

RECORDATION NO. 10167-^A Filed 1425

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INTERSTATE COMMERCE COMMISSION

AGREEMENT AND ASSIGNMENT dated as of February 15, 1979, between PULLMAN INCORPORATED (Pullman Standard Division), FMC CORPORATION and PACCAR INC, respectively (each hereinafter called a "Builder"), and MERCANTILE-SAFE DEPOSIT AND TRUST COMPANY, not in its individual capacity but solely as Agent under a Participation Agreement (the "Participation Agreement") dated as of the date hereof (the "Assignee").

WHEREAS each Builder and FIRST NATIONAL BANK AND TRUST COMPANY OF EVANSTON, as Trustee (the "Owner-Trustee") under a Trust Agreement dated as of the date hereof with FIRST NATIONAL BANK OF MINNEAPOLIS (the "Owner"), have entered into a Conditional Sale Agreement dated as of the date hereof (the "CSA") covering the construction, sale and delivery, on the conditions therein set forth, by each Builder and the purchase by the Owner-Trustee for the Owner of the railroad equipment described in Annex B to the CSA manufactured by such Builder (said equipment being collectively hereinafter called "its Equipment" and the equipment manufactured by all the Builders being collectively called the "Equipment"); and

WHEREAS the Owner-Trustee and AMERICAN RAIL BOX CAR COMPANY (the "Lessee") have entered into a Lease of Railroad Equipment dated as of the date hereof (the "Lease") providing for the lease to the Lessee of the Equipment;

NOW, THEREFORE, THIS AGREEMENT AND ASSIGNMENT (this "Assignment") WITNESSETH: that in consideration of the sum of \$1.00 and other good and valuable consideration paid by the Assignee to each Builder, the receipt of which is hereby acknowledged, as well as of the mutual covenants herein contained, the parties hereto agree as follows:

SECTION 1. Each Builder hereby assigns, transfers and sets over unto the Assignee, its successors and assigns:

(a) the security interest of such Builder in and to each unit of its Equipment when and as severally delivered to and accepted by the Owner-Trustee, and when and as payment is made (i) by the Assignee to such Builder of the amount required to be paid pursuant to Section 4 hereof and (ii) to such Builder by the Owner-Trustee pursuant to subparagraphs (a) and (b) of the third paragraph of Article 4 of the CSA;

(b) all the right, title and interest of such Builder in and to the CSA (except the right to construct and deliver its Equipment, the right to receive the payments specified in subparagraphs (a) and (b) of the third paragraph of Article 4 thereof and reimbursement for taxes paid or incurred by such Builder), and, except as aforesaid, in and to any and all amounts which may be or become due or owing to such Builder under the CSA on account of the indebtedness in respect of the Purchase Price (as defined in the CSA) of its Equipment and interest thereon, and in and to any other sums becoming due from the Owner-Trustee under the CSA, other than those hereinabove excluded; and

(c) except as limited by subparagraphs (a) and (b) of this paragraph, all such Builder's rights, titles, powers, privileges and remedies under the CSA;

without any recourse hereunder, however, against such Builder for or on account of the failure of the Owner-Trustee to make any of the payments provided for in, or otherwise to comply with, any of the provisions of the CSA; *provided, however*, that this Assignment shall not subject the Assignee to, or transfer, or pass, or in any way affect or modify, the obligations of such Builder to construct and deliver its Equipment in accordance with the CSA or with respect to its warranties and agreements set forth in or referred to in Article 13 of the CSA or relieve the Owner-Trustee from its obligations to the Builder contained in Articles 2, 3, 4, 6 and 13 of

the CSA, it being understood and agreed that, notwithstanding this Agreement, or any subsequent assignment pursuant to the provisions of Article 14 of the CSA, all obligations of such Builder to the Owner-Trustee shall be and remain enforceable by the Owner-Trustee, its successors and assigns, against and only against such Builder. In furtherance of the foregoing assignment and transfer, each Builder hereby authorizes and empowers the Assignee in the Assignee's own name, or in the name of the Assignee's nominee, or in the name of and as attorney, hereby irrevocably constituted, for such Builder, to ask, demand, sue for, collect, receive and enforce any and all sums to which the Assignee is or may become entitled under this Assignment and compliance by the Owner-Trustee with the terms and agreements on its part to be performed under the CSA, but at the expense and liability and for the sole benefit of the Assignee.

SECTION 2. Each Builder agrees that it shall construct its Equipment in full accordance with the CSA and will deliver the same upon completion to the Owner-Trustee in accordance with the provisions of the CSA; and that, notwithstanding this Assignment, it will perform and fully comply with each of and all the covenants and conditions of the CSA set forth to be performed and complied with by such Builder. Each Builder further agrees that it will warrant to the Assignee and the Owner-Trustee that at the time of delivery of each unit of its Equipment under the CSA it had legal title to such unit and good and lawful right to sell such unit and that such unit was free of all claims, liens, security interests and other encumbrances of any nature except only the rights created under the CSA, this Assignment and the Lease; and such Builder further agrees that it will defend the title to such unit against the demands of all persons whomsoever based on claims originating prior to the delivery of such unit by such Builder under the CSA; all *subject, however*, to the provisions of the CSA and the rights of the Owner-Trustee thereunder. No Builder will deliver any unit of Equipment to the Owner-Trustee under the CSA until the CSA, the Lease, this Assignment and the Lease Assignment (as defined in the Lease) have been filed in accordance with 49 U.S.C. § 11303(a) (each Builder and its counsel being entitled to rely on advice from special counsel for the Assignee that such filing has been made).

SECTION 3. Each Builder agrees with the Assignee that in any suit, proceeding or action brought by the Assignee under the CSA for any installment of, or interest on, indebtedness in respect of the Purchase Price of its Equipment or to enforce any provision of the CSA, such Builder will indemnify, protect and hold harmless the Assignee from and against all expenses, loss or damage suffered by reason of any defense, setoff, counterclaim or recoupment whatsoever claimed by the Owner-Trustee or the Lessee arising out of a breach by such Builder of any obligation with respect to its Equipment or the manufacture, construction, delivery or warranty thereof, or by reason of any defense, setoff, counterclaim or recoupment whatsoever arising by reason of any other indebtedness or liability at any time owing to the Owner-Trustee or the Lessee by such Builder. Each Builder's obligation so to indemnify, protect and hold harmless the Assignee is conditional upon (a) the Assignee's timely motion or other appropriate action, on the basis of Article 14 of the CSA, to strike any defense, setoff, counterclaim or recoupment asserted by the Owner-Trustee or the Lessee in any such suit, proceeding or action and (b) if the court or other body having jurisdiction in such suit, proceeding or action denies such motion or other action and accepts such defense, setoff, counterclaim or recoupment as a triable issue in such suit, proceeding or action, the Assignee's prompt notification to such Builder of the asserted defense, setoff, counterclaim or recoupment and the Assignee's giving such Builder the right, at such Builder's expense, to compromise, settle or defend against such defense, setoff, counterclaim or recoupment.

Except in cases of articles or materials specified by the Lessee and not manufactured by the appropriate Builder and in cases of designs, systems, processes, formulae or combinations specified by the Lessee and not developed or purported to be developed by such Builder, such Builder agrees to indemnify, protect and hold harmless the Assignee from and against any and all liability, claims, costs, charges and expenses, including royalty payments and counsel fees, in any manner imposed upon or accruing against the Assignee or its assigns because of the use in or about the construction or operation of any of its Equipment of any design, system, process, formula, combination, article or material which infringes or is claimed to infringe on any patent or other right. The Assignee will give prompt notice to the appropriate Builder of any claim actually known to the

Assignee which is based upon any such alleged infringement and will give such Builder the right, at such Builder's expense, to compromise, settle or defend against such claim. Each Builder agrees that any amounts payable to it by the Owner-Trustee or the Lessee with respect to its Equipment, whether pursuant to the CSA or otherwise, not hereby assigned to the Assignee, shall not be secured by any lien, charge or security interest upon the Equipment or any unit thereof settled for under Section 4 hereof.

SECTION 4. Subject to the provisions of Article 3 of the CSA, the Assignee, on each Closing Date fixed as provided in Article 4 of the CSA with respect to a Group (as defined in said Article 4) of the Equipment, shall pay to the appropriate Builder an amount equal to the portion of the Purchase Price thereof which, under the terms of said Article 4, is payable in installments, provided that there shall have been delivered to the Assignee on or prior to such Closing Date, the following documents, in form and substance satisfactory to it and to its special counsel, Messrs. Cravath, Swaine & Moore, in such number of counterparts as may be reasonably requested by said special counsel:

(a) an instrument or instruments from such Builder to the Assignee transferring to the Assignee the security interest of such Builder in such units, warranting to the Assignee and to the Owner-Trustee that, at the time of delivery of such units under the CSA, such Builder had legal title to such units and good and lawful right to sell such units and such units were free of all claims, liens, security interests and other encumbrances of any nature except only the rights created under the CSA, this Assignment and the Lease, and covenanting to defend the title to such units against demands of all persons whomsoever based on claims originating prior to the delivery of such units by such Builder under the CSA;

(b) a Certificate or Certificates of Acceptance with respect to the units of the Equipment in such Group as contemplated by Article 3 of the CSA and § 2 of the Lease;

(c) an invoice of the Builder for the units of its Equipment in such Group accompanied by or having endorsed thereon a certification by the Lessee and the Owner-Trustee as to their approval thereof if the purchase price is other than the base price or prices set forth in Annex B to the CSA;

(d) an opinion of counsel for the appropriate Builder, dated as of such Closing Date, addressed to the Assignee and the Owner-Trustee, to the effect that the aforesaid instrument or instruments have been duly authorized, executed and delivered by such Builder and are valid and effective to vest in the Assignee the security interest of the Builder in the units of the Equipment in such Group, free from all claims, liens, security title and interests and other encumbrances (other than those created by the CSA, this Assignment and the Lease) arising from, through or under such Builder; and

(e) a receipt from the appropriate Builder for any payment (other than the payment being made by the Assignee pursuant to the first paragraph of this Section 4) required to be made on such Closing Date to such Builder with respect to its Equipment, unless such payment is made by the Assignee with funds furnished to it for that purpose by the Owner-Trustee.

The obligation of the Assignee hereunder to make any payment provided for in this Section 4 is hereby expressly conditioned upon satisfaction of all the conditions contained in Paragraph 7 of the Participation Agreement, upon payment by the Owner-Trustee of the amount required to be paid by it pursuant to subparagraphs (a) and (b) of the third paragraph of Article 4 of the CSA, upon the Assignee's having on deposit, pursuant to the terms of the Participation Agreement, sufficient funds available thereunder to make such payment and upon compliance by the Builder of the Equipment to be paid for with the provisions of Article 3 of the CSA. In the event that the Assignee shall not make any such payment, the Assignee shall reassign to the appropriate Builder, without recourse to the Assignee, all rights, titles, interests, powers, privileges and remedies assigned to the Assignee pursuant to Section I hereof insofar as they relate to the units of its Equipment with respect to which payment has not been made by the Assignee.

SECTION 5. The Assignee may assign all or any of its rights under the CSA, including the right to receive any payments due or to become due to it from the Owner-Trustee thereunder. In the event of any such

assignment, any such subsequent or successive assignee or assignees shall, to the extent of such assignment, and upon giving the written notice required in Article 14 of the CSA, enjoy all the rights and privileges and be subject to all the obligations of the Assignee hereunder.

SECTION 6. Each Builder hereby:

(a) represents and warrants to the Assignee, the Owner-Trustee and their successors and assigns, that the CSA was duly authorized by it and lawfully executed and delivered by it for a valid consideration, that, assuming due authorization, execution and delivery by the Owner-Trustee, the CSA is, insofar as such Builder is concerned, a legal, valid and existing agreement binding upon such Builder in accordance with its terms and that, insofar as such Builder is concerned, it is now in force without amendment thereto;

(b) agrees that it will from time to time, at the request of the Assignee or its successors or assigns, make, execute and deliver all such further instruments of assignment, transfer and assurance and do all such further acts and things as may be necessary and appropriate in the premises to give effect to the provisions hereinabove set forth and more perfectly to confirm the rights, titles and interests hereby assigned and transferred to the Assignee or intended so to be; and

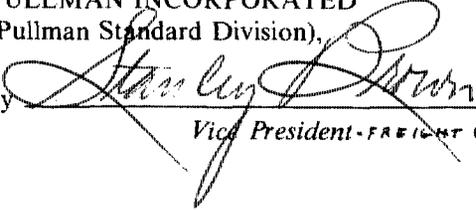
(c) agrees that, subsequent to payment of the sums due it hereunder and under the CSA, upon request of the Assignee, its successors and assigns, it will execute any and all instruments which may be necessary or proper in order to discharge of record the CSA or any other instrument evidencing any interest of the Builder therein or in its Equipment.

SECTION 7. The terms of this Assignment and all rights and obligations hereunder shall be governed by the laws of the State of Illinois; *provided, however*, that the parties shall be entitled to all the rights conferred by 49 U.S.C. § 11303(a), such additional rights arising out of the filing, recording or depositing of the CSA and this Assignment as shall be conferred by the laws of the several jurisdictions in which the CSA or this Assignment shall be filed, recorded or deposited, or in which any unit of the Equipment shall be located, and any rights arising out of the marking on the units of Equipment.

SECTION 8. This Assignment may be executed in any number of counterparts, all of which together shall constitute a single instrument. It shall not be necessary that any counterpart be executed by both the Assignee and any Builder so long as each such party has executed and delivered to the other one counterpart hereof. Each Builder shall be bound hereunder notwithstanding the failure of any other Builder to execute and deliver this Assignment or to perform its obligations hereunder. Although for convenience this Assignment is dated as of the date first above written, the actual date or dates of execution hereof by the parties hereto is or are, respectively, the date or dates stated in the acknowledgments hereto annexed. The rights and obligations under this Agreement of each Builder are several in accordance with its interests and not joint. Accordingly, whenever in this Agreement a right is conferred or an obligation is imposed on a Builder, such right shall be construed to accrue to or to be enforceable against only the specific Builder furnishing the units of Equipment giving rise to such right or obligation and its successors and assigns.

IN WITNESS WHEREOF, the parties hereto, each pursuant to due corporate authority, have caused this instrument to be executed in their respective corporate names by duly authorized officials, and their respective corporate seals to be hereunto affixed and duly attested, all as of the date first above written.

PULLMAN INCORPORATED
(Pullman Standard Division),

by 
Vice President - FREIGHT UNIT

[Corporate Seal]

Attest:


Assistant Secretary

FMC CORPORATION,

by _____

[Corporate Seal]

Attest:

PACCAR INC,

by _____

Vice President

[Corporate Seal]

Attest:

MERCANTILE-SAFE DEPOSIT AND
TRUST COMPANY, not in its individual
capacity but solely as Agent,

by _____

Assistant Vice President

[Corporate Seal]

Attest:

Corporate Trust Officer

ACKNOWLEDGEMENT OF NOTICE OF ASSIGNMENT

Receipt of a copy of, and due notice of the assignment made by, the foregoing Agreement and Assignment dated as of February 15, 1979, is hereby acknowledged as of February 15, 1979.

**FIRST NATIONAL BANK AND TRUST
COMPANY OF EVANSTON,**
as Owner-Trustee,

by _____

