

225950

BEFORE THE SURFACE TRANSPORTATION BOARD

PENNSYLVANIA RAILROAD COMPANY

—MERGER—

NEW YORK CENTRAL RAILROAD  
COMPANY

Finance Docket No. 21989 (Sub-No. 4)

(Arbitration Review)

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CLAIMANTS' BRIEF IN OPPOSITION TO PENN CENTRAL'S PETITION FOR REVIEW  
OF ARBITRATION DECISION

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The thirty two former railroad workers (“Claimants”<sup>1</sup>) who initiated this action more than forty years ago move this Board deny Petitioners’ Petition for Review and to affirm the award by the Arbitration Panel of benefits to which they are entitled under the 1964 “Agreement for Protection of Employees in Event of Merger of Pennsylvania and New York Central Railroads” (“MPA”). The Claimants are former railroad employees who seek to sustain the arbitration panel award of damages for the refusal of Defendants Penn Central Company (“Railroad”, Penn Central” or “Carrier” its affiliates, and/or successors) to provide them with benefits under the MPA and its implementing agreements. MPA, Appendix 644-657. The arbitration award that the Claimants seek to uphold results from a protracted arbitration proceeding that this Board mandated upon remand more than ten years ago in its decision in *Pennsylvania Railroad Company – Merger- New York Central Railroad Company* STB Finance Docket No. 2189 (Sub-No. 3) (1998), (STB Decision) Appendix 742-751. See also section III F *infra*. Arbitration Decision, pages 28-32, Appendix 2646-2654. The Arbitration Panel issued an extremely well reasoned opinion, which followed this Board’s 1998 decision as the law of the case, and determined that the Claimants were entitled to benefits under the MPA.

## **I. INTRODUCTION**

The MPA, effective January 1, 1964, was entered into between the carriers then contemplating a merger – the Pennsylvania and New York Central Railroads – and the unions representing the employees of those two carriers. The MPA established substantial protections and benefits for the employees of the two railroads, the most significant of which was a lifetime job guarantee. The Defendants breached the contract by failing to pay the Brakemen (Knapik Group) and Carmen (Sophner Group) benefits under the MPA, that both groups were employed

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<sup>1</sup> As used herein the term “Claimants” or “employees” refers to the employees or their estates who have instituted this action.

by the Cleveland Union Terminals (CUT), a subsidiary of the New York Central which was not included under the terms of the MPA. Similarly the clerks (Watjen/Bundy Group) were denied “separation allowance” benefits under the terms of the MPA.

## **II. STATEMENT OF THE FACTS**

### **A. Summary of the Facts.**

Claimants were hired by the New York Central Railroad (“New York Central”) on various dates between 1944 and 1951. As employees of the New York Central Railroad, the Claimants worked at a number of locations operated by the New York Central and the Cleveland Union Terminals Company (“CUT”). The CUT was a subsidiary of the New York Central.

Prior to the merger, which occurred on February 1, 1968, New York Central took the position that Claimants were employees of one of its subsidiaries, and that such subsidiaries were not included in the merger. The merged company, Penn Central, and its successors, Penn Central Corp. (“PCC”) and American Premier Underwriters (“APU”) continued to take that position for years after the merger.

On February 25, 1968, all of Claimants in the *Knapik* case were furloughed *en masse*. Despite the Railroad’s denial of their status as employees covered by the MPA, all of the *Knapik* Claimants nevertheless returned to work as required by the carrier. Ellert testimony at 85, 86, Appendix 1418-1419. Similarly, the *Sophner* Claimants who worked at CUT locations were furloughed at various times after the merger, but all continued to report to work. Penn Central refused to provide MPA coverage to either group.

The *Bundy* and *Watjen* Claimants were rate revision clerks who worked continuously for New York Central since their dates of hire. Their jobs were abolished at various times in early 1969 as part of the consolidation of railroad operations. They attempted to exercise their

seniority on their home district but were told there were no jobs available to them. Thereafter, they demanded their separation allowance pursuant to the MPA. The Railroad did not respond to their requests, but rather ordered them to return to work as utility employees “or forfeit all benefits.” Affidavit and deposition testimony of Philip Franz, Appendix 663-675. The *Bundy* and *Watjen* Claimants returned to work in much worse working conditions and at reduced pay, but were never paid their separation benefits under the MPA.

### **B. Parties.**

The Claimants are thirty-two former employees of the New York Central. Claimants worked for New York Central’s subsidiary, the Cleveland Union Terminals, at various times from 1944 to 1978. Railroad Retirement Board Records Appendix 752-1177. Claimants are all considered “present employees” for purposes of the MPA. 2007 Arbitration - Cioffi, at 619-620, Appendix 3069-3070.<sup>2</sup> Claimants are generally classified into three groups: Knapik (brakemen),<sup>3</sup> Sophner (carmen),<sup>4</sup> and Watjen/Bundy (clerks).<sup>5</sup>

The Defendant is Penn Central, a former railway carrier. Penn Central was created by the merger of the Pennsylvania Railway and the Central on February 1, 1968. MPA, Appendix 644-

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<sup>2</sup>Panel Member Lansdowne: “Are you stipulating that all of these employees were present employees for purposes of the agreement?” Mr. M. L. Cioffi: “Yes. That was decided long ago by Judge Lambros. Yes.” In addition to this admission by the railroad, Judge Lambros also found these Claimants were and always had been employees under the MPA. See 1976 Lambros Order at 14, Appendix 689. The ICC also issued a decision in Pennsylvania Railroad Company merger New York Central Railroad Company 347 ICC 536, 548 (1974) holding that employees of subsidiaries of the merged railroads were *ab initio* entitled to the protections of the MPA. *Pennsylvania Railroad Company – Merger- New York Central Railroad Company*, STB Finance Docket 21989, at 548, Appendix 726.

<sup>3</sup>The Claimants in the Brakemen/Knapik Group are: Acree, Benko, Day, Doran, Gastony, Gentile, Norris, Steimle, Tomczak, and Uher.

<sup>4</sup>The Claimants in the Carmen/Sophner Group are: Bilinsky, Crtalic, Foecking, Gallagher, Janke, Jarabeck, Kochenderfer, McLaughlin, McNeeley, Novotny, Opalk, Pentz, Schreiner, Scuba, Sophner, Sowinski.

<sup>5</sup>The Claimants in the Clerks/Watjen/Bundy Group are: Franz, O’Neil, Watjen, Wilger, Bundy, Feldscher.

657. Penn Central was reorganized in 1978 and is now known as American Premier Underwriters.<sup>6</sup>

**C. History of the Merger.**

The MPA, effective January 1, 1964 was entered into between the Carriers, the New York Central, Penn Central, and the employee unions. Major changes were envisioned by the carriers in the operation of the merged company. February 1, 1986 Penn Central letter to all Penn Central Employees, Appendix 1265. One of the goals of the merger was to maximize efficiency and to consolidate operation of the two carriers. The employees and their unions knew that these efficiencies would inevitably entail furloughs and/or permanent layoffs and displacement of employees. The Unions knew that they had the power to affect the terms of any merger in order to fully protect their current members. Accordingly, the Unions negotiated, and the ICC required, that the MPA protect all employees from loss of work after the consolidation of the railroads. The ICC was statutorily required to protect the interest of railroad employees. See 49 U.S.C. §5(2) (1973). The MPA covered all employees who worked for either carrier between January 1, 1964, and the date of consummation of the merger. Such employees were

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<sup>6</sup> The successor to Penn Central Transportation Company was Penn Central Corp. (“PCC”). In 1994, PCC changed its name to American Premier Underwriters (“APU”), a wholly owned subsidiary of American Financial Group (“AFG”). In the appeal of the related case of *Augustus v. STB* Case No. 99-3014 in the Sixth Circuit Court of Appeal, the Defendants intervened as the real party in interest as “Penn Central Corporation” and admitted that American Financial Corp had a financial interest in the outcome. See “Final brief of Intervenor Penn Central Corporation” title page and Statement of Corporate Affiliates and Interest Appendix 2620-2621. In their pleadings from 1978-2007 Defendants represented themselves to be Penn Central Corporation. Only in 2007 did Defendants attempt to revert to being “Penn Central Transportation Corporation”. The doctrine of equitable estoppel prevents this sleight of hand. 6A Charles A. Wright et al., *Federal Practice and Procedure* § 1500 (1990)(noting that equitable estoppel applies “[i]f the originally named defendant or the party sought to be added either knowingly allows plaintiff to think he has sued the proper party or actually misleads him as to the identity of the party that should be held responsible . . .”)

defined as “present employees.” Merger Protection Agreement, Appendix 644-657. The MPA provided in part that, notwithstanding the merger:

None of the present employees of either of said carriers should be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment.

*Id.*

Publications of the New York Central trumpeted these provisions as the gold standard of employee protection. *Headlight*-Publication of Penn Central, Appendix 1265-1. To place the MPA in its historical context, the Chairman of the Board of the Pennsylvania Railroad Stuart T. Saunders touted these protections in order to gain approval from the unions and the ICC. “[T]his agreement protects those men not only against the loss of jobs by reason of merger **but for any reason other than** resignation, death, or dismissal for cause – in other words dismissal for discipline. These men are protected for life subject to retirement, death, resignation, or discipline **and they can’t lose their jobs for any reason.**” Excerpts Saunders Speech to City Council of New Castle- December 16, 1966 at 21, Appendix 1267-2. (Emphasis added.)

#### **D. The Merger Protection Agreement.**

The MPA has five separately-numbered sections: §1 defines the guarantees for present employees; §2 allows the parties to re-open negotiations to extend these guarantees if the ICC requires Penn Central to acquire other railroads as a condition of the merger; §3 recites the authority of the labor unions to negotiate; §4 limits the guarantees to employees represented by the signatory labor unions; and §5 states the effective date as January 1, 1964. Additional definitions of the guarantees are contained in appendices to the MPA.

MPA §1 is the section that is most pertinent to this litigation. It contains two separate and distinct benefit clauses: Subsection 1(a) of the MPA incorporates the 1936 Washington Job

Protection Agreement (“WJPA”) and extends its benefits to “all employees.” Subsection 1(b) creates new benefits which are “in addition” to the WJPA benefits and extends such benefits to “present employes [sic]”. Subsections 1 (c) – (e) require Penn Central to maintain its work force, assume executory contracts, and refer disputes to arbitration.

**E. MPA Subsection 1(a) Incorporates The WJPA.**

The long-established labor standard in the railway industry was the WJPA. As a starting point for the MPA, the parties incorporated the WJPA as MPA Appendix A. MPA §1(a). Merger Protection Agreement, Appendix 644-657. (“Subsection 1(a)”) As written, the WJPA limited its benefits to only those employees displaced “**as a result of such coordination.**” WJPA §6. However, the MPA eliminated this language and expanded the protections more broadly. MPA §1(a) provides that:

[t]he provisions of the Washington Job Protection Agreement of 1936 . . . shall be applied for the protection of **all employees** of Pennsylvania and Central . . . who may be adversely affected with respect to their compensation, rules, working **conditions**, fringe benefits or rights and privileges . . . **incident to approval and effectuation of said merger.**

*Id.* (Emphasis added.) The MPA eliminated the language “as a result of such coordination” and replaced it with the phrase “incident to approval and effectuation of said merger.” Thus, Subsection 1(a) incorporates the WJPA, extends its provisions to “all employees”, and permits claims to be brought thereunder. This type of claim is known as a Subsection 1(a) claim.

**F. Subsection 1(b) Creates Benefits “In Addition To” Those in the WJPA.**

The MPA also allows “present employees” to bring claims under MPA §1(b). (“Subsection 1(b)”). The last sentence of Subsection 1(a) and the relevant portion of Subsection 1(b) state:

provided, however, **that in addition** to benefits set forth in the said Washington Job Protection Agreement, it is further agreed as follows:

**(b) . . . none of the present employes [sic] of either of these said carriers shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment.**

*Id.* (Emphasis added.) This language expands the WJPA's protections by eliminating the language "caused by the merger" or "affected by the merger." Subsection 1(b) simply says that "**none** of the present employees . . . shall be placed in a worse position." There is no ambiguity in this language. By its plain meaning it is broader than the WJPA language.

Subsection 1(b) explicitly states that it exists "in addition" to the "benefits" under the WJPA. This clause also differs from the WJPA in at least two respects. First, there is no limitation on the number of years of benefits. Subsection 1(b) applies "at any time during such employment." In contrast, §6(a) of the WJPA limits benefits to five years. Second, Subsection 1(b)'s additional benefits replace the WJPA's requirement that workers must prove a causal connection. Instead, "in addition to the" WJPA's protections, the MPA provides what is called "attrition" protection.<sup>7</sup> Thus in seeking approval of the merger, Penn Central represented to the ICC that the MPA's expanded protection was superior to the protections in the WJPA<sup>8</sup>.

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<sup>7</sup> In the valuation proceedings regarding the sale of Penn Central and its subsidiary, the Erie Lackawanna Railroad, the Court recognized the distinction between protections limited to "causation", and "attrition protection." The Court noted that Penn Central employees had attrition protection:

The most generous type of labor protection is "attrition protection," which guarantees employment or its equivalent in wages and fringe benefits until an employee dies, retires, resigns, becomes disabled, or refuses to accept a bona fide job opening. The ELMPA [Erie Lackawanna MPA], the PCMPA [Penn Central MPA], and other agreements provided attrition protection for covered employees.

Moreover the ICC, in approving the merger, further held:

Disputes are to be arbitrated – under a plan which we consider superior to that contained in the Washington Agreement. Applicants [the Railroads] are willing to make the terms of the agreement available to all the employees whom we are required by law to consider in evaluating the proposed merger, including those not represented by the signatory unions.

Though they have in the past reduced the number of their employees by more than 50 percent over a ten-year period, the applicants, [the Railroads] under this agreement will not be free to reduce their work force unless business contracts by more than 5 percent in any 30-day period, in which event the work force may be reduced one percent for each one percent business decline in excess of the said 5 percent. If the plan of the merger successfully materializes, however, and company growth results, new and additional jobs will be created. This, along with normal attrition and the voluntary separation from employment of those who would rather not move to a new location, should enable the Transportation Company to maximize the proficient utilization of the retained work force.

Surprisingly the cost of protection provided by the agreement is estimated as \$78 ¼ million, of which practically all would be payable over the first eight years.

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*In The Matter Of The Valuation Proceedings Under Sections 303(C) And 306 Of The Regional Rail Reorganization Act Of 1973*, 531 F.Supp. 1191, fn 136, (Sp.Ct.R.R.R.A., 1981). See also, Excerpts of *The Wreck of the Penn Central* by Daughen and Bizen at 222, Appendix 1273 in which Penn Central's CEO Saunders described the MPA as an attrition agreement. As indicated *supra*, Saunders also recognized that the MPA was different from the prior WJPA's limited protection, because the MPA "protects these men not only against the loss of jobs by reason of merger but for any reason other than resignation, death or dismissal for cause – in other words, discipline. These men are protected for life subject to retirement, death, resignation, or discipline, and they can't lose their jobs for any reason. The only way we can do anything about this is when a man's job is vacant; then we don't have to fill it. We will get our merger savings that way, . . ." Excerpts Saunders Speech to City Council of New Castle December 16, 1966 at 21, Appendix 1267-2.

<sup>8</sup> Indeed, in a related case, *Bundy v. Penn Central* 4555 F. 2d 277, 280 (1972) the Sixth Circuit characterized the railroad's position as follows:

Penn Central contends that the implementing agreement which was authorized by the 1964 agreement did not take away any rights which the employees otherwise had, but gave them an option for added rights, namely, guaranteed employment for life in the absence of dismissal for cause . . .

*Pennsylvania Railroad Company – Merger – New York Central Railroad Company*, 327 ICC 475, 543-44 (1966). (Emphasis added.), Appendix 721.

The ICC, in approving the merger, ratified the lack of causal relationship necessary to invoke the protective conditions:

It must be recognized that applicants [the Railroad] have agreed to certain benefits greater than we have heretofore required of any section 5 applicant, *e.g.*, the job-retention (attrition) and the limitations against reduction in force, which embrace protection from adverse effects **not causally connected** with the merger.” (Emphasis added.)

*Pennsylvania Railroad Company – Merger – New York Central Railroad Company*, 327 ICC 475, 545 (1966). The plain language of the MPA, as approved by the ICC, eliminated the WJPA’s causation element. The order of the ICC, predecessor of this Board, forms the law of the case. It interprets the MPA and is conclusive as to the meaning of the labor protections required by the government before any merger could occur.

Subsection 1(b) claims are not limited to “adversely affected” employees, but extend to “present employees.” In order to be covered by Subsection 1(b), a Claimant must only show that he was a “present employee,” not that he was adversely affected.

The next paragraph of Subsection 1(b) defines “present employee.” Penn Central has stipulated that all of the Claimants are “present employees.” *See, fn. 1, supra.* Tr. 619-620. However, a “present employee” must still show two additional facts: that he was, in fact, “placed in a worse position with respect to compensation” and the amount of his damages. The next issue becomes, how are these two elements proven?

The third paragraph of Subsection 1(b) provides the answers to both questions. Subsection 1(b)’s third paragraph requires Penn Central to “furnish upon request, information

specified in Appendix E to this Agreement.”<sup>9</sup> Appendix E is the “*Memorandum of Understanding Re Employment Information to be Furnished Upon Request and Computations Respecting Compensation Due Operating Employes [sic] Under Agreement.*” MPA, Appx. E (Emphasis added.) Subsection 1(b) incorporates Appendix E to define the measure of damage for Subsection 1(b) claims. Using Subsection 1(b)’s exact same phrase “placed in a worse position with respect to compensation,” MPA Appendix E states that:

For purposes of determining **whether**, or to **what extent**, such an employe [sic] has been **placed in a worse position with respect to his compensation**, his total compensation, and total time paid for during the base period will be separately divided by twelve.

*Id.* (Emphasis added.) Appendix E defines “whether” an employee has been “placed in a worse position.” This criteria of “placed in a worse position” is objectively defined as the difference between base period compensation and actual compensation.

Appendix E conspicuously deletes the WJPA’s phrase “as a result of such coordination.” *Cf.* WJPA §6(a). Also removed from Appendix E is any language limiting its benefits to “any month in which he performs work.” *Cf.* WJPA §6(c). Appendix E further defines the “base period” as the twelve months prior to May 1964, as adjusted for general wage increases. Appendix E creates a monthly guarantee amount by accounting for both time worked and wages paid.

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<sup>9</sup>Claimants requested but never received such information as early as 1970. *See*, Claimants’ Trial Ex. 56, Interrogatories No. 26-30, Appendix 2209-2210. Claimants again requested this information during the 1990 Arbitration. Instead of providing all of the personnel information requested, Penn Central only provided the O’Neill letter which contained limited information regarding only the Knapik Plaintiffs. February 28, 1990 letter from Robert O’Neill to Arbitrator Blackwell regarding guarantees, Appendix 1372-1376. In the current arbitration proceedings Claimants again repeatedly requested personnel information regarding all of the Claimants. Penn Central has not complied with these requests. For a discussion of the failure of Penn Central to produce documents in discovery and Penn Central’s litany of unwarranted excuses *See* Arbitration Award pages 48-50, Appendix 2670-2672.

**G. A Voluntary Absence May Reduce – But Does Not Eliminate – The Amount Of The Guarantee In Any Particular Month.**

Appendix E creates an offset only for high levels of voluntary absence. The employee “shall be paid the difference less any compensation for voluntary absences to the extent that he is not available for service equivalent to his average time paid for during the base period.”MPA-Appx. E, ¶3, Appendix 644-657. The effect of a voluntary refusal to work is to reduce the amount of the guarantee – but only to the extent that these voluntary absences are greater than the average time paid. *Id.* Thus, any offset is limited and is subtracted from the guarantee. *Id.* The effect of a voluntary absence is that it reduces, but does not eliminate, the guarantee in any particular month. *Id.*

**H. Appendix E Has A Savings Clause.**

Finally, the last paragraph of Appendix E preserves the benefits of the WJPA for anyone who is not otherwise covered by the superior benefits in Subsection 1(b):

Employees [sic] not entitled to preservation of employment but entitled to the benefits of the Washington Job Protection Agreement pursuant to Section 1(a) of the Protective Agreement shall be entitled to compensation computed in accordance with the provision of said Washington Job Protection Agreement.

Merger Protection Agreement-Appx. E, Appendix 644-657. Thus, if a worker is not protected by the MPA, these employees are still entitled to any benefits they would otherwise receive under the WJPA. For example, this savings clause would apply to workers of non-signatory unions as well as to workers hired after the merger date. The savings clause of Appendix E clarifies that it is not reducing any benefits that are otherwise owed under the WJPA. This clause amplifies the point that the benefits in Subsection 1(b) and Appendix E are separate from, and in addition to, any benefits under Subsection 1(a)’s incorporation of the WJPA.

**I. Subsection 1(b) Creates An Affirmative Obligation By Penn Central To Provide The Information Required By Appendix E.**

As noted above, claims under Subsection 1(b) are linked to Appendix E by requiring that: “[t]he Carrier will furnish upon, request, information specified in Appendix E to this Agreement.” MPA-§1(b), Appendix 644-657. (See ft. 10 *supra* regarding the Railroad’s failure to fulfill its affirmative duty to produce such information.) If Appendix E’s formula were irrelevant to benefits under Subsection 1(b), this obligation would not be included in Subsection 1(b) itself. Instead, the MPA recognizes that “present employees” will bring claims under Subsection 1(b), which will be measured by the terms of Appendix E. Thus, Penn Central is required to keep and produce all necessary records.<sup>10</sup>

**J. Types of Benefits Under the MPA.**

The MPA provided the following benefits:

1. **Lifetime Income Guarantee.**

The phrase, “placed in a worse position” extended, without time limitation, the protection previously afforded railroad employees under Section 5(2) (f) of the Interstate Commerce Act and Section 6(a) of the Washington D.C. Merger Protection Agreement of May, 1936. (“WJPA”) The first portion of the above-quoted passage from the MPA (“none of the present employees of either of said Carriers shall be deprived of employment.”), presents a significant addition to the protection that had previously been established by the Interstate Commerce Act and the WJPA. That clause is unequivocal; it has only been interpreted in one way: a lifetime guarantee.

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<sup>10</sup> When Claimants sent discovery requests in 1970, Penn Central admitted at that time it had possession of and would produce personnel records. See Penn Central Transportation Company’s Answers to Interrogatories 28-30, Appendix 2210. Since that time, Claimants have requested such records on numerous occasions and in subsequent rounds of litigation. Penn Central has failed to produce these records.

Where the prior agreements had only offered job protection for a limited, finite number of years, the MPA, offered lifetime protection. Any person on the payroll at the time of the merger agreement was signed could not be dismissed except for cause. If any employee was laid-off, he had to be given a year's severance pay. In exchange for this, the unions agreed to drop their opposition to the merger. Without the MPA, the unions would not have withdrawn their opposition and the ICC would not have approved the merger.

*See Wreck of the Penn Central* at 220 – 222, Appendix 1268-1273. This is also the consistent interpretation of the Penn Central CEO, the ICC, Courts, and the Claimants.

2. Displacement Allowance.

Under Section 6(a) of the WJPA as incorporated as Appendix A of the MPA, no employees shall be placed in a worse position with respect to compensation and working conditions than he occupied at the time of such coordination as long as he is unable in the normal exercise of his seniority rights under existing agreements, rules and practices to obtain a position producing equal to or exceeding the compensation of the position held by him at the time of the particular coordination. Merger Protection Agreement - Appendix A, Appendix 644-657

This protection is referred to as displacement allowance. *Id.* Under MPA Appendix E, the displacement allowance is calculated as follows:

For purposes of determining whether, or to what extent, such an employee has been placed in a worse position with respect to his compensation, his total compensation, and total time paid for during the base period will be separately divided by twelve. If his compensation in his current position is less in any month (commencing with the first month following the date of consummation of the merger) than his average base period compensation (adjusted to include subsequent general wage increases), he shall be paid the difference less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average time paid for

during the base period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the time paid for during the base period, however, that in determining compensation in his current position the employee shall be treated as occupying the position producing the highest rate of pay and compensation to which his seniority entitles him under the working agreement and which does not require a change in residence.

This benefit applied to the *Knapik* and *Sophner* Claimants, who were “continued in service” and never terminated,<sup>11</sup> but were not able to obtain positions yielding even their pre-merger compensation as defined by their test period earnings and increased by daily rate increases.<sup>12</sup>

### 3. Separation Allowance.

The separation allowance applies to the *Watjen* and *Bundy* Claimants. Under §9 of Appendix A of the MPA, an employee eligible to receive a coordination allowance may, **at his option**, at the time of coordination, resign and in lieu of all other benefits and protection provided in the agreement accept, in a lump sum, a separation allowance based upon a schedule premised on length of service.<sup>13</sup> A coordination allowance is defined as a benefit given to those deprived of employment under MPA §7(c)(1) when the position the worker holds in his home road is abolished as a result of coordination and he is unable to obtain another position on his home road or a position in the coordinated operation.

## **K. Effect of Merger on the Claimants.**

### 1. *Knapik* Claimants.

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<sup>11</sup> Although a few of the *Knapik* Claimants received termination notices, the Railroad never terminated them and brought them back into service, albeit in sporadic jobs. Railroad records considered them to be on a furlough status. See i.e. Appendix 317, 318, 2159-12, 14.

<sup>12</sup> Daily Rate increases are schedules based upon union negotiated rates. Those schedules are attached as Exhibits to each of Dr. Rosen’s individual reports, Appendix 1178-1264.

<sup>13</sup> All of the *Watjen* and *Bundy* Claimants were employed by the New York Central for at least fifteen (15) years prior to the merger. This fact entitled them to the maximum allowance of three hundred and sixty (360) days pay.

The Claimants were railroad employees in their 40's and 50's, most of whom had worked for the Railroad their entire working lives. As New York Central employees, they worked at any number of locations operated by the New York Central and the CUT. CUT operated a passenger station and terminal. Its operating costs were paid by the various railroads in direct proportion to the use of those facilities. CUT was used primarily by the New York Central, which eventually controlled approximately 97% of CUT operations. Ellert testimony at 630, Appendix 1552.

Knapik Claimants worked as brakemen, also known as switchmen, coupling and uncoupling railroad cars. Crews consisted of about five people, with a foreman of each crew referred to as a conductor.<sup>14</sup> Cognizant of the fact that the railroad wanted to rid itself of passenger service, which it perceived as a drain,<sup>15</sup> the Brotherhood of Railroad Trainmen ("BRT"), negotiated an agreement with the Railroad, referred to as the "Top and Bottom Agreement", effective February 16, 1965. That agreement provided for, *inter alia*, seniority roster consolidation of the New York Central Cleveland Terminal District Yard Service Employees and CUT yard service employees<sup>16</sup>. The agreement stated that yard service

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<sup>14</sup> All five worked as a team at CUT and New York Central location. When the merger came 90% of these people were protected, with the exception of the brakemen and the carmen. Beedlow testimony at 203, 204, Appendix 1588-1590.

<sup>15</sup> See *Wreck of the Penn Central* at 131, Appendix 1270.

<sup>16</sup> The Railroad's only witness at the arbitration hearing confirmed his belief that the "Top and Bottom Agreement" was not an implementing agreement of the MPA:

Q. Didn't you just tell us that the 1965 top and bottom agreement was an implementing agreement to the 1964 merger protection agreement?

A. I think the record will show that it is not.

Q. That it is not an implementing agreement?

A. That's right.

Q. It had nothing to do with the 1964 agreement?

A. It was before the 1964 agreement because in our office we were not aware of the 1964 merger protective agreement. And this was made entirely separate from the 1964 merger agreement.

Mr. Ellert later confirmed his position:

employees of the CUT would be placed on the New York Central Seniority Roster, the Freight Yard Roster, following the most junior employee currently on that roster and that the CUT employees would then be placed on the roster in the same order as they appeared on the CUT company yard and seniority roster. However, under the Top and Bottom Agreement, all CUT employees were placed in the New York Freight Yard Roster receiving New York Central seniority date of September 10, 1964. This agreement was separate and distinct from the rights which Claimants had under the MPA.

The *Knapik* Claimants received a notice indicating that yardmen at the CUT were being reduced and, thus, they were being furloughed. February 15, 1968 Furlough Notice, Appendix 1306. The notice further directed that they may stand for work at the NY Central freight yards. However, because the Claimants were placed on the bottom of the seniority roster with new September 10, 1964 seniority, they could mark-up for work but could not obtain work. Beedlow testimony at 250-258, Appendix 1635-1643. Being placed on the bottom of the freight yard roster meant for example that Claimant Steimle lost more than 400 places of seniority on the consolidated roster. Rosters, Appendix 1307-311. When Steimle and other Claimants marked up, they marked up for non-existent jobs. Steimle testimony at 467-469, Appendix 1844-1846.

In May 1969, for the first time in fifteen months, some of the *Knapik* Claimants were called back to work.<sup>17</sup> May 2, 1969 Return to Work Notice, Appendix 1312. Within the requisite period for response to the recall notice all of the remaining *Knapik* Claimants responded

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Q. My question was [the 1965 Agreement] was not intended to extend to [the Claimants] the merger protection agreement benefits at the time it was drafted, was it?

A. It had no reference to it whatsoever.

Ellert testimony-at 101-102,111, Appendix 1434-1435, 1444.

George Ellert thus contradicted a major element of the Railroad's defense.

<sup>17</sup>Some other *Knapik* Claimants had enough seniority to bump into part time work and they had already reported to work and therefore were not part of this recall. They marked up in the freight yard under protest. See i.e. Letter of June 30, 1968, Appendix 1315.

to work immediately and/or signed a letter saying that they were reporting to work under protest, and then reported for work. 1969 Protest letters, Appendix 1313-1315.

In an attempt to resolve the obvious inequity to the CUT men, an agreement was reached in late 1969 among the Penn Central, CUT and the employees of both Carriers represented by the U.T.U., formerly the B.R.T., which purported to extend merger protection benefits to the Claimants. 1969 Agreement, Appendix 1316-1318. Several problems resulted from this agreement however. First, it provided that 2.5 percent of the total yard work in the new merged yard territory would be designated for former CUT employees. This allocation established approximately seven to nine jobs depending on vacation or illness of other workers. Beedlow testimony at 243, 470-471, Appendix 1628, 1847-1848. As a result, most of the workers furloughed were still left without any jobs, in contravention of the lifetime job guarantee contained in the MPA. Second, the 1969 Agreement did not become effective until more than 17 months after the date of the furlough. In violation of the MPA the agreement did not resolve the Claimants' entitlement to any compensation for the underemployment or unemployment they suffered during that period.<sup>18</sup> The MPA was drafted to solve just such concerns. Third, a number of the furloughed employees had received multiple termination notices from Penn Central prior to the effective date of the 1969 Agreement; the Railroad did not give effect to these notices, as every *Knapik* Plaintiff returned to work. Thus, even with the 1969 Agreement the employees were excluded from coverage of the MPA. The 1969 agreement was never implemented to benefit workers who had clearly "been placed in a worse position". Even with the 2.5% allocation in place, the *Knapik* Claimants didn't have enough seniority to get jobs other

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<sup>18</sup> The Lambros Court indicated in 1976 that the Claimants were in 1969 and at all times prior thereto were covered by the MPA, therefore the terms of the MPA should have applied to them as of their furlough dates.

than to fill in for other men who were on vacation or sick leave. Thus, at best, the Claimants got sporadic employment during which they earned less than their guarantee. Beedlow testimony at 252-255, Appendix 1637-1640; Steimle testimony at 467-469, Appendix 1844-1846.

2. Sophner Claimants.

The *Sophner* Claimants were carmen who worked at both the CUT and the New York Central locations prior to the merger. The Railroad took the same position toward them as the *Knapik* Claimants; they were not covered. The *Sophner* Claimants were not furloughed all at once as a group as was the *Knapik* group. However, their loss of seniority had the same effect: in some years, an inability to work enough to make their wage guarantees. Accordingly, they were placed in a worse condition as to compensation and working conditions in violation of the MPA. Unlike the *Knapik* Claimants there is no allegation that these sixteen Claimants failed to mark up for work. They all marked up but got less work as documented by their earnings in the Railroad Retirement Board (RRB) records.

3. Watjen and Bundy Claimants.

These Claimants worked as rate revision clerks on the first shift performing duties such as reviewing freight bills, making refunds or collection and quoting rates. Based on a 1950 agreement, their seniority division was on the Detroit roster. Watjen, Franz and Feldscher received notice on January 10, 1969 that their jobs were abolished. January 10, 1969 Notices that jobs were abolished, Appendix 1319-1324. They wrote to the Manager of Freight Accounting, E. T. Scheper, in reply to the letter abolishing their jobs and advised him of their intent to obtain a position by the exercise of their seniority. January 14, 1969 Letters to Scheper exercising seniority, Appendix 1325-1326. Mr. Scheper notified these clerks that they would not be allowed to exercise their seniority in their home district of Detroit. Affidavit and deposition of Philip Franz, Appendix 663-675. Upon receiving this information, all three requested their

separation allowances. January 1969 Letters to Scheper requesting separation allowance, Appendix 1327-1331.

The *Watjen* and *Bundy* Claimants were not permitted to exercise their seniority rights on their home road as the MPA requires them to do. They also were not able to obtain “a position in the coordinated operation,” within the seven to ten-day period required in the notice abolishing their jobs. Accordingly, they exercised their option to submit resignations and demand the lump sum separation allowance. The Railroad never responded to those requests. Weeks later the clerks were demoted and ordered to report to jobs with worse working conditions and lower pay. Claimants Franz, Watjen and Feldscher reported to work and served as utility clerks. The seniority they were given in those jobs was with their “new dates of hire”, i.e. for Franz February 11, 1969, a loss of fourteen years of seniority. As a result, they worked various hours and often on the midnight shift with no advance notice. Their paychecks were always less than before the abolishment of their old jobs and were never consistent. They all attempted to bid on new jobs with hours and duties comparable to their old rate clerk jobs but they were outbid by employees of years less seniority – often with only one or two years of seniority.

They did everything required of them: 1) tried to exercise their seniority rights on their home road, but were told not to go to Detroit, the only place they had seniority; 2) timely submitted separation allowance requests that were ignored; 3) reported to new jobs with new hire seniority dates, which by definition yielded them worse pay with worse working conditions in which they could not exercise their seniority. They never received their separation allowances.

Plaintiff Wilger was a 58 year old widow when her job was abolished. Her seniority was in Detroit but she was also told not to report. She requested the separation allowance. Without a response she was ordered to show up at a location in Eversmen, Ohio at reduced pay.

Plaintiff O'Neill worked in upstate, New York. He was also on the Detroit seniority roster. His request for separation allowance was ignored. He was assigned to various duties such as "engine crew caller". He was told there was no work for seven and one-half weeks.

David Bundy worked as lead clerk in Albany, New York. He was informed that his job was being abolished on February 7, 1968 as Penn Central was converting the former Albany central billing to the office of controllers in New York, New York. Again, his seniority was on the Detroit roster. Mr. Scheper also informed him not to seek a job in Detroit. Accordingly, he sent a letter dated February 13, 1969, requesting separation allowance. The Railroad never acknowledged his letter.

**L. For Years, Penn Central Has Interpreted And Applied The MPA Exactly The Way That Claimants Interpret It Today.**

The logic of the MPA was fairly simple: a Claimant would file a claim for his benefits, and Penn Central would either pay the claim, or produce the evidence to adjust the amount as appropriate. The MPA was a practical solution to be implemented in a blue-collar workplace. Neither the unions nor the railroads intended that every time an employee was entitled to a guarantee that he would have to hire economists and accountants as expert witnesses. With hundreds of thousands of employees, each with monthly calculations, this would have been impossible. The MPA did not establish such a situation.

### 1. Penn Central's Standard Forms.

Instead, the evidence showed that to comply with the MPA, Penn Central used a system of one-page claim forms by the employee<sup>19</sup>. Penn Central's Standard Forms, Appendix 2216-2247. If there were any disputes regarding the numbers claimed by the employee and the railroad, Penn Central would specify the reason for the reduction and then produce the records needed to resolve the issue one way or the other. *Id.* At least until 1975, seven years after the merger, this was exactly what happened.

Penn Central used a standard form to administer MPA benefits. *Id.* Appendix 2216-2247. Exhibit 57 contains Penn Central's Standard Forms MPA Guarantee forms for H.J. Middleton, Appendix 2216-2230. Penn Central's forms simply require the Claimant to provide his name and identifying information (Part A); his base period guarantee (Part B1); total earnings for the month (Part B2), then subtract these figures to determine the adjustment claimed (Part B3); then the Claimant signed and certified that the information was correct. (Part B). *Id.* Any adjustments were made by Penn Central in Part C where Penn Central would produce information specifying any better-paying job (Part C(1)(c)) or other reasons. *Id.* In fact, in Part D, on the reverse of the form, it says "**This Side Of Form For Carrier Use Only**" and provides the place for the carrier to specify any higher paying jobs. Penn Central prohibited the Claimants from providing such data.

### 2. Payments For Months Of Complete Unemployment.

In Mr. Middleton's case, his forms show that he performed no work during the months claimed, yet he was paid his full guarantee. *Id.* Furthermore, in consecutive months of no work, Middleton was paid the same amount indicating that the test period was not a variable rolling

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<sup>19</sup> For a discussion of the standard form, *See* Arbitration Decision pages 58-59, Appendix 2680-2681.

period. *Id.* January – April (1972) pp. 1,3,4,7,9,10,11,13. Middleton’s payment was consistent with Subsection 1(b) and Appendix E.

Similarly, Mr. W.P. Predmore filed a claim form for January 1972, a month in which he claimed no work. Penn Central’s Standard Forms, Appendix 2231-2233. In large letters, just below the box in the middle, there appears the notation: “(Had no compensation in January).” *Id.* Then, at the bottom left corner is written “OK to pay full guarantee minus offset.” *Id.* The last page of Exhibit 58 shows that the Railroad paid Predmore his January 1972 guarantee, less an offset of \$11.44, for a total payment of \$745.61. *Id.*

3. Reductions – Not Eliminations – For Voluntary Absences.

Furthermore, when a worker was voluntarily absent, his guarantee was reduced but not eliminated. For example, in May 1975, Mr. P.V. Behnen applied for his guarantee and requested \$379.13. Penn Central’s Standard Form, Appendix 2248-2250. When he was eventually paid in August 1975, Penn Central reduced his payment by \$130.75 for days on which he voluntarily laid off. *Id.* Behnen’s guarantee was reduced, but not eliminated; he was ultimately paid \$232.55 under the MPA for May 1975. *Id.*

4. Penn Central’s Own Forms Confirm Claimants’ Interpretation.

Penn Central’s own forms are instructive. First, there is no place on the form for “causation” or for any workers to submit an expert’s opinion. The fact that MPA benefits were paid out for at least seven years after the merger even for a few hours of isolated time means that workers were not required to prove a causal link to an event in 1968. Second, benefits were paid during months in which no work was performed. Third, any voluntary absences were used as an offset, not as a forfeiture, to payment. Penn Central’s course of performance is consistent with Subsection 1(b) and Appendix E. At least through 1975, employees were timely paid their MPA guarantees in the manner described by the Claimants.

Ultimately, Penn Central's course of performance proves the terms of the MPA. Penn Central paid out \$116.3 million in MPA benefits to workers from 1968 to 1972, during the course of its bankruptcy. *In the Matter of Valuation Proceedings Under Sections 303(c) and 306 of Regional Rail*, 531 F.Supp. 1191, fn. 176 (Sp. Ct. RRA 1981). If Penn Central could have avoided this payment simply by claiming that business had declined, or that the lack of work was caused by the merger, it would have done so. Paying out over \$100 million during the bankruptcy shows that the MPA was not interpreted by Penn Central, or its creditors (or the bankruptcy court), as allowing it to avoid these obligations simply as a result of lost business.

### **III. PROCEDURAL HISTORY AND CONTROLLING AUTHORITY WHICH FORMS THE LAW OF THE CASE**

#### **A. The Lawsuit.**

The respective Claimants' groups filed four lawsuits at various times between 1969 and 1974 alleging breach of the MPA by the carrier. Claimants also sued their respective unions in those cases. The claims against the unions were dismissed by the trial court. In 1974 ICC determined that the Claimants were employees of the New York Central and were covered by the MPA.<sup>20</sup>

#### **B. 1976 Order.**

In 1976, the Court conducted a jury trial in the *Knapik* case. At the end of the presentation of evidence by the Claimants, the Court issued certain findings.

The Court held:

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<sup>20</sup> In the intervening period, from the time the Claimants filed their lawsuits and the time the Court made rulings in 1976, the ICC issued a decision in *Pennsylvania Railroad Company merger New York Central Railroad Company* 347 ICC 536 (1974) holding that employees of subsidiaries of the merged railroads were *ab initio* entitled to the protections of the MPA. *Pennsylvania Railroad Company merger New York Central Railroad Company* 347 ICC 536, 548 (1974), Appendix 762

as a matter of law that the Plaintiffs are employees of New York Central Railroad as that term is defined in the Merger Protection Agreement and as that term applies to their job protection agreement and their guarantee entitlement under the merger agreement.

1976 Lambros Order at 14, Appendix 689.

\* \* \*

Plaintiffs were entitled to the full benefits of the jobs protection agreement, based on their combined wages of CUT and New York Central work and ere entitled to this not only as of 1969, but at all applicable times prior thereto.

*Id.* at 15.

Court also held with regard to ensuing litigation:

It would seem to me that the triable issue remaining in this lawsuit is one stemming out of the merger protection agreement. It is a contract issue, and it would seem to me that in view of the fact that the issues in this case were by agreement of the parties bifurcated at the outset, and we were to try only the liability issues at this time, and damage questions later, and as this Court is making a finding now relative to the applicability of the merger protection agreement to these plaintiffs and a findings as to their entitlement to job guarantee, and to the extent that there was any dispute between the parties, that issue is now resolved on that finding, and it would seem to me that the issue as to whether or not there was a breach of the agreement is best tried in the context of a damage question, . . .

*Id.*

The Court continued:

It seems to me those issues [entitlement to benefits of job guarantee] must be tried in the context of a damage claim.

*Id.* at 24.

**C. Bundy v. Penn Central.**

Prior to consolidation of all four cases in its 1979 order, the Court had granted summary judgment against the clerks (the Bundy/Watjen Groups) on their claims against both their union

and the carrier. With regard to the employees' claim against the railroad, the Sixth Circuit remanded the case to the District Court for an evidentiary hearing on whether the railroad "frustrated the exercise of them [their seniority rights]" and "whether they [the *Bundy* and *Watjen* Claimants] were placed in a worse position" in violation of the agreement, the statute and the ICC order. Since the carrier in 1979 compelled the referral of this matter to arbitration, and the court granted its motion, the arbitration proceeding in 2007 is the first opportunity these Claimants [the *Bundy* and *Watjen* Claimants] have had to conduct the evidentiary proceeding ordered in 1972 by the Sixth Circuit. *Bundy v. Penn Central* 455 F.2d 277 (6<sup>th</sup> Cir. 1972), Appendix 1332-1336.

**D. 1979 Order.**

In 1979, Penn Central moved to compel arbitration on the remaining contract issues provided in the MPA. The Court granted the Defendants' motion and referred all of the cases to binding arbitration.

As to the *Knapik* claims, it referred to its 1976 Order as having framed the remaining issues. Regarding the *Sophner* Claimants, the parties were charged with framing the issues. The issues in *Watjen* and *Bundy* were framed by the Sixth Circuit in its remand to the trial court. *Bundy v. Penn Central* 455 F.2d 277 (6<sup>th</sup> Cir. 1972), Appendix 1332-1336.

Ironically, thirty years ago, the Court indicated its referral to arbitration was "primarily for the sake of expediency; that of the litigants especially the former employees. . . ." 1979 Lambros Order, Appendix 731-741. "Reference to arbitration of these disputes will result in resolution of all the paramount claims more quickly than in any proceeding which the Court could devise." *Id.*

**E. 1980 Arbitration Agreement.**

In 1980, “Penn Central Corp., successor to Pennsylvania Central Transportation Company,” negotiated and signed an agreement to arbitrate this case. 1980 Agreement for Arbitration, Appendix 1337-1342. In this arbitration agreement, entered into after the final consummation of Penn Central’s bankruptcy, Penn Central Corp. agreed to resolve these cases through final and binding arbitration by this panel. *Id.*

**F. 1998 STB Decision.**

In a decision issued in December, 1998, in *Pennsylvania Railroad Co. – Merger – NY Central Railroad Company* (Arbitration Review) STB Finance Docket No 21989 (Sub-No. 3), [hereinafter STB Decision], Appendix 742-751. The STB held that the denial of benefits by a prior arbitration panel to the ten Knapik Claimants who returned to work constituted “egregious” error and a failure to observe the imposed labor conditions. STB Decision at 5-6, Appendix 742-751.

The Board (“STB”) remanded the *Knapik* Claimants for further proceedings.

In its order the STB definitively held:

the record shows that the Claimants who reported for work suffered losses as a result of the merger. . .

STB Decision at 7, Appendix 748.

\* \* \*

It is not clear what else Claimant could have submitted to satisfy the panel that they suffered losses as a result of the merger.

*Id.* at 8, Appendix 749.

\* \* \*

Having found the Panel Decision summarily denying all claims was fundamentally unfair to Claimants who reported for work at their freight yard, however we find it necessary to remand the matter for the unfairness to be corrected.

*Id.* at 10, Appendix 751.

The issues of liability and damages had been bifurcated in 1990 Arbitration. Since that panel ruled against the Claimants, no damage evidence was presented. Accordingly the STB was not able to render “a decision that provided final resolution or greater certainty for the parties” .

*Id.* at 10, Appendix 751. Therefore, upon remand, the STB ordered that

“for each individual Claimant the parties, or an arbitration panel of the parties cannot agree, will have to gather facts that are relevant to determining the amount of compensation under the MPA. . .”.

*Id.* at 9, Appendix 750.

The Arbitration panel followed the STB directive to correct the fundamental unfairness to the Claimants who reported for work. *Id.* at 10, Appendix 751. After confirming the eligibility of the Claimants to receive MPA benefits the panel determined the Claimants’ damages. For the *Knapik* and *Sophner* groups the damages are measured by the loss of income the Claimants suffered subsequent to the merger based on the Railroad Retirement Board (“RRB”) records.<sup>21</sup>

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<sup>21</sup> The RRB was established by Congress pursuant to the provisions of the Railroad Retirement Act of 1935 and 1937 as the agency governing the administration and application of benefits due railroad employees. The Congress in passing the law provided in part as follows:

Where complete records of all service and compensation which may be creditable toward benefits under the provisions of the Railroad Retirement Act of 1937 and the Railroad Retirement Act of 1935 are required for the Administration of said Acts; and Whereas such records with respect to service prior to January 1,1937, are largely in the possession of employers subject to said Acts and are constantly subject to the danger of loss and destruction; and Whereas the loss or destruction of such records would jeopardize the establishment of the rights of individuals to annuities based in whole or in part on such prior service and would otherwise severely and permanently impede and impair the administration of said Acts; and the danger of loss or destruction presents a serious emergency; and Whereas the prompt

Railroad Retirement Board Records, Appendix 752-1144. Their loss of income placed the Claimants in a worse position in violation of the MPA. Merger Protection Agreement, Appendix 644-655, Under Appendix A, Section 5 of the MPA and Appendix E of the MPA these Claimants were entitled to displacement allowance. *Id.* The damages for the *Bundy* and *Watjen* groups are measured by computing separation allowances provided for in the MPA Appendix A. *Id.*

Further, the STB held that the carrier presented no evidence to refute the voluminous evidence of injury submitted by the Claimants. *Id.* Since the original arbitration was bifurcated, the STB's vacation of the award constitutes a decision on the merits as to liability as to the *Knapik* Claimants in any subsequent damage proceeding.<sup>22</sup> The Claimants who failed to return to work filed an appeal to the Sixth Circuit. The Sixth Circuit affirmed. *See Augustus, et al. v. STB, et al.*, 2000 U.S. App. Lexis 33966 (6<sup>th</sup> Cir. 2000).

The Railroad cross-appealed that portion of the STB decision which held that the remaining ten Claimants, who are Claimants in this proceeding and who returned to work, were entitled to their guarantees. The STB filed a motion to dismiss, and argued that the Sixth Circuit lacked jurisdiction because the Railroad's appeal was interlocutory. The Railroad and the STB stipulated to the dismissal of that appeal. Accordingly, the Sixth Circuit opinion in *Augustus* did not apply to the Claimants here.

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transcription, compilation, and filing with the Railroad Retirement Board of such records will remove the data contained therein from the danger of their loss or destruction and make them expeditiously and permanently available for necessary operations of the Railroad Retirement Board and will result in a more efficient and economical administration of said Act.

The Railroad Retirement Board is an unimpeachable source of the reporting of the income of the employees from railroad work.

<sup>22</sup> See Claimants' Post Arbitration brief footnote 12 at 14, Appendix 3218.

### **G. Orders of Judge Oliver.**

After the *Augustus* decision Claimants moved to implement the STB's order to remand to arbitration.<sup>23</sup> Claimants filed a Motion to Reinstate these cases because the Carrier had refused to arbitrate the cases of the ten remaining *Knapik* Claimants and the *Sophner* case and the *Bundy* and *Watjen* cases which had never been arbitrated at all.<sup>24</sup> In ordering the parties back to arbitration, the Court found that Penn Central "does not come with clean hands". Judge Oliver February 28, 2005 Order at 8, Appendix 1343-1353. The Court modified Judge Lambros' 1979 Order in stating all parties should proceed to arbitration on the four cases simultaneously.<sup>25</sup> Penn Central moved for reconsideration of the Court's Order which was summarily denied. Judge Oliver then established procedures for the selection of the arbitration panel. After Defendants' failure to participate in the selection of a neutral arbitrator, Claimants filed a motion requesting appointment of a neutral arbitrator. The Court requested that the parties submit suggested neutral arbitrators. The parties submitted multiple names and the Court issued an Order on June 23, 2006, selecting the neutral arbitrator on this panel. *Id.*

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<sup>23</sup> The Claimants, through the office of a mediator at the Sixth Circuit, provided voluminous documentation of its damages to the Railroad in an effort to follow this Board's mandate to "work together to reach a just and speedy resolution." STB Decision at 10, Appendix 751. In contrast, the railroad made a mockery of this Board's admonition urging the parties to work together, by failing to make any effort whatsoever to resolve the claims and then by refusing to participate in arbitration until ordered to by the District Court. STB Decision at 10, Appendix 751.

<sup>24</sup> Between 1998 and Judge Oliver's 2005 Order, Claimants repeatedly tried to reconvene the arbitration. The Carrier consistently refused to proceed to arbitration despite all of the prior orders of multiple tribunals. Defendants refused to comply with the 1979 Order, the 1980 Agreement for Arbitration, and the 1998 STB Decision. *See i.e.* letters of carrier's counsel Kershner (with copies to current carrier counsel, Cioffi) refusing to appoint an arbitrator to participate in arbitration. Kershner 2001 letters, Appendix 1361-1364.

<sup>25</sup> The parties later agreed to consolidate the four cases, which was approved by Judge Oliver.

#### **H. The Reorganization Court.**

Following numerous pre-hearing motions and orders before the Arbitration Panel, the Penn Central, on November 19, 2007, filed a “Petition with the Bankruptcy Court to Rescind Leave and Enforce Prior Orders”.<sup>26</sup> On November 23, 2007, the Penn Central filed another motion “Emergency Petition to Stay Proceedings Pending Resolution of the Petition to Rescind Leave and Enforce Prior Orders”. Judge Fullam denied both motions in an Order issued November 29, 2007. Penn Central, only days before the start of the arbitration, filed yet a third motion with the Bankruptcy Court on December 5, 2007 entitled “Petition to Enforce Order No 4349”. This motion was filed during the parties’ final prehearing telephone conference with the Arbitration Panel in yet another effort to disrupt, delay, or completely avoid the arbitration.

Since this Arbitration Award was issued in July 2009, Penn Central has filed two additional motions with the Bankruptcy Court, both of which have been denied.

The Defendants have to date have filed five motions to wrest jurisdiction, first from the Arbitration Panel and now from this Board, without success.

#### **I. The Arbitration Award.**

The Panel convened the evidentiary portion of its proceeding on December 10, 2007. Arbitration Award at 38, Appendix 2660. The Panel heard evidence for four days. *Id.* Both Penn Central and the Claimants had a full and fair opportunity to provide all material which they believed to be relevant to the adjudication of the dispute. *Id.* at 38-39, Appendix 2660-61. The Panel heard testimony from expert witnesses presented by both Penn Central and the Claimants. *Id.* The Panel also heard testimony from nine fact witnesses. *Id.* In addition to the live

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<sup>26</sup> The Bankruptcy issue was raised by the Defendants in 2007 for the first time in thirty five years. As indicated in footnote 6, Defendant has appeared in this case since 1978 as the reorganized company, Penn Central Corporation which had emerged from Bankruptcy in 1978, retaining liability as the real party in interest in this matter.

testimony, the Panel admitted into evidence the complete transcript of the 1990 Hearing before the Blackwell Panel, subject to subsequent arguments about authenticity, reliability, and weight. *Id.* The Panel also considered hundreds of pages of documentary evidence relating to Claimants' earnings, Penn Central's practices in administering the MPA, Penn Central's own representations and interpretations of the MPA and other evidentiary documents. *Id.*

As an initial matter, the Panel considered the following preliminary issues:

**Delay.** The Panel noted that in "attempting to avoid responsibility for the delay, Penn Central tries to shift the blame to the Claimants by identifying actions by the Claimants that delayed resolution of this dispute since the Sixth Circuit's 2000 decision in *Augustus*." *Id.* at 4, Appendix, 2663. In determining that Penn Central is primarily responsible for delaying this case for more than 40 years, the Panel noted that Penn Central: continued to advance arguments which had been rejected by the Sixth Circuit (*Id.* at 42, Appendix 2264.); attempted to relitigate liability issues that have been previously decided (*Id.*); "its belated raising of its strict causation defense and strained reading of the relationship between section 1(a) and section 1(b) of the MPA" (*Id.* at 43, Appendix 2665); its "misrepresentation of Judge Oliver's conclusion about responsibility for the delay (*Id.*); its repackaging of its unsuccessful laches argument in an effort to scuttle the proceedings because of the non-appointment of personal representatives; its failure to produce the employee personnel records after promising to do so; its effort to shift responsibility for not producing the employee personnel records that it was required to maintain; its effort that the failure its argument that the failure of the Claimants to present these documents and evidence amounted to a failure of proof; and its repeated efforts to modify the hearing schedule." *Id.* at 42-43. Although the Panel determined that Penn Central was primarily

responsible for the delays in this case, it declined to award sanctions for such dilatory conduct. *Id.* at 44, Appendix 2666.

**Spoilation.** The Panel concluded that Penn Central had an obligation to retain and maintain documents relating to the Claimants employment records. *Id.* at 46-51, 2668-2673. However, rather than reverse the burden of proof or provide other sanctions, the Panel decided only to allow the Claimants to provide additional evidence relating to the relevant claims. *Id.*

**Burden of Proof.** The Panel determined that the Claimants were not required to anticipate and rebut the affirmative defenses available to Penn Central in the MPA to any greater extent than other plaintiffs in civil litigation are expected to plead and prove that their actions are not barred by the statute of limitations, by preclusion, or by laches. *Id.* at 51-55. Accordingly, the Panel concluded that “Penn Central has the burden of raising the issue of non-compliance with the work-related requirements, which it has done. It also has the burden presenting evidence to support its defense and the burden of persuading us of its correctness, which it has not done.” *Id.*

**Evidentiary Issues.** The Panel, recognizing that the formal Federal Rules of Evidence do not apply in arbitration, nonetheless adjusted the weight given to various pieces of evidence depending upon the strength of their authenticity and admissibility.

After addressing the preliminary issues, the Panel considered the primary legal and factual arguments raised by the parties. Before the Panel, as it does here, Penn Central argued that the MPA did not provide any benefits of any kind that could be in addition to benefits provided under the Washington Job Protection Agreement. The Panel rejected this argument noting “we look at section 1(a) as a whole and view its final phrase (i.e., that **in addition** to the benefits set forth in the said Washington Job Protection Agreement, it is further agreed as

follows") as not only extending benefits without regard to the temporal limitations of the WJPA (i.e., five-year merger protection benefits) but also eliminating the strict causation requirement of section 1 of the WJPA. And the Sixth Circuit recognized this expansion of benefits in *Augustus*." *Id.* at 62, Appendix 2684.

The Panel also noted that: the ICC had recognized and approved the merger because the "railroads had agreed to provide benefits under the MPA that were greater than those typically made available in other railroad mergers" (*Id.* at 65, Appendix 2687); the Special Railroad Reorganization Court had agreed that the MPA "provided attrition protection for covered employees"; the MPA has a "business decline clause" that would be rendered meaningless by Penn Central's interpretation; over the course of performing the MPA, Penn Central paid out more than \$100 million in wage guarantees without requiring proof of causation; and Penn Central in its own publications indicated that Claimants would have lifetime job guarantees based on the principle of attrition. *Id.* at 65-67, Appendix 2687-89.

The Panel went on to determine the work-related eligibility issues for each group of Claimants as well as their compensation loss issues. *Id.* 70-106, 2692-2728. In determining the amount of damages, the Panel recognized that prejudgment interest is an integral part of damages needed to make an injured plaintiff whole. Relying on expert testimony provided by Dr. Harvey Rosen, the Panel determined that an award of interest was necessary to remedy the injuries caused to the Claimants. Penn Central provided no contrary evidence from any expert or fact witness. Accordingly, in the absence of evidence to the contrary, the Panel determined the rate and the amount of interest on each award as to each individual claimant.

After carefully considering the issues, the evidence, and the arguments, the Panel rendered its detailed and comprehensive decision on July 31, 2009.

#### IV. STANDARD OF REVIEW

In the seminal case of *Chicago and Northwestern Transportation Co. – Abandonment* 3 ICC 2d. 729 (1987) (Lace Curtain) aff'd subnom. *IBEW v. I.C.C.* 862 F.2d 330 (D.C. Cir. 1988), the Interstate Commerce Commission (ICC), the predecessor to this Board, articulated the very limited standard of review it uses in appeals of arbitration decisions regarding imposed employee protective conditions.

In *Lace Curtain*, the ICC held:

(1) We do not review issues of causation, the calculation of benefits, or the resolution of other factual questions in the absence of egregious error and (2) our review is limited to recurring or otherwise significant issues of general importance regarding the interpretation of out labor protective conditions. *Id.* at 735-36 (Emphasis added.) *Delaware and Hudson Railway Company – Lease and Trackage Rights Exemption – Springfield Terminal Railway Company*. Finance Docket No. 30965 (Sub-No. 1) *et al.* (ICC served October 4, 1990 ) slip op. at 16-17, remanded on other grounds in *Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806 (D.C. Cir. 1993),

*Lace Curtain* standard was further explained as follows:

Once having accepted a case for review, we may only overturn an arbitral award when it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or it exceeds the authority reposed in arbitrators by those conditions.

See *Delaware & Hudson Railway Lease Trackage Rts Expemption – Springfield Terminal Railway* Finance Docket No. 30965 (Sub No. 1) at 16-17. 1009-\*1013-14 (Ninth Cir. 1991) 503 US 936 (1992) affirming the agency's adoption of the *Lace Curtain* standard.

In *CSX Corp - - Conrail- - Chessie System, Inc., et al.* 4 ICC 2d. 641 (“*Orange Book*” case), vacated and remanded on other grounds subnom. *Brotherhood of Railway Carmen v. ICC*, 880 F.2d 562 (D.C. Cir. 1989), rev's sub nom. *Norfolk & Western Ry. v .ATDA*, 111 S.Ct. 1156

(1991), remanded (D.C. Cir. September 17, 1991) The ICC described in detail the very restrictive nature of its review of factual findings:

We will employ an extremely limited standard of review, according substantial deference to the arbitrator's competence and special role in resolving labor disputes and giving a strong presumption of finality to an award. Our deference to the arbitrator's decision will vary with the nature of the issue involved, ranging from the most deferential treatment in the case of evidentiary issues such as causation, to significantly less deference when reviewing interpretations of Commission regulation or orders and matters of transportation policy: (citations omitted.) (Emphasis added)

See also *Union Pac. Corp., Union Pac. R.R. Co., & Missouri Pac. R.R. Co. – Control and Merger- Southern Pac. Rail Corp., Southern Pac. Tansp. Co., St. Louis S.W. Ry. CO., SPCSL Corp & The Denver & Rio Grande W. Ry Co.*, (Arbitration Review) STB Finance Docket 32760 (Sub-No. 42) (decision served August 14, 2006); *Rio Grande Industries, Inc., SPTC Holding, Inc. and the Denver and Rio Grande Western Railroad Company- Control-Southern Pacific Transportation Company* (Arbitration Review) STB Finance Docket No. 32000 (Sub-No. 12) (STB served Sept. 19, 2002), *rev'd on other grounds, Union Pacific R.R. Co. v. STB*, 358 R.3d 31 (D.C. Cir. 2004); *Haskell H. Bell v. Western Maryland Railway Company*, 336 I.C.C. 61,67 (1981) (*Bell*); *L.A. Rowlett, Jr. v. Missouri Pacific Railroad Company*, Finance Docket No. 30853 (ICC served Aug. 19, 1987) (Deference to arbitral factual determination of status of employee).

See also *Maine Central R.R. - - Lease* (Arbitration Review), Finance Docket no. 29720 (Sub-No. 1A) (decision served December 29, 1989); *Norfolk & Western Ry., et al. – Exemption – Contract to Operate and Trackage Rights* (Arbitration Review), Finance Docket No. 30582 (Sub-No. 2), decision served July 7, 1989 (Interstate R.R case) remanded D.C. Cir. September 7,1991; *Norfolk & Western Ry. And New York, Chicago & St. Louis R.R. – Merger ,etc.* (Arbitration Review), 5 ICC 2d. 234 (1989); *Brotherhood of Maintenance of Way Employees v.*

*Union Pacific R.R.* (Arbitration Review), ICC Finance Docket No. 30964 (Sub-No. 1) decision served March 27, 1991.

Penn Central's petition fails to meet the STB's threshold standard for acceptance of a case for review.

**A. Penn Central's Petition Deals With Factual Issues Not Subject To The STB's Threshold Requirement For Granting Reviews.**

The petition must be rejected because it deals with the issues given the most deferential treatment by this Board: causation and calculation of benefits. The panel exhaustively explained the bases for its decision. This Board gives strong deference to the fact finder. See *Norfolk and Western, supra*. Penn Central is requesting this Board to rehash such minutiae as the date the Claimants returned to work. Such factual issues are exclusively within the province of the Arbitration Panel, which held a week long evidentiary hearing, reviewed voluminous documents, and issued an extremely detailed decision.

This Board previously held that a prior arbitration panel had "erred egregiously and failed to observe the imposed labor conditions in summarily denying benefits to the Claimants who reported for work at the freight yard". STB Decision at 8, Appendix 749. This Board further found that "summary denial of all benefits is completely unjustified". *Id.* at 9, Appendix 750. It is therefore inapposite that an Arbitration Panel, having reviewed the same eligibility evidence and additional damage evidence would have "erred egregiously", or "failed to draw its essence from the imposed labor conditions", by awarding the benefits which this Board has held were unjustly denied by the prior panel.

The Panel followed the letter and spirit of the 1964 Agreement and all of the other authority in formulating its decision.

**B. Petition For Review Lacks Policy Implications.**

The requested review has nothing to do with broad matters of labor policy. *Black v. STB* 476 F. Ed 409, 414 (Sixth Cir. 2007). The issues in this case deal with a factual dispute over a merger that occurred over forty years ago. Since that time the entire railroad industry has changed. Although these issues are significant to the Claimants involved in this case, they do not constitute significant issues that implicate labor policy on an ongoing basis.

**V. LAW AND ARGUMENT**

**A. Summary of Argument.**

Penn Central's interpretation of the MPA renders it completely meaningless. Penn Central's entire argument 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. If the parties had believed that the WJPA was sufficient to protect their workers, there would not have been any need to enter into the MPA. Penn Central's defense would have had the arbitration panel and the Board completely ignore the additional benefits provided under the terms of the MPA.

For example, Penn Central argues that the Claimants have failed to 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 this Board 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 demonstrate 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. 2007 Arbitration transcript-Weinman at 546-47, 553, 555-58, and 570, Appendix 3022, 3024-3024 and 3028; Weinman Deposition at 51, 84, Appendix 1287, 1295. 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." MPA Section 1(b), Appendix 645. Penn Central realizes that no such advance notice was ever provided. Penn Central did not base its 1968 actions on this latest interpretation it pursued in the 2007 arbitration.<sup>27</sup> 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 Board 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

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<sup>27</sup> Accordingly, Penn Central is now manufacturing *post-facto* defenses to rationalize its action in denying benefits to the Claimants. These attempts at asserting affirmative defenses constitute revisionist history, to wit: the Railroad denied coverage to the *Knapik* and *Sophner* Claimants solely because it ostensibly believed that employees of CUT were not covered by the MPA. It has now been established as a matter of law that Penn Central was wrong.

simply provide this defense for the first time 40 years after the fact. See STB Decision at 8, Appendix 742-751. 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 the business decline section meaningless, because the five percent requirement could always be defeated by a proximate cause 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 was 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 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 more extensive 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 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 gain approval for the merger 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.

**B. Causation.**

**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 Petition for Review of Arbitration Decision at 1-25. 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 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); Penn Central's Standard Form, Appendix 2216-2250. Not a single form ever produced by Penn Central required proof of causation. 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 continues to do, 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 parts of the record in order to claim that causation is required. Penn Central's quotes are all taken out of context to mislead this Board. None of them discuss whether they are addressing claims under Subsection 1(a) or the additional benefits under Subsection 1(b). Penn Central Petition for Review of Arbitration Decision at 9. 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.

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 distorts 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 it were determined that Claimants must prove causation to recover under Subsection 1(b), there is ample evidence in the record to demonstrate causation. First, this very STB concluded that, with respect to the Brakemen, the Claimants had proved causation. Claimants' STB Decision at 7-9, Appendix 750. 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. Excerpts of *The Wreck of The Penn Central* by Daughen and Bizen at 131, Appendix 1270. When the merger allowed Saunders to assume control of the New York Central, he eliminated passenger service and, thus, caused damage to the Claimants.<sup>28</sup> Further, with regard to the Brakemen, they were laid off within thirty days of the merger. February 21, 1968 Furlough Notice, Appendix 1306. As this Board noted, "the fact that Claimants' losses began to be experienced shortly after the merger and furlough makes it unlikely that supervening causes could explain Claimants' losses." STB Decision at 9, Appendix 750, *See also Id.* at 7, 8, Appendix 748-749. The Clerks were explicitly told that their positions were being consolidated as a result of centralizing the accounting departments of the merged railroads. January 10, 1969 Notices that jobs were abolished, Appendix 1319-1324. 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

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<sup>28</sup> Again, these damages were anticipated by the parties, which is why the MPA created enhanced benefits to protect these workers.

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. Regardless, this Panel soundly rejected this position.

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 agreed that neither his testimony nor his expert report dealt in any manner with the issue of whether Penn Central breached the MPA or why the Penn Central treated the Claimants in any particular manner. 2007 Arbitration transcript - Weinman at 546-47, 553, 555-58, 570, Appendix 3022, 3024-3025, 3028; Weinman deposition at 51, 84, Appendix 1287, 1295.

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 employees [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.<sup>29</sup> 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.

2007 Arbitration transcript - Weinman 551, Appendix 3023.

#### 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

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<sup>29</sup> 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. Memoranda of PCTC attempting to calculate 5% business decline to justify layoffs, Appendix 1383-1385. See also Claimants' Trial Brief at 51-52, Appendix 570-635.

Groppe, counsel for Penn Central, to him dated August 20, 2007. 2007 Arbitration transcript-Weinman, 545 – 546, Appendix 3022. 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); . . .

Weinman Report at PCC 003899 – 003900, Appendix 23-24.

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.

2007 Arbitration transcript - Weinman at 547, Appendix 3022.

Despite knowing that it could not justify its conduct under the MPA, Penn Central continued 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.

2007 Arbitration transcript -Weinman at 555 – 556, Appendix 3024-3025.

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. 2007 Arbitration transcript-Weinman at 556, Appendix 3025. 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.

2007 Arbitration transcript -Weinman at 570, Appendix 3028.

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.

2007 Arbitration transcript Weinman at 557 - 558, Appendix 3025; *See also* Weinman deposition at 51, 84, Appendix 1287, 1295.

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 was no testimony or proof offered by Penn Central which in any way established that fact as a justification for the treatment of Claimants. This last-ditch effort to justify the unjustifiable was rejected by the Panel and should be rejected here.

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. Penn Central's Standard Forms, Appendix 2216-2247, 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.

**C. Railroad Completely Misconstrues the Panel's Decision on Burden of Proving Compliance.**

1. Introduction.

The Panel required the Claimants to satisfy their *prima facie* burden of proving their eligibility for benefits. First the Claimants proved they were present employees. Next they proved they suffered losses.<sup>30</sup> Then they proved the specific amount of damages each suffered.

The Panel then required the Carrier to prove any bases for denying benefits to the Claimants. Non-compliance (just as “Acts of God”, disability of Claimants or any other supervening events that would justify the Carrier’s failure to pay benefits), is akin to an affirmative defense.

The panel properly analogized the bases for non-compliance (that is, potentially disqualifying factors) to affirmative defense on which Defendants have the burden of persuasion. See Arbitration Award at 52-53, Appendix 2674-2675; See also Panel’s Findings of Fact at 12, Appendix 255. See also, Appendix 656.

Moreover, the Claimants do not have access to the records which could prove or disprove compliance, particularly when the Carrier has repudiated its affirmative duty to provide personnel records. MPA, Appendix 644-657. This Board also found that the Carrier was the proper repository for the records. “Claimants had no duty to administer the compensation scheme and to act as record keepers for that purpose.” STB Decision at 7, Appendix 748.

Accordingly, this Panel did not engage in “burden shifting” as the Defendants mischaracterize the Award. Rather the Panel made an informed decision based on the fact that

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<sup>30</sup> This Board has already indicated with even less evidence before it in the 1990 Arbitration, “It is not clear what else Claimants could have submitted to satisfy the Panel that they had suffered losses as a result of the merger.” STB Decision at 8, Appendix 749.

the Carrier was in the best position to maintain the records upon which it premised, but could not prove its allegations of non-compliance.

2. Claimants Fully Complied With The MPA.

a) 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*. *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." Time Cards, Appendix 2159-1 -2159-83. 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 20, 23, and 25 of its Petition, 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 ignores the critical issue of 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. The record is replete with evidence that no work was available. Beedlow testimony at 234, 235, Appendix 1619, 1620.

b) 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.<sup>31</sup> 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. Time Cards, Appendix 2159-1 -2159-83

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<sup>31</sup> 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. 2007 Arbitration transcript-Knapik at 140, Appendix 2872. This was done over the telephone without even appearing at the yard. 2007 Arbitration transcript - Knapik at 101-02, Appendix 2863.

c) **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 CUT passenger employees to work in the freight yard in the event of a furlough. February 16, 1965 Agreement, Appendix 436-437. 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. Rosters, Appendix 1307-1311. 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 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. Rosters, Appendix 1307-1311; Beedlow Testimony at 234, 235, Appendix 1619-1620.

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. February 21, 1968 Furlough Notice, Appendix 1306. 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. Beedlow Testimony at 250-258, Appendix 1635-1643. 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. February 21, 1968 Furlough Notice, Appendix 1306. 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; Appendix 317-322; 2007 Arbitration Transcript- Knapik at 116, 124, Appendix 2868; Penn Central Records Appendix 2159-1 -2159-83. Testimony of Beedlow at 257, Appendix 1642; Testimony of Steimle 467-469, Appendix 1844-1846.

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. July 5, 1968 Acree Letter, Appendix 2180. The time cards of the Knapik Claimants also indicated that they were on furlough. Claimants’ Time Cards, Appendix 2159-1-2159-83. 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. Tannenbaum Time Card, Appendix 2161.

- d) 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. July 11, 1969 Agreement, Appendix 455-458. 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." July 11, 1969 Agreement, Appendix 455-458.

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, Appendix 322.* However even 2.5% only amounted to 7-9 jobs for approximately 63 CUT men on the roster. Steimle testimony at 470, Appendix 1847; Knapik testimony at 135, Appendix 1468; Rosters, Appendix 1307-1311. 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. Railroad Retirement Board Records, Appendix 752-1177; Steimle testimony at 467,468, Appendix 1844, 1845; Beedlow testimony at 257 Appendix 1642; 2007 Arbitration transcript- Knapik at 141, Appendix 2873. 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. 2007 Arbitration transcript-Gallagher at 164, Appendix 2878. 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).

July 11, 1969 Agreement ¶ 7, Appendix 456.

That language is critical. It acknowledges that Appendix E is the document used to compute guarantees of the Knapik Claimants, and completely negates Penn Central's position that the WJPA ¶6 applies. July 11, 1969 Agreement, Appendix 455- 457.<sup>32</sup>

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<sup>32</sup> 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* Ellert testimony at 78, 84-85, 92, Appendix 1411, 1417-1418, 1425. This blatant breach of the agreement delayed this case for years and further highlights the malfeasance of the Railroad. 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. *Id.* at 121, 127-128, Appendix 1454, 1460-1461.

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

In addition to seeking to overturn the Panel, Penn Central is 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. 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.
- 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 letters in 1969, didn’t he?
- A. Yes.

Ellert testimony at 172, Appendix 1505. 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.

- f) Penn Central’s Furlough Is An Admission That Claimants 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.

- g) 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. Railroad Retirement Board Records, Appendix 752-1177; Penn Central Trial Ex. 18-27, Appendix 317-326. Obviously if a worker returns to work, it must be true that he also made himself “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.” Appendix 1319.

- h) 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 claimed in the arbitration, and here, 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.

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.” Appendix 1319. 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. *Id.* Thus, they become a utility employee if they meet the MPA’s criteria for failure to obtain a position through their seniority. Even Penn Central admits that, following this Notice, the Clerks became “utility” employees; this 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. January 10, 1969 Notice of Jobs abolished, Appendix 1319-1324; 2007 Arbitration transcript- Franz at 219, Appendix 2892. Accordingly, the Clerks are entitled to their separation payments.

**D. 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. Penn Central's Responses to Request for Production of Documents, Appendix 2212-2215. Penn Central breached the MPA's contractual obligation to produce the data needed to calculate Claimants' damages. 2007 Arbitration transcript - Rosen, at 385-86, Appendix 2982.

**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.<sup>33</sup> Under Penn Central's theory, the negotiators drafted an entire section of the MPA that should not be considered. This is not a reasonable position.

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. 2007 Arbitration transcript – Rosen at 396, 11, 12-25, Appendix 2985. These amounts are the same figures that are also contained in Penn Central's own trial exhibits. See Penn Central Trial Exs. 18-27 Appendix 317-326. See also Comparison Chart, Claimants' Post-Arb Brief at 18, Appendix 3222. Dr. Rosen then applied the formula contained in Exhibit E. 2007 Arbitration transcript-Rosen at 397, Appendix 2985.

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 31 of Penn Central's Brief here, they quote:

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<sup>33</sup> Paragraph 7 of the 1969 Agreement explicitly provides that the C.U.T. workers, including the Knapik Claimants are covered by the MPA. July 11, 1969 Agreement, Appendix 455-458. Penn Central's Trial Ex. 99.

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 2007 Arbitration transcript at 440-441, Appendix 2996.

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 was not opining that this formula should be applied in lieu of Appendix E. Nor was 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 placed 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, Appendix 3334. This attack is meritless because Dr. Rosen relied upon Penn Central's own calculations of these guarantees.

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, Appendix 3335. 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. 2007 Arbitration transcript -Rosen at 397, Appendix 2985. 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, Appendix 3232.

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. STB Decision at 7, Appendix 748. The STB also determined that Penn Central could have proven the availability of jobs, by comparing records of employees in senior to and junior to the Claimants on the roster. Penn Central failed

to make this proof. STB Decision at 8, Appendix 749; 2007 Arbitration transcript - Knapik at 104, Appendix 2863.

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, because only Penn Central had those records. 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. Penn Central’s Standard Form, Appendix 2216-2216-2233. 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. Penn Central's Standard Form, Appendix 2216-2216-2250. Penn Central's Standard Form, Appendix 2216-2216-2233 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 required 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 claim forms 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.

**E. Interest was Properly Awarded by the Panel**

1. Pre-Judgment Interest Is An Essential Element Of Damages.

Prejudgment interest is "an element of complete compensation." *West Virginia v United States*, 479 U.S. 305, 310 (1987). The U.S. Supreme Court stated: "[p]rejudgment interest is an element of complete compensation," and explained in footnote 2: "[p]rejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until

judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress.” *Id.*

Though articulated in many different ways, the courts are mindful of the time-value of money when calculating the compensation for a damages award. As the court stated in *U. S. v. Atlantic Refining Co.*, 85 F.2d 427, 429 (3rd Cir. 1936), “delay in . . . (receiving) compensation is an element in determining the damages . . . and an award made on one date is not the equivalent of an award made at an earlier date.” The delayed compensation is a greater figure and “delay . . . enters into the late award as an element of loss.” See, *Harpum, Specific Performance With Compensation as a Purchaser’s Remedy-A Study in Contract and Equity*, 40 *Camb.L.J.* 47 (1981); *Oakey, Pecuniary Compensation For Failure to Complete a Contract for the Sale of Land*, 39 *Camb.L.J.* 58 (1980).

The aim of awarding damages is compensation. *United States v. City of Warren, Mich.*, 138 F.3d 1083, 1096 (6th Cir.1998) (“An award of prejudgment interest ‘ is an element of complete compensation’ in a Title VII back pay award.”); *Chandler v. Bombardier Capital, Inc.*, 44 F.3d 80, 83 (2nd Cir.1994) (“The purpose of a prejudgment interest award in a wrongful termination case is to compensate a plaintiff for the loss of use of money that the plaintiff otherwise would have earned had he not been unjustly discharged.”); *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1331 (7th Cir.1992) (“Prejudgment interest is an element of complete compensation,” citing *West Virginia v. U.S.* and other cases); *Northern Natural Gas Co. v. Grounds*, 393 F.Supp. 949, 991 (1974) (“The object of this phase of the litigation is to assure that just compensation be paid . . . [and] an award of prejudgment interest is required in order to assure this result.”)

“Money today is not a full substitute for the same sum that should have been paid years ago.” *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1331 (7th Cir.1992). “Prejudgment interest, like all monetary interest, is simply compensation for the use or forbearance of money owed.” *Transmatic, Inc. v. Gulton Industries, Inc.*, 180 F.3d 1343, 1347 (Fed. Cir.1999). “Prejudgment interest is not awarded as a penalty; it is merely an element of just compensation.” *City of Milwaukee v. Cement Division, National Gypsum, Co.*, 515 U.S. 189, 197 (1995).

Such interest can be large and exceed the basic claim. *In the Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279 (7<sup>th</sup> Cir. 1992), the Court upheld prejudgment interest of more than \$120 million, accrued over 13 years, on a damage award of \$61 million. *Id.* at 1335. Similarly, in *City of Milwaukee*, damages were \$1.67 million, and prejudgment interest amounted to \$5.3 million. *City of Milwaukee*, 515 U.S. at 192. However, because prejudgment interest is an element of “full compensation,” an award of such interest “no matter how large, cannot be called ‘punitive.’” *Matter of Milwaukee Cheese Wisconsin, Inc.*, 112 F.3d 845, 849 (7th Cir.1997).

Federal Courts have agreed that prejudgment interest is the “norm in federal litigation” ; it is an “ordinary part of any award under federal law.” *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1331-32 (7th Cir.1992), citing *West Virginia v. United States*, 479 U.S. 305, 310 (1987); See also *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655-56 (1983); *Barbour v. Merrill*, 48 F.3d 1270, 1278-79 (D.C.Cir.1995); *Lorenzen v. Employees Retirement Plan of Sperry & Hutchinson Co.*, 896 F.2d 228, 236 (7th Cir.1990).

Federal courts presume the inclusion of prejudgment interest is a necessary component of damages, unless circumstances justify otherwise. Many cases specifically articulate a presumption in favor of such inclusion. *Barbour v. Merrill*, 48 F.3d 1270, 1279 (D.C.Cir.1995);

*Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436 (7th Cir.1989); *Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150, 154 (2nd Cir.1984). Indeed, courts that decline to award prejudgment interest are expected to justify this departure from the federal norm. *City of Milwaukee v. Cement Division, National Gypsum Co.*, 515 U.S. 189 (1995); Courts must justify failure to award prejudgment interest. *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1334 (7th Cir.1992).

“[I]n the context of arbitration award confirmations . . . there is a ‘presumption in favor of prejudgment interest.’” *Service Employees Int’l Union, Local 32BJ, AFL-CIO v. Stone Park Associates, LLC et al.*, 326 F.Supp.2d 550, 555 (S.D. N.Y. 2004)(quoting, *Waterside Ocean Navigation Co. v. Int’l Navigation Ltd.*, 737 F.2d 150, 154 (2d Cir. 1984)). Following this presumption, Courts “have exercised their discretion to award prejudgment interest when confirming arbitration awards under collective bargaining agreements. . . .” *Id.*

## 2. Prejudgment Interest Is Awarded In Labor Arbitration.

Numerous courts and arbitration panels have awarded interest in labor cases. In *Shore v. Federal Express Corp.*, 42 F.3d 373, 380(6th Cir. 1994), the Sixth Circuit held that the plaintiff is entitled to an award of prejudgment interest for the delayed payment of monies due to employees, “for delays attributable both to Federal Express and to the judicial process.” Moreover, the court reversed the district court’s denial of prejudgment interest. *Id.* Similarly, the Sixth Circuit explained in *EEOC v. Wilson Metal Casket Co.*, 24 F.3d 836, 842 (6th Cir. 1994), that: “Prejudgment interest helps to make victims of discrimination whole and compensates them for the true cost of money damages they incurred.” *United States v. City of Warren*, 138 F.3d 1083, 1096 (6th Cir. 1998), stated that “victims of [employment] discrimination should not be penalized for delays in the judicial process, and discriminating employers should not benefit from such delays.” *Id.* (citations omitted).

Arbitration panels have also held that employers must pay interest to employees in order to make them whole. *Laidlaw Transit Co.*, 109 LA 647 (1997)(prejudgment interest assessed at the rate of 10.5% per year where company delayed from May 1996 to September 1997 and “because of Laidlaw’s dilatory and bad faith conduct, the grievant was forced to wait more than an additional year to receive his back pay award. Therefore, it is appropriate to include interest on the back pay award.”). In *National Railroad Passenger Corporation and AMTRAK Service Workers’ Council*, NMB Case No. 67, 95 LA 617, 631 (1990), the neutral arbitrator Jessie Simons noted that the National Labor Relations Board “routinely” awards interest. *See also Vermont Dept. of Corrections*, 89 LA 383-84 (1987)(“We conclude that adding interest to the backpay award is necessary to make Grievant whole for income losses suffered as a result of his dismissal. By awarding interest, we are not imposing a penalty or punishment on management, but are simply compensating Grievant for the loss of the use of the money.”); *Dayco Products, Inc.*, 92 LA 876 (1989)(awarding additional interest on pension benefits where employer delayed case for three years.).

#### **F. Chairman Steinglass Was Not Biased**

On or about October 26, 2007, Defendants filed a Motion to Recuse the neutral arbitrator Professor Steven Steinglass. This motion was filed approximately six weeks before the arbitration and more than eighteen months after Arbitrator Steinglass had been appointed by the District Court. The basis of the Motion to Recuse was the purported relationship between Professor Steinglass and the wife of the partner of Plaintiffs’ expert economist. Professor Steinglass disclosed his acquaintance with Judge Nancy Fuerst, who had been one of his students at the Cleveland State University Marshall School of Law. He also disclosed that Judge Fuerst and her husband John Burke, (who is the partner of Plaintiffs’ expert witness Harvey Rosen) had made contributions to the law school and that as contributors they were included in social events

Professor Steinglass attended during his tenure as Dean. The basis of the Defendants' motion was that Professor Steinglass' acquaintance with Judge Fuerst's husband constituted the appearance of impropriety.

In *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640 (6th Cir. 2005) the Sixth Circuit rejected the "appearance of bias," standard as it would "render this efficient means of dispute resolution [arbitration] ineffective." *Id.* at 647 (quoting *Morelite Construction Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir.1984)).<sup>34</sup>

The *Nationwide* Court at 646 continued quoting *Int'l Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 552 (2d Cir.1981):

The most sought-after arbitrators are those who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose. Since they are chosen precisely because of their involvement in that community, some degree of overlapping representation and interest inevitably results.

Again, citing *Morelite*, the *Nationwide* Court recognized the reality in the legal community that "to disqualify any arbitrator who had professional dealings with one of the parties (to say nothing of a social acquaintanceship) would make it impossible, in some circumstances, to find a qualified arbitrator at all." *Nationwide*, 429 F.3d at 647.

The Sixth Circuit has repeatedly declined to vacate based on alleged partiality in the absence of evidence of direct personal financial interest. See, *Uhl v. Komatsu Forklift Co.*, 512 F.3d 294 (6<sup>th</sup> Cir. 2008) (neutral prior service as counsel with one party's counsel in prior cases constitutes insignificant relationship), *Apperson v. Fleet Carrier Corp.* 879 F.2d 1244 (1989),

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<sup>34</sup> The *Nationwide* case post dates the "appearance of bias" standard used by the District Court in its 1985 ruling and therefore controls here.

*cert denied* 495 U.S. 947, 10 S.Ct. 2206, 109 L. Ed. 2d. 533 (1990) (neutral as former law partner of parties does not constitute bias.

In *Nationwide*, the Court rejected the notion that an arbitrator is biased due to contact with opposing counsel. Specifically, the Court stated:

We likewise agree with the district court that [the arbitrator's] social engagements did not constitute improper or prohibited *ex parte* contacts. These events did not involve any communication regarding the . . . arbitration. Certainly arbitrators and attorneys frequently participate in activities that result in communication unrelated to the subject matter of litigation before the arbitrator [citation omitted] and it would be unreasonable to suggest such contacts in unrelated matters are prohibited.

*Id.* at 649.

The contact complained of here was not even as direct as between arbitrator and opposing counsel which was acceptable to the Court in *Nationwide*. Here, the contact was between the arbitrator and the wife of a partner of an expert witness. Likewise, the focus of the *Nationwide* Court in making the statement above was clearly on whether the communication was “regarding the arbitration. . .” or “[r]elated to the subject matter of the litigation before the arbitrator.” *Id.* As was the case in *Nationwide*, here too the contact alleged to have occurred was at events completely unrelated to the present litigation. In fact, Respondents cannot show any connection between the contacts which they now assail and any issue in the instant case.

The Defendants allege that the only explanation for the panel's award of interest was premised on the irrationality of Professor Steinglass based on his attenuated relationship with the expert's partner's wife. However, what is irrational here is that Defendants did not offer any opposition whatsoever to Dr. Rosen's damage assessment. Defendants relied exclusively on its sole witness, Dr. Weinman who opined that no benefits were awardable. Their position is akin to a personal injury case in which the Defendant disputes liability and then fails to oppose any

expert testimony of the plaintiff's damages. This was a strategic decision by the Defendants not to address the award of interest or the amount of interest in the arbitration. In the absence of any opposing testimony on interest, coupled with its threshold decision on liability, the Arbitration Panel, had no interest figures to use other than those provided by the Claimants.

The Motion to Recuse was one of many last ditch efforts in Defendants' arsenal as they attempted to delay or completely avoid the arbitration. Defendants filed three motions before the Bankruptcy Court within a two week period, seeking to stop the arbitration from proceeding. All of those motions were unsuccessful.

Professor Steinglass properly summarily dismissed the Motion to Recuse. His decision to rule unilaterally on the motion was ratified by the other Arbitration Panel members. Appendix 2263. Respondents cannot meet the onerous burden of proof of the party alleging partiality of an arbitrator. *Sphere Drake Insurance Limited v. All American Life Insurance Company*, 307 F3d. 617 (2002)

The Defendants' claim must be dismissed.

## VI. CONCLUSION

For all the foregoing reasons, the Petition for Review should be denied and the Arbitration Award should be affirmed in its entirety.

/s/ Carla M. Tricarichi

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**CERTIFICATE OF SERVICE**

A copy of the foregoing was sent via electronic mail to:

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on this 29th day of October, 2009.

***/s/ Carla M. Tricarichi*  
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