a continuation of documented existing trends.
- There is no competent evidence in the record that any Sophner Claimant was adversely affected as a result of the merger.

2) **complied with the MPA's requirements so as to warrant an award of benefits**

- Each Knapik Claimant conceded that he did not report to work at the NYC freight yard within the prescribed time period under the Top and Bottom Agreement as required by the February 1968 furlough notice. The Sixth Circuit has previously ruled that such failure to report precludes a Claimant from any benefits under the MPA.
- Every Watjen and Bundy Claimant is barred from receiving a separation allowance under the MPA because they all voluntarily quit full-time utility employee jobs with Penn Central Transportation Company ("Penn Central"). These Claimants were given full-time jobs as utility employees after the merger and thus were not "deprived of employment" under

Section 7(a) of the Washington Job Protection Agreement of 1936 (“WJPA”), a prerequisite to a separation allowance.

3) **suffered compensation loss as defined by the MPA and for which the MPA provides entitlement to payment**

- No Claimant came forward with any competent evidence that there was compensation loss which entitled them to payment under the MPA. As the Panel heard during Dr. Rosen's cross examination, he completely failed to follow the formula under the MPA to calculate compensation loss for any Claimant. The calculations Dr. Rosen did make are not part of, nor permitted by, the express terms of the MPA and, therefore, are not evidence of compensation loss.

In a desperate attempt to divert the Panel from their failure to meet their evidentiary burden, Claimants made wild allegations and bold assertions – that Penn Central spoiled evidence, that recall to work means the same as report to work, that Dr. Rosen's calculations were permitted by Appendix E, and that Penn Central endlessly delayed and protracted this litigation. Each of these charges proved to be utterly false and without merit. These accusations are red herrings made to prejudice the Panel and stampede it into an award for the Claimants even though there is no evidence in the record that any of them met their burden of proof for any of the three contract issues.

If the Claimants had played this fast and loose with the truth before any District Court Judge in the country, their credibility would be zero. Litigants cannot do such violence to the truth about so many issues and expect a trier of fact to believe anything they say. Given the record of these mischaracterizations, Penn Central cannot imagine the Panel giving Claimants'

case any credibility or credence at all. Indeed, without doubt, the Federal Courts who will review this record will be aghast at the Claimants' mischaracterizations.

## II. PROCEDURAL HISTORY

The relevant procedural history in this matter has been well documented in previous filings with this Panel and is highlighted only briefly here. The MPA was collectively bargained and entered into between the NYC, the PRR, and the railroad unions in 1964 to provide certain benefits to any worker who was adversely affected as a result of the planned consolidation of the two railroads. The merger was consummated on February 1, 1968. Claimants here, former workers at the CUT, filed a total of four suits in the ensuing six years, both before and after Penn Central filed for bankruptcy protection, alleging entitlement to MPA benefits. They sought, and were granted, leave from the bankruptcy court to pursue their claims, subject to that court's retaining jurisdiction to enter and enforce the result.

Various finders of fact, including the District Court and two previous arbitration panels, have heard these claims and, each time, Claimants have appealed the result – to the Surface Transportation Board and to the Sixth Circuit. These various adjudicatory tribunals, together with the bankruptcy court, have framed the three contract issues before this Panel. Thirty-two Claimants remain. During the four-day arbitration before this Panel, they were given yet another opportunity to present competent evidence to prove their claims. They utterly failed to do so.

Before and during the arbitration, Claimants' counsel continued to represent to the Panel that the Reorganization Court does not have jurisdiction over the claims, the Claimants may obtain an award against the Reorganized Company, and the Claimants are entitled to interest, punitive damages and attorney's fees. On January 9, 2008, however, Judge Fullam granted Penn Central's petition and exposed the Claimants' statements to this Panel as more

mischaracterizations. In the Order, which was provided to the Panel, Judge Fullam restated black letter bankruptcy law and reinforced the principles he had set forth in the previous conference call with the parties and his previous Order -- that awards of interest, punitive damages or attorney's fees, if any, will not be enforceable. Most importantly, Judge Fullam held the decision of the Panel can be entered and enforced only by the Reorganization Court and no other court.

### III. ARGUMENT

#### A. **The Claimants Fail on the First Contract Issue – No Claimant Put Forth Any Competent Evidence to Meet His Burden of Proof That He Was Placed in a Worse Condition With Respect to His Employment By Reason of the Merger**

##### i. The Claimants Did Not Meet Their Causation Burden of Proof That Any Job Loss, Loss of Seniority, or Reduction in Pay Was as a Result of the Merger

The MPA and WJPA specifically require the Claimants to demonstrate that any loss they sustained was a result of the merger of the PRR and NYC. If they cannot do so, and they did not do so at the arbitration, they cannot recover MPA benefits. The MPA is clear, unambiguous, 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 initially demonstrated by the very title of the document – “Agreement For Protection of Employees in Event of Merger of Pennsylvania and New York Central Railroads.”<sup>4</sup> 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

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<sup>4</sup> MPA (PCTC Exhibit 100), p. 1.

which will or may have **adverse effect upon employees** represented by the labor organization parties hereto.

(emphasis added). Two paragraphs later, the MPA quotes Section 5(2) of the Interstate Commerce Act<sup>5</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 employees 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 employees 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 employees of Pennsylvania and Central,”<sup>6</sup> and is attached as Appendix A to the MPA. The

WJPA states:

[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** . . .<sup>7</sup>

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<sup>5</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.”)

<sup>6</sup> MPA, p. 1.

<sup>7</sup> WJPA (PCTC Exhibit 100), Section 1 (emphasis added).

The intent of the WJPA and the MPA is clearly expressed -- to provide protection to employees adversely affected solely as a result of the merger. The Sixth Circuit has also spoken on the causation issue, ruling that the MPA was “for the protection of employees affected by the proposed merger.”<sup>8</sup> In his 1976 Ruling, Judge Lambros specifically required the Claimants to demonstrate causation, thereby framing their first contract issue:

[W]ere plaintiffs placed in a worse condition with respect to their employment by reason of the merger? . . . [I]f the railroad takes the position that they declined work which was available, then of course the merger protection agreement provides that would not be a condition where they were placed in a worse position.<sup>9</sup>

Thus, Claimants are first required to demonstrate that they were furloughed from their positions or were otherwise adversely affected as a result of the merger. The MPA was designed to protect railroad workers from job loss and benefit loss resulting from combination of the NYC and PRR, not from unrelated reasons. Indeed, the MPA via the WJPA anticipated job loss and compensation loss brought about by causes unrelated to the merger: “[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.”<sup>10</sup> Thus, for example, the Claimants would not receive benefits under the MPA if a fire or explosion damaged the CUT thereby causing a decline in traffic and reduction of jobs.

The Claimants introduced no evidence at the arbitration demonstrating they have been adversely affected **as a result of the merger**. The most some of them have alleged is a temporal proximity between the consummation of the merger and their furlough or alleged adverse effect.

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<sup>8</sup> Augustus at \*2.

<sup>9</sup> 1976 Lambros Ruling at 19.

<sup>10</sup> WJPA, Section 1.

A mere temporal relationship, however, is not enough to meet their initial burden of proving that the merger was the proximate cause of an adverse effect to them under the MPA. Tuttle v. Metro. Gov't of Nashville, 474 F.3d 307, 321 (6<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> Cir. 2007) (temporal proximity, alone, is not enough to establish an essential element of the claim). The Claimants failed to put forth any evidence proving a causal connection between the merger and any adverse effect upon them. Claimants thus failed to make even a prima facie showing of the necessary proximate causation and, therefore, their claims must be denied. Moreover, not only did Claimants fail to meet their burden of proof on the first contract issue, but further Penn Central conclusively established during the arbitration that these Claimants were not adversely affected by the merger.

a. None of the Claimants Could Have Been “Adversely Affected” by the Merger Because the Merger Had No Impact on the CUT

Unrefuted evidence at the hearing established that the merger or combination between the NYC and PRR had absolutely **no impact** or effect on the CUT, let alone an adverse impact.

Railroad expert witness Michael Weinman testified:

**The merger had almost no effect on the CUT and the reason was that the Pennsylvania Railroad, which, of course, was one of the partners in the merger, had not served the Cleveland area with passenger trains for several years. The Pennsylvania Railroad's passenger service to Cleveland ended in approximately 1965 . . . in fact the Pennsylvania Railroad had never used Cleveland Union Terminal . . . So three years went by [before the merger] with no passenger service whatsoever of the Pennsylvania [anywhere in Cleveland] and therefore when the merger**

occurred, the Pennsylvania was a nonentity as far as passenger service in Cleveland . . . ergo, there would have been no effect of the merger itself on the Cleveland Union Terminal.<sup>11</sup>

Clearly, the Claimants' jobs at the passenger facility CUT were not adversely affected by the combination of the PRR with the NYC.<sup>12</sup> There was no redundancy between PRR operations and NYC operations at the CUT. Thus, when the NYC and PRR merged, there was no "combination" of personnel or other resources at the CUT. PRR employees did not come in and take away jobs from NYC employees at the CUT. There were never any PRR employees, jobs or positions at the CUT. As is clear from Mr. Weinman's testimony and basic logic, NYC and PRR operations could be combined and workforces reduced as a result of the combination only where the NYC and PRR were operating in the same region and where both entities had employees performing comparable work. This was not the case at the CUT. The perceived efficiencies which are standard components of mergers and consolidations were completely irrelevant to what happened at the CUT.

Claimants put forth **no evidence** to the contrary to prove they were "adversely affected" as a direct result of the combination of the railroads. Claimants failed to show that specific facilities were consolidated resulting in excess employees, which is a critical element necessary to meet their burden of proving adverse effects caused by a consolidation. Because Claimants failed to prove that each of them was placed in a worse condition with respect to his employment by reason of the merger, they lose on the first contract issue before the Panel and each of their claims must be denied.

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<sup>11</sup> Arbitration Transcript at 538.

<sup>12</sup> The WJPA and MPA were designed to protect hundreds of thousands of employees systemwide from the adverse result of huge railroads combining operations and reducing work force to achieve efficiencies. Claimants themselves admit this -- "One of the goals of the merger was to maximize efficiency and to consolidate operations of the two carriers." Claimants' Opposition Brief to Penn Central's Motion for Summary Judgment at 9.

ii. Penn Central Conclusively Demonstrated at the Arbitration 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

Not only did Claimants fail to carry their burden of proof, but Penn Central provided compelling evidence that the decline in passenger traffic was the cause of any adverse effect on the Claimants. Most tellingly, several Claimants themselves testified that any adverse effect was a direct result of a substantial decline in passenger traffic that led to fewer available positions, and not due to the merger. 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.**<sup>13</sup>

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.**<sup>14</sup>

These are the Claimants' own witnesses testifying -- **on direct** -- that their job loss was caused, not by the merger, but by the decline in passenger service at the CUT. There is no evidence in the record before this Panel to rebut their testimony. The only additional evidence on this point was the corroborating testimony of railroad expert witness Michael Weinman,

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<sup>13</sup> PCTC Exhibit 76 at 15.

<sup>14</sup> Arbitration Transcript at 109.

which Claimants also failed to rebut. Accordingly, the Panel can only conclude that job loss at the CUT was caused by a decline in passenger service.

The Claimants' forthright statements provide real-time perspective of the well-documented decline in passenger traffic at the CUT in, and continuing after, 1968. Mr. Weinman confirmed the decline with detailed testimony and confirming statistics. 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 Mr. Weinman testified, the decline in passenger traffic at the CUT began before, and continued after, the merger:

Q: Prior to the merger, was the passenger service declining nationally?

A: Yes, it was.

Q: Prior to the merger, was the passenger service declining for the New York Central and Pennsylvania Railroads?

A: Yes, it was.

Q: Did that decline continue after the merger?

A: Yes, it did.<sup>15</sup>

Mr. Weinman's testimony traces the undeniable severe national decline in rail passenger traffic prior and subsequent to 1968. The advent of more convenient modes of transportation in the 1940s attracted prospective rail passengers. The effects of that trend were felt in rail passenger yards across the nation, particularly in the Northeast Corridor. Passenger activity at the CUT mirrored the downward national trend of the rail passenger industry. As Mr. Weinman testified, 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

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<sup>15</sup> Arbitration Transcript at 536.

years between 1961 and 1971.<sup>16</sup> The number of passenger cars decreased even more drastically – from 231,936 to 0 – in the same time period.<sup>17</sup> Mr. Weinman also testified to the corresponding decline in labor needs at the CUT during the late 1960s, when these Claimants assert they were adversely affected. The number of CUT employees diminished proportionately to the number of trains and passenger cars at the CUT.<sup>18</sup> In 1961, the CUT had just over 550 employees.<sup>19</sup> By 1971, there were only about 60 employees needed to provide services.<sup>20</sup> When asked about the correlation between the decline in passenger service and that of the labor force at the CUT in the late 1960's, Mr. Weinman unequivocally testified:

The labor force at CUT reacted to the decline in passenger service because the management reacted to it by discontinuing jobs, discontinuing assignments and reducing the resources applied to that commensurate with the decline in passengers and the revenue therefrom. It was a case that affected virtually every craft at Cleveland Union Terminal. **Every craft lost job opportunities as a result of the diminution of the passenger service through CUT.**<sup>21</sup>

Clearly, as Mr. Weinman substantiates, the decline in rail passenger traffic that continued into 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.<sup>22</sup> This testimony stands unrebutted in the record before the Panel.

Thus, the CUT, a passenger yard, experienced a substantial decline in rail passenger traffic between 1949 and 1971. The decline in passenger trains directly impacted the operations at the CUT, which resulted in fewer employees needed to handle the decreased passenger traffic and, therefore, less available work, particularly between 1968 and 1971 when these Claimants

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<sup>16</sup> Arbitration Transcript at 529.

<sup>17</sup> Arbitration Transcript at 536.

<sup>18</sup> Arbitration Transcript at 534.

<sup>19</sup> Weinman Affidavit, ¶2i (PCTC Exhibit 2).

<sup>20</sup> Weinman Affidavit, ¶2i (PCTC Exhibit 2).

<sup>21</sup> Arbitration Transcript at 540 (emphasis added).

<sup>22</sup> Arbitration Transcript at 540 & 541.

claim to have been adversely affected. Any remote implication of causation solely because of the temporal relation between the merger and some Claimants' furloughs is completely refuted by the undeniable facts in the record. The only cause and effect relationship that has been proved in this case was between the decrease in passenger traffic at the CUT and the subsequent furloughs and decrease in available positions. Fewer employees were needed at the CUT, not because of the merger, but simply because of the ever-decreasing amount of passenger traffic flowing through the CUT at that time. By 1968, when many of these Claimants were furloughed or claim to have been adversely affected, there were only 11 trains per year at the CUT.<sup>23</sup> Between 1945 and 1960, NYC lost over \$500 million in passenger operations, and this dramatic decline continued into the late 1960s, thereby creating the need for a national passenger rail carrier, Amtrak. Hence, the clear, overwhelming evidence in the record establishes that any adverse effect upon Claimants was caused by the decline in passenger traffic, a cause completely unrelated to the merger.

The Claimants failed to present any competent evidence that any loss they suffered was a result of the merger. The MPA itself, by incorporating the WJPA, anticipated adverse effects from causes other than the merger. The agreement specifically bars recovery due to "fluctuations, rise and falls and changes in volume or character of employment brought about solely by other causes . . . ."<sup>24</sup> The only evidence in the record is that there was a sharp decrease in passenger service at the CUT which resulted in fewer available jobs at the CUT. The Claimants not only failed to meet their initial burden of proving that they suffered adverse effects as a result of the merger, but also failed to rebut Penn Central's evidence that the decline in passenger traffic, wholly unrelated to the merger, caused the decrease in available work at the

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<sup>23</sup> Arbitration Transcript at 534; PTSI Report at PCC003904 & PCC003907.

<sup>24</sup> WJPA, Section 1.

CUT. Because Claimants failed to prove that each of them was placed in a worse condition with respect to his employment by reason of the merger -- the first contract issue before the Panel -- each of their claims must be denied.

iii. There is No Evidence in the Record That Any *Sophner* Claimant Was Adversely Affected By the Merger

There is no competent evidence in the record that any of the Sophner Claimants was adversely affected as a result of the merger. The only evidence is that the Sophner Claimants were furloughed well before or well after the February 1, 1968 merger. Even the slight temporal relationship that exists for some of the other Claimants between the time of the merger and some adverse effect on them is missing with respect to the Sophner Claimants.

Set forth below is a list of the Sophner Claimants and each of their dates of furlough<sup>25</sup>:

<u>Sophner Claimant</u>	<u>Date of Furlough</u>
William Billinski	November 7, 1965
Joseph Crtalic	August 12, 1969
Paul Foecking	February 5, 1964
John Gallagher	September 3, 1962
Gus Janke	April 30, 1971
Joseph Jarabeck	April 30, 1971
Edwin Kochenderfer	April 30, 1971
Robert Schreiner	August 27, 1969
Paul McLaughlin	February 18, 1967
Robert McNeeley	July 18, 1966
Andrew Novotny	June 18, 1966
Martin Opalk	August 27, 1969
Louis Pentz	January 20, 1967

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<sup>25</sup> PCTC Exhibits 28-42.

Paul Scuba  
George Sophner  
Peter Sowinski

August 13, 1969  
January 1, 1966  
April 30, 1971

These furlough dates are all well before or well after the February 1, 1968 date of the merger. There is, thus, no temporal connection between any of these furloughs and the merger to give rise to even a prima facie inference.

Even the Claimants themselves were unable to provide testimony demonstrating that they satisfied the causal requirement. Claimant Gallagher, the only Sophner Claimant who testified at the Arbitration, provided only conclusory and irrelevant testimony without substantiation, which is not competent evidence. Claimant Gallagher's testimony on direct examination illustrates this point:

Q: Is there any question that you and the other people that you talked about were placed in a worse position?

A: Definitely. We had to make each one of our employees aware of the Merger Protective Agreement. They were aware of it. They felt good for it when it happened. They were going to have a protected job and after it happened, I'm saying it was 25 of us that sought legal help. What happened to the rest of them? They got disgusted. They said forget the railroad industry.<sup>26</sup>

Claimant Gallagher's response sheds no light on his burden of proof, and while he was quick to assert and conclude on direct that he was placed in a worse position, Claimant Gallagher's testimony on cross examination proved otherwise. Claimant Gallagher admitted that he made more money each year that he was with the railroad, except for 1969 when he was out of work for six months due to injury:

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<sup>26</sup> Arbitration Transcript at 181.

Q: So really from 1970, on, except from the year you were injured [1969], from 1970, on, you made \$7,800 and then \$9,000 and \$10,000. You were making more than at any period prior to the merger, right?

A: Yes, I was. It's a matter of economics.<sup>27</sup>

Because there is no competent evidence in the record that any of the Sophner Claimants met their burden of proving the first contract issue – that they were adversely affected as a result of the merger -- each of their claims must be denied.

**B. The Claimants Fail on the Second Contract Issue – No Claimant Put Forth Any Competent Evidence to Meet His Burden of Proof That He Complied With the MPA's Requirements So As to Warrant an Award of Benefits**

i. Knapik Claimants Concede That They Did Not Report to Work After the February 21<sup>st</sup> Furlough Notice And Are Thus Barred By The Sixth's Circuit's Decision In Augustus

The Sixth Circuit has already interpreted the MPA and this Panel is required to apply this controlling law to the Knapik Claimants. In Augustus, the Court was specific as to when and how trainmen like the Knapik Claimants (i.e., claimants who received furlough notices on February 21, 1968) were obligated to report to work:

On February 21, 1968, Petitioners and other CUT employees were furloughed from their CUT jobs as part of a reduction in force on the CUT, effective February 25, 1968. The furlough notice told the CUT employees to “**immediately contact**” the N.Y. Central yardmaster for work in the freight yard, pursuant to the Top and Bottom Agreement.<sup>28</sup>

The Sixth Circuit held that failure to comply with this obligation precludes any recovery under the MPA:

<sup>27</sup> Arbitration Transcript at 195 & 196.

<sup>28</sup> Augustus at \*3-4 (emphasis added).

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 . . . **refusal to report to work was at their own peril** . . .<sup>29</sup>

It is thus clear that the MPA, as definitively interpreted by the Sixth Circuit, required the Knapik Claimants to report to work at the freight yard within 15 days of the February 21 furlough notice or they were precluded from any recovery under the MPA. The record before the Panel is undisputed that each of the Knapik Claimants failed to report for work at the freight yard within the time limit, and therefore, their claims must be denied.

In order to avoid the preclusive effect of Augustus, the Claimants make a very disingenuous and misleading argument to this Panel in their Trial Brief. The Claimants would have the Panel believe that they “reported to work” as required by the Sixth Circuit because they all eventually “accepted recall to work.” Claimants have brazenly argued to this Panel:

In bold letters, Penn Central claims that “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.” Penn Central should check its own exhibit list. For example, although these document[s] were prepared by Penn Central expressly for this litigation, Penn Central's own Trial Exhibits Nos. 19, 20, 21, 22, 23, 24, separately state that Claimants Benko, Day, Doran, Gastony, Gentile and Norris all “accepted recall”.<sup>30</sup>

This argument is wrong and misleading. “Reporting to work” and “accepting recall” to work are two separate and distinct concepts. Claimants' attempted slight of hand was exposed by their own witnesses. Claimants' witness, Mr. Knapik, testified:

Q. Can you tell us the distinction between reporting for work and accepting recall?

<sup>29</sup> Id. at \*14, \* 16 (emphasis added).

<sup>30</sup> Claimants' Brief Contra Penn Central's Pre-Arbitration Brief at 5.

A. When you report for work, you are telling the crew dispatcher that you are available.

\* \* \*

Q. What does reporting for work mean?

A. That you're available for work. That you will work.

\* \* \*

Q. And when there is a recall to work, that would come in the -- how would recalls happen?

A. It would have to be -- started [sic, stated] that they were needed by either the general yard master or labor relations that people were needed. And they would then look at the furloughed people and tell the furloughed people that they're recalled to -- recalled for active duty.<sup>31</sup>

Of course, as a result of attrition, all of the Knapik Claimants were eventually "recalled to work" many months and in some cases years after the February 21, 1968 furlough notice. That notice, as the Sixth Circuit explained, affirmatively required them to "report to work" by immediately contacting the NYC yardmaster **within 15 days** of the February 25 effective date of the furlough notice. None of the Knapik Claimants did so, for reasons subsequently rejected by the Sixth Circuit. As the Sixth Circuit held, failure to contact the yardmaster was at their peril and their claims must be denied.

In a last ditch attempt to avoid this inevitable outcome, the Knapik Claimants offer a lame excuse why they believe they were relieved from the requirement to report to the NYC freight yard -- Penn Central anticipatorily breached the MPA by "misrepresenting" that the Claimants were not covered by the MPA, thereby supposedly waiving the requirements of the MPA (vis-à-vis reporting to the NYC freight yard). Specifically, the Knapik Claimants argued in their Trial Brief:

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<sup>31</sup> Arbitration Transcript at 105-106.

Instead, Penn Central maintained (until at least 1976 when the Court ruled otherwise) that Claimants were never New York Central employees, and thus, that they were not covered by the MPA . . . The position taken by Penn Central at these different stages -- in pleadings, correspondence with unions and in prior testimony -- makes it abundantly clear that the Railroad steadfastly refused to recognize Claimants as covered by the MPA. Penn Central told the Claimants that they would never be paid under the MPA . . . Thus, the Railroad is estopped from compelling a futile act. The Railroad waived the requirements of the MPA when it pointedly told Claimants that they would never be paid any guarantees.<sup>32</sup>

This is no new excuse; they made the same one to the 1990 Arbitration Panel.<sup>33</sup> That Panel rejected this excuse, and so did the Sixth Circuit:

Moreover, the Panel [1990 Panel] rejected Petitioners' argument that the carrier anticipatorily breached its contractual obligations under the MPA. The Panel reasonably found that Petitioners' refusal to report to work was at their own peril . . . Furthermore, the panel was justified by ample record evidence in rejecting Petitioners' argument that the work at the N.Y. Central freight yard was not comparable to their previous work at the CUT.<sup>34</sup>

The Knapik Claimants' proffered excuse for not reporting was rejected by the Sixth Circuit. The Knapik Claimants are exactly like the Petitioners in Augustus who also received the February 21, 1968 furlough notice requiring them to report to the NYC freight yard. The Knapik Claimants and petitioners in Augustus refused to report to the NYC freight yard for the same reasons. As the Sixth Circuit held, this "refusal to report to work was at their own peril . . ."<sup>35</sup> This Panel is bound by the Sixth Circuit on this issue and must, therefore, reject this excuse. Rather, the only competent evidence of record before the Panel is that the Knapik Claimants

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<sup>32</sup> Claimants' Trial Brief, pp. 25-27

<sup>33</sup> "Defendant was guilty of misrepresenting to all Plaintiffs that they were not covered by the Merger Protection Agreement. Plaintiffs relied on this "misrepresentation of existing fact" by electing not to stand for work in the freight yard." Claimants' 1990 Arbitration Brief, p. 33.

<sup>34</sup> Augustus at \*16.

<sup>35</sup> Id.

failed to prove the second contract issue – that they complied with the MPA’s requirements so as to warrant an award of benefits – and, therefore, the Panel must deny their claims.

ii. The Claimants in *Watjen* and *Bundy* Quit Their Full-Time Jobs as Utility Employees and Thus Were Not Deprived of Employment

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 were never *deprived* of employment by Penn Central. When their rate clerk positions were abolished, the Claimants were given full-time jobs as utility employees. Each of the Claimants accepted, and subsequently *quit*, their jobs as utility employees and are thereby disqualified from receiving benefits under the MPA.

Entitlement to a lump sum separation allowance is contingent upon an employee’s eligibility to receive a coordination allowance as articulated in the WJPA.<sup>36</sup> 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). Section 7(c) of the WJPA qualifies the scope of eligibility by stating that “[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 a result of coordination and he is unable to obtain by the exercise of his seniority rights another position on his home road or a position in the coordinated operation.” The language is clear. In order to become eligible for a

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<sup>36</sup> Attachment A to the MPA, PCTC Exhibit 100.

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 be unable to obtain a position 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. Thus, to be eligible to receive a coordination allowance, a Claimant must prove he was deprived of employment as a result of the merger and that he was unable to obtain a position within the merged company, Penn Central.

The Claimants in Watjen and Bundy claim that they are entitled to lump sum separation allowances.<sup>37</sup> But they have failed to prove that they qualify for any such payment under the explicit terms of the WJPA. Section 7(a) of the WJPA cannot be read in a vacuum devoid of the qualifications Section 7(c) imposes upon it. These Claimants were given the option of, and accepted, full-time positions as utility employees with Penn Central.<sup>38</sup> Each Claimant accepted such position and eventually quit,<sup>39</sup> which disqualifies them from receiving a separation allowance. The position of utility employee was “a position in the coordinated operation” and the Claimants’ refusal to keep, instead quitting, the position precludes their recovery under the MPA.

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<sup>37</sup> See Rosen Reports for Claimants Franz, O’Neil, Watjen, Wilger, Bundy, and Feldscher (Claimants Exhibit 9).

<sup>38</sup> PCTC Exhibit 79.

<sup>39</sup> Claimants’ Trial Brief at 23.

Each of the Claimants received notice between January 10, 1969 and January 17, 1969 that their positions as rate clerks were being abolished because the work they were performing was transferred to locations outside of Cleveland.<sup>40</sup> 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>41</sup>

This language in the notice comports with the requirements under the MPA and WJPA. An employee becomes eligible for a separation allowance only if he is unable to obtain a position within the merged company. Hence, being denied a position with the merged company is a condition precedent to eligibility for claiming benefits under the MPA. Clearly, as the notice states, the Claimants were never deprived of employment with Penn Central, but were simply given different, but equivalent, jobs as utility employees. Claimant Franz, in his dialogue with Chairman Steinglass during the arbitration, admitted that the position of utility employee was a full-time job, and that he received forty hours a week.<sup>42</sup> Furthermore, the position of utility employee carried the same rate of pay as the Claimants' rate clerk positions.<sup>43</sup> The only evidence of record is that these Claimants received full-time jobs with comparable pay with Penn Central, and there is no evidence that these Claimants were ever deprived of employment within the meaning of the WJPA or MPA.

The Watjen and Bundy Claimants' election to reject continued employment supposedly because of some personal distaste with their new position is not a valid reason under the MPA or

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<sup>40</sup> PCTC Exhibits 79, 84, & 88.

<sup>41</sup> Id. (emphasis added).

<sup>42</sup> Arbitration Transcript at 250.

<sup>43</sup> Arbitration Transcript at 240.

WJPA for eligibility for the coordination allowance. Essentially, the Claimants did not like their new positions and decided to quit. Claimant Franz's testimony at the arbitration clearly demonstrates this chain of events:

Q: You stayed at the Kinsman job for how long?

A: A month or so. Maybe a little longer.

Q: Then what happened? Did you find another job?

A: Then I resigned and asked for my lump sum allowance again and left.

Q: You quit; is that right?

A: I asked for my protection that I should have been afforded and I—yeah. I didn't quit. I just left and went home.<sup>44</sup>

Semantics aside, Claimant Franz and the other Claimants quit their jobs as utility clerks. Their voluntary resignation from an equivalent position in the merged company disqualifies them from receiving benefits under the MPA.

The MPA provided protection to employees who were deprived of employment as a result of the merger. The Claimants in Watjen and Bundy were not deprived of employment, but rather were given full-time jobs as utility employees when their rate clerk positions were abolished. These Claimants failed to comply with the requirements under both the MPA and WJPA, and admittedly quit their full-time jobs as utility employees with Penn Central. This refusal to accept available work is factually indistinguishable from 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, and thus they are not entitled to benefits under the MPA. Because these Claimants failed to carry their burden of proof as to the second contract issue that

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<sup>44</sup> Arbitration Transcript at 240.

they complied with the MPA's requirements so as to warrant an award of benefits, the Watjen and Bundy claims must be denied.

**C. The Claimants Fail on the Third Contract Issue -- No Claimant Put Forth Any Competent Evidence to Meet His Burden of Proof That He Suffered Compensation Loss as Defined By the MPA and For Which the MPA Provided Entitlement to Payment**

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."<sup>45</sup> Thus, in order to recover, the Claimants must first prove actual compensation loss. Because this is a contract action, compensation loss must be proved under the terms and conditions of the contract itself. The MPA and the incorporated WJPA **provide the only method** for calculating compensation loss. The Claimants hired Dr. Rosen supposedly to make these calculations, but Dr. Rosen failed to apply the formula as required under the agreement. The fact that Dr. Rosen failed to follow the MPA means that no Claimant has been able to come forward with evidence of compensation loss that entitles them to payment under the MPA.

The MPA<sup>46</sup> sets forth the formula for determining what amount of compensation is owed, if any, using Section 6(c) of the WJPA, which states:

Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last twelve (12) months in which he performed service immediately preceding the date of displacement (such twelve (12) months being hereinafter referred to as the "test period") and by dividing separately the total

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<sup>45</sup> 1976 Lambros Ruling p. 35. (emphasis added)

<sup>46</sup> Appendix E of the MPA requires displacement allowances to be calculated in accordance with the WJPA by stating: "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."

compensation and the total time paid for by twelve, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee, and if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation he shall be paid the difference . . .

In his report, Dr. Rosen correctly cites Section 6(c) of the WJPA as defining the displacement allowance by stating “if his compensation in his current position is less in any month in **which he performs work** than the aforesaid average compensation he shall be paid the difference . . .”<sup>47</sup> In his testimony, Dr. Rosen acknowledged that Section 6(c) contains the proper formula for displacement allowances:

Q: And specifically, your report is – here you cited this language “if his compensation in his current position is less than any amount [*sic* month] in which he performed work, then the aforesaid average compensation, he shall be paid the difference.”

A: Yes.

Q: All right. And that’s generally what’s known as the displacement allowance, correct?

A: That’s my understanding, yes.

Q: Now, I think we all agree, and you agreed a little bit earlier, that Section C tells us how to calculate the displacement allowance; isn’t that right?

A: Section C outlines a formula on page 10. That’s correct.<sup>48</sup>

Section 6(c) provides a simple, straightforward formula to calculate entitlement to a displacement allowance. The six-step calculation requires the following:

Step 1: Determine the Claimant’s date of displacement.

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<sup>47</sup> Claimants’ Exhibit 9. (emphasis added)

<sup>48</sup> Arbitration Transcript at 438.

- Step 2: Determine the Claimant's compensation and hours worked in the twelve months preceding the date of displacement.
- Step 3: Divide, separately, the total compensation and total time paid by twelve to obtain the average monthly compensation and average monthly time paid, which are the minimum amounts used to guarantee the displaced employee.
- Step 4: Make a month by month comparison of the monthly guarantee in relation to the compensation and hours worked in the Claimant's current position.
- Step 5: Subtract compensation for any time lost due to voluntary absences.
- Step 6: Only calculate a displacement allowance for any month in which the Claimant performed compensated service for Penn Central.

As demonstrated on cross examination, though, Dr. Rosen failed to do each of the following when calculating the displacement allowances:

- Failed to follow Step 2: Dr. Rosen did not use the total compensation in the twelve months preceding displacement as the base period salary --

Q: So you didn't do this calculation. We are only on step two, there're five steps.

A: For the ten people on the O'Neill list, I did not.

\* \* \*

Q: Well for any of the Claimants. You didn't have their hours worked, did you?

A: I did not.

Q: You estimated it, correct?

A: Correct.

Q: Does it say in here you are supposed to estimate in 6(c)?

A: No, it doesn't say you are supposed to estimate them.<sup>49</sup>

- Failed to follow Step 3: 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 --

Q: Let's look at the next step. And the next step is to divide this total wage information separately. So step three is divide income for the last 12 months, right?

A: Yes.

Q: Hours for the last 12 months, and you divide that by 12, correct?

A: Correct.

Q: Did you do that?

A: I couldn't do it. I didn't have the data . . . I could not because I didn't have the monthly data.<sup>50</sup>

- Failed to follow Step 4: Dr. Rosen did not make a month by month comparison of the monthly guarantee to the compensation of the Claimant in his current position --

Q: Step four. There is a monthly basis comparison, right?

A: Yes.

Q: And the displacement allowance is paid based on a disparity each month?

A: Yes.

Q: You didn't do that comparison, did you?

A: I couldn't. You are right.<sup>51</sup>

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<sup>49</sup> Arbitration Transcript at 454-455.

<sup>50</sup> Arbitration Transcript at 456-457.

<sup>51</sup> Arbitration Transcript at 458.

- Failed to follow Step 5: Dr. Rosen did not subtract compensation for any time lost on account of voluntary absences --

Q: Now, there is a step five. Step five begins right here. Do you see this language?

A: I do.

Q: So “less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period.” Do you see that?

A: Yes, and I agree with that. There should be a deduction made for any of those offsets that can be proven . . .

Q: All right. So you didn’t do that. Step five, you did not do?

A: No, I was only asked to look at guarantee difference.

Q: So counsel only asked you to look at part of the calculations, is that correct?

A: Through step four.<sup>52</sup>

- Failed to follow Step 6: Dr. Rosen completely 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 he performs work” by calculating a displacement allowance for Claimants in months in which they did not perform any work --

Q: Well there is a step six, too. So step six is what I have in brackets. And that is when you do the month to month comparison, right?

A: Yes.

Q: You only compare to months in which the employee performed work, don’t you?

A: Correct.

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<sup>52</sup> Arbitration Transcript at 459.

Q: So practically speaking, you gave him credit or you gave him a displacement allowance in months in which he did not work, correct?

A: Yes.

Q: All right. But Section C says he only gets the displacements allowance in any month in which he performs work.

A: C does say that.<sup>53</sup>

Even though he had cited Section 6(c) as the correct formula in his report and conceded in his testimony that Section 6(c) defines the “formula” for calculating the displacement allowance, Dr. Rosen failed to follow Section 6(c) because it would have provided a dramatically less desirable result for the Claimants. Instead of following the required, straightforward steps in Section 6(c) to calculate displacement allowances, Dr. Rosen invented a new formula out of whole cloth. When confronted with the fact that he was not following the requirements of Section 6(c), Dr. Rosen -- as experts often do when caught stretching the truth -- made up an excuse. He said that Appendix E of the MPA expressly permitted him to deviate from Section 6(c).<sup>54</sup> Claimants’ counsel also jumped on the Appendix E *deus ex machina* in order to escape from the predicament of their only evidence of compensation loss being other than that required by the contract. Claimant’s counsel during opening statement said:

Both of these groups, the Knapik group and the Sophner group, in reliance on the terms of the Merger Protection Agreement, . . . thought all right, even if we get furloughed, we will get our benefits, our job guarantee based on our 1963, 1964 earnings, which would be increased by general wage increases as indicated in Appendix E of the MPA.<sup>55</sup>

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<sup>53</sup> Arbitration Transcript at 459, 475.

<sup>54</sup> Arbitration Transcript at 468, 473-476.

<sup>55</sup> Arbitration Transcript at 14.

During Dr. Rosen's cross-examination, Claimants' counsel on objection stated, "I'm going to object to the extent that he is asking Dr. Rosen to opine on legal significance of these issues. You know Dr. Rosen is here as an economics expert. We can certainly discuss later the legal significance of Appendix E or Appendix A."<sup>56</sup> During her closing, Claimants' counsel said:

The other thing is it's our position that Appendix E to the MPA shows a different type of calculation on the '63 and '64 base . . . And I think it's important along that line, there was some cross-examination on Rosen on this interplay between 6(a) of the WJPA and Appendix E, and I think that that's important to look at because they are very different documents . . . So I think there are different documents and I think Dr. Rosen followed Appendix E because it was the one that was done concurrently with the MPA.<sup>57</sup>

Appendix E, of course, totally contradicts the maneuvering of Dr. Rosen and Claimants' counsel. Appendix E expressly states that benefits are to be calculated in accordance with the WJPA. The final paragraph of Appendix E reads:

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 **computed in accordance with the provisions of said Washington Job Protection Agreement.**<sup>58</sup>

All of the puffing from Dr. Rosen and Claimants' counsel that Appendix E of the MPA takes precedence over Section 6(c) of the WJPA was pure misdirection designed to spin this Panel away from a critical dispositive truth. That truth is Claimants failed to meet their burden of proof on the third contract issue before this Panel because Claimants presented no evidence of compensation loss as required by Section 6(c) of the WJPA.

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<sup>56</sup> Arbitration Transcript at 466.

<sup>57</sup> Arbitration Transcript at 610.

<sup>58</sup> MPA Appendix E (emphasis added).

The language in Appendix E is clear and unambiguous. Displacement allowances are to be calculated in accordance with the WJPA. Dr. Rosen intentionally ignored this language in Appendix E in an attempt to give employees a base number of hours and compensation, even if no work was done. Indeed, Exhibit E says just the opposite. It does not guarantee a “base number of hours” or any other employment. In fact, Appendix E says quite clearly that “employees are not entitled to preservation of employment” through a guarantee of base hours or any other method.

The Claimants also rely on Dr. Rosen’s utilization of an improper, generic “forecasted wage” formula that allegedly shows what the average carman or trainman made in a given year. Rather than obtain the relevant compensation records from Conrail, the Claimants gave Dr. Rosen their Railroad Retirement Board records and Dr. Rosen compared the earnings shown there to a “forecasted wage” he derived from third party sources for the corresponding year to determine if a Claimant experienced a loss in that year.<sup>59</sup> However, that a Claimant made less in any year as compared to a generic “forecasted wage” formula is completely irrelevant and not permitted by the MPA, and Dr. Rosen admitted as much on cross examination:

Q: Would you read that, please?

A: “Summary of covered compensation under the Railroad Retirement Act for each employee evaluated, entitled employment data, maintenance, credible service and earning yearly totals.”

Q: Where in Section C or Appendix E or anywhere in the MPA or WJPA does it say to consult that source in calculating the displacement allowance?

A: It doesn’t. It says you should consult the monthly records from the railroad for each person’s compensation wage rate and time worked.

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<sup>59</sup> Arbitration Transcript at 394.

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Q: The next bullet, “wage rates for brakemen UTU, research and statistical department.” The agreement does not say that one should consult that document, does it?

A: No.

Q: Same thing with the next bullet point. “Wage rates for carmen.” The agreement does not say you should consult that document, does it?

A: It does not.<sup>60</sup>

The Claimants seek recovery based entirely upon Dr. Rosen’s patently incorrect wage calculations. Not only are Dr. Rosen’s calculations improperly and misleadingly inflated for the calculation of any displacement allowance, but also they have absolutely no evidentiary value because they contradict the express requirements of the MPA and WJPA. Dr. Rosen conjures up a formula that is present nowhere in the agreement and inserts variables barred by the agreement’s terms. As such, Dr. Rosen’s calculations must be disregarded in their entirety.

The Claimants’ claims are nothing more than bare assertions with no evidentiary support that would entitle them to benefits under the MPA. They have failed to meet their burden of proof under the third contract issue before this Panel.

**D. Claimants’ Red Herrings – That Penn Central Spoiled Evidence, That Recall to Work Means the Same as Report to Work, That Dr. Rosen’s Calculations Were Permitted by Appendix E, That Penn Central Endlessly Delayed and Protracted This Litigation – Are Utterly False and Without Merit**

Recognizing their failure to meet their evidentiary burden of proving compliance with the requirements of the MPA for entitlement to benefits and their failure to rebut Penn Central’s

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<sup>60</sup> Arbitration Transcript at 477-78.

evidence showing no causal relationship between the merger and an adverse effect upon any of them, Claimants unabashedly attempt to play to the Panel's sympathies by making wild allegations and recklessly false assertions. They improperly seek an emotion-based, rather than evidence-based, decision.

Claimants go so far as to allege that Penn Central spoiled evidence, that recall to work means the same as report to work, that the manner in which Dr. Rosen calculated their alleged compensation loss was permitted by Appendix E to the MPA, and that Penn Central endlessly delayed and protracted this litigation. All of these assertions which were demonstrated at the hearing to be false, were designed to misdirect the Panel from their own lack of evidence by casting aspersions on Penn Central.

i. Claimants Have Falsely Accused Penn Central of Spoiling Evidence, Their Personnel Records, When Those Records Remained With Conrail

Claimants have attempted to account for their lack of evidence to substantiate their claims by alleging that Penn Central hid or destroyed documents related to this litigation, specifically, their personnel records. An absolute falsehood. Legal custody of the personnel records was conveyed by Penn Central to Conrail on April 1, 1976 pursuant to Act of Congress as Penn Central told Claimants through discovery. In its response to Claimants' Request for Production of Documents back in February 2007, Penn Central disclosed:

On April 1, 1976, pursuant to the Final System Plan formulated by the United States Railway Association ("USRA"), § 743(b) of the Rail Act, and Special Orders issued by the Reorganization Court, PCTC transferred most of its trackage, equipment, real estate and personnel, and other records to Conrail. Personnel and personnel records associated with commercial transportation of goods became employees of Conrail at this time. That same day, Conrail reconveyed title of PCTC's inter-city passenger services to Amtrak. Personnel and personnel records associated with inter-city passenger service became employees of Amtrak at this time.

As a result of USRA, Penn Central ceased and no longer existed as an operated railroad as of April 1, 1976.<sup>61</sup>

The conveyance language in the Bill of Sale and Assignment from Penn Central to Conrail states as follows:

All current and historical books, files, records, instruments and documents of every kind in which grantor has any interest, proprietary or custodial, including but not limited to: business records; muniments of title, deeds, tracings and other real estate records; **personnel records and files**; paper documents; manuals; correspondence; data files; tariff and division files; engineering records including valuation accounts, track charts and blueprints.<sup>62</sup>

From April 1, 1976, Conrail had legal custody of all Penn Central personnel records and files. All Claimants had to do, at any point during the ensuing 30 plus years, was subpoena them from Conrail pursuant to Civil Rule 45. They never did. Although legal custody of the records was conveyed from Penn Central to Conrail, the records themselves always remained in the same place at the CUT -- the car department. At all times, opposing counsel's own clients knew where they were located. Surely counsel had to know. Claimant Gallagher testified:

On Direct Examination

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

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.<sup>63</sup>

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On Recross-Examination

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

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<sup>61</sup> Defendant's Feb. 2007 Discovery Responses (Claimants' Exhibit 33).

<sup>62</sup> PCTC Exhibit 105, Schedule D (emphasis added).

<sup>63</sup> Arbitration Transcript at 173.

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.<sup>64</sup>

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On Redirect-Examination

Q: When you say the records would show when you were injured, you are talking about personnel records, right?

A: Absolutely.

Q: And those are the personnel records that would have been in the possession of Penn Central until at least 1976; isn't that correct?

A: They should have been in the records file from Penn Central to Conrail. They were on their property.<sup>65</sup>

Similarly, Mr. Knapik testified:

Q: And in about 1976, you became a Conrail employee.

A: Yes.

Q: And all your personnel records, your seniority records, et cetera went with Conrail, didn't it?

A: Yes.<sup>66</sup>

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<sup>64</sup> Arbitration Transcript at 209.

<sup>65</sup> Arbitration Transcript at 211.

<sup>66</sup> Arbitration Transcript at 143. The Panel will recall that Mr. Knapik, not a Claimant himself but the son of a Claimant, worked for the railroad, including Penn Central after the merger, continuously from 1947 to the date of his retirement from Conrail. Arbitration Transcript at 91, 142, & 143.

The Panel should see Claimants' wild accusation for what it is – a disingenuous attempt to raise a strawman. From the time they were created, the personnel records remained in the same location -- the car department. As Claimant Gallagher confirmed, the records of the car department remained in the car department after the conveyance to Conrail, and are still at the car department today. Claimants failed to obtain these records, and that failure is not attributable to Penn Central.

ii. Claimants' Red Herring Aside, Recall to Work is Different Than Report to Work

As discussed previously, the Sixth Circuit in Augustus definitively interpreted the MPA and ruled that “failure to report to work precluded [a] recovery under the MPA” and that CUT workers’ “refusal to report to work was at their own peril.”<sup>67</sup> Faced with the unrefuted evidence that the Knapik Claimants failed to report to work at the NYC freight yard within 15 days of the February 21, 1968 notice, they raise a new red herring. They argue that because they were eventually *recalled* to work, they obviously must have *reported* to work. In other words, they improperly conflate the terms “recall to work” and “report to work.” Of course, they were not even recalled within the 15-day time limit so that argument fails of its own force. But, even more importantly, the two terms mean two different things.

On cross-examination, Mr. Knapik readily acknowledged that being recalled to work and reporting to work were two distinct things:

Q: You talked about reporting to work and getting recalled to work. They are all – they’re two different concepts, right?

A: Yes.<sup>68</sup>

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<sup>67</sup> Augustus at \*14, \*25.

<sup>68</sup> Arbitration Transcript at 143-44.

Indeed, on direct examination, Mr. Knapik testified that to “report to work” meant to affirmatively notify the dispatcher that you were available for, and willing to, work whereas “recall to work” meant that the yardmaster called you back to active duty:

Q. Can you tell us the distinction between reporting for work and accepting recall?

A. When you report for work, you are telling the crew dispatcher that you are available.

\* \* \*

Q. What does reporting for work mean?

A. That you’re available for work. That you will work.

\* \* \*

Q. And when there is a recall to work, that would come in the -- how would recalls happen?

A. It would have to be -- started [sic, stated] that they were needed by either the general yard master or labor relations that people were needed. And they would then look at the furloughed people and tell the furloughed people that they’re recalled to -- recalled for active duty.<sup>69</sup>

Time and time again, Claimants play fast and loose with the truth in an effort to try to compensate for their failure to adduce competent evidence in the record to establish that they reported to work as required by the Sixth Circuit in Augustus.

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<sup>69</sup> Arbitration Transcript at 105-106.

iii. Claimants Themselves Are To Blame For The Protracted Nature of This Litigation

In an effort to distract attention from the lack of evidence on the merits of their case, Claimants have repeatedly attempted to inflame this Panel by falsely accusing Penn Central of needlessly delaying this litigation. Claimants' counsel have made that impassioned accusation in pre-arbitration filings. Contrary to their finger pointing, however, Claimants themselves were the source of the delay since the Sixth Circuit decision in Augustus in 2000. The Claimants have continually slept on their rights and made every effort to avoid re-convening the Blackwell panel, resulting in years of needless delay.

After the Augustus decision came down, Claimants refused to agree that the remaining cases proceed before the Blackwell Panel (obviously because it had ruled against them before). From 2000 to 2005, Penn Central made every effort to reconvene the Blackwell panel based on Judge Lambros' Order that "the same panel hear each case."<sup>70</sup> However, the Claimants maneuvered desperately to obtain a different panel by writing letters (a total of five) to the National Mediation Board requesting a list of arbitrators in order to effectuate delay to ensure that the Blackwell panel would not be available. During the time in which the Claimants were panel shopping, Mr. Blackwell was ready and willing to resume the arbitration, providing the impetus for the Claimants' strategy of seeking to avoid yet another adverse decision.

Claimants even refused to have the cases go before *any* one panel, instead insisting on four entirely new panels and writing to the National Mediation Board seeking names of panel members. They finally convinced Judge Oliver five years later that all four cases "shall proceed simultaneously with four separate panels hearing each case."<sup>71</sup> Four panels were then constituted. But, after years of insisting on not one but four panels and accusing Penn Central of

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<sup>70</sup> Lambros 1979 Order (Claimants' Exhibit 6), p. 7.

<sup>71</sup> Order of April 28, 2005 (Claimants' Exhibit 25), p. 3.

needless delay, out of the blue Claimants' counsel contacted Penn Central's counsel and announced they agreed to all four cases being arbitrated in the same proceeding before one panel!

IV. CONCLUSION

For the foregoing reasons, Penn Central respectfully requests the Panel to deny the claims of each and every Claimant. Each has failed to meet his burden of proof on any of the three contract issues in this case. Each has failed to prove he was placed in a worse condition with respect to his employment by reason of the merger. Each Claimant has failed to prove he complied with the MPA's requirements to warrant an award of benefits. Each Claimant has failed to prove he suffered loss as defined by the MPA and for which the MPA provided entitlement to payment. The following charts summarize the lack of evidence of each Claimant, grouped by case, as well as the reason each claim must be denied:

**EACH KNAPIK CLAIMANT'S LACK OF EVIDENCE**

<b>Claimant</b>	<b>No Evidence That Claimant Was Adversely Affected As A Result of the Merger</b>	<b>No Evidence That Claimant Reported to Work at the Freight Yard as Required by Augustus</b>	<b>No Evidence of Compensation Loss</b>
Jack Acree	Failed to produce any evidence of being adversely affected by the merger.	Claimant Acree did not report to work at the Freight Yard within 15 days of receiving the February 21, 1968 furlough notice and is thus barred from MPA benefits by the decision in <i>Augustus</i> .	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.
Edward Benko	Failed to produce any evidence of being adversely affected by the merger.	Claimant Benko did not report to work at the Freight Yard within 15 days of receiving the February 21, 1968 furlough notice and is thus barred from MPA benefits by the decision in <i>Augustus</i> .	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.
Kenneth Day	Failed to produce any evidence of being adversely affected by the merger.	Claimant Day did not report to work at the Freight Yard within 15 days of receiving the February 21, 1968 furlough notice and is thus barred from MPA benefits by the	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of

		decision in <i>Augustus</i> .	compensation loss.
Harvey Doran	Failed to produce any evidence of being adversely affected by the merger.	Claimant Doran did not report to work at the Freight Yard within 15 days of receiving the February 21, 1968 furlough notice and is thus barred from MPA benefits by the decision in <i>Augustus</i> .	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.
Joseph Gastony	Failed to produce any evidence of being adversely affected by the merger.	Claimant Gastony did not report to work at the Freight Yard within 15 days of receiving the February 21, 1968 furlough notice and is thus barred from MPA benefits by the decision in <i>Augustus</i> .	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.
George Gentile	Failed to produce any evidence of being adversely affected by the merger.	Claimant Gentile did not report to work at the Freight Yard within 15 days of receiving the February 21, 1968 furlough notice and is thus barred from MPA benefits by the decision in <i>Augustus</i> .	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.
George Norris	Failed to produce any evidence of being adversely affected by the merger.	Claimant Norris did not report to work at the Freight Yard within 15 days of receiving the February 21, 1968 furlough notice and is thus barred from MPA benefits by the decision in <i>Augustus</i> .	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.
Christ Steimle	Failed to produce any evidence of being adversely affected by the merger.	Claimant Steimle did not report to work at the Freight Yard within 15 days of receiving the February 21, 1968 furlough notice and is thus barred from MPA benefits by the decision in <i>Augustus</i> .	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.
Clarence Tomczak	Failed to produce any evidence of being adversely affected by the merger.	Claimant Tomczak did not report to work at the Freight Yard within 15 days of receiving the February 21, 1968 furlough notice and is thus barred from MPA benefits by the decision in <i>Augustus</i> .	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.
Frank Uher	Failed to produce any evidence of being adversely affected by the merger.	Claimant Uher did not report to work at the Freight Yard within 15 days of receiving the February 21, 1968 furlough notice and is thus barred from MPA benefits by the decision in <i>Augustus</i> .	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.

**EACH SOPHNER CLAIMANT'S LACK OF EVIDENCE**

<b>Claimant</b>	<b>No Evidence That Claimant Was Adversely Affected as a Result of the Merger</b>	<b>No Evidence That Claimant Exercised Seniority Rights to All Available Positions</b>	<b>No Evidence of Compensation Loss</b>
William Billinsky	No evidence at all about this Claimant at the hearing. Completely failed to produce any evidence of being adversely affected by the merger.	Failed to produce any evidence of exercising his seniority rights for months in which he is claiming a displacement allowance.	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.
Joseph Crtalic	No evidence at all about this Claimant at the hearing. Completely failed to produce any evidence of being adversely affected by the merger.	Failed to produce any evidence of exercising his seniority rights for months in which he is claiming a displacement allowance.	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.
Paul Foecking	No evidence at all about this Claimant at the hearing. Completely failed to produce any evidence of being adversely affected by the merger.	Failed to produce any evidence of exercising his seniority rights for months in which he is claiming a displacement allowance.	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.
John Gallagher	Although this Claimant testified at the Arbitration, he completely failed to produce any evidence of being adversely affected by the merger.	Personal testimony at the Arbitration where he did not know any months in which he exercised his seniority rights during 1969, the year he is claiming a displacement allowance. Mr. Gallagher's failure to prove that he exercised his seniority rights to available positions disqualifies him from receiving benefits under the MPA.	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.
Gus Janke	No evidence at all about this Claimant at the hearing. Completely failed to produce any evidence of being adversely affected by the merger.	Failed to produce any evidence of exercising his seniority rights for months in which he is claiming a displacement allowance.	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.
Joseph Jarabeck	No evidence at all about this Claimant at the hearing. Completely failed to produce any evidence of being adversely affected by	Failed to produce any evidence of exercising his seniority rights for months in which he is claiming a displacement allowance.	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of

	the merger.		compensation loss.
Edwin Kochenderfer	No evidence at all about this Claimant at the hearing. Completely failed to produce any evidence of being adversely affected by the merger.	Failed to produce any evidence of exercising his seniority rights for months in which he is claiming a displacement allowance.	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.
Patrick McLaughlin	No evidence at all about this Claimant at the hearing. Completely failed to produce any evidence of being adversely affected by the merger.	Failed to produce any evidence of exercising his seniority rights for months in which he is claiming a displacement allowance.	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.
Robert McNeeley	Although this Claimant testified at the Arbitration, he completely failed to produce any evidence of being adversely affected by the merger.	Personal testimony at the Arbitration, but fails to provide when and where he exercised his seniority rights to. Mr. McNeeley has not shown that he exercised his seniority rights to all available positions, a requirement under the MPA, and therefore Mr. McNeeley is not entitled to benefits thereunder.	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.
Andrew Novotny	No evidence at all about this Claimant at the hearing. Completely failed to produce any evidence of being adversely affected by the merger.	Deposition testimony of Mr. Novotny. Mr. Novotny fails to provide when and where he exercised his seniority rights to. Mr. Novotny has not shown that he exercised his seniority rights to all available positions, a requirement under the MPA, and therefore Mr. Novotny is not entitled to benefits thereunder.	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.
Martin Opalk	No evidence at all about this Claimant at the hearing. Completely failed to produce any evidence of being adversely affected by the merger.	Failed to produce any evidence of exercising his seniority rights for months in which he is claiming a displacement allowance.	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.
Louis Pentz	No evidence at all about this Claimant at the hearing. Completely failed to produce any evidence of being adversely affected by the merger.	Inadmissible hearsay—testimony of John Gallagher and Ann Marie Pentz. Their testimony fails to provide when and where Mr. Pentz exercised his seniority rights to and that he exercised his seniority to all available positions, a requirement under the MPA, and therefore Mr. Pentz is not entitled to benefits thereunder.	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.
Robert Schreiner	No evidence at all about this Claimant at the hearing. Completely failed to produce any	Failed to produce any evidence of exercising his seniority rights for months in which he is claiming a displacement	Dr. Rosen's incorrect salary and displacement allowance calculations are not permitted by the

	evidence of being adversely affected by the merger.	allowance.	MPA and are not evidence of compensation loss.
Paul Scuba	No evidence at all about this Claimant at the hearing. Completely failed to produce any evidence of being adversely affected by the merger.	Inadmissible hearsay—testimony of John Gallagher and Paul Scuba, Jr. Their testimony fails to provide when and where Mr. Scuba exercised his seniority rights to and that he exercised his seniority to all available positions, a requirement under the MPA, and therefore Mr. Scuba is not entitled to benefits thereunder.	Dr. Rosen’s incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.
George Sophner	No evidence at all about this Claimant at the hearing. Completely failed to produce any evidence of being adversely affected by the merger.	Failed to produce any evidence of exercising his seniority rights for months in which he is claiming a displacement allowance.	Dr. Rosen’s incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.
Peter Sowinski	No evidence at all about this Claimant at the hearing. Completely failed to produce any evidence of being adversely affected by the merger.	Failed to produce any evidence of exercising his seniority rights for months in which he is claiming a displacement allowance.	Dr. Rosen’s incorrect salary and displacement allowance calculations are not permitted by the MPA and are not evidence of compensation loss.

**EACH WATJEN AND BUNDY CLAIMANT’S LACK OF EVIDENCE**

<b>Claimant</b>	<b>No Evidence that Claimant Was Adversely Affected as a Result of the Merger</b>	<b>No Evidence That Claimant Was Unable to Obtain a Position With Penn Central</b>	<b>No Evidence That Claimant Exercised Seniority Rights to All Available Positions</b>
Phillip Franz	Failed to produce any evidence of being adversely affected by the merger.	Mr. Franz admitted that he obtained a position as a Utility Clerk within two weeks after his position as Rate Clerk was abolished. (Arbitration Transcript at 239) Because Mr. Franz obtained a position with Penn Central as a Utility Clerk, which he voluntarily quit, he is not eligible for a separation allowance under the MPA.	Personal Testimony from 2007 Arbitration.
Thomas O’Neil	Failed to produce any evidence of being adversely affected by the merger.	When his position as Rate Clerk was abolished, Mr. O’Neil was offered, and accepted, the position of Utility Clerk with Penn Central. Because Mr. O’Neil obtained a position with Penn Central as a Utility Clerk, which he voluntarily quit,	Failed to produce any evidence that Claimant O’Neil exercised his seniority rights.

		he is not eligible for a separation allowance under the MPA. (Claimants' Trial Brief at 24).	
Robert Watjen	Failed to produce any evidence of being adversely affected by the merger.	When his position as Rate Clerk was abolished, Mr. Watjen was offered, and accepted, the position of Utility Clerk with Penn Central. Because Mr. Watjen obtained a position with Penn Central as a Utility Clerk, which he voluntarily quit, he is not eligible for a separation allowance under the MPA. (Claimants' Trial Brief at 24).	Failed to produce any evidence that Claimant Watjen exercised his seniority rights.
Anna Mae Wuliger	Failed to produce any evidence of being adversely affected by the merger.	When her position as Rate Clerk was abolished, Ms. Wuliger was offered, and accepted, the position of Utility Clerk with Penn Central. Because Ms. Wuliger obtained a position with Penn Central as a Utility Clerk, which she voluntarily quit, she is not eligible for a separation allowance under the MPA. (Claimants' Trial Brief at 24).	Failed to produce any evidence that Claimant Wuliger exercised her seniority rights.
David Bundy	Failed to produce any evidence of being adversely affected by the merger.	When his position as Rate Clerk was abolished, Mr. Bundy was offered, and accepted, the position of Utility Clerk with Penn Central. Because Mr. Bundy obtained a position with Penn Central as a Utility Clerk, which he voluntarily quit, he is not eligible for a separation allowance under the MPA. (Claimants' Trial Brief at 24).	Failed to produce any evidence that Claimant Bundy exercised his seniority rights.
James Feldscher	Failed to produce any evidence of being adversely affected by the merger.	When his position as Rate Clerk was abolished, Mr. Feldscher was offered, and accepted, the position of Utility Clerk with Penn Central. Because Mr. Feldscher obtained a position with Penn Central as a Utility Clerk, which he voluntarily quit, he is not eligible for a separation allowance under the MPA. (Claimants' Trial Brief at 24).	Failed to produce any evidence that Claimant Feldscher exercised his seniority rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing Post-Arbitration Brief was sent on February 22, 2008 by email transmission (except for Mr. Goldfarb) to:

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