

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY

GORDON E. NEUENSCHWANDER
EXECUTIVE VICE PRESIDENT
& GENERAL COUNSEL

G. EDWARD YURCON
ASSISTANT GENERAL COUNSEL

RICHARD A. PORACH
ATTORNEY

10869
RECORDATION NO. Filed 1425³²⁴ P&LE TERMINAL BUILDING
PITTSBURGH, PA. 15219
PHONE (412) 261-3201

OCT 9 1979 - 10 50 AM

INTERSTATE COMMERCE COMMISSION
October 5, 1979

9-282A126
OCT 8 1979
50.00
CC Washington, D. C.

Miss Agatha L. Mergenovich, Secretary
Interstate Commerce Commission
12th and Constitution Ave., N.W.
Washington, D. C. 20423

Dear Miss Mergenovich:

Enclosed for filing with the Commission pursuant to Section 11303(a) of the Interstate Commerce Act are the original and four copies of the following document:

Railroad Equipment Lease, dated as of October 1, 1979, between The Pittsburgh and Lake Erie Railroad Company and Michigan Interstate Railway Company, operator of the Ann Arbor Railroad System.

The names and addresses of the parties to the transaction are as follows:

OWNER: The Pittsburgh and Lake Erie Railroad Company
Smithfield and Carson Streets
Pittsburgh, PA 15219

LESSEE: Michigan Interstate Railway Company
P. O. Box 619
Owosso, Michigan 48867

The following is a general description of the railroad equipment covered by said document:

<u>No. of Units</u>	<u>Description</u>	<u>A.A.R. Mechanical Designation</u>	<u>Identifying Road Nos.</u>
125	35' 70-ton steel, covered hopper cars	LO	AA 700-824

RECEIVED
OCT 9 10 43 AM '79
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Vertical handwritten notes and signatures on the left margin.

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Interstate Commerce Commission

Washington, D.C. 20423

10/9/79

OFFICE OF THE SECRETARY

Gordon E. Neuenschwander
The Pittsburgh & Lake Erie RR Co.
324 P&LE Terminal Building
Pittsburgh, PA 15219

Dear
Sir:

The enclosed document(s) was recorded pursuant to the provisions of Section 11303 of the Interstate Commerce Act, 49 U.S.C. 11303, on 10/9/79 at 10:50am, and assigned re-
recording number(s). 10869

Sincerely yours,

Agatha L. Mergenovich
Agatha L. Mergenovich
Secretary

Enclosure(s)

NH 79 1790

RECORDATION NO. 10869 Filed 1425

RAILROAD EQUIPMENT LEASE OCT 9 1979 - 10 50 AM

INTERSTATE COMMERCE COMMISSION

THIS AGREEMENT AND LEASE dated as of the 1st day of

October 1, 1979, by and between THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, hereinafter called "P&LE", and Michigan Interstate Railway Company, operator of the ANN ARBOR RAILROAD SYSTEM, hereinafter called "AA".

W I T N E S S E T H :

1. Lease of Cars. P&LE agrees to lease to AA and AA agrees and does hereby lease from P&LE one hundred twenty-five (125) steel, covered hopper cars (any one of said cars hereinafter referred to as "Car" and more than one or all of which are hereinafter referred to as "Cars"), bearing numbers as set forth on Exhibit A, attached hereto and made a part hereof. The lease shall become effective as to any Car immediately upon its acceptance pursuant to paragraph 3 hereof.

2. Delivery of Cars. P&LE shall deliver the Cars as promptly as is reasonably possible. Delivery of any Car to AA shall be effective upon the date when such Car has been accepted in interchange by a connecting railroad at such point as is designated by AA.

3. Condition of Cars - Acceptance. All Cars delivered hereunder shall be in satisfactory condition for movement in normal interchange service and shall conform to the provisions and specifications of AAR Interchange Rule No. 88. The Cars shall be transported without cost to P&LE to such point on the line of the

AA as AA shall designate. AA will inspect all of the Cars on the lines of P&LE prior to their delivery in accordance with paragraph 2. AA agrees to accept the same without objection as to condition upon delivery provided that a Certificate of Acceptance is executed and delivered to P&LE by an officer of AA with respect to each such Car, within fifteen days of said inspection. AA shall not be responsible, however, for damage which may have occurred to any Car subsequent to said inspection but prior to delivery.

4. Use and Possession. During the term of this lease, so long as AA is not in default of the provisions hereunder, AA shall be entitled to possession of each Car from the date the lease becomes effective as to such Car, and the same may be used on its own property or lines and upon the lines of any other railroad in interchange service; provided, however, that the Cars shall be used only in the United States of America or Canada and for the uses for which they were designed.

5. Term. This lease shall be for an initial term which shall commence on the date of delivery by P&LE and shall terminate ten years from said date. If AA has fully performed all of its obligations under this Agreement and Lease, AA may, by written notice to P&LE given no later than thirty (30) days prior to the conclusion of the preceding terms, renew this lease for up to but not exceeding three (3) additional terms of one (1) year each. During any additional term or terms all of the provisions and conditions of this Agreement and Lease shall continue in effect.

6. Rental. As rental for the use of each Car, AA shall pay P&LE Two Hundred Seventeen Dollars (\$217.00) per month from the date of delivery thereof in accordance with the provisions of paragraph 2 hereof. AA shall make monthly payments of the aforesaid rental to P&LE within forty-five (45) days from the end of each month. It is specifically agreed that AA will retain all Daily Time Charges and Mileage Charges attributable to the use of the Cars during the term of this lease.

7. Title. AA shall not by reason of this Agreement and Lease or any action taken hereunder acquire or have any right or title in and to the Cars except as to the rights herein expressly granted to it as lessee.

8. Maintenance. During the continuance of this lease, AA shall promptly and with due diligence keep and maintain the Cars in good working order and repair, and make all replacements and repairs to the Cars or their equipment and appliances to the extent required by presently effective Interchange Rules of the Association of American Railroads and laws and regulations of any Federal, State or governmental body or department. In the event that any modifications are made in said Interchange Rules, laws or regulations during the term of this lease which would require expenditures exceeding ten percent (10%) of the value of any Car or Cars, AA shall have the right, upon written notice thereof, to terminate this Agreement and Lease with respect to any or all of the Cars affected by said modifications upon re-delivery thereof in accordance with paragraph 15 hereof. Except as provided in the preceding sentence and in paragraph 14 hereof

with respect to the loss or destruction of Cars, and paragraph 5 hereof with respect to maintenance exceeding depreciation after the first five (5) years of the initial term, all of the foregoing maintenance and replacements shall be provided at the sole cost and expense of AA and without any reduction or abatement in rent or other loss, cost or expense to P&LE.

9. Additions to Cars. Any parts, replacements or additions made to any Car shall be accessions to such Car and title thereto shall be immediately vested in P&LE without cost or expense to P&LE.

10. Taxes. AA shall promptly pay all taxes, assessments and other governmental charges, including sales, use or ad valorem taxes, levied or assessed during the continuance of this lease upon the Cars or the interest of AA therein whether or not upon the use or operation thereof or the earnings derived therefrom. If any levy or assessment is made against P&LE on account of any of the foregoing matters or on account of its ownership of the Cars, exclusive, however, of any taxes on the rentals herein provided or the net income of P&LE therefrom, AA will promptly pay or reimburse P&LE for the same except that AA shall not be required to pay the same so long as it shall in good faith and by appropriate legal or administrative proceedings protest the validity or amount of such levy or assessment.

11. Prohibition Against Liens. AA shall pay or set aside and discharge any and all sums claimed by any party by, through or under AA and its successors and assigns which, if unpaid, might become a lien or a charge upon the Cars. AA shall not be required, however, to pay or discharge any such claim as long as the validity thereof shall be contested in good faith and by appropriate legal proceedings in any reasonable manner which will not affect the title in and to the Cars.

12. Identification of Cars. At all times during the continuance of this lease, AA will cause each Car to bear the number assigned to it and appearing thereon as of the date of its delivery. Prior to acceptance of any Car, P&LE shall replace the P&LE markings thereon with AA markings. With respect to each Car bearing "AA" reporting marks, P&LE shall plainly, distinctly and conspicuously stencil on each side of such Cars in letters not less than 3/4" in height the following legend:

"THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,
OWNER/LESSOR"

Upon termination of this lease for any reason, AA shall restore P&LE markings to all Cars prior to their redelivery to P&LE. All changes in markings made upon the Cars as provided herein shall be performed at the sole cost and expense of AA.

13. Indemnity. AA hereby agrees to forever indemnify, defend and save P&LE harmless from and against all expenses, damages, claims, actions, or liabilities based upon personal injury, death or property damage arising directly or indirectly out of

or in connection with the condition, operation or use of all or any of the Cars from and after their delivery to AA until their redelivery to P&LE, whether or not due to the negligence in whole or in part of P&LE, its agents or employees, AA, its agents or employees, or of P&LE and AA, their agents or employees jointly, except for death or injury to employees of P&LE; provided, however, that this indemnity provision shall not apply with respect to any personal injury, death or property damage arising out of or in connection with the condition, operation or use of any Car or Cars while in the possession, custody or control of P&LE for purposes of transportation or for any other purpose.

14. Loss or Destruction of Cars. In the event that any Car shall be lost, destroyed or irreparably damaged beyond economic repair from any cause whatsoever at any time during the term of this lease, AA shall be relieved of its obligation to pay rentals in respect of such Car from the date of such occurrence. AA shall forthwith advise P&LE of such occurrences and shall make prompt settlement for each such Car by payment in cash to P&LE of a sum calculated, as of the date of said loss, destruction or damage, in accordance with the prevailing rules applicable thereto in the Field Manual of the Interchange Rules prescribed by the Association of American Railroads, plus any unpaid rental and charges as herein provided to such date. Upon payment of such settlement this lease shall terminate as to such Car as of said date and AA shall be entitled to salvage, if any.

15. Redelivery of Cars. Upon termination of this lease with respect to any Car (other than pursuant to paragraph 14 hereinabove), AA shall at its sole cost and expense immediately surrender possession of such Car by causing delivery of the same to be made to P&LE at the nearest point or points on the lines of P&LE where cars are normally interchanged with connecting railroads. AA shall return all Cars to P&LE in as good condition (ordinary wear and tear excepted) as when the same were accepted by AA and in furtherance of this obligation, AA and P&LE shall perform a joint inspection of all Cars prior to redelivery, each party to assume the expense of its own inspection. Such repairs as may be determined by said joint inspection to be required to place the Cars in as good condition (ordinary wear and tear excepted) as when accepted under this lease will be performed by AA at its sole expense prior to redelivery to P&LE. Until such time as each Car has been redelivered to P&LE, AA shall continue to pay rental at the rate being paid immediately prior to termination of this lease and AA shall make all other payments and perform all obligations and requirements of AA under all provisions of this lease as though such termination had not occurred.

16. Default. The term "event of default" for the purpose hereof shall mean any one or more of the following:

- (a) Non-payment by AA within ten (10) days after written notice to AA from P&LE of default in payment of rental or any other sum required to be paid hereunder by AA;

- (b) AA shall default or fail for a period of thirty (30) days in the observance or performance of any agreement required to be observed or performed on its part under this Agreement and Lease, except as referred to in the foregoing clause (a), and said default or failure shall continue for a period of thirty (30) days after the giving of written notice thereof by P&LE;
- (c) A decree or order shall be entered by a court having jurisdiction in the premises adjudging AA bankrupt or insolvent, or approving as property filed a petition seeking reorganization under the Federal or State law;
- (d) The institution by AA of proceedings to be adjudicated a bankrupt or insolvent, or the consent by it to the institution of any proceeding or to any action taken or proposed to be taken in any proceeding described hereinabove in clause (c), or the making by AA of a general assignment for the benefit of creditors.

17. Remedies. P&LE shall have the right in the event of default by AA to terminate this Agreement and Lease immediately by giving notice to AA, and P&LE may without any notice of demand take or cause to be taken immediate possession of the Cars and sell or otherwise dispose of the same, provided, however,

that such retaking shall not be deemed a waiver of P&LE's right to receive payment of all sums payable by AA to P&LE under this Agreement and Lease or any other rights or remedies conferred upon P&LE under applicable laws.

18. Recording. AA, immediately upon execution and without expense to P&LE, shall cause this lease to be filed with the Interstate Commerce Commission for recordation under Section 11303(a) of the Interstate Commerce Act.

19. Sublease and Assignment. AA shall not assign or sublease this lease or any of the Cars without the prior written consent of P&LE. P&LE may assign and reassign all or part of its rights under this lease, including the rent to be paid, without the consent of AA if said assignment or reassignment does not diminish, interfere or prejudice the rights of AA under this lease, and P&LE shall give to AA notice of any such assignment or reassignment.

20. Successors and Assigns. The covenants, conditions and agreements contained in this Agreement and Lease shall bind and inure to the benefit of the parties, their successors and assigns (to the extent permitted by paragraph 19 hereof).

21. Governing Laws - Amendments. The terms of this Agreement and Lease and all rights and obligations hereunder shall be governed by the laws of the Commonwealth of Pennsylvania. The terms of this Agreement and Lease and the rights and obligations of the parties hereto may not be amended or terminated

orally, but only by agreement in writing by the party against whom the enforcement of such amendment or termination is sought.

22. Execution and Governmental Approvals. This Agreement and Lease may be executed in any number of counterparts, each of which so executed shall be deemed to be an original, and such counterparts together shall constitute but one and the same contract, which shall be sufficiently evidenced by any such original counterpart. This Agreement and Lease is subject to approval by the Michigan Department of Transportation; said approval to be obtained by AA within 30 days of the date of P&LE execution thereof.

23. Non-Discrimination. AA hereby agrees to comply with the state and federal non-discrimination clauses as set forth in Exhibits B and C attached hereto and made a part hereof.

24. Conflict of Interests. AA hereby agrees that no director, officer or employee of AA during his tenure or for one year thereafter shall have any interest, direct or indirect, in this Agreement and Lease or the proceeds thereof.

25. Record-Keeping. AA hereby agrees that it shall retain all records related to this Agreement and Lease on file for a period of not less than four years following expiration of the Operating Agreement between AA and the Michigan Department of Transportation.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement and Lease to be executed by their duly authorized officers as of the day and year first above written.

ATTEST:

THE PITTSBURGH AND LAKE ERIE
RAILROAD COMPANY

Howard Brown
Assistant Secretary

By *J. J. Dan*
Vice President

ATTEST:

MICHIGAN INTERSTATE RAILWAY
COMPANY

Milroy L. King
Secretary

By *Vincent M. Maloney*
Chairman and Chief
Executive Officer

APPROVED
Director, Michigan Department of
Transportation
Date 9-24-79

COMMONWEALTH OF PENNSYLVANIA)

)

SS:

COUNTY OF ALLEGHENY)

On this 16th day of July, 1979, before me, the undersigned Notary Public, personally appeared J. J. DAN, who, being by me duly sworn, acknowledged that he is Vice President-Marketing and Sales of The Pittsburgh and Lake Erie Railroad Company; that he executed the foregoing instrument for and on behalf of said corporation and that the execution of the foregoing instrument was the free act and deed of said corporation.

Donald E. Miller
Notary Public

My Commission expires:

Notary Public, Pittsburgh, Allegheny County
My Commission Expires June 20, 1982

STATE OF MICHIGAN
COUNTY OF SHIAWASSEE

)
) SS:
)

On this 1st day of October, 1979, before me, the undersigned Notary Public, personally appeared Vincent M. Malanaphy who, being by me duly sworn, acknowledged that he is the Chairman and Chief Executive Officer of Michigan Interstate Railway Company, operator of the Ann Arbor Railroad System; that he executed the foregoing instrument for and on behalf of said company, and that the execution of the foregoing instrument was the free act and deed of said company.

Melody Lee King
Notary Public

My Commission expires:

January 4, 1982

EXHIBIT A

The Pittsburgh and Lake Erie Railroad Company hereby leases the following cars to Michigan Interstate Railway Company pursuant to that certain Lease Agreement dated as of October 1, 1979.

A.A.R. Mech. Design	Description	Numbers	Length	Width	Height	Cubic Ft.	No. of Cars
L0	covered hoppers, steel	700-824	35'2-3/4" over stricker	10'1-5/8"	12'9-11/16"	1958	125

The Pittsburgh and Lake Erie
Railroad Company

By G. E. Nevenschwanke

Title Executive Vice President

Date October 3, 1979

Michigan Interstate Railway
Company

By Vincent M. Maloney

Title Chairman and President

Date October 1, 1979

PROHIBITION OF DISCRIMINATION IN STATE CONTRACTS

In connection with the performance of work under this contract, the contractor agrees as follows:

1. In accordance with Act No. 453, Public Acts of 1976, the contractor hereby agrees not to discriminate against an employee or applicant for employment with respect to hire, tenure, terms, conditions, or privileges of employment, or in matter directly or indirectly related to employment, because of race, color, religion, national origin, age, sex, height, weight, or marital status. Breach of this covenant may be regarded as a material breach of this contract.
2. The contractor hereby agrees that any and all subcontracts to this contract, whereby a portion of the work set forth in this contract is to be performed, shall contain a covenant the same as hereinbefore set forth in Section I of this Appendix.
3. The contractor will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, national origin, age, sex, height, weight or marital status. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.
4. The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, national origin, age, sex, height, weight or marital status.
5. The contractor or his collective bargaining representative will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice advising the said labor union or workers' representative of the contractor's commitments under this appendix.
6. The contractor will comply with all relevant published rules, regulations, directives, and orders of the Michigan Civil Rights Commission which may be in effect prior to the taking of bids for any individual state project.
7. The contractor will furnish and file compliance reports within such time and upon such forms as provided by the Michigan Civil Rights Commission, said forms may also elicit information as to the practices, policies, program, and employment statistics of each subcontractor as well as the contractor himself, and said contractor will permit access to his books, records, and accounts by the Michigan Civil Rights Commission, and/or its agent, for purposes of investigation to ascertain compliance with this contract and relevant with rules, regulations, and orders of the Michigan Civil Rights Commission.
8. In the event that the Civil Rights Commission* finds, after a hearing held pursuant to its rules, that a contractor has not complied with the contractual obligations under this agreement, the Civil Rights Commission may, as part of its order based upon such findings, certify said findings to the Administrative Board of the State of Michigan, which Administrative Board may order the cancellation of the contract found to have been violated, and/or declare the contractor ineligible for future contracts with the state and its political and civil subdivisions, departments, and officers, and including the governing boards of institutions of higher education, until the contractor complies with said order of the Civil Rights Commission. Notice of said declaration of future ineligibility may be given to any or all of the persons with whom the contractor is declared ineligible to contract as a contracting party in future contracts. In any case before the Civil Rights Commission in which cancellation of an existing contract is a possibility, the contracting agency shall be notified of such possible remedy and shall be given the option by the Civil Rights Commission to participate in such proceedings.
9. The contractor will include, or incorporate by reference, the provisions of the foregoing paragraphs (1) through (8) in every subcontract or purchase order unless exempted by the rules, regulations or orders of the Michigan Civil Rights Commission, and will provide in every subcontract or purchase order that said provisions will be binding upon each subcontractor or seller.

* The Civil Rights Commission referred to is the Michigan Civil Rights Commission.

EXHIBIT C

AFFIRMATIVE ACTION

Section 1. Definitions

As used in this Appendix:

- (a) "Act" means the Railroad Revitalization and Regulatory Reform Act of 1976 (P.L. 94-210)
- (b) "Administrator" means the Federal Railroad Administrator or his delegate.
- (c) "Affirmative action program" means the program described in Sections 265.9 through 265.15 of 49 CFR Part 265.
- (d) "Agency" means the Federal Railroad Administration.
- (e) "Contractor" means a prime contractor or a sub-contractor who will be paid in whole or in part directly or indirectly from financial assistance under the Rail Acts.
- (f) "Minority" means women, Blacks, Hispanic Americans, American Indians, American Eskimos, American Orientals and American Aleuts.
- (g) "Rail Acts" means the Act and the provisions of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 701 et seq.) and the Rail Passenger Service Act (45 U.S.C. 501 et seq.) amended by the Act.
- (h) "Regulations" means the Regulations relative to non-discrimination in Federally-assisted programs of the DOT Title 49, CFR, Part 21, as they may be amended from time to time.
- (i) "Subsidizer" means Michigan State Transportation Commission through the Michigan Department of Transportation.

Section 2. Affirmative Action Requirements

In connection with the performance of rail freight services under this Agreement, the Contractor agrees as follows:

(a) The Contractor shall comply with the Regulations, which are herein incorporated by reference and made a part of this Agreement.

(b) The Contractor, with regard to the work performed by it under this Agreement, shall not discriminate on the grounds of race, color, or national origin in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The Contractor shall not participate either directly or indirectly in the discrimination prohibited by Section 21.5 of the Regulations, including employment practices when the contract covers a program set forth in Appendix B of the Regulations.

(c) In all solicitations either by competitive bidding or negotiation made by the Contractor for work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential subcontractor or supplier shall be notified by the Contractor of its obligations under this contract and the Regulations relative to nondiscrimination on the grounds of race, color, or national origin.

(d) The Contractor shall provide all information and reports required by the Regulations or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the Subsidizer or the Agency to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of the Contractor is in the exclusive possession of another who fails or refuses to furnish this information, the Contractor shall so certify to the Subsidizer or to the Agency, whichever is appropriate, and shall set forth what efforts it has made to obtain the information.

(e) In the event of the Contractor's noncompliance with the nondiscrimination provisions of this Agreement, the Subsidizer shall impose such contract sanctions as it or the Agency may determine to be appropriate, including but not limited to:

- (1) Withholding of payments to the Contractor under this Agreement until it complies; and/or
- (2) Cancellation, termination or suspension of this Agreement in whole or in part.

(f) The Contractor shall include the provisions of paragraphs (a) through (e) in every subcontract, including procurement of materials and lease of equipment, unless exempt by the Regulations, or directives issued pursuant thereto. The Contractor shall take such action with respect to any subcontract or procurement as the Subsidizer or the Agency may direct as a means of enforcing such provisions including sanctions for noncompliance; provided, however, that, in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, the Contractor may request the Subsidizer to enter into such litigation to protect the interests of the Subsidizer and, in addition, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

(g) The Contractor shall comply with all applicable provisions of the Rail Acts, Regulations of the Office of the Secretary of Transportation, 49 CFR 1.49 (u), Public Law No. 94-210 (90 Stat. 31), and Section 905 of the Act.

(h) As a condition to receiving Federal financial assistance under the Act or the provisions of the Rail Acts, the Contractor hereby agrees to observe and comply with the following:

(1) No person in the United States shall on the ground of race, color, national origin or sex be excluded from participation in, or denied the benefits of, or be subjected to discrimination under, any project, program or activity funded in whole or in part through such assistance.

(i) The following specific discriminatory actions are prohibited:

(1) The Contractor under any projects, program or activity to which these clauses apply shall not, directly or through contractual or other arrangements, on the ground of race, color, national origin, or sex:

(A) Deny a person any service, financial aid, or other benefit provided under such project, program or activity;

(B) Provide any service, financial aid, or other benefit to a person which is different, or is provided in a different manner, from that provided to others under such project, program or activity;

(C) Subject a person to segregation or separate treatment in any matter related to their receipt of any service, financial aid or other benefit under such project, program or activity;

(D) Restrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid or other benefit under such project, program or activity; or

(E) Deny a person an opportunity to participate in such project, program or activity through the provision of services or otherwise or afford them an opportunity to do so which is different from that afforded others under such project, program or activity.

(2) The Contractor in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such project, program or activity or the class of persons to whom, or the situations in which such services, financial aid, other benefits, or facilities will be provided under any such project, program or activity, or the class of persons to be afforded an opportunity to participate in any such project, program, or activity shall not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the project, program or activity with respect to individuals of a particular race, color, national origin or sex.

(3) In determining the site or location of facilities, the Contractor shall not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any project, program, or activity to which these clauses apply on the grounds of race, color, national origin or sex, or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of these clauses.

(4) The Contractor shall not discriminate against any employee or applicant for employment because of race, color, national origin or sex. Except as otherwise required by the regulations or orders of the Administrator, the Contractor shall take affirmative action to insure that applicants for employment are employed, and that employees are treated during employment, without regard to their race, color, national origin or sex. Such action shall include, but not be limited to the following: employment, promotion, demotion, transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment notices to be provided by the agency's representative setting forth the provisions of these non-discrimination clauses. The Contractor understands and agrees that it shall not be an excuse for failure to provide affirmative action that the labor organizations with which the Contractor has a collective bargaining agreement failed or refused to admit or qualify minorities for admission to the union, or that the provisions of such agreements otherwise prevent the Contractor from implementing its affirmative action program.

(5) The Contractor shall not discriminate against any business organization in the award of any contract because of race, color, national origin or sex of its employees, managers or owners. Except as otherwise required by the regulations or orders of the Administrator, the Contractor shall take affirmative action to insure that business organizations are permitted to compete and are considered for awards of contracts without regard to race, color, national origin or sex.

(j) As used in these clauses, the services, financial aid, or other benefits provided under a project, program or activity receiving financial assistance under the Rail Acts include any service, financial aid, or other benefit provided in or through a facility funded through financial assistance provided under the Rail Acts.

(k) The enumeration of specific forms of prohibited discrimination does not limit the generality of prohibition in paragraph (h) (1) of this Section.

(l) These clauses do not prohibit the consideration of race, color, national origin or sex if the purpose and effect are to remove or overcome the consequences of practices or impediments which have restricted the availability of, or participation in, the Contractor's operations or activities on the grounds of race, color, national origin or sex. Where prior discriminatory or other practice or usage tends on the grounds of race, color, national origin or sex, to exclude individuals or businesses from participation in, to deny them the benefits of, or subject them to discrimination under any project, program or activity to which these clauses apply, the Contractor must take affirmative action to remove or overcome the effects of the prior discriminatory practice or usage. Even in the absence of prior discriminatory practice or usage to which this part applies, the Contractor is expected to take affirmative action to insure that no person is excluded from participation in or denied the benefits of the project, program or activity on the grounds of race, color, national origin or sex, and that minorities and minority businesses are afforded a reasonable opportunity to participate in employment and procurement opportunities that will result from financial assistance provided under the Rail Acts.

(m) The Contractor agrees to take such actions as are necessary to monitor its activities and those of its contractors who will be paid in whole or in part with funds provided by the Rail Acts, or from obligations guaranteed by the administrator pursuant to the Rail Acts, except obligations guaranteed under section 602 of the Rail Passenger Service Act, in order to carry out affirmatively the purposes of paragraph (h) above, and to implement the affirmative action program developed and implemented pursuant to 49 CFR 265.

(n) The Contractor shall, in all advertisements for employees, or solicitations for services or materials from business organizations placed by or on behalf of the recipient, in connection with any project, program or activity funded in whole or in part with financial assistance under the Rail Acts, state that all applicants for employment will receive consideration for employment, and all business organizations will receive consideration for an award of a contract without regard to race, color, national origin or sex.

(o) The Contractor shall send to each labor organization or representative of workers with which it has a collective bargaining agreement or other contract or understanding a notice to be provided by the agency's representative, advising the labor organization or worker's representative of the Contractor's commitments under Section 903 of the Act, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(p) The Contractor shall comply with all provisions of Section 905 of the Act, the Civil Rights Act of 1964, any other Federal civil rights act and with the rules, regulations, and orders issued under such acts.

(q) The Contractor shall furnish all information and reports required by the rules, regulations, and orders of the Administrator, and will permit access to its books, records, and accounts by the Administrator for purposes of investigation to ascertain compliance with rules, regulations, and orders referred to in paragraph (p) hereof.

(r) The Contractor shall furnish such relevant procurement information not included in its affirmative action program, as may be requested by the Minority Business Resource Center. Upon the request of the Contractor, the Minority Business Resource Center shall keep such information confidential to the extent necessary to protect commercial or financial information or trade secrets to the extent permitted by law.

(s) In the event of the Contractor's noncompliance with the nondiscrimination clauses of this Agreement, or with the provisions of Section 905 of the Act, the Civil Rights Act of 1964, or with any other Federal civil rights act, or with any rules, regulations, or orders issued under such acts, this Agreement will, after notice of such noncompliance, and after affording a reasonable opportunity for compliance, be cancelled, terminated, or suspended in whole or in part and the Contractor may be declared ineligible for further Federal financial assistance in accordance with procedures authorized in Section 906 of the Act, or as otherwise provided by law.

(t) The Contractor shall not enter into any contract or contract modification whether for the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, or for construction, in connection with a project, program or activity which receives financial assistance under the Rail Acts with a contractor debarred from or who has not demonstrated eligibility for Federal or federally assisted contracts, and will carry out such sanctions and penalties for violation of this part as may be imposed upon contractors and subcontractors by the Administrator or any other authorized Federal official. The Contractor shall insure that the clauses required by Section 4 of this Appendix implementing Executive Order No. 11246 will be placed in each non-exempt federally assisted construction contract.

(u) The Contractor agrees to comply with and implement the written affirmative action program as approved by the Administrator pursuant to Section 265.17 of Title 49 CFR.

(v) The Contractor agrees to notify the Administrator promptly of any law suit or complaint filed against the recipient alleging discrimination on the basis of race, color, national origin or sex.

(w) The Contractor shall include the preceding provisions of paragraphs (h) through (v) in every contract or purchase order, whether for the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, or for construction relating to project, programs or activities financed in whole or in part under the Rail Acts. The Contractor shall cause each such contractor or vendor to include the provisions of paragraphs (h) through (v) in every subcontract. The Contractor will take such action with respect to any such contract or purchase order as the Administrator may direct as a means of enforcing such provisions including sanctions for noncompliance; provided, however, that in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the Administrator, the Contractor may request the United States to enter into such litigation.

Section 3. Affirmative Action Programs

(a) General. A prerequisite to the development of a satisfactory affirmative action program is the identification and analysis of problem areas inherent in minority employment and utilization of minority employment and utilization of minority businesses, and an evaluation of opportunities for utilization of minority group personnel and minority businesses. Therefore, an affirmative action program to guarantee employment and contractual opportunities shall provide for specific actions keyed to the problems and needs of minority persons and minority businesses including, where there are deficiencies based on past practices, and with respect to future plans for hiring and promoting employees or awarding contracts, the development of specific goals and timetables for the prompt achievement and maintenance of full opportunities for minority persons and minority businesses with respect to programs, projects and activities subject to this part.

(b) Employment practices

(1) The affirmative action program for employment showing the level of utilization of minority employees, and establishing a plan to insure representative opportunities for employment for minority persons shall be developed in accordance with the regulations of the Department of Labor at 41 CFR 60-2.

(2) Railroad applicants or recipients shall develop their program for each establishment in their organization and by job categories in accordance with the requirements of the Joint Reporting Committee of the Equal Employment Opportunity Commission and the Department of Labor. Other applicants recipients or contractors may use any program format or organization which has been approved for use by other Federal agencies enforcing equal opportunity laws.

(3) The affirmative action program shall show the source of statistical data used.

(4) The affirmative action program shall include a listing by job category of all jobs which may be established or filled by the applicant, recipient or contractor as a result of the project, program or activity funded by federal financial assistance under the Rail Acts for the first five (5) years of such project, program or activity or the period during which such project, program, or activity will be undertaken, whichever is the lesser ("program period").

(5) The affirmative action program shall set forth in detail a plan to insure that with respect to the project, program, or activity financed in whole or in part through financial assistance under the Rail Acts, minority persons have an opportunity to participate in employment in proportion to the percentage of the minority work force in the area where the applicant's, recipient's or contractor's operations are located as compared to the total work force, and that such minority persons have an equal opportunity for promotion or upgrading. Where appropriate because of prior underutilization of minority employees, the program shall establish specific goals and timetables to utilize minority employees in such projects, programs or activities in the above-mentioned proportion.

(c) Contracts

(1) The affirmative action program shall include details of proposed contracts in excess of Ten Thousand Dollars (\$10,000.00) to be awarded in connection with projects, programs, and activities funded in whole or in part through financial assistance under the Rail Acts, including contracts for professional and financial services, for the program period. The details shall include a description of the services or products which will be sought including estimated quantities, the location where the services are to be provided, the manner in which proposals will be solicited (e.g., cost plus fixed fee, fixed price), the manner in which contracts will be awarded (e.g., competitive or sole source). The plan shall also give details as to bidding procedures and information as to other qualifications for doing business with the applicant, recipient or contractor. Upon request by the applicant, recipient or contractor, any information submitted to the Administrator shall be kept confidential to the extent permitted by law.

(2) The affirmative action program shall review the procurement practices of the applicant, recipient or contractor for the full year preceeding the date of the submission of the affirmative action program and evaluate the utilization of minority business in its procurement activities. Such evaluation of utilization of minority business shall include the following:

(i) An analysis of awards of contracts to minority businesses during such year describing the nature of goods and services purchased and the dollar amount involved; and

(ii) A comparison of the percentage of awards of contracts to minority businesses (by number of contracts and by total dollar amount involved) to the total procurement activity of the applicant, recipient or contractor for said year.

(3) The affirmative action program shall set forth in detail the applicant's, recipient's or contractor's plan to insure that minority businesses are afforded a fair and representative opportunity to do business with the applicant, recipient or contractor (both in terms of number of contracts and dollar amount involved) for the program period. Such plan shall indentify specific actions to be taken to:

(i) Designate a liaison officer who will administer the minority business program;

(ii) Provide for adequate and timely consideration of the availability and potential of minority businesses in all procurement decisions;

(iii) Assure that minority businesses will have an equitable opportunity to compete for contracts, by arranging solicitation time for the preparation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation of minority businesses who are potential contractors in preparing bid materials and in obtaining and maintaining suitable bonding coverage in those instances where bonds are required;

(iv) Maintain records showing that the policies set forth in this part are being complied with;

(v) Submit quarterly reports of the records referred to in subparagraph (iv) above in such form and manner as the Administrator may prescribe: and

(vi) Where appropriate because of prior underutilization of minority businesses, establish specific goals and timetables to utilize minority businesses in the performance of contracts awarded.

(d) Successor organizations. Where applicant, recipient or contractor is a successor organization, its affirmative action program shall review the hiring and procurement practices of its predecessor organizations.

Section 4. Equal Opportunity Clause

During the performance of this Agreement the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this non-discrimination clause.

(b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(c) The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or workers' representative of the Contractor's commitments under Section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The Contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(e) The Contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the Subsidizer and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Contractor's noncompliance with the nondiscrimination clauses of this Agreement or with any of such rules, regulations, or orders, this Agreement may be canceled, terminated or suspended in whole or in part and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(g) The Contractor will include the provisions of paragraphs (a) through (g) of this Section in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the Subsidizer may direct as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, That in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the Subsidizer, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.