

BEFORE THE ARBITRATION COMMITTEE

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. :

CLAIMANTS' REPLY BRIEF

TABLE OF CONTENTS

I. PENN CENTRAL’S INTERPRETATION OF THE MPA RENDERS VAST PORTIONS OF IT COMPLETELY MEANINGLESS.1

II. SPECIFIC RESPONSES.....4

A. Causation Requirements4

1. There Is No Causation Requirement.....4

2. Penn Central’s Course of Performance Proves There Is No Causation Requirement.....4

3. Penn Central’s Assertions Of Causation Are Without Merit.....5

4. In The Alternative, There Is Ample Proof That The Merger Caused The Claimants’ Damages.....6

5. Penn Central’s Expert Admits That His Testimony Does Not Relate To The MPA.....7

6. Penn Central Knew That Weinman’s Testimony Was Irrelevant.8

7. None Of Weinman’s Testimony Relates To Why Any Claimant Was Furloughed.....10

8. Sophner Plaintiffs Are Entitled To Damages.11

9. Sophner Plaintiffs Are Entitled to Damages14

B. Claimants Fully Complied With The MPA.14

1. Availability Issue Is Only Relevant To the Brakemen, Not To the Carmen Or Clerks.14

2. The MPA Does Not Contain the Phrase “Report to Work.”.....16

3. The 1965 Top and Bottom Agreement Effectively Precluded The Claimants From Receiving Work in the Freight Yard.16

4. The 1969 Agreement Abrogated the 1965 Agreement, Facilitated the Recall by Guaranteeing a Percentage of Jobs and Recognized That Appendix E Determined Claimants’ Rights To Wage Guarantee.....18

5. The STB Has Already Determined That All The Brakemen Reported To Work At The Freight Yard.....20

6. Penn Central’s Furlough Is An Admission That They Were Available for Work But that There Was No Work In The Freight Yard.....21

7.	The Fact That The Brakemen Actually Returned To Work Proves That They Reported for Work, Made Themselves Available and Accepted Recall.....	21
8.	The Severance Clerks Were Not Obligated To Keep Working Because They Invoked Their Rights to Separation Payments.	22
C.	Dr. Rosen Properly Calculated Claimants' Damages.	23
1.	Penn Central Cannot Refuse To Produce Information, Destroy Documents, And Then Complain About Dr. Rosen's Calculations. Penn Central Is Estopped From Challenging Dr. Rosen's Calculations.	23
2.	Dr. Rosen Calculated Damages According To the MPA.....	24
3.	Dr. Rosen Calculated Damages According To Penn Central's Own Practices.....	27
4.	Dr. Rosen's Report Constitutes The Completion Of Penn Central's Own Standard MPA Benefits Form.	28
5.	Penn Central Intentionally Misquotes Appendix E In Order To Reverse Its Meaning.	29
D.	Penn Central's Miscellaneous Arguments Are Without Merit.	30
1.	Spoliation.	30
2.	Recall To Work vs. Report To Work.	32
3.	Penn Central's Chart Is Incorrect, Misunderstands the MPA And Ignores The Evidence In The Record.	33
4.	Penn Central's Chart is Incorrect, Misunderstands the MPA And Ignores The Evidence In The Record	34
E.	Penn Central Does Not Address Other Critical Issues.....	35
III.	CONCLUSION	36

I. PENN CENTRAL'S INTERPRETATION OF THE MPA RENDERS VAST PORTIONS OF IT COMPLETELY MEANINGLESS.

Penn Central's entire defense is based on its interpretation of the Washington Jobs Protection Agreement ("WJPA"). Penn Central believes that the WJPA, as incorporated in MPA §1(a), replaces the rest of the MPA. The WJPA was negotiated and signed in 1936 to resolve labor disputes over displacements caused by railroad mergers. At the time of the announcement of the Pennsylvania/New York Central merger in 1964, the unions and the railroads entered into the 1964 Merger Protection Agreement ("MPA"). Claimants' Trial Ex. 1. If the parties had believed that the WJPA was sufficient to protect their workers, there would not have been any need to enter in to the MPA. Penn Central's defense would have this panel completely ignore the added benefits of the MPA.

For example, Penn Central argues that the Claimants must prove that their lost wages are causally related to the merger. This argument rests on the WJPA as incorporated through Subsection 1(a) and Penn Central's hope that this Panel will ignore the remaining 80% of the MPA. The MPA contradicts this argument. *Id.* Subsection 1(b) contains an explicit and lengthy provision relating to "general business decline." *Id.* It provides that Penn Central is not required to pay guarantees only if, under a statistically-precise set of objective data, their total business declines by more than 5 percent. Even then, Penn Central may only reduce staff by the amount in excess of the 5 percent benchmark.

Under Penn Central's theory, all of this language and objective criteria is superfluous. In Penn Central's view, it does not have to show a nationwide decline in its general business. Instead, Penn Central, purportedly, can simply claim that there was a loss of a segment of traffic (i.e. passenger traffic) in a particular location. They can allegedly do this simply by finding an expert who has never done a study of the impact of Penn Central's action on these Claimants and

who has no opinion as to why these Claimants were denied wage guarantees. Weinman, Tr. 546-47, 553, 555-58 and 570; Claimants' Trial Ex. 14; pp. 51, 84. This expert can simply state the obvious: that there was a loss of passenger traffic. Based upon this undisputed point, Penn Central claims it is relieved of its obligations under the MPA.

Subsection 1(b) also explicitly requires "advance notice." Penn Central realizes that no such advance notice was ever provided. Penn Central did not base its 1968 actions on its latest interpretation. Rather, knowing that it cannot meet the precise equation of business decline under Subsection 1(b), Penn Central tries to transfer and apply the inapplicable causation argument from Subsection 1(a). Penn Central, would have this Panel ignore the fact that the MPA requires that Penn Central provide "[a]dvance notice of force reductions" for this reason. Penn Central believes that it can simply provide this defense for the first time 40 years after the fact.

Penn Central's new interpretation means that the parties wasted their time in negotiating a specific five percent business decline threshold and extensive language regarding the only permissible circumstances for lay-offs. They could have just incorporated the WJPA. Penn Central's theory renders this business decline section meaningless, because the five percent requirement could always be defeated by a proximate clause claim – without regard to the threshold level.

Similarly, the MPA specifically creates benefits "in addition to benefits" of the WJPA. Yet, Penn Central denies that there are any additional benefits. This language would also be rendered meaningless.

Subsection 1(b) has further provisions to permit force reductions based on "Act of God", emergency circumstances such as a "flood, snowstorm, hurricane, earthquake . . ." under which

the company is excused from paying wage guarantees. This language is superfluous if Penn Central was only required to pay for damages caused by the merger.

Finally, the parties negotiated an entire Appendix E with objective criteria for determining “whether . . . such an employee has been placed in a worse position.” No causation language exists to determine eligibility for guaranties under Appendix E. In fact, Appendix E requires for Penn Central to produce wage data which Appendix E explicitly incorporated into Subsection 1(b). None of these provisions have any meaning if Penn Central is absolved of liability simply by claiming that the layoffs were caused by some alternative causation factors such as a decline in passenger service.

The truth is that the WJPA is only one part of a much longer document. The WJPA only comprises MPA §1(a) and Appendix A. The rest of the MPA is completely focused on the protections which are “in addition to benefits set forth” in the WJPA. MPA §1(a). Penn Central’s interpretation is that the remaining 80% of the MPA is irrelevant and that the negotiators wasted years of effort in negotiating these clauses. In the largest merger in U.S. history, Penn Central now claims that the negotiators added entire sections and pages of unnecessary language. Under Penn Central’s analysis, the negotiators should have simply incorporated the WJPA by reference and not laboriously drafted the remaining 80 percent of the MPA. The more reasonable, and correct, interpretation is that both the labor unions and the Penn Central knew that the WJPA’s inadequate protection would never allow the merger to be approved by the ICC. *See* 49 U.S.C. §5(2). That is why the parties negotiated additional specific unambiguous language which replaced a causation analysis in the WJPA with a simple comparison of wages, provided increased guaranties, and created objective criteria for determining the amount of such guaranties in Subsection 1(b) and Appendix E. Penn Central’s

interpretation eliminates all of this negotiated language and limits the MPA to the incorporation of the WJPA.

II. SPECIFIC RESPONSES

A. Causation Requirements

1. There Is No Causation Requirement.

The entirety of Penn Central's first argument rests upon the assertion that Subsection 1(b) requires proof of causation. Penn Central Post Arbitration Brief at 6-17. Penn Central is incorrect. A causation requirement only exists in the original WJPA. This provision was deliberately modified in Subsection 1(a) and was completely eliminated in Subsection 1(b). As explained previously, Claimants' rights are determined by Appendix E. Penn Central's primary argument is incorrect because it wrongly assumes that the MPA requires proof of causation.

2. The Existence of Subsection 1(b)'s Business Decline Clause Proves That There Is No Causation Requirement.

As discussed more fully below the MPA §1(b) provides a very specific formula whereby if business decline in freight and passenger traffic exceeds 5 percent, Penn Central could, under certain circumstances, furlough some of its workers. That section is the only "out" provided in the MPA, other than for an "Act of God", which would in any way allow Penn Central to justify furloughing workers. The fact that there is no language in the MPA which would provide any other justification for furloughing workers or which states any other prerequisites for application of the MPA, evidences the fact that there is no causation requirement. If the Unions and Penn Central had wanted to negotiate other reasons for avoiding payments under the MPA, they certainly could have done so. The fact that they negotiated a separate **specific** business decline clause is clear proof that they did not intend Penn Central to be absolved from its obligation to comply with the terms of the MPA by **general** claims of lost passenger traffic.

3. **Penn Central's Course of Performance Proves There Is No Causation Requirement.**

The Ohio Supreme Court has said:

In construing any written instrument, the primary and paramount objective is to ascertain the intent of the parties. The general rule is that contracts should be construed so as to give effect to the intention of the parties.

Aultman Hospital v. Community Mut. Ins. Co., 46 Ohio St.3d 51, 53, 544 N.E.2d 920, 923 (1989); *See also, Burris v. Grange Mutual Cos.*, 46 Ohio St.2d 84, 89, 545 N.E.2d 83, 88 (1989) (A court's fundamental role in interpreting a contract "is to ascertain the intent of the parties from a reading of the contract in its entirety, and to settle upon a reasonable interpretation of any disputed terms in a manner calculated to give the agreement its intended effect.")

The Ohio Supreme Court has held that courts should look to the parties' course of performance in order to interpret the meaning of a contract. *St. Marys v. Auglaize Cty. Bd. of Commrs*, 115 Ohio St.3d 387, 875 N.E.2d 561, 2007 -Ohio- 5026 (citing *Natl. City Bank of Cleveland v. Citizens Bldg. Co. of Cleveland*, 48 Ohio Law Abs. 325, 335, 74 N.E.2d 273)(1947)("Where a dispute arises relating to an agreement under which the parties have been operating for some considerable period of time, the conduct of the parties may be examined in order to determine the construction which they themselves have placed upon the contract."); *Pavlik v. Consolidation Coal Co.*, 456 F.2d 378, 381 (6th Cir. 1972)(courts look to the post-formation conduct of the parties, their course of performance, in order to discover the meaning of the contract).

The Ohio Revised Code is more direct. R.C. 1302.05 (emphasis added) provides: "Terms . . . may not be **contradicted** by evidence of any prior agreement or of a contemporaneous oral agreement but **may be explained or supplemented**: (A) by **course of dealing** or usage of trade as provided in section 1301.11 of the Revised Code or by a **course of**

performance as provided in section 1302.11 of the Revised Code.” The Official Comments to R.C. 1302.11 state that:

1. The parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was. This section thus rounds out the set of factors which determines the meaning of the "agreement" and therefore also of the "unless otherwise agreed" qualification to various provisions of this Article [RC Ch 1302].

2. Under this section **a course of performance is always relevant** to determine the meaning of the agreement.

R.C. 1302.11 (Emphasis added). Although these sections are most relevant to claims under the UCC, they show that courts can, and should, look to the parties' actual conduct in determining their intentions.

Here, Penn Central's course of performance establishes that causation was never required. Penn Central produced in discovery the standard forms which they used to pay out over \$100 million in guaranties under the MPA. *In the Matter of Valuation Proceeding Under Sections 303(c) and 306 of Regional Rail*, 531 F.Supp. 1191, fn. 176 (Sp. Ct. R.R.A. 1981); Claimants' Trial Exs. 57-60. Not a single form ever produced by Penn Central required proof of causation. There was never a requirement that thousands of employees hire expert economists to opine that their lost week of work was proximately caused by a merger which had occurred years previously. Penn Central's course of performance also shows that they calculated benefits based upon Appendix E. *Id.* It strains credibility to claim, as Penn Central now does, that they have been misapplying the MPA for forty years.

4. **Penn Central's Assertions Of Causation Are Without Merit.**

Penn Central erroneously relies on various opinions in order to claim that causation is required. Penn Central's quotes are all taken out of context to mislead this Panel. None of them discuss whether they are addressing claims under Subsection 1(a) or the additional benefits under

Subsection 1(b). Penn Central Post-Arb. Brief at 8. For example, the oral comments by Judge Lambros are part of a fifty-page transcript in which he recites a laundry list of possible issues. Judge Lambros correctly recognized that the railroad would take the position at arbitration that they are absolved by reason of a purported causation requirement. Judge Lambros was not making a ruling on the validity of the argument. He was simply observing that Penn Central would raise this defense and that the panel would need to address it. Moreover, as provided *infra* Penn Central has not even quoted correctly the language on which they seek to rely.

Penn Central also fundamentally misunderstands the WJPA. It quotes in support of its own position, a section stating that “fluctuations, rise and falls, changes in volume or character of employment brought **solely** by other causes are not . . . covered or intended to be covered by this agreement.” Penn Central Post-Arb. Brief at 8 (Emphasis added). First, this clause may be relevant to Subsection 1(a), but is completely irrelevant to Subsection 1(b). Second, this provision undermines Penn Central’s argument. It provides that a fluctuation must be solely caused by factors other than the merger. Thus, even under the original WJPA, if out of many possible causal factors, the merger has any causal connection, then the workers were still entitled to their guarantees. Penn Central is required to negate all other possible causes. It is not enough simply to say that there was a decline in passenger traffic, Penn Central must prove that no part of the merger was related to the loss of employment. Again, Penn Central mis-reads the MPA. In any event, no other set of employees were ever required to prove causation.

5. In The Alternative, There Is Ample Proof That The Merger Caused The Claimants’ Damages.

One of the primary purposes of the MPA was to eliminate any continuing barriers to recovery under the WJPA. Causation was eliminated. However, even if the Panel determines that Claimants must prove causation to recover under Subsection 1(b), there is ample evidence in

the record to demonstrate causation. First, the Surface Transportation Board ("STB") concluded that, with respect to the Brakemen, the Claimants had proved causation. Claimants' Trial Ex. 7 at 7-9. Second, even in the face of declining patronage, the New York Central had for years prior to the merger continued passenger service. In contrast, the Pennsylvania's C.E.O. Saunders was committed to eliminating passenger service. Claimants' Trial Ex. 13 at 131. When the merger allowed Saunders to assume control of the New York Central, he eliminated passenger service and, thus, caused damage to the Claimants.¹ Further, with regard to the Brakemen, they were laid off within thirty days of the merger. Claimants' Trial Ex. 15. The Clerks were explicitly told that their positions were being consolidated as a result of centralizing the accounting departments of the merged railroads. Claimants' Trial Ex. 20. Based on the testimony of Penn Central's expert Weinman, the passenger traffic had been in decline for many years prior to the merger, yet the Claimants jobs had not been abolished. It strains credibility to claim that it is simply a coincidence that Penn Central's treatment of the Claimants just happened to occur at the same time as the merger.

6. Penn Central's Expert Admits That His Testimony Does Not Relate To The MPA.

Penn Central's heavy reliance on the testimony of its sole witness, Michael Weinman is misplaced. Weinman's entire testimony and his expert report entirely miss the point of Claimants' case. This action is one for breach of the MPA. As explained below, however, Weinman's entire testimony is concerned with whether there was a decrease in passenger traffic at the CUT during the 1960's. Weinman agrees that neither his testimony nor his expert report deal in any manner with the issue of whether Penn Central breached the MPA or why the Penn

¹ Again, these damages were anticipated by the parties which is why the MPA created enhanced benefits to protect these workers.

Central treated the Claimants in any particular manner. Weinman, Tr. 546-47, 553, 555-58, 570; Claimants' Trial Ex. 14, at 51, 84.

The MPA prevented the Penn Central from placing workers in a worse position relative to compensation, rules, working conditions, fringe benefits, seniority rights, disability or discipline. MPA, §1(b). The MPA theoretically would have allowed Penn Central to reduce the work force of the merged company only under very explicit and specific circumstances, none of which had been met by Penn Central. Specifically, MPA §1(b) provides, in pertinent part that:

In the event of a decline in the merged company's business in excess of 5% in the average percentage of both gross operating revenue and net revenue ton miles in any 30-day period compared with the average of the same period for the years 1962 and 1963, a reduction in forces in the craft represented by the organization signatory hereto may be made at any time during the said 30-day period below the number of employes[sic] entitled to preservation of employment under this Agreement to the extent of one percent for each one percent the said decline exceeds 5%. The average percentage of decline shall be the total of the percent of decline in gross operating revenue and percent of decline in net revenue ton miles divided by two. Advance notice of any such force reduction shall be given as required by the current schedule Agreements of the organization signatory hereto and such reduction shall be made in accordance with existing Agreements. Upon restoration of the merged company's business following any such force reduction employes [sic] entitled to preservation of employment must be recalled in accordance with the same formula within 15 calendar days.

MPA §1(b) (Emphasis added.)

As the quoted portion of the MPA shows, a business decline meeting the formula in MPA §1(b) could have justified Penn Central's actions. Penn Central, however, has not provided any evidence of a business decline meeting the formula provided in the MPA.² Rather, Penn Central has elicited the testimony of Weinman to opine that, in general, there was a decline in passenger

traffic on the railroad in the 1960's. On cross-examination, Weinman admitted that his testimony regarding the decline in passenger traffic had nothing to do with any part of the MPA.

Specifically, Weinman testified:

Q. So the testimony that you gave earlier about the decline in passenger traffic, that had nothing to do with the MPA, did it?

A. As near as I can tell, it was an entirely different area.

Weinman, Tr. 551.

7. Penn Central Knew That Weinman's Testimony Was Irrelevant.

More telling is the fact that Penn Central asked Weinman to help prove that there was a business decline which met with the formula in MPA §1(b) and that Weinman told Penn Central that he could not do so. Weinman testified that the questions that were put to him by Penn Central in preparation of his report were those contained in an e-mail communication from Jason Groppe, counsel for Penn Central, to him dated August 20, 2007. Weinman, Tr. 545 – 546. The first question put to him by Penn Central was:

What documents will you need to prove the below stated issues:

- 1) that PCC had a business decline that necessitated a furlough based on the formula for overall business decline in the MPA section 1(b), as a disqualifying factor for receipt of benefits under the MPA (basically, did PCC's decline in passenger service and possibly other areas, meet the formula in the MPA – of which you should have a copy that I faxed); . . .

Penn Central Trial Ex. 1 at PCC 003899 – 003900.

² The required percentage of business decline was an accepted provision that Penn Central regularly calculated in order to monitor its business and to justify layoffs under other railroad agreements. Claimants' Trial Ex. 31. See also Claimants' Trial Brief at 51-52.

Weinman could not "help prove" that the MPA's business decline clause had been met because of the fact that the MPA formula deals with freight issues, not the passenger issues for which he claims to be an "expert." He testified in this regard as follows:

Q. And you responded to that by saying that you couldn't answer the question, right?

A. That's essentially correct.

Q. And you couldn't answer it because the formula that's provided in the MPA doesn't have anything to do with passenger service, isn't that right?

A. As near as I can interpret, it's primarily related to freight business.

Weinman, Tr. 547.

Despite knowing that it could not justify its conduct under the MPA, Penn Central continues to rely on Weinman's testimony that there was a general decline in passenger traffic at the CUT. There is not a single issue in this case for which such testimony is even remotely relevant. The bottom line, however, is that it does not justify any breach of the MPA.

8. None Of Weinman's Testimony Relates To Why Any Claimant Was Furloughed.

In addition to the fact that Weinman's testimony was irrelevant to the issues of whether the MPA was violated or whether there is a defense to such violation, Weinman's testimony regarding the general decline in passenger traffic had nothing to do with addressing the reasons behind Penn Central's treatment of the Claimants. In this regard, Weinman testified:

Q. Can you tell me why Mr. Gentile didn't receive benefits under the MPA?

A. No, I can't tell that. I don't know.

* * *

Q. You didn't do any analysis to determine specifically why a particular Claimant didn't receive benefits, am I right?

A. That's correct.

Q. And you weren't asked to do that, right?

A. That's correct.

Q. And you couldn't do that?

A. That's correct.

Q. It's outside the scope of what you do?

A. Yes.

Weinman, Tr. 555 – 556.

Rather, Weinman was testifying in a general sense, not specific to these Claimants, regarding a number of social issues that were occurring in the 1960's and the fact that they may have impacted the Penn Central or its employees. For example, Weinman identified riots, the highway system, mail service and others. However, he could not quantify the impact of any one of these things on the specific Claimants in this case. Weinman, Tr. 556. In fact, Weinman admits that he did no study on the impact of any of these items.

Q. You weren't involved in the decision as to how to treat the particular Claimants in this case, were you?

A. No.

Q. You haven't done a particular study on that have you?

A. No.

Q. And you have not done any study to determine what caused the Penn Central to act in any particular way towards its employees.

A. No.

Q. No, you have not?

A. I have not.

Weinman, Tr. 570.

Despite Penn Central's attempt to use Weinman in areas admittedly beyond his scope, Weinman himself contradicts Penn Central's attempt to use him to justify their conduct. As if it made a difference, which it does not, Penn Central is arguing that its conduct was justified by business decline on the passenger side of the company. However, the fact that their sole witness, Weinman, could neither quantify the impact of the decline on the particular Claimants in this case nor even opine on whether it had any impact on these particular Claimants shows that this argument is yet another attempt to justify conduct years after the fact.

It is clearly "grasping at straws" to ask your expert to justify conduct and then, when he says that he cannot do it, ask him to testify on a wholly irrelevant issue regarding passenger traffic in order to prove a nonexistent causation requirement. Weinman's use to this proceedings is best summed up in the following exchange from the hearing:

Q. And you have no opinion on what caused – or any causation issues specifically to this case, do you?

A. Could you be more specific please?

Q. Yes. Well, the scope of your report was limited, specifically, to tell this Panel that there is a decline in passenger service over a number of years, is that right?

A. That's certainly the gist of it.

CHAIRMAN STEINGLASS: I think we are going to stipulate there has been a significant decline in the passenger service in the last 30 years.

Tr. 557 – 558; *See also* Weinman Dep., Claimants' Trial Ex. 14 at 51, 84.

It is clear Weinman had no opinion on why these Claimants were furloughed or why they were deprived of their benefits under the MPA. Weinman's testimony proved the obvious, to wit: passenger train service has declined over the years. There is no testimony or proof offered by Penn Central which in any way establishes that fact as a justification for the treatment of Claimants. This last-ditch effort to justify the unjustifiable should be rejected.

9. Sophner Plaintiffs Are Entitled To Damages.

Penn Central claims that the Sophner Claimants should not be paid because their damages occurred years after the merger, and therefore, could not have been proximately caused by the merger. Claimants' Trial Exhibits 57-60 show that Penn Central's course of performance was to pay workers under the MPA at least through 1975. Again, this shows that causation was not required. Moreover, in comparison, the loss of income by the Sophner Claimants was closer in time to the merger than were the claims of the other employees who were paid. *Id.* The Sophner Claimants are seeking damages for time periods before 1975. They should be paid.

Penn Central also misunderstands the Sophner Claimants' case. Penn Central seems to think that it is important that some Sophner Claimants were furloughed either before or after the merger. There is no claim for damages **before** the merger. The only claim is for time lost **after** the merger. This is not necessarily based upon any furlough. These claims are based upon the application of the MPA's objectively determined guarantee that workers will not be paid less than their 1963-64 base period wages. Regardless of the reason for their loss of work the Sophner Claimants (and the other Claimants) are entitled to the difference between their guaranteed base period wages and their actual wages.

B. Claimants Fully Complied With The MPA.

1. Availability Issue Is Only Relevant To the Brakemen, Not To the Carmen Or Clerks.

Penn Central continues to argue over whether Claimants were available for work. Availability is only an issue for the Brakemen who were furloughed *en masse* in February 1968. Availability is not an issue for the Sophner Claimants who continued to work. Availability is not an issue for the Clerks who requested severance payments. Obviously, it is ridiculous to argue that the Clerks' right to separation is conditioned on **not** being separated.

The basis of Penn Central's availability argument is rooted in their misuse of the Sixth Circuit's decision in *Augustus*. Of course, *Augustus* concerned plaintiffs who refused to report to work after they were recalled from their furlough. Here, all the Brakemen were maintained on the rosters of Penn Central as "being on furlough." The Brakemen all timely accepted recall and returned to work after their furloughs ended and work became available.

In the portion of the *Augustus* decision quoted by Penn Central at page 18 of its Merit Brief, the Sixth Circuit first states that "that Petitioners' failure to report to work precluded their recovery under the MPA – was based on the express terms of the MPA." Although not highlighted by Penn Central, the Sixth Circuit also stated that the MPA "required covered employees to accept **available** work in order to qualify for benefits." (Emphasis added.) It is the **work** that must be **available**. The Court went on to state that "refusal to report to work was at their own peril." The "peril" is that they might miss available work, which would then deprive them of a right to compensation. It is clear from reading the entirety of the *Augustus* decision that the Court was concerned with whether the employees had refused **available** work, not with whether the employees had simply reported for work. The Court's focus is clearly on availability of work. Understandably, a worker cannot get paid if he voluntarily refuses available work.

However, Penn Central does not care whether the work was available or not. Under Penn Central's interpretation of the Sixth Circuit ruling, the only thing that mattered was whether the employees had reported for work, regardless of whether there was any **available** work. The entire MPA was predicated on an agreement that the "present employees" would not be deprived of work. If there was a deprivation, the MPA required compensation. If no work was available, the workers were entitled to benefits.

2. The MPA Does Not Contain the Phrase "Report to Work."

The MPA does not discuss the concept of "reporting." Instead, the MPA has a reduction for "voluntary absences to the extent that he is not available for service." Appx. E. Thus, there must be 1) a voluntary absence; and 2) service for which he was unavailable. "Reporting" is not a requirement that is contained in the MPA.³ To the extent that it means anything, it means that the workers must be listed on the roster, and available for a call in the event that there is work for the employee. Here, the Brakemen were always on the roster and designated as being on "furloughed" status. Claimants' Trial Exs. 46, 51.

3. The 1965 Top and Bottom Agreement Effectively Precluded The Claimants From Receiving Work in the Freight Yard.

After the execution of the 1964 agreement, the employees through their unions entered into various implementing agreements in preparation for the consolidation of the railroads. On February 16, 1965, the union signed an agreement with the New York Central allowing C.U.T. passenger employees to work in the freight yard in the event of a furlough. Penn Central Trial Ex. 97. The CUT roster was placed on the "bottom" of the New York Central roster. In other words, regardless of their actual seniority, all of the CUT men were placed after the last man on the NYC roster. All CUT men, regardless of their true hire dates were given September 10, 1964 seniority dates for purposes of seniority in freight yard jobs. Claimants' Trial Ex. 16. Accordingly, when the Knapik claimants were furloughed, the notice correctly stated "you have rights in the Cleveland Freight Yard Territory effective February 16, 1965." However with the

³ The Railroad did not provide any documentation of any failure to "report for work." Indeed, other than the current roster and personnel information such as phone numbers there is no evidence that such documentation was kept. An employee simply informed the yardmaster verbally if he was available for work. Knapik Tr. 140. This was done over the telephone without even appearing at the yard. Knapik Tr. 101-02.

September 10, 1964 seniority date given them under the Top and Bottom Agreement, they did not have enough seniority to bump into any jobs at the time of the furlough.

For example, they lost, in some instances, over four hundred places at the bottom of the consolidated roster. Compare Christ Steimle's position 58 on the CUT roster dated February 16, 1965, the day of the Top and Bottom Agreement and Steimle's position 506 on the consolidated Freight Roster, also dated February 16, 1965. Claimants' Trial Ex. 16; Beedlow Testimony, Claimants' Trial Ex. 34 at 234, 235.

Although the furlough notice said the CUT men had rights, it only stated that they "may stand for employment in the Freight Yard Territory," not that any jobs would actually be available. Claimants' Trial Ex. 15. This was another deception by Penn Central. The Knapik group theoretically had the right to work in the freight yard but they did not have enough seniority to make them eligible for actual jobs in the freight yard. Claimants' Trial Ex. 34, Beedlow Testimony at 250-58. The furlough notice was merely reiterating that under the 1965 Agreement they were permitted to apply for jobs in the freight yard, **not** that jobs were available to them in the exercise of their September 10, 1964 freight yard seniority.

The language "you may stand for work" in the February 21, 1968 furlough notice was never, in its plain language, nor in its application, a "recall" to work in the freight yard or even an indication that any work was available in the freight yard. Claimants' Trial Ex. 15. With the exception of a few of the most senior CUT men in the Knapik group, such as Day and Uher who were recalled to CUT in 1968, none of the other CUT men had enough seniority to get jobs until the 1969 recall. Penn Central's Trial Exs. 18, 20, 21, 23; Tr. 116, 124; Claimants' Trial Ex. 46; Claimants' Trial Ex. 34, Testimony of Beedlow at 257; Testimony of Steimle 467-69.

The lack of available work, which continued to place most of the Knapik claimants on furlough status, was verified by Penn Central. For example, in mid 1968 the Railroad indicated that Knapik Claimant Acree was not required to undergo a periodic physical exam, a prerequisite for work, because he was on furlough and thus was ineligible to work. Claimants' Trial Ex. 51. The time cards of the Knapik claimants also indicated that they were on furlough. Claimants' Trial Ex. 46. Compare the furlough notation on the Knapik timecards to notations on the *Augustus* claimants' time cards, such as Sam Tannenbaum, which indicated "failed to answer recall from furlough when recalled 5/16/69", confirming they were no longer on furlough status because of their refusal to work which rendered them unavailable to work. Claimants' Trial Ex. 47.

4. The 1969 Agreement Abrogated the 1965 Agreement, Facilitated the Recall by Guaranteeing a Percentage of Jobs and Recognized That Appendix E Determined Claimants' Rights To Wage Guarantee.

In response to the obvious problem and the inequity that "bottoming" the CUT roster had caused in rendering the CUT men jobless, the merged company and the union for the CUT men negotiated the 1969 agreement. Penn Central Trial Exhibit 99. That agreement at paragraph four abrogated the 1965 Top and Bottom Agreement "On the effective date of this Agreement all prior agreements in effect between the Cleveland Union Terminals Company and its yard service employees represented by the former Brotherhood of Railroad Trainmen will be abrogated." Penn Central Trial Ex. 99.

The 1969 Agreement created a new, predetermined, ratio such that 2.5% of the freight jobs would be allocated to CUT men. The 1969 Agreement was a step in the right direction. It gave some Knapik men jobs, which is why they were recalled within close proximity to the execution of this agreement. See Penn Central Trial Ex. 23. However even 2.5% only amounted to 7-9 jobs for approximately 63 CUT men on the roster. Claimants' Trial Ex. 34, Steimle

testimony at 470; Knapik Tr. 135; Claimants' Trial Ex. 16. Therefore while most of the CUT men were eventually recalled in 1969 (because of the 1969 Agreement) and got jobs, they were not full time positions, as reflected by their decreased earnings, post 1969. Claimants' Trial Ex. 8; Claimants' Trial Ex. 34, Steimle testimony at 467,468, Beedlow testimony at 257; Knapik Tr. 141. Claimant Steimle testified:

Q. And when you reported, I believe in 1969, what kind of jobs were available to you when you reported?

A. Well, I would get as many as seven phone call a day telling me I was displaced, to pick another job or back on the extra board, and there was days that I would go four, five, six days at a time without working.

Claimants' Trial Ex. 34, Steimle Testimony at 467. The only jobs they could get were mostly extra board, vacation or illness replacement temporary jobs. Gallagher, Tr. 164. Steimle testified that with September 10, 1964 seniority he could not get full time employment even as part of the 2.5% allocation until 1984 more than fifteen years after the furlough.

Another important aspect of the 1969 agreement was that it explicitly provided that the CUT men were covered under the MPA and recognized that

the Cleveland Union Terminals Company and former New York Central Railroad earnings during the test period established by **Appendix E of the Merger Protection Agreement** will be combined for the purposes of computing the earnings guarantees for Cleveland Union Terminal employees who are entitled to such **guarantees** under the provisions of this agreement subject to the qualifying conditions of the November 16, 1964 Merger Protection Agreement and appendices thereto. (emphasis added).

Penn Central Trial Ex. 99 at ¶ 7.

That language is critical. It acknowledges that Appendix E applies to compute guarantees of the Knapik claimants, and completely negates Penn Central's position that the WJPA ¶6 applies. Penn Central Trial Ex. 99.⁴

5. The STB Has Already Determined That All The Brakemen Reported To Work At The Freight Yard.

Penn Central is now attempting to reverse the conclusion of the STB that all the Knapik Claimants reported for work at the freight yard. The STB reversed the prior arbitration panel for "egregious error" because the evidence then, as now, demonstrated that they all reported to the freight yard. For example, Penn Central's only witness, Mr. Ellert, testified regarding Claimant Benko that:

Q. In fact, Defense Exhibit 10 submitted by your carrier says "Accepted recall, 1969" worked in the New York Central freight yard.

A. All right.

Q. Isn't that right?

A. Right.

Q. And that was the freight yard he was supposed to go to pursuant to the 1965 agreement where he was supposed to get all his benefits, right?

A. That's correct.

Q. And the 1969 agreement where he was supposed to get all his benefits, isn't that right?

A. That's correct.

⁴ Further, this language clarifies that CUT employees were protected under the MPA and were entitled to wage guarantees. This completely undercuts Penn Central's original litigation position that the CUT employees were not covered. Penn Central repudiated the 1969 Agreement in failing to recognize that the Claimants were covered by the MPA and were entitled to wage guarantees. *See also* Claimants' Trial Ex. 34 Ellert testimony at 78, 84-85, 92. This blatant breach of the agreement delayed this case for years and further demonstrates that claimants are entitled to punitive damages. The Agreement also undercuts Penn Central's position that WJPA, not Appendix E applies. Even Penn Central's Assistant Manager of Labor Relations, George Ellert, confirmed that Appendix E was to be used to calculate guarantees and to make them whole. Claimants' Trial Ex. 34, Ellert testimony at 121, 127-128.

- Q. He did what he was supposed to do, isn't that right, he reported to work?
- A. Did he work full time?
- Q. He reported to work like the furlough notice told him to do, didn't it?
- A. Yes, he did.
- Q. He reported to work like the carrier told him to when they sent him those letter in 1969, didn't he?
- A. Yes.

Claimants' Trial Ex. 34, p.172. Similar evidence was admitted regarding the other claimants. The prior arbitration panel heard sufficient factual evidence regarding each Knapik Claimant to enable the STB to reverse the decision for "egregious error" and to affirmatively find that all of the Knapik Claimants reported for work at the freight yard. Penn Central's assertions to the contrary are simply an attempt to overturn the factual findings of the STB in this case.

6. Penn Central's Furlough Is An Admission That They Were Available for Work But that There Was No Work In The Freight Yard.

The fact that the Brakemen were listed by Penn Central as being furloughed proves that there were no jobs in the freight yard. In order to have been furloughed, the workers had to be on the active roster and thus available for work. If they were available for work and nonetheless furloughed, it means that there was no available work. With no available work, Claimants are entitled to protection under the MPA.

7. The Fact That The Brakemen Actually Returned To Work Proves That They Reported for Work, Made Themselves Available and Accepted Recall.

There is no dispute that the Brakemen actually returned work. This is evidenced by the fact that the RRB records show earnings after the furlough and by Penn Central's own records. Claimants' Trial Ex. 8; Penn Central Trial Ex. 18-27. Obviously if a worker returns to work, it must be true that they also made themselves "available" for work. It also follows logically that

these workers both “accepted recall” and “reported to work.” Further, there was no work available for furloughed workers until they were recalled. In fact, Penn Central’s records use the words “accepted recall.” The dates that these workers reported for work are detailed in Claimants’ Post Arbitration Brief.

8. The Severance Clerks Were Not Obligated To Keep Working Because They Invoked Their Rights to Separation Payments.

Penn Central ignores the fact that the definition of “deprived of employment” is contained in the MPA when it argues broadly that the Clerks could have had jobs as “utility” employees. Penn Central claims that because of the availability of “utility” jobs, these workers were not “deprived of employment.” It is the abolition of the particular position that is significant. The MPA, however, addresses this issue:

An 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. (emphasis added).

WJPA §7(a). There are two specific prongs: the abolishment of the particular position that is held by the employee and the inability of the employee to exercise the worker’s seniority rights. Once those are met, the worker is entitled to a separation allowance.

Contrary to Penn Central’s claims, the availability of any “utility” employment, where the workers were precluded from exercising their seniority rights, does not satisfy the MPA or justify Penn Central’s non-compliance. Only a job that is available through the employee’s seniority rights is sufficient. Here, the Clerks were stripped of all their seniority. There were no jobs available to them “by exercise” of seniority. Finally, there is no dispute that their positions on their home roads were abolished or that this abolition was due to the consolidation of the merged railroads’ accounting offices.

Surprisingly, Penn Central's brief cites a Notice which proves this point. Penn Central informed the Clerks that:

Under the provisions of the 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) days you will become a utility employee subject to use by the Company in accordance with the terms of the Merger Implementing Agreement.

Penn Central Post-Arbitration Brief at 23.

The plain language of this Notice is quite clear. Under the first sentence, the worker has 10 days to try to get a job through the "exercise of [their] seniority." If they could not "obtain a regularly assigned position available to you in the exercise of [their] seniority," the second sentence states that it is then that they would become "utility" employees. Thus, they become a utility employee if they meet the MPA's criteria for failure to obtain a position through their seniority. The fact that Penn Central agrees that, following this Notice, that the Clerks became "utility" employees proves that these employees could not exercise their seniority. Thus, it also proves that they have met the second prong entitling them to separation payments under the MPA. The first prong (i.e. abolition of position as a result of the merger) was proven by Penn Central's own letters and by the testimony of Claimant Phillip Franz. Claimants' Trial Ex. 20; Tr. 219. Accordingly, the Clerks are entitled to their separation payments.

C. Dr. Rosen Properly Calculated Claimants' Damages.

- 1. Penn Central Cannot Refuse To Produce Information, Destroy Documents, And Then Complain About Dr. Rosen's Calculations. Penn Central Is Estopped From Challenging Dr. Rosen's Calculations.**

The MPA §1(b) requires that Penn Central provide the *prima facie* information necessary to calculate benefits due to Claimants. Penn Central must produce information including

“current rate of pay, compensation paid and hours worked during the base period comprised of the last twelve (12) months in which he performed compensated service immediately preceding May 16, 1964” and “all elements of compensation.” MPA, Appx. E. This employment information was kept by Penn Central during the normal course of its business. Although Penn Central admitted in its Answers to interrogatories that it maintained such information, it has never produced all of its required data. Claimants’ Trial Ex. 56. Penn Central breached the MPA’s contractual obligation to produce the data needed to calculate Claimants’ damages. Rosen, Tr. 385-86. Penn Central cannot create a lack of information, and then claim that Dr. Rosen did not use the correct information. Penn Central is equitably estopped from challenging Dr. Rosen’s calculations.

2. Dr. Rosen Calculated Damages According To the MPA.

Despite Penn Central’s failure to produce information, Dr. Rosen correctly calculated damages according to the terms of the MPA. Penn Central asserts that the WJPA formula should be applied to all claims, including claims under Subsection 1(b). This argument would mean that the formula contained in Appendix E is meaningless.⁵ Under Penn Central’s theory, the negotiators drafted an entire section of the MPA that should not be considered. This is not correct.

Dr. Rosen correctly applied Appendix E to claims arising under Subsection 1(b) and applied the WJPA to claims arising under Subsection 1(a). With respect to the Brakemen, Dr. Rosen used Penn Central’s own calculations of their guarantee amounts. Rosen, Tr. 396, ll. 12-25. These amounts are the same figures that are also contained in Penn Central’s own trial

⁵ Paragraph 7 of the 1969 Agreement explicitly provides that the C.U.T. workers, including the Knapik Claimants are covered by the MPA. Penn Central’s Trial Ex. 99.

exhibits. See Penn Central Trial Exs. 18-27. See also Comparison Chart, Claimants' Post-Arb Brief at 18. Dr. Rosen then applied the formula contained in Exhibit E. Rosen, Tr. 397.

With respect to the Sophner Claimants, Penn Central failed to provide Dr. Rosen or the Claimants with the guarantee amounts. Accordingly, Dr. Rosen calculated these amounts using data from an authoritative source, the Railroad Retirement Board, and continued to follow the formula in Appendix E.

Penn Central's cross-examination of Dr. Rosen did not focus on Subsection 1(b) or Appendix E. Instead, it was limited to attempting to convince Dr. Rosen that, as a matter of law, he should have applied the WJPA to claims arising under Subsection 1(b). Dr. Rosen never agreed that the WJPA should be applied to claims under Subsection 1(b). As is clear from his testimony, Dr. Rosen agreed that the WJPA should be applied to claims under Subsection 1(a). On page 26 of Penn Central's Post-Arbitration brief, they quote:

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

Id. citing Tr. 438.

Penn Central does not seem to realize that when Dr. Rosen testified that "Section C outlines a formula on page 10. That's correct" that Dr. Rosen is simply stating the obvious: that, in fact, there is a formula in existence on page 10. He is not opining that this formula should be applied in lieu of Appendix E. Nor is he agreeing that Penn Central's six-step calculation is appropriate at all.

In fact, while sparring with Dr. Rosen, Penn Central helped clarify that Dr. Rosen correctly used Appendix E's formula, including the proper base period:

Q. All right. And that's just a base period so the worker knows what his base period salary was?

A. To compare it to.

Q. Right. But where does it say in this provision investigation [sic] that you use it to calculate the displacement allowance?

A. The next paragraph, I believe talks about “for purpose of determining whether or to what extent, such an employee has been place in a worse position” – that would be displaced – with respect to his compensation, his total compensation and total time paid for during the base period will be separately divided by twelve. If his compensation in his current position is less in any month (commencing with the first month following the date of consummation of the merger) than his average base period compensation – adjusted to include subsequent general wage increases.

Next, Penn Central goes into a litany of complaints which all relate to the WJPA, not the formula in Appendix E. First, Penn Central complains that Dr. Rosen did not personally calculate the individual guarantees for the Brakemen. Penn Central Post-Arbitration Brief at 27. This attack is meritless because Dr. Rosen relied upon Penn Central’s own calculations of these guarantees.

Next, Penn Central argues that, although Penn Central itself failed to produce monthly time records, that Dr. Rosen should have used monthly data. Penn Central Post-Arbitration Brief at 28. This attack is meritless for two reasons: Penn Central’s failure to produce monthly records is by itself a breach of the MPA; and Dr. Rosen’s use of annual data (in lieu of monthly data) worked to the benefit of Penn Central. Rosen, Tr. 397 In every case, the use of annual data reduced Penn Central’s damages. In some cases, the use of monthly data instead of annual data would have tripled the damages due to the Claimant. *See* discussion of damages for Christ Steimle, Claimants’ Post-Hearing Brief at 28.

Next, Penn Central complains that Dr. Rosen did not subtract any time for voluntary absences. Here, it is important to note the language of the MPA and the course of performance of Penn Central during the ten years of administering the MPA. First, Appendix E requires that

Penn Central produce information relating to the worker's *prima facie* claim for benefits. Thus, Appendix E requires Penn Central to produce wages, hours worked, etc. Significantly, the MPA does not require Penn Central to produce data regarding other available work, or work taken by less senior employees. Thus, under the MPA, the employee is never expected to have evidence regarding other available jobs. These are offsets or affirmative defenses on which Penn Central would bear the burden of proof. That is why the employee has no ability to access this information unless Penn Central attempts to prove its affirmative defense. It also makes sense because, as the STB held, the MPA places the burden on Penn Central to keep all the records needed to administer the compensation scheme. The STB also determined that Penn Central could have proven the availability of jobs, by comparing records of employees in front of and behind the Claimants on the roster. Penn Central failed to make this proof. Claimants' Trial Ex. 7 at 8; Knapik Tr. 104.

The course of performance in implementing the MPA makes this clear. On the back of the MPA form, it states that filling in any information regarding voluntary absences is "For Railroad Use Only." Penn Central prohibited employees from providing this information, but now – forty years later – wants Claimants to do so. Any offset for voluntary absences must be proven by Penn Central. These absences are proven by identifying the precise jobs that were filled by other workers and the days on which those jobs were filled. This was the course of performance for Penn Central workers. The Claimants here are entitled to the same rights.

3. Dr. Rosen Calculated Damages According To Penn Central's Own Practices.

Next, Penn Central complains that Dr. Rosen did not apply the WJPA's language that purportedly only pays benefits "in any month in which he performs work." Of course, the WJPA's language is completely irrelevant to Subsection 1(b), but it is also badly misconstrued.

Under Penn Central's new interpretation, an employee who works for one hour in a month is entitled to nearly his entire monthly salary, but the worker who is completely unemployed receives nothing. Penn Central's construction means that the worker who is injured more, actually receives less, while the worker who is injured less, actually receives more.

Not only is this interpretation unusual, it is not consistent with Penn Central's own course of performance. A review of the benefits paid, for example, to Mr. Middleton and Mr. Predmore shows that they were paid for months in which they were completely unemployed. Trial Exs. 57, 58. It is also worth noting that they were always entitled to the same guaranty amount in each month. Under Penn Central's attempt to apply the rolling time period of the WJPA, this guaranty amount should have changed each month. It did not. See Claimants' Trial Exs. 57-60. This is simply further proof that Penn Central's latest argument of seeking to apply the WJPA is simply incorrect. Thus, Dr. Rosen correctly interpreted and applied the MPA.

4. Dr. Rosen's Report Constitutes The Completion Of Penn Central's Own Standard MPA Benefits Form.

Penn Central created standardized forms for the payment of benefits under the MPA. They apparently used these every month for tens of thousands of workers. These forms require the employees to simply fill out the amount of their guarantee, the amount they were actually paid, and then subtract these amounts to determine the sum owed to the worker under the MPA. There is no space for an expert opinion on causation. Indeed, the idea of monthly causation studies by experts is not credible. Moreover, any evidence of an offset for voluntary absences is the burden of the railroad.

Dr. Rosen's testimony has "filled in" the claims form for the Claimants. The Claimants have set forth specific evidence of their guaranty amounts, their actual payments, and the amount

of their claims. They are entitled to the same rights as Penn Central's other workers. Based upon the evidence presented, they are entitled to the guaranties as determined by Dr. Rosen.

5. Penn Central Intentionally Misquotes Appendix E In Order To Reverse Its Meaning.

Penn Central's misreading and misinterpretation of the MPA is nowhere more apparent than when it attacks Dr. Rosen's work and claims that "Dr. Rosen intentionally ignored this language in Appendix E. . . ." Penn Central Post-Arbitration Brief at 31-32. To attempt to support its position, Penn Central misquotes Appendix E when Penn Central states: "Appendix E says quite clearly that 'employees **are** not entitled to preservation of employment' through guarantee of base hours or any other method." *Id.* at 32 (emphasis added). While Penn Central might wish for Appendix E to contain the language it quotes, in fact, the word "are" is not contained in that sentence. Thus, rather than stating that "employees **are** not entitled to preservation," Appendix E actual states that "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." MPA, Appx. E.

Penn Central's intentional insertion of the word "are" in that sentence changes the entire meaning of Appendix E. Far from stating that "employees are not entitled to preservation" as Penn Central would hope, the actual language shows that workers **are** entitled to preservation of employment and benefits under the MPA and for those who are not (i.e. employees that are not members of the signatory unions, or employees hired after the relevant time period), they are **still** entitled to protection under the WJPA. The last paragraph of Appendix E has no application to the Knapik or Sophner Claimants. Penn Central's latest attempt to distort and twist the meaning

of the MPA is consistent with its forty-year history of litigating this case. They will do anything to avoid payment. Penn Central's alteration of this section is unacceptable.

D. Penn Central's Miscellaneous Arguments Are Without Merit.

1. Spoliation.

Penn Central believes that because it sold its rail assets to Conrail that it is somehow relieved of its obligation to keep any copies of its records. The transfer of assets does not transfer a litigant's legal obligations. Yet, Penn Central believes that it is no longer required to preserve evidence. This is not the law. Even prior to the commencement of any litigation, a "plaintiff is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action." See *Cincinnati Ins. Co. v. Gen. Motors Corp.*, *supra*, citing *Hirsch v. Gen. Motors Corp.*, 266 N.J.Super. 222, 628 A.2d 1108, 1130 (1993).

Even if the Panel finds that the evidence was not deliberately destroyed, "negligent or inadvertent destruction of evidence is sufficient to trigger sanctions where the opposing party is disadvantaged by the loss." *Simeone v. Girard City Bd. of Edn.*, 171 Ohio App.3d 633, 872 N.E.2d 344, 222 Ed. Law Rep. 362, 2007 -Ohio- 1775 (Ohio App. 11 Dist., 2007). If the Panel finds that relevant evidence was, indeed, destroyed, then the Panel has the power to fashion a just remedy. *American States Ins. Co. v. Tokai-Seiki (H.K.), Ltd.* (1997), 94 Ohio Misc.2d 172, 175, 704 N.E.2d 1280. *Id.* at 176, 704 N.E.2d 1280, citing *Farley Metals, Inc. v. Barber Colman Co.* (1994), 269 Ill.App.3d 104, 206 Ill.Dec. 712, 645 N.E.2d 964, 968. Moreover, to the extent that any intent element is required, it can be inferred from the facts.

[T]he intent of the spoliator in destroying or altering evidence can be inferred from the surrounding circumstances. In other words, intent can be inferred from the fact that the evidence was destroyed prior to the commencement of any litigation against the defendant and there is only a potential for litigation. Therefore, the [spoliator]

is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.

Cincinnati at 9, citing *Hirsch*, 266 N.J.Super. 222, 628 A.2d at 1130.

Furthermore, “[w]here the loss of evidence is belated, a court should not dwell on intent but, rather, focus on the importance of information legitimately sought and which is unavailable as a result of the destruction of evidence.” *Am. States Ins. Co.*, 94 Ohio Misc.2d at 176, 704 N.E.2d 1280.

The Panel must balance “[t]he intent of the offending party, the level of prejudice, and the reasonableness of the offending party’s action . . . in fashioning a just remedy. The relative importance of the information denied the opposing party bears directly on [the] reasonableness of the offending party’s action and the resulting prejudice.” *Id.*

If the Panel does find that spoliation of evidence did occur because the offending party failed to preserve the evidence, then “the court must impose a sanction that is proportionate to the seriousness of the infraction under the facts of this particular case.” *Id.*

Here, the information that is missing is time and payroll records. It is not disputed that this information was in the possession of Penn Central. Claimants’ Trial Ex. 56; Gallagher Tr. 209. It is equally indisputable that the information was in Penn Central’s possession at the time the lawsuit was instituted in 1968. *Id.* Accordingly, under Ohio law, Penn Central had a duty to maintain this information. Penn Central admits that despite the law to the contrary, it did not maintain this information, but sent it to Conrail, notwithstanding the pendency of the suit. Regardless, Penn Central was required to keep copies of documents relevant to pending litigation.

Even worse, Penn Central conveniently ignores Section 7 of the Conrail sales agreement which requires Penn Central to retain litigation related materials. Penn Central Trial Ex. 105.

Similarly, Penn Central has negotiated other agreements, for example with the Pennsylvania Historical Society, which allowed it to retain any personnel records or records which might relate to litigation. Claimant Trial Ex. 32. Under these circumstances, Penn Central cannot even claim that it was accidental: it knowingly and intentionally failed to preserve these documents.

As stated in the law above, in this situation, “the court must impose a sanction proportionate to the seriousness of the infraction. . . .” Here the infraction was serious in that it prevented the Claimants from proving damages based on monthly data, proving their case without the help of an expert, determining the amount of the fringe benefits and reviewing the availability of specific jobs. Despite the temerity of Penn Central in demanding that its own spoliation inure to its benefit, this Panel should fashion a remedy that sanctions Penn Central for such conduct. Such a remedy should include barring Penn Central from contesting Dr. Rosen’s calculations, barring Penn Central from contesting the fact that all Claimants returned to work, and requiring Penn Central to pay for the costs of Dr. Rosen’s work.

2. Recall To Work vs. Report To Work.

Penn Central seems to place great emphasis on “reporting to work” – a phrase that does not exist in the MPA. Penn Central begins by intentionally confusing the *Augustus* plaintiffs with the current Claimants. These are two entirely different groups. None of the *Augustus* plaintiffs remain in this case because, unlike the Claimants, none of the *Augustus* plaintiffs returned to work. In contrast, all of the current Claimants reported to work and accepted work. First, they were always carried on the employment rolls – showing that they had reported. Indeed, the fact that they were “recalled” also shows that they were still on the employment rolls and were considered “available for work.” Second, the STB determined that they reported to the

freight yard even though there was never any available work at the freight yard.⁶ (Reporting to the freight yard for work that was not available was just another invented “hoop” through which Penn Central wanted the Claimants to jump in order to avoid payment). Third, they all accepted and responded to recall. In any event, the issue of “reporting” versus “recall” does not exist in the MPA. The language of the MPA focuses on “voluntary absences” and “available work.” The MPA does not mention or refer to “reporting” or “recalling.” Consistent with the MPA, the Claimants did not refuse available work.

3. Delays Of This Case.

Penn Central wishes to re-argue who is to blame for the forty-year delay in this case. Penn Central Post-Arbitration Brief at 39. Penn Central is particularly upset that when they fully briefed this argument before Judge Oliver that Judge Oliver, after considering all the evidence, determined that Penn Central has unclean hands. Judge Oliver’s decision is not subject to modification by this Panel.

First, Penn Central repudiated the 1969 Agreement, the 1974 ICC Order and Judge Lambros’ 1976 Order by continuing to hold the position that the Knapik and Sophner Claimants were not covered under the MPA until as late as the 1990 Arbitration. *See* Claimants’ Trial Ex. 34; Testimony of Ellert 80, 84, 85, 88, 91. This conduct delayed the case for ten to twenty years. Second, after the 1996 remand and order by the STB, Penn Central again refused Claimants’ request to reconvene the arbitration panel. Claimants’ Trial Ex. 25. Penn Central refused to appoint an arbitrator until it was ordered to do so by Judge Oliver. Penn Central’s intentional delays of this case are a basis for awarding punitive damages in this matter.

⁶ Penn Central refused to supply the rosters as requested, although it had access to them at the onset of this litigation. Claimants’ Trial Ex. 56.

4. Penn Central's Chart Is Incorrect, Misunderstands the MPA And Ignores The Evidence In The Record.

At the end of its brief, Penn Central includes a chart which purports to analyze each Claimants' case. In fact, the chart largely repeats the same conclusory allegations contained in their Post Arbitration Brief. Claimants have attached a responsive chart as Appendix A to this brief. Penn Central's chart is incorrect for numerous reasons. The Knapik Chart's first column erroneously assumes that causation is required for claims under Subsection 1(b). Then Penn Central simply copies this error throughout the chart. The chart also ignores the findings of the STB and the evidence presented regarding Saunders' policy changes, proximity in time and others. The second column in the Knapik Chart misconstrues *Augustus*, ignores the STB's findings that the Claimants' reported to the freight yard, ignores the fact that all Claimants were listed on Penn Central's employment roles, assumes that the MPA discusses "reporting" for work instead of "voluntary absences from available work," assumes that there was any work available at the freight yard, and ignores the fact that all Claimants returned to work. The third column erroneously claims that Dr. Rosen should have used the WJPA to evaluate claims under Subsection 1(b).

The Sophner Chart's first column is in error because, like the Knapik Chart, it assumes that the Claimants must prove causation. The second column incorrectly asserts that the Sophner Claimants have the burden of proving that they exercised their seniority rights. Penn Central's course of performance prohibited Claimants from filling in information regarding any other available jobs on their standard MPA form. The STB requires that Penn Central provide this information. The third column also incorrectly claims that Dr. Rosen should have applied the WJPA formula.

The Watjen/Bundy chart is in error. As Franz testified, the clerk positions were abolished as a result of the merger's consolidation of regional accounting positions. The second column misunderstands that the MPA requires that employee be able to secure a job "through the exercise of his seniority" and that the clerks were stripped of all their seniority. The third column is at odds with the Notice that Penn Central sent to the clerks: they only became utility employees because they were unable to find another job through the exercise of their seniority.

E. Penn Central Does Not Address Other Critical Issues.

Penn Central's brief is notably deficient in its failure to address several important issues which were fully litigated:

- **Interest:** Federal law awards prejudgment interest. Claimants' Post-Arb. Brief at 40-42. Dr. Rosen testified without rebuttal that pre-judgment interest was necessary to make the Claimants whole and that the proper rate of interest is the prime rate. Rosen, Tr. 426-28.
- **Attorneys Fees and Costs Of Litigation.** Arbitration panels have the power to award attorneys fees and the costs of litigation. Claimants' Post-Arb. Brief at 43-45. Penn Central did not respond to Claimants' law and evidence that, due to the conduct of Penn Central, attorneys fees and costs of litigation should be awarded.
- **Punitive Damages.** Punitive damages should be awarded to deter dilatory conduct and spoliation of evidence by Penn Central and other defendants. Here, double damages are appropriate. Claimants' Post-Arb Brief at 45.
- **Waiver Of Affirmative Defenses.** The Federal Rules of Civil Procedure require that any affirmative defenses must be raised and pled in the Answer. Penn

Central failed to raise its affirmative defenses of discharge in bankruptcy and any claims for offset. Claimants' Post-Arb. Brief at 45-46.

III. CONCLUSION

For all the foregoing reasons, judgment should be entered in favor of each individual claimant in the amount determined by Dr. Rosen, including interest at the prime rate, expert fees as damages, and the fees and costs of this litigation.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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on this 11th day of March 2008



Carla M. Tricarichi
Attorney for Claimants

APPENDIX A



EACH KNAPIK CLAIMANT'S EVIDENCE

Claimant	Evidence That Claimant Was Adversely Affected	Evidence That Claimant was Adversely Affected as a Result of the Merger	Evidence of When Claimant Reported For and Returned to Available Work	Evidence of Compensation Loss
Jack Acree	<ul style="list-style-type: none"> ▪ Furlough Notice Claimants' Trial Ex. 15. ▪ Railroad Retirement Board Records. Claimants Trial Ex. 8. ▪ Penn Central's Own Damage Calculations in Ex. A Claimants' Past Arbitration Brief. Rosen Report Claimants' Trial Exs. 9 and 42-45. 	<ul style="list-style-type: none"> ▪ STB Decision Claimants' Trial Ex. 7 at 7-9. ▪ Saunders' elimination of passenger service. Claimants' Trial Ex. 13 at 131. ▪ Temporal proximity (three weeks between merger and furlough). 	<ul style="list-style-type: none"> ▪ STB Decision reversing prior panel for "egregious error" and finding that all Knapik claimants reported to work at the freight yard. ▪ Penn Central's Trial Ex. 18 RTW Date June 1969. ▪ Claimants considered on furlough and available for work, Claimants' Trial Exs. 46 and 51. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 Ellert Testimony 626-628. ▪ Railroad Retirement Board Records. Claimants 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1968, 1969. ▪ Penn Central's Own Damage Calculations of "AMOUNTS OWED", Ex. A Claimants' Past Arbitration Brief.

			<p>Trial Ex. 8.</p> <ul style="list-style-type: none"> ▪ Penn Central's Own Damage Calculations of "AMOUNTS OWED", Ex. A Claimants' Past Arbitration Brief. 	
Edward Benko	<ul style="list-style-type: none"> ▪ Furlough Notice Claimants' Trial Ex. 15. ▪ Railroad Retirement Board Records. Claimants Trial Ex. 8. ▪ Penn Central Damage Calculations Ex. A Claimants' Past Arbitration Brief. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. 	<ul style="list-style-type: none"> ▪ STB Decision Claimants' Trial Ex. 7 at 7-9. ▪ Saunders' elimination of passenger service. Claimants' Trial Ex. 13 at 131. ▪ Temporal proximity (three weeks between merger and furlough). 	<ul style="list-style-type: none"> ▪ STB Decision reversing prior panel for "egregious error" and finding that all Knapik claimants reported to work at the freight yard. ▪ Penn Central's Trial Ex. 19 RTW Date June 1969. ▪ Claimants considered on furlough and available for work Claimants' Trial Exs. 46 and 51. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 Ellert Testimony 626-628. ▪ Railroad Retirement 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1968-1969. ▪ Penn Central's Own Damage Calculations of "AMOUNTS OWED", Ex. A Claimants' Past Arbitration Brief.

			<p>Board Records. Claimants Trial Ex. 8.</p> <ul style="list-style-type: none"> ▪ Penn Central's Own Damage Calculations of "AMOUNTS OWED", Ex. A Claimants' Past Arbitration Brief. 	
<p>Ken Day</p>	<ul style="list-style-type: none"> ▪ Furlough Notice Claimants' Trial Ex. 15. ▪ Railroad Retirement Board Records. Claimants Trial Ex. 8. ▪ Penn Central Damage Calculations Ex. A Claimants' Past Arbitration Brief. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. 	<ul style="list-style-type: none"> ▪ STB Decision Claimants' Trial Ex. 7 at 7-9. ▪ Saunders' elimination of passenger service. Claimants' Trial Ex. 13 at 131. ▪ Temporal proximity (three weeks between merger and furlough). 	<ul style="list-style-type: none"> ▪ STB Decision reversing prior panel for "egregious error" and finding that all Knapik claimants reported to work at the freight yard. ▪ Penn Central's Trial Ex. 20 RTW June 1968. ▪ Claimants considered on furlough and available for work Claimants' Trial Exs. 46 and 51. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 Ellert Testimony 626-628. ▪ Railroad Retirement 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1968-1969. ▪ Penn Central's Own Damage Calculations of "AMOUNTS OWED", Ex. A Claimants' Past Arbitration Brief.

			<p>Board Records. Claimants Trial Ex. 8.</p> <ul style="list-style-type: none"> ▪ Penn Central's Own Damage Calculations of "AMOUNTS OWED", Ex. A Claimants' Past Arbitration Brief. 	
Harvey Doran	<ul style="list-style-type: none"> ▪ Furlough Notice Claimants' Trial Ex. 15. ▪ Railroad Retirement Board Records. Claimants' Trial Ex. 8. ▪ Penn Central Damage Calculations Ex. A Claimants' Past Arbitration Brief. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. 	<ul style="list-style-type: none"> ▪ STB Decision Claimants' Trial Ex. 7 at 7-9. ▪ Saunders' elimination of passenger service. Claimants' Trial Ex. 13 at 131. ▪ Temporal proximity (three weeks between merger and furlough). 	<ul style="list-style-type: none"> ▪ Penn Central's Trial Ex. 21 RTW Date December 1969. ▪ Claimants considered on furlough and available for work Claimants' Trial Exs. 46 and 51. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 Ellert Testimony 626-628. ▪ Railroad Retirement Board Records. Claimants Trial Ex. 8. ▪ Penn Central's Own Damage Calculations of "AMOUNTS OWED", Ex. 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1968-1974. ▪ Penn Central's Own Damage Calculations of "AMOUNTS OWED", Ex. A Claimants' Past Arbitration Brief.

			<p>A Claimants' Past Arbitration Brief.</p>	
<p>Joseph Gastony</p>	<ul style="list-style-type: none"> ▪ Furlough Notice Claimants' Trial Ex. 15. ▪ Railroad Retirement Board Records. Claimants' Trial Ex. 8. ▪ Penn Central Damage Calculations Ex. A Claimants' Past Arbitration Brief. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. 	<ul style="list-style-type: none"> ▪ STB Decision Claimants' Trial Ex. 7 at 7-9. ▪ Saunders' elimination of passenger service. Claimants' Trial Ex. 13 at 131. ▪ Temporal proximity (three weeks between merger and furlough). 	<ul style="list-style-type: none"> ▪ STB Decision reversing prior panel for "egregious error" and finding that all Knapik claimants reported to work at the freight yard. ▪ Penn Central's Trial Ex. 22 RTW Date June 1968. ▪ Claimants considered on furlough and available for work Claimants' Trial Exs. 46 and 51. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 Ellert Testimony 626-628. ▪ Railroad Retirement Board Records. Claimants Trial Ex. 8. ▪ Penn Central's Own Damage Calculations of 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1968, 1969, 1971. ▪ Penn Central's Own Damage Calculations of "AMOUNTS OWED", Ex. A Claimants' Past Arbitration Brief.

			<p>“AMOUNTS OWED”, Ex. A Claimants’ Past Arbitration Brief.</p>	
George Gentile	<ul style="list-style-type: none"> ▪ Furlough Notice Claimants’ Trial Ex. 15. ▪ Railroad Retirement Board Records. Claimants Trial Ex. 8. ▪ Penn Central Damage Calculations Ex. A Claimants’ Past Arbitration Brief. ▪ Rosen Report Claimants’ Trial Exs. 9 and 42-45. 	<ul style="list-style-type: none"> ▪ STB Decision Claimants’ Trial Ex. 7 at 7-9. ▪ Saunders’ elimination of passenger service. Claimants’ Trial Ex. 13 at 131. ▪ Temporal proximity (three weeks between merger and furlough). 	<ul style="list-style-type: none"> ▪ STB Decision reversing prior panel for “egregious error” and finding that all Knapik claimants reported to work at the freight yard. ▪ Penn Central’s Trial Ex. 23 RTW Date September 1969. ▪ Claimants considered on furlough and available for work Claimants’ Trial Exs. 46 and 51. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants’ Trial Ex. 7 at 6-7. Claimants’ Arb Ex. 43 Ellert Testimony 626-628. ▪ Railroad Retirement Board Records. Claimants Trial Ex. 8. ▪ Penn Central’s Own 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants’ Trial Ex. 8. ▪ Calculation of Loss Rosen Report Claimants’ Trial Exs. 9 and 42-45 Showing Years of Loss 1968, 1969, 1971, 1972. ▪ Penn Central’s Own Damage Calculations of “AMOUNTS OWED”, Ex. A Claimants’ Past Arbitration Brief.

			<p>Damage Calculations of "AMOUNTS OWED", Ex. A Claimants' Past Arbitration Brief.</p>	
<p>George Norris</p>	<ul style="list-style-type: none"> ▪ Furlough Notice Claimants' Trial Ex. 15. ▪ Railroad Retirement Board Records. Claimants Trial Ex. 8. ▪ Penn Central Damage Calculations Ex. A Claimants' Past Arbitration Brief. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. 	<ul style="list-style-type: none"> ▪ STB Decision Claimants' Trial Ex. 7 at 7-9. ▪ Saunders' elimination of passenger service. Claimants' Trial Ex. 13 at 131. ▪ Temporal proximity (three weeks between merger and furlough). 	<ul style="list-style-type: none"> ▪ STB Decision reversing prior panel for "gregarious error" and finding that all Knapik claimants reported to work at the freight yard. ▪ Penn Central's Trial Ex. 24 RTW Date June 1968. ▪ Claimants considered on furlough and available for work Claimants' Trial Exs. 46 and 51. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 Ellert Testimony 626-628. ▪ Railroad Retirement Board Records. Claimants Trial Ex. 8. 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1968-1975. ▪ Penn Central's Own Damage Calculations of "AMOUNTS OWED", Ex. A Claimants' Past Arbitration Brief.

			<ul style="list-style-type: none"> ▪ Penn Central's Own Damage Calculations of "AMOUNTS OWED", Ex. A Claimants' Past Arbitration Brief. 	
Christ Steimle	<ul style="list-style-type: none"> ▪ Furlough Notice Claimants' Trial Ex. 15. ▪ Railroad Retirement Board Records. Claimants Trial Ex. 8. ▪ Penn Central Damage Calculations Ex. A Claimants' Past Arbitration Brief. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. ▪ Claimants' Trial Ex. 34 Steimle testimony at 467-469 	<ul style="list-style-type: none"> ▪ STB Decision Claimants' Trial Ex. 7 at 7-9. ▪ Saunders' elimination of passenger service. Claimants' Trial Ex. 13 at 131. ▪ Temporal proximity (three weeks between merger and furlough). 	<ul style="list-style-type: none"> ▪ STB Decision reversing prior panel for "egregious error" and finding that all Knapik claimants reported to work at the freight yard. ▪ Penn Central's Trial Ex. 25 RTW Date December 1969. ▪ Furlough Notice Claimants' Trial Ex. 15. ▪ Claimants considered on furlough and available for work Claimants' Trial Exs. 46 and 51. ▪ Penn Central as proper repository of personnel records STB Decision Claimants' Trial Ex. 7 at 6-7. ▪ Railroad Retirement Board Records. Claimants 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1968, 1969, 1971. ▪ Penn Central's Own Damage Calculations of "AMOUNTS OWED", Ex. A Claimants' Past Arbitration Brief.

			<p>Trial Ex. 8.</p> <ul style="list-style-type: none"> ▪ Penn Central's Own Damage Calculations of "AMOUNTS OWED", Ex. A Claimants' Past Arbitration Brief. 	
<p>Clarence Tomczak</p>	<ul style="list-style-type: none"> ▪ Furlough Notice Claimants' Trial Ex. 15. ▪ Railroad Retirement Board Records. Claimants' Trial Ex. 8. ▪ Penn Central Damage Calculations Ex. A Claimants' Past Arbitration Brief. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. 	<ul style="list-style-type: none"> ▪ STB Decision Claimants' Trial Ex. 7 at 7-9. ▪ Saunders' elimination of passenger service. Claimants' Trial Ex. 13 at 131. ▪ Temporal proximity (three weeks between merger and furlough). 	<ul style="list-style-type: none"> ▪ STB Decision reversing prior panel for "egregious error" and finding that all Knapik claimants reported to work at the freight yard. ▪ Penn Central's Trial Ex. 26 RTW Date December 1969. ▪ Furlough Notice Claimants' Trial Ex. 15. ▪ Claimants considered on furlough and available for work Claimants' Trial Exs. 46 and 51. ▪ Penn Central as proper repository of personnel records STB Decision Claimants' Trial Ex. 7 at 6-7. ▪ Railroad Retirement 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1968-1972, 1974, 1977-1979. ▪ Penn Central's Own Damage Calculations of "AMOUNTS OWED", Ex. A Claimants' Past Arbitration Brief.

			<p>Board Records. Claimants Trial Ex. 8.</p> <ul style="list-style-type: none"> ▪ Penn Central's Own Damage Calculations of "AMOUNTS OWED", Ex. A Claimants' Past Arbitration Brief. 	
<p>Frank Uher</p>	<ul style="list-style-type: none"> ▪ Furlough Notice Claimants' Trial Ex. 15. ▪ Railroad Retirement Board Records. Claimants Trial Ex. 8. ▪ Penn Central Damage Calculations Ex. A Claimants' Past Arbitration Brief. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. 	<ul style="list-style-type: none"> ▪ STB Decision Claimants' Trial Ex. 7 at 7-9. ▪ Saunders' elimination of passenger service. Claimants' Trial Ex. 13 at 131. ▪ Temporal proximity (three weeks between merger and furlough). 	<ul style="list-style-type: none"> ▪ STB Decision reversing prior panel for "egregious error" and finding that all Knapik claimants reported to work at the freight yard. ▪ Penn Central Damage Calculations Ex. A Claimants' Past Arbitration Brief. RTW' Date 1969. ▪ Claimants considered on furlough and available for work Claimants' Trial Exs. 46 and 51. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1968-1972. ▪ Penn Central's Own Damage Calculations of "AMOUNTS OWED", Ex. A Claimants' Past Arbitration Brief.

EACH SOPHNER CLAIMANT'S EVIDENCE

Claimant	Evidence That Claimant Was Adversely Affected	Evidence That Claimant Exercised Seniority Rights to All Available Positions	Evidence of Compensation Loss, Calculation of Loss, and Years of Loss
William Bilinsky	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. ▪ All Claimants adversely affected. Gallagher Tr. 181, 198. 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 Ellert Testimony 626-628, Gallagher Tr. 173, 209. ▪ Appendix E requires production of wage records. ▪ Sophner Claimants exercised seniority. Gallagher Tr. 174, 200, 201. ▪ No punishment or sanction by Penn Central. Gallagher Tr. 201. 	<ul style="list-style-type: none"> ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1971. ▪ All Claimants experienced loss. Gallagher Tr. 181, 198.
Joseph Cralic	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 8. 	<ul style="list-style-type: none"> ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1972, 1973. ▪ All Claimants experienced loss. Gallagher Tr. 181, 198.

	<ul style="list-style-type: none"> ▪ All Claimants adversely affected. Gallagher Tr. 181,198. 	<p>Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 Ellert Testimony 626-628, Gallagher Tr. 173, 209.</p> <ul style="list-style-type: none"> ▪ Appendix E requires production of wage records. ▪ Sophner Claimants exercised seniority. Gallagher Tr. 174, 200, 201. ▪ No punishment or sanction by Penn Central. Gallagher Tr. 201. 	
<p>Paul Foecking</p>	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45 ▪ All Claimants adversely affected. Gallagher Tr. 181,198. 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 Ellert Testimony 626-628, Gallagher Tr. 173, 209. ▪ Appendix E requires production of wage records. ▪ Sophner Claimants exercised seniority. Gallagher Tr. 174, 200, 201. ▪ No punishment or sanction by 	<ul style="list-style-type: none"> ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1969-1971, 1973, 1977-1978,1981-1983. ▪ All Claimants experienced loss. Gallagher Tr. 181, 198.

		Penn Central. Gallagher Tr. 201.	
John Gallagher	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. ▪ All Claimants adversely affected. ▪ Effect on Gallagher Tr. 161,164,167,175,177. 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 Ellert Testimony 626-628, Gallagher Tr. 173, 209. ▪ Appendix E requires production of wage records. ▪ Sophner Claimants exercised seniority. Gallagher Tr. 174, 200, 201. ▪ No punishment or sanction by Penn Central. Gallagher Tr. 201. 	<ul style="list-style-type: none"> ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1969-1972. ▪ All Claimants experienced loss. Gallagher Tr. 181, 198.
Gus Janke	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. ▪ All Claimants adversely affected. ▪ Gallagher Tr. 181,198. 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 Ellert Testimony 626-628, 	<ul style="list-style-type: none"> ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1969-1972. ▪ All Claimants experienced loss. Gallagher Tr. 181, 198.

		<p>Gallagher Tr. 173, 209.</p> <ul style="list-style-type: none"> ▪ Appendix E requires production of wage records. ▪ Sophner Claimants exercised seniority. Gallagher Tr. 174, 200, 201. ▪ No punishment or sanction by Penn Central. Gallagher Tr. 201. 	
Joseph Jarabeck	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. ▪ All Claimants adversely affected. Gallagher Tr. 181, 198. 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 Ellert Testimony 626-628, Gallagher Tr. 173, 209. ▪ Appendix E requires production of wage records. ▪ Sophner Claimants exercised seniority. Gallagher Tr. 174, 200, 201. ▪ No punishment or sanction by Penn Central. Gallagher Tr. 201. 	<ul style="list-style-type: none"> ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1970-1972. ▪ All Claimants experienced loss. Gallagher Tr. 181, 198.

<p>Edwin Kochenderfer</p>	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. ▪ All Claimants adversely affected. Gallagher Tr. 181, 198. 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 Ellert Testimony 626-628, Gallagher Tr. 173, 209. ▪ Appendix E requires production of wage records. ▪ Sophner Claimants exercised seniority. Gallagher Tr. 174, 200, 201. ▪ No punishment or sanction by Penn Central. Gallagher Tr. 201. 	<ul style="list-style-type: none"> ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1971-1974. ▪ All Claimants experienced loss. Gallagher Tr. 181, 198.
<p>Patrick McLaughlin</p>	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. ▪ All Claimants adversely affected. Gallagher Tr. 181, 198. 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 Ellert Testimony 626-628, Gallagher Tr. 173, 209. ▪ Appendix E requires production 	<ul style="list-style-type: none"> ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1968-1973, 1978. ▪ All Claimants experienced loss. Gallagher Tr. 181, 198.

		<ul style="list-style-type: none"> of wage records. ▪ Sophner Claimants exercised seniority. Gallagher Tr. 174, 200, 201. ▪ No punishment or sanction by Penn Central. Gallagher Tr. 201. 	
<p>Robert McNeeley</p>	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. ▪ All Claimants adversely affected. Gallagher Tr. 181, 198. ▪ Effect on McNeeley Claimants' Trial Exhibit 44 at 10-12. 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 Ellert Testimony 626-628, Gallagher Tr. 173, 209. ▪ Appendix E requires production of wage records. ▪ Sophner Claimants exercised seniority. Gallagher Tr. 174, 200, 201. ▪ No punishment or sanction by Penn Central. Gallagher Tr. 201. 	<ul style="list-style-type: none"> ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1968-1970, 1975, 1982-1983. ▪ All Claimants experienced loss. Gallagher Tr. 181, 198.
<p>Andrew Novotny</p>	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. 	<ul style="list-style-type: none"> ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss

	<p>Trial Ex. 8.</p> <ul style="list-style-type: none"> ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. ▪ All Claimants adversely affected. Gallagher Tr. 181, 198. 	<ul style="list-style-type: none"> ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 Ellert Testimony 626-628, Gallagher Tr. 173, 209. ▪ Appendix E requires production of wage records. ▪ Sophner Claimants exercised seniority. Gallagher Tr. 174, 200, 201. ▪ No punishment or sanction by Penn Central. Gallagher Tr. 201. 	<p>1968, 1970, 1973, 1978.</p> <ul style="list-style-type: none"> ▪ All Claimants experienced loss. Gallagher Tr. 181, 198.
<p>Martin Opalk</p>	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. ▪ All Claimants adversely affected. Gallagher Tr. 181, 198. 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 Ellert Testimony 626-628, Gallagher Tr. 173, 209. ▪ Appendix E requires production of wage records. ▪ Sophner Claimants exercised seniority. Gallagher Tr. 174, 200, 	<ul style="list-style-type: none"> ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1968-1969, 1971-1973, 1975. ▪ All Claimants experienced loss. Gallagher Tr. 181, 198.

		<ul style="list-style-type: none"> 201. ▪ No punishment or sanction by Penn Central. Gallagher Tr. 201. 	
<p>Louis Pentz</p>	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. ▪ All Claimants adversely affected. Gallagher Tr. 181, 198. 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 7 at 6-7. Claimants' Artb Ex. 43 Ellert Testimony 626-628, Gallagher Tr. 173, 209. ▪ Appendix E requires production of wage records. ▪ Sophner Claimants exercised seniority. Gallagher Tr. 174, 200, 201. ▪ No punishment or sanction by Penn Central. Gallagher Tr. 201. 	<ul style="list-style-type: none"> ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1969-1970, 1972-1973, 1975. ▪ All Claimants experienced loss. Gallagher Tr. 181, 198.
<p>Robert Schreiner</p>	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' 	<ul style="list-style-type: none"> ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1969-1973, 1975, 1978-1979. ▪ All Claimants experienced loss. Gallagher Tr. 181, 198.

	<ul style="list-style-type: none"> ▪ All Claimants adversely affected. Gallagher Tr. 181,198. 	<p>Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 Ellert Testimony 626-628, Gallagher Tr. 173,209.</p> <ul style="list-style-type: none"> ▪ Appendix E requires production of wage records. ▪ Sophner Claimants exercised seniority. Gallagher Tr. 174, 200, 201. ▪ No punishment or sanction by Penn Central. Gallagher Tr. 201. 	
<p>Paul Scuba</p>	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. ▪ All Claimants adversely affected. Gallagher Tr. 181,198. 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 Ellert Testimony 626-628, Gallagher Tr. 173, 209. ▪ Appendix E requires production of wage records. ▪ Sophner Claimants exercised seniority. Gallagher Tr. 174, 200, 201. ▪ No punishment or sanction by 	<ul style="list-style-type: none"> ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1968,1971-1973, 1975. ▪ All Claimants experienced loss. Gallagher Tr. 181, 198.

		Penn Central. Gallagher Tr. 201.	
George Sophner	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. ▪ All Claimants adversely affected. Gallagher Tr. 181,198. 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 Ellert Testimony 626-628, Gallagher Tr. 173, 209. ▪ Appendix E requires production of wage records. ▪ Sophner Claimants exercised seniority. Gallagher Tr. 174, 200, 201. ▪ No punishment or sanction by Penn Central. Gallagher Tr. 201. 	<ul style="list-style-type: none"> ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1968-1972. ▪ All Claimants experienced loss. Gallagher Tr. 181, 198.
Peter Sowinski	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Rosen Report Claimants' Trial Exs. 9 and 42-45. ▪ All Claimants adversely affected. Gallagher Tr. 181,198. 	<ul style="list-style-type: none"> ▪ Railroad Retirement Board Record Claimants' Trial Ex. 8. ▪ Penn Central is proper repository of personnel records, but produced no records of reporting for work STB Decision Claimants' Trial Ex. 7 at 6-7. Claimants' Arb Ex. 43 Ellert Testimony 626-628, 	<ul style="list-style-type: none"> ▪ Calculation of Loss Rosen Report Claimants' Trial Exs. 9 and 42-45 Showing Years of Loss 1971-1973, 1975. ▪ All Claimants experienced loss. Gallagher Tr. 181, 198.

		<p>Gallagher Tr. 173, 209.</p> <ul style="list-style-type: none"> ▪ Appendix E requires production of wage records. ▪ Sophner Claimants exercised seniority. Gallagher Tr. 174, 200, 201. ▪ No punishment or sanction by Penn Central. Gallagher Tr. 201. 	
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EACH WATJEN AND BUNDY CLAIMANT'S EVIDENCE

Claimant	Evidence that Claimant Was Adversely Affected	Evidence That Claimant Was Unable To Obtain Position Through Exercise Of Seniority	Evidence That Requested Separation Allowance	Evidence of Value of Separation Allowance
Phillip Franz	<ul style="list-style-type: none"> ▪ Penn Central Letter and Posting Abolishing Job; Claimants' Trial Ex. 20. ▪ Franz Tr. 219, 230, 235, 240, 248. 	<ul style="list-style-type: none"> ▪ Claimants try to exercise seniority in Detroit; Claimants' Trial Ex. 21. ▪ Claimants denied right to exercise seniority; Franz Tr. 219, 220, 226-229, 251. ▪ Placed in utility jobs because left with no seniority; Franz Tr. 223, 224, 235. 	<ul style="list-style-type: none"> ▪ Claimants' Trial Ex. 22. ▪ Franz Tr. 221-222. 	<ul style="list-style-type: none"> ▪ Calculation of Value of Separation Allowance; Rosen Report Claimants' Trial Exs. 9 and 42-45.
Thomas O'Neil	<ul style="list-style-type: none"> ▪ Penn Central Letter Abolishing Job; Claimants' Trial Ex. 20. ▪ Franz Tr. 219, 230, 235, 240, 248. 	<ul style="list-style-type: none"> ▪ Claimants try to exercise seniority in Detroit; Claimants' Trial Ex. 21. ▪ Claimants denied right to exercise seniority; Franz Tr. 219, 220, 226-229, 251. ▪ Placed in utility jobs because left with no seniority; Franz Tr. 223, 224, 235. 	<ul style="list-style-type: none"> ▪ Claimants' Trial Ex. 22. ▪ Franz Tr. 221-222. 	<ul style="list-style-type: none"> ▪ Calculation of Value of Separation Allowance; Rosen Report Claimants' Trial Exs. 9 and 42-45.
Robert Watjen	<ul style="list-style-type: none"> ▪ Penn Central Letter and Posting Abolishing Job; Claimants' Trial Ex. 20. 	<ul style="list-style-type: none"> ▪ Claimants try to exercise seniority in Detroit; Claimants' Trial Ex. 21. 	<ul style="list-style-type: none"> ▪ Claimants' Trial Ex. 22. ▪ Franz Tr. 221-222. 	<ul style="list-style-type: none"> ▪ Calculation of Value of Separation Allowance; Rosen Report Claimants'

	<ul style="list-style-type: none"> ▪ Franz Tr. 219, 229, 230, 234, 235, 248. 	<ul style="list-style-type: none"> ▪ Claimants denied right to exercise seniority; Franz Tr. 219, 220, 226-229, 251. ▪ Placed in utility jobs because left with no seniority; Franz Tr. 223, 224, 229-230, 235. 	<p>Trial Exs. 9 and 42-45.</p>
<p>Anna Mae Wuliger</p>	<ul style="list-style-type: none"> ▪ Penn Central Letter Abolishing Job; Claimants' Trial Ex. 20. ▪ Franz Tr. 219, 230, 232, 235, 240, 248. 	<ul style="list-style-type: none"> ▪ Claimants try to exercise seniority in Detroit; Claimants' Trial Ex. 21. ▪ Claimants denied right to exercise seniority; Franz Tr. 219, 220, 226-229, 251. ▪ Placed in utility jobs because left with no seniority; Franz Tr. 223, 224, 235. 	<ul style="list-style-type: none"> ▪ Claimants' Trial Ex. 22. ▪ Franz Tr. 221-222. <p>Calculation of Value of Separation Allowance; Rosen Report Claimants' Trial Exs. 9 and 42-45.</p>
<p>David Bundy</p>	<ul style="list-style-type: none"> ▪ Penn Central Letter Abolishing Job; Claimants' Trial Ex. 20. ▪ Franz Tr. 219, 231, 230, 232, 235, 248. [sic court reporter error Donely = Bundy] ▪ Bundy Tr. 331, 336. 	<ul style="list-style-type: none"> ▪ Claimants try to exercise seniority in Detroit; Claimants' Trial Ex. 21. ▪ Claimants denied right to exercise seniority; Franz Tr. 219, 220, 226-229, 251. ▪ Placed in utility jobs because left with no seniority; Franz Tr. 223, 224, 235. Bundy Tr. 331, 335. 	<ul style="list-style-type: none"> ▪ Claimants' Trial Ex. 22. ▪ Franz Tr. 221-222. Bundy Tr. 332. <p>Calculation of Value of Separation Allowance; Rosen Report Claimants' Trial Exs. 9 and 42-45.</p>
<p>James Feldscher</p>	<ul style="list-style-type: none"> ▪ Penn Central Letter 	<ul style="list-style-type: none"> ▪ Claimants try to 	<ul style="list-style-type: none"> ▪ Claimants' Trial ▪ Calculation of

	<p>and Posting Abolishing Job; Claimants' Trial Ex. 20.</p> <ul style="list-style-type: none"> ▪ Franz Tr. 219, 229, 230, 234, 235, 248. 	<p>exercise seniority in Detroit; Claimants' Trial Ex. 21.</p> <ul style="list-style-type: none"> ▪ Claimants denied right to exercise seniority; Franz Tr. 219, 220, 226-229, 251. ▪ Placed in utility jobs because left with no seniority; Franz Tr. 223, 224, 235. 	<p>Ex. 22.</p> <ul style="list-style-type: none"> ▪ Franz Tr. 221-222. 	<p>Value of Separation Allowance; Rosen Report Claimants' Trial Exs. 9 and 42-45.</p>
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