no #5

RECORDATION NO. 7708-13
DEC 16 1974 10:26 AM
INTERSTATE COMMERCE COMMISSION

# AGREEMENT AND ASSIGNMENT

**Dated as of July 15, 1974,**

**among**

**PULLMAN INCORPORATED**
**(Pullman-Standard division)**

**and**

**NORTH AMERICAN CAR CORPORATION**

**and**

**FIRST PENNSYLVANIA BANK N.A.,**
***as Agent***

**AGREEMENT AND ASSIGNMENT** dated as of July 15, 1974, among PULLMAN INCORPORATED (PULLMAN-STANDARD DIVISION), NORTH AMERICAN CAR CORPORATION, in its capacity as builder (each such corporation being hereinafter called the Builder and together the Builders), and FIRST PENNSYLVANIA BANK N.A., acting as Agent under a Finance Agreement dated as of the date hereof (hereinafter called the Finance Agreement) and as Assignee hereunder said Agent, so acting, being hereinafter called the Agent.

WHEREAS the Builders, EXCHANGE NATIONAL BANK OF CHICAGO, as Trustee (hereinafter called the Vendee), under a Trust Agreement dated as of the date hereof (hereinafter called the Trust Agreement) with GENERAL ELECTRIC CREDIT CORPORATION (hereinafter called the Beneficiary), and NORTH AMERICAN CAR CORPORATION (hereinafter in its capacity as guarantor being called the Lessee) have entered into a Conditional Sale Agreement dated as of the date hereof (hereinafter called the Conditional Sale Agreement), covering the construction, sale and delivery, on the conditions therein set forth, by the Builders and the purchase by the Vendee of the railroad equipment described in Annex B to the Conditional Sale Agreement (said equipment being hereinafter called the Equipment); and

WHEREAS the Vendee and the Lessee have entered into a Lease of Railroad Equipment dated as of the date hereof (hereinafter called the Lease) providing for the lease to the Lessee of the Equipment;

NOW, THEREFORE, THIS AGREEMENT AND ASSIGNMENT (hereinafter called this Assignment) WITNESSETH: That, in consideration of the sum of One Dollar ($1.00) and other good and valuable consideration paid by the Agent 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 Agent, its successors and assigns:

(a) All the right, security title and interest of such Builder in and to each unit of such Builder's Equipment when and as severally delivered to and accepted by the Vendee, subject to the payment by the Vendor to such Builder of the amount required to be paid under Section 4 hereof and of the amounts due from the Vendee to such Builder under the Conditional Sale Agreement;

(b) All the right, title and interest of such Builder in and to the Conditional Sale Agreement (except the right to construct and deliver such Builder's Equipment and the right to receive the payments specified in the third paragraph of Article 3 thereof, in the first paragraph and in subparagraph (a) of the third paragraph of Article 4 thereof, in the last paragraph of Article 15 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 Conditional Sale Agreement on account of the indebtedness in respect of the Purchase Price (as defined in the Conditional Sale Agreement) of the Equipment and interest thereon, and in and to any other sums becoming due from the Vendee or the Lessee under the Conditional Sale Agreement, other than those hereinabove excluded; and

(c) Except as limited by subparagraph (b) of this paragraph, all such Builder's rights, titles, powers, privileges and remedies under the Conditional Sale Agreement;

without any recourse hereunder, however, against such Builder for or on account of the failure of the Vendee or the Lessee to make any of the payments provided for in, or otherwise to comply with, any of the provisions of the Conditional Sale Agreement; *provided, however,* that this Assignment shall not subject the Agent to, or transfer, or pass, or in any way affect or modify, the obligations of such Builder to construct and deliver such Builder's Equipment in accordance with the Conditional Sale Agreement or with respect to its warranties and agreements referred to in Article 14 of the Conditional Sale Agreement or relieve the Vendee or the Lessee from their respective obligations to such Builder contained in Articles 2, 3, 4, 6, 8 and 14 of the Conditional Sale Agreement, it being understood and agreed that, notwithstanding this Agreement, or any subsequent assignment pursuant to the provisions of Article 15 of the Conditional Sale Agreement, all obligations of such Builder to the Vendee with respect to the Equipment shall be and remain enforceable by the Vendee, 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 Agent in the Agent's own name, or in the name of the Agent'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

Agent is or may become entitled under this Assignment and compliance by the Vendee and the Lessee with the terms and agreements on their parts to be performed under the Conditional Sale Agreement, but at the expense and liability and for the sole benefit of the Agent.

SECTION 2. Each Builder agrees that it shall construct such Builder's Equipment in full accordance with the Conditional Sale Agreement and will deliver the same upon completion to the Vendee in accordance with the provisions of the Conditional Sale Agreement; and that, notwithstanding this Assignment, it will perform and fully comply with each of and all the covenants and conditions of the Conditional Sale Agreement set forth to be performed and complied with by such Builder. Each Builder further agrees that it will warrant to the Agent and the Vendee that at the time of delivery of each unit of such Builder's Equipment under the Conditional Sale Agreement it had legal title to such unit and good and lawful right to sell such unit and that title to such unit was free of all claims, liens, security interests and other encumbrances of any nature except only the rights of the Vendee under the Conditional Sale Agreement and the rights of the Lessee under the Lease; and such Builder further agrees that it will defend the title to such unit of its Equipment against the demands of all persons whomsoever based on claims originating prior to the delivery of such unit by such Builder under the Conditional Sale Agreement; all *subject, however,* to the provisions of the Conditional Sale Agreement and the rights of the Vendee and the Lessee thereunder. No Builder will deliver any of its Equipment to the Vendee under the Conditional Sale Agreement until the Conditional Sale Agreement and the Lease have been filed and recorded in accordance with Section 20c of the Interstate Commerce Act (the respective Builders and their counsel being entitled to rely on advice from special counsel for the Assignee that such filing and recordation have occurred).

SECTION 3. Each Builder agrees with the Agent that in any suit, proceeding or action brought by the Agent under the Conditional Sale Agreement for any instalment of, or interest on, indebtedness in respect of the Purchase Price of its Equipment or to enforce any provision of the Conditional Sale Agreement, such Builder will indemnify, protect and hold harmless the Agent from and against all expense, loss or damage suffered by reason of any defense, setoff, counterclaim or recoupment whatsoever claimed by the Vendee or the Lessee arising out of a breach by the 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 Vendee or the Lessee by such Builder. Each Builder's obligation so to indemnify, protect and hold harmless the Agent is conditional upon (a) the Agent's timely motion or other appropriate action, on the basis of Article 15 of the Conditional Sale Agreement, to strike any defense, setoff, counterclaim or recoupment asserted by the Vendee 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 Agent'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 such 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, except as otherwise specifically provided in Annex A to the Conditional Sale Agreement, to indemnify, protect and hold harmless the Agent 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 Agent 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 Agent will give prompt notice to such Builder of any claim actually known to the Agent 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 Vendee or the Lessee with respect to the Equipment, whether pursuant to the Conditional Sale Agreement or otherwise, not hereby assigned to the Agent, shall not be secured by any lien, charge or security interest upon the Equipment or any unit thereof.

SECTION 4. The Agent, on each Closing Date fixed as provided in Article 4 of the Conditional Sale Agreement with respect to a Group (as defined in said Article 4) of the Equipment, shall pay to each Builder whose

Equipment is included in such Group an amount equal to the portion of the Purchase Price thereof which, under the terms of said Article 4, is payable in instalments, provided that there shall have been delivered to the Agent (with an executed counterpart to the Vendee), as provided in Article 15 of the Conditional Sale Agreement and at least five business days prior to such Closing Date, the following documents, in form and substance satisfactory to it and to its special counsel hereinafter mentioned, in such number of counterparts as may be reasonably requested by said special counsel:

(a) A bill of sale from such Builder to the Agent transferring to the Agent security title to the units of the Equipment in such Group, warranting to the Agent and to the Vendee that, at the time of delivery of such units under the Conditional Sale Agreement, such Builder had legal title to such units and good and lawful right to sell such units and that title to such units was free of all claims, liens, security interests and other encumbrances of any nature except only the rights of the Vendee under the Conditional Sale Agreement and the rights of the Lessee under the Lease, and covenanting to defend the title to such units against the demands of all persons whomsoever based on claims originating prior to the delivery of such units by such Builder under the Conditional Sale Agreement;

(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 Conditional Sale Agreement and § 2 of the Lease;

(c) The opinions of counsel and officers' certificates required by Paragraph 4 of the Participation Agreement and §15 of the Lease;

(d) An invoice of such Builder for the units of the Equipment in such Group accompanied by or having endorsed thereon a certification by the Vendee and the Lessee as to their approval thereof, and, in the case of any Equipment built by North American Car Corporation, in its capacity as a Builder, a certification by a responsible officer of said Corporation that the Purchase Price of such Equipment does not exceed the fair market value thereof;

(e) An opinion of Messrs. Cravath, Swaine & Moore, who are acting as special counsel for the Agent and the Investors named in the Finance Agreement, dated as of such Closing Date, stating that (i) the Finance Agreement, assuming due authorization, execution and deliv-

ery by such Investors, has been duly authorized, executed and delivered and is a legal, valid and binding instrument, (ii) the Conditional Sale Agreement has been duly authorized, executed and delivered by the respective parties thereto and is a legal, valid and binding instrument enforceable in accordance with its terms, (iii) this Assignment has been duly authorized, executed and delivered by the respective parties thereto and is a legal, valid and binding instrument, (iv) the Agent is vested with all the rights, titles, interests, powers and privileges purported to be assigned to it by this Assignment, (v) security title to the units of the Equipment is validly vested in the Agent and such units, at the time of delivery thereof to the Vendee under the Conditional Sale Agreement, were free from all claims, liens, security interests and other encumbrances (other than those created by the Conditional Sale Agreement and the rights of the Lessee under the Lease), (vi) no approval of the Interstate Commerce Commission or any other governmental authority is necessary for the valid execution and delivery of the Finance Agreement, the Conditional Sale Agreement or this Assignment, or if any such authority is necessary, it has been obtained, (vii) the Conditional Sale Agreement and this Assignment have been duly filed and recorded with the Interstate Commerce Commission in accordance with Section 20c of the Interstate Commerce Act and no other filing or recordation is necessary for the protection of the rights of the Agent in any state of the United States of America or in the District of Columbia, and (viii) registration of the Conditional Sale Agreement, this Assignment or the certificates of interest delivered pursuant to the Finance Agreement is not required under the Securities Act of 1933, as amended, and qualification of an indenture with respect thereto is not required under the Trust Indenture Act of 1939, as amended; and such opinion shall also cover such other matters as may reasonably be requested by the Agent or such Investors;

(f) An opinion of counsel for the Vendee dated as of such Closing Date, stating that the Trust Agreement, the Finance Agreement, the Conditional Sale Agreement, the Lease and the assignment thereof to the Agent have been duly authorized, executed and delivered by the Vendee and, assuming due authorization, execution and delivery by the other parties thereto, are legal and valid and binding instruments, enforceable in accordance with their terms;

(g) An opinion of counsel for such Builder, dated as of such Closing Date, to the effect set forth in clauses (iv) and (v) of subparagraph (e) above and stating that (i) such Builder is a duly organized and existing corporation in good standing under the laws of its jurisdiction of incorporation and has the power and authority to own its properties and to carry on its business as now conducted, (ii) the Conditional Sale Agreement has been duly authorized, executed and delivered by such Builder, assuming due authorization, execution and delivery by the other parties thereto, and is a legal and valid instrument binding upon such Builder and enforceable against such Builder in accordance with its terms, and (iii) this Assignment has been duly authorized, executed and delivered by such Builder, assuming due authorization, execution and delivery by the other parties thereto, and is a legal and valid instrument binding upon such Builder;

(h) An opinion of outside counsel for the Lessee, dated as of such Closing Date, to the effect set forth in §15 of the Lease;

(i) A receipt from such 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 the Builder with respect to the Equipment, unless such payment is made by the Agent with funds furnished to it for that purpose by the Vendee;

(j) an opinion of counsel for the Beneficiary, dated as of such Closing Date, stating that the Trust Agreement has been duly authorized, executed and delivered by the Beneficiary and, assuming due authorization, execution and delivery by the other parties thereto, is a legal and valid instrument binding on the Beneficiary; and

(k) a certificate from the Beneficiary as to the absence of any outstanding Federal tax liens which would affect the security interest of the Assignee in and to the Equipment.

In giving the opinions specified in subparagraphs (e), (f), and (g) of this Section 4, counsel may qualify any opinion to the effect that any agreement is a legal, valid and binding instrument enforceable in accordance with its terms by a general reference to limitations as to enforceability imposed by bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the enforcement of creditors' rights generally. In giving the opinion specified in said subparagraph (e), counsel may rely (i)

as to authorization, execution and delivery by any Builder of the documents executed by such Builder and title to such Builder's Equipment at the time of delivery thereof under the Conditional Sale Agreement, on the opinion of counsel for such Builder and (ii) as to any matter governed by the law of any jurisdiction other than New York or the United States, on the opinion of counsel for such Builder, the Lessee or the Vendee as to such matter.

The obligation of the Agent hereunder to make payment for any of the Equipment assigned hereunder is hereby expressly conditioned upon the Agent having on deposit, pursuant to the terms of the Finance Agreement, sufficient funds available to make such payment and upon payment by the Vendee of the amount required to be paid by it pursuant to subparagraph (a) of the third paragraph of Article 4 of the Conditional Sale Agreement. The Agent shall not be obligated to make any of the above-mentioned payments at any time after the commencement of any proceedings specified in clause (c) of Article 16 of the Conditional Sale Agreement or if an event of default, or any event which with the lapse of time and/or demand provided for in the Conditional Sale Agreement would constitute an event of default, shall have occurred and be continuing under the Conditional Sale Agreement. In the event that the Agent shall not make any such payment, the Agent shall reassign to such Builder, without recourse to the Agent, all right, title and interest of the Agent in and to the units of the Equipment with respect to which payment has not been made by the Agent.

SECTION 5. The Agent may assign all or any of its rights under the Conditional Sale Agreement, including the right to receive any payments due or to become due to it from the Vendee or the Lessee 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 15 of the Conditional Sale Agreement, enjoy all the rights and privileges and be subject to all the obligations of the Agent hereunder.

SECTION 6. Each Builder hereby:

(a) represents and warrants to the Agent, its successors and assigns, that the Conditional Sale Agreement 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 Vendee and the Lessee, the Conditional Sale Agreement is, in so far as such Builder

is concerned, a legal, valid and existing agreement binding upon such Builder in accordance with its terms and that it is now in force without amendment thereto;

(b) agrees that it will from time to time and at all times, at the request of the Agent or its successors or assigns, make, execute and deliver all such further instruments of assignment, transfer and assurance and do 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 Agent or intended so to be; and

(c) agrees that, upon request of the Agent, its successors and assigns, it will execute any and all instruments which may be necessary or proper in order to discharge of record the Conditional Sale Agreement or any other instrument evidencing any interest of such Builder therein or in the 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 Section 20c of the Interstate Commerce Act, such additional rights arising out of the filing, recording or depositing of the Conditional Sale Agreement and this Assignment as shall be conferred by the laws of the several jurisdictions in which the Conditional Sale Agreement 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 the Equipment.

SECTION 8. This Assignment may be executed in any number of counterparts, but the counterpart delivered to the Agent shall be deemed to be the original counterpart. 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. It shall not be necessary for all the Builders to execute and deliver this Assignment or to execute the same counterpart of this Assignment, but when this Assignment is executed and delivered by one or more Builders and the Agent it shall be a legal, valid and binding agreement between such Builder or Builders and the Agent.

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*

[CORPORATE SEAL]

Attest:

.....
*Assistant Secretary*

NORTH AMERICAN CAR CORPORATION
in its capacity as Builder

by .....
*Vice President*

[CORPORATE SEAL]

Attest:

.....
*Assistant Secretary*

FIRST PENNSYLVANIA BANK N.A.,
as Agent,

by .....
*Vice President*

[CORPORATE SEAL]

Attest:

.....
*Assistant Secretary*

STATE OF ILLINOIS }
COUNTY OF COOK } ss.:

On this 13th day of December, 1974, before me personally appeared Stanley Brown, to me personally known, who, being by me duly sworn, says that he is a Vice President of PULLMAN INCORPORATED (Pullman-Standard division), that one of the seals affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

Hollis E. Zink
*Notary Public*

[NOTARIAL SEAL]

My Commission expires May 7, 1978

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA } SS.:

On this 13th day of December, 1974, before me personally appeared H. M. Kaye, to me personally known, who, being by me duly sworn, says that he is Vice President of FIRST PENNSYLVANIA BANK N.A., that one of the seals affixed to the foregoing instrument is the corporate seal of said national bank, that said instrument was signed and sealed on behalf of said national bank by authority of its Board of Directors, and he acknowledged that the execution of the foregoing instrument was the free act and deed of said national bank.

Elizabeth J. Sabatra
*Notary Public*

[NOTARIAL SEAL]

My Commission expires
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires March 1, 1976

STATE OF ILLINOIS
COUNTY OF COOK } SS.:

On this 13th day of December, 1974, before me personally appeared Louis W. Hansen, to me personally known, who, being by me duly sworn, says that he is a Vice President of NORTH AMERICAN CAR CORPORATION, that one of the seals affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

Marshann Smack
*Notary Public*

Notary Public State of Illinois
My Commission Expires December 18, 1976

ACKNOWLEDGMENT OF NOTICE OF ASSIGNMENT

Receipt of a copy of, and due notice of the assignment made by, the foregoing Agreement and Assignment is hereby acknowledged as of July 15, 1974.

EXCHANGE NATIONAL BANK OF CHICAGO,
as Trustee,

by .....
*Vice President*

NORTH AMERICAN CAR CORPORATION,
in its capacity as Lessee

by .....
*Vice President*