

RECORDATION NO.

7737-1A

DEC 10 1974 - 10 15 AM

~~INTERSTATE COMMERCE COMMISSION~~

AGREEMENT AND ASSIGNMENT dated as of December 1, 1974, between METAL FABRICATORS, INC., a South Carolina corporation (hereinafter called the Vendor) and NORTH CAROLINA NATIONAL BANK, with its place of business at One NCNB Plaza, Charlotte, North Carolina (hereinafter called the Assignee).

WHEREAS Metal Fabricators, Inc. and PICKENS RAILROAD COMPANY (hereinafter called the Railroad) and NATIONAL RAILWAY UTILIZATION CORPORATION (hereinafter called Builder) have entered into a Conditional Sale Agreement dated as of December 1, 1974 (hereinafter called the Conditional Sale Agreement), covering the construction, sale and delivery by the Builder to the Vendor and the sale and delivery by the Vendor and the purchase by the Railroad of the railroad equipment referred to in the Conditional Sale Agreement (hereinafter called the Equipment);

NOW, THEREFORE, this Agreement and Assignment (hereinafter called this Assignment) Witnesseth that, in consideration of the sum of One Dollar and other good and valuable consideration paid by the Assignee to the Vendor, the receipt of which is hereby acknowledged, as well as of the mutual covenants herein contained the parties hereto do hereby agree as follows:

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

(a) all the right, title and interest of the Vendor in and to each unit of the Equipment when and as severally delivered to and accepted by the Railroad subject to payment by the Assignee to the Vendor of

the amount required to be paid under Section 5 hereof;

(b) all the right, title and interest of the Vendor in and to the Conditional Sale Agreement (except the right of the Builder to construct and deliver the Equipment and the right of Vendor to receive the payments specified in the third paragraph of Article 3 thereof and in subparagraphs (a) and (b) of the third paragraph of Article 4 thereof and the last paragraph of Article 17 thereof and reimbursements for taxes paid or incurred by the Vendor as provided in Article 5 thereof) and in and to any and all amounts which may be or become due or owing by the Railroad to the Vendor under the Conditional Sale Agreement on account of its 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 Railroad under the Conditional Sale Agreement, other than those hereinabove excluded; and

(c) except as limited by subparagraph (b) hereof, all the Vendor's rights, powers, privileges and remedies under the Conditional Sale Agreement;

with recourse against the Vendor as provided in a Guaranty Agreement of even date herewith for or on account of the failure of the Railroad 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 Assignee to, or transfer, or pass, or in any way affect or modify, the liability of the Builder to construct and deliver to Vendor and Vendor to deliver to Railroad the Equipment in accordance with the Conditional Sale Agreement or with respect to its obligations referred to or contained in Articles 10 and 16 of the Conditional Sale Agreement, or relieve the Railroad from its obligations to the Vendor referred to or contained in Articles 2, 3, 4, 5, 10, 15, 16 and 17 of the Conditional Sale Agreement, it being understood and agreed that, notwithstanding this Assignment, or any subsequent assignment pursuant to the provisions of Article 17 of the Conditional Sale Agreement, all obligations of the Builder and Vendor to the Railroad with respect to the Equipment shall be and remain enforceable by the Railroad, its successors and assigns, against and only against the Builder and Vendor. In furtherance of the foregoing assignment and transfer, the Vendor 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 the Vendor, 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 Railroad with the terms and agreements on its part to be performed under the Conditional Sale Agreement, but at the expense and liability and for the sole benefit of the Assignee.

SECTION 2. The Vendor agrees that the Equipment shall be constructed in full accordance with the Conditional Sale Agreement and that it will deliver the same upon completion to the Railroad 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 the Vendor. The Vendor further agrees that it will warrant to the Assignee and the Railroad that at the time of delivery of each unit of the 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 Railroad under the Conditional Sale Agreement; and the Vendor 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 the Vendor under the Conditional Sale Agreement; all subject, however, to the provisions of the Conditional Sale Agreement and the rights of the Railroad thereunder. The Vendor will not deliver any of the Equipment to the Railroad under the Conditional Sale Agreement until the filings and recordations referred to in Article 21 of the Conditional Sale Agreement have been effected.

SECTION 3. The Vendor agrees with the Assignee that in any suit, proceeding or action brought by the Assignee under the Conditional Sale Agreement for any installment of, or interest on, indebtedness in respect of the Purchase Price of the Equipment or to enforce any provision of the Conditional Sale Agreement, the Vendor will indemnify, protect and hold harmless the Assignee from and against all expense, loss or damage suffered by reason of any defense, setoff, counterclaim or recoupment whatsoever of the Railroad arising out of a breach by the Vendor or Builder of any obligation with respect to the Equipment or the manufacture, construction, delivery or warranty thereof, or under Article 10 or 16 of the Conditional Sale Agreement, 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 Railroad by the Vendor or the Builder. The Vendor'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 17 of the Conditional Sale Agreement, to strike any defense, setoff, counterclaim or recoupment asserted by the Railroad 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 the Vendor of the asserted defense, setoff, counterclaim

or recoupment and the Assignee's giving the Vendor the right, at the Vendor's expense, to compromise, settle or defend against such defense, setoff, counterclaim or recoupment.

Except in cases of articles or materials specified by the Railroad and not manufactured by the Builder and in cases of designs, systems, processes, formulae or combinations specified by the Railroad and not developed or purported to be developed by the Builder, the Vendor 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 the 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 Vendor agrees that any amounts payable to it by the Railroad with respect to the Equipment, whether pursuant to the Conditional Sale Agreement 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.

SECTION 4. The Vendor will cause each side of each unit of the Equipment, at the time of delivery thereof to the Railroad, to be plainly, distinctly, permanently and conspicuously marked with the following legend in letters not less than one inch in height:

"NORTH CAROLINA NATIONAL BANK, CHARLOTTE,
NORTH CAROLINA, OWNER".

SECTION 5. The Assignee, on each Closing Date fixed on seven business days' prior written notice to it 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 the 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, as provided in Article 17 of the Conditional Sale Agreement and at least seven 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 the Vendor to the Assignee transferring to the Assignee title to the units of the Equipment in such Group, warranting to the Assignee and to the Railroad that at the time of delivery of such units under the Conditional Sale Agreement the Vendor 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 Railroad under the Conditional Sale Agreement, 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 the Vendor 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;

(c) An invoice of the Vendor for the units of the Equipment in such Group accompanied by or having endorsed thereon a certification by the Railroad as to the correctness of the prices of such units;

(d) An opinion of Messrs. Helms, Mulliss & Johnston, who are acting as special counsel for the Assignee, dated as of such Closing Date, stating that (i) the Conditional Sale Agreement has been duly authorized, executed and delivered by the Railroad and the Vendor and the Builder and is a legal, valid and binding instrument enforceable against the Railroad and the Vendor and the Builder in accordance with its terms, (ii) this Assignment has been duly authorized, executed and delivered by the Vendor and the Assignee and is a legal, valid and binding instrument, (iii) the Assignee is vested with all the rights, titles, interests, powers and privileges purported to be assigned to it by this Assignment, (iv) security title to the units of the Equipment in such Group is validly vested in the Assignee and such units, at the time of delivery thereof to the Railroad 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), (v) no approval of the Interstate Commerce Commission or any other governmental authority is necessary for the valid execution and delivery of the Conditional Sale Agreement or this Assignment, or if any such authority is necessary, it has been obtained, (vi) 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 Assignee in any state of the United States of America or in the District of Columbia; and such opinion shall also cover such other matters as may reasonably be requested by the Assignee;

(e) An opinion of counsel for the Railroad, dated as of such Closing Date, to the effect set forth in clauses (i), (ii), (iv), (v) and (vi) of subparagraph (d) of this Section 5 and stating that the Railroad 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;

(f) An opinion of counsel for the Vendor, dated as of such Closing Date, stating that (i) the Vendor 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 the Vendor and is a legal and valid instrument binding upon the Vendor and enforceable against the Vendor in accordance with its terms, (iii) this Assignment has been duly authorized, executed and delivered by the Vendor and is a legal and valid instrument binding upon the Vendor, (iv) the Assignee is vested with all the rights, title, interests, powers, privileges and remedies purported to be assigned to the Assignee by this Assignment and (v) security title to the units of the Equipment in such Group is validly vested in the Assignee and such units, at the time of delivery thereof to the Railroad 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);

(g) An opinion of counsel for the Builder, dated as of such Closing Date, to the effect set forth in clauses (i) and (ii) of subparagraph (f) of this Section 5; and

(h) A receipt from the Vendor and the Builder for any payment (other than the payment being made by the

Assignee pursuant to the first paragraph of this Section 6) required to be made on such Closing Date to the Vendor and the Builder with respect to the Equipment, unless such payment is made by the Assignee with funds furnished to it for that purpose by the Railroad.

In giving the opinions specified in subparagraphs (d), (e), (f) and (g) of this Section 5, counsel may qualify any opinion to the effect that any agreement is a 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 laws affecting the enforcement of creditors' rights generally. In giving the opinion specified in said subparagraph (d), counsel may rely, as to the matters set forth in (i), (ii), (iv), (v) and (vi) of subparagraph (d) of this Section 5 on the opinions of counsel for the Vendor, Builder and Railroad, and as to any matter governed by the law of any jurisdiction other than North Carolina or the United States, on the opinion of counsel for the Vendor or the Builder or the opinion of counsel for the Railroad as to such matter.

The Assignee shall not be obligated to make any above-mentioned payment at any time while 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 be subsisting under the Conditional Sale Agreement. In

the event that the Assignee shall not make any such payment, the Assignee shall reassign to the Vendor, without recourse to the Assignee, all right, title and interest of the Assignee in and to the units of the Equipment with respect to which payment has not been made by the Assignee.

It is understood and agreed that the Assignee shall not be required to make any payment with respect to, and shall have no right or interest in, any Equipment excluded from the Conditional Sale Agreement pursuant to Article 2 thereof.

The term "business days" as used herein means calendar days, excluding Saturdays, Sundays, and holidays.

SECTION 6. The Assignee may assign all or any of its rights under the Conditional Sale Agreement and the Guaranty Agreement of Vendor of even date herewith, including the right to receive any payments due or to become due to it from the Railroad or Vendor thereunder. In the event of any such assignment, any such subsequent or successive assignee or assignees shall, to the extent of such assignment, enjoy all the rights and privileges and be subject to all the obligations of the Assignee hereunder and under the Guaranty Agreement.

SECTION 7. The Vendor hereby:

(a) represents and warrants to the Assignee, 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 Builder and the Railroad,

the Conditional Sale Agreement is, in so far as the Vendor is concerned, a valid and existing agreement binding upon it and the Railroad 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 Assignee 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 Assignee or intended so to be; and

(c) agrees that, 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 Conditional Sale Agreement or any other instrument evidencing any interest of the Vendor therein or in the Equipment.

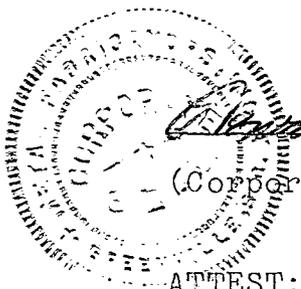
SECTION 8. The terms of this Assignment and all rights and obligations hereunder shall be governed by the laws of the State of North Carolina; provided, however, that the parties shall be entitled to all rights conferred by Section 20c of the Interstate

Commerce Act. The terms, rights and obligations of the parties hereunder may not be changed orally, but may be changed only by an agreement in writing signed by the party against whom enforcement of such change is sought.

SECTION 9. Although this Assignment is dated for convenience as of December 1, 1974, 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.

IN WITNESS WHEREOF, the Vendor and the Assignee have caused this instrument to be executed in their respective corporate names by their respective officers thereunto duly authorized, and their respective corporate seals to be hereunto affixed and duly attested, all as of the date first above written.

ATTEST:



Edward A. Allen
Assistant Secretary
(Corporate Seal)

METAL FABRICATORS, INC.

By *John A. Grier*
President

ATTEST:

Millard H. Swain
Asst Secretary
(Corporate Seal)

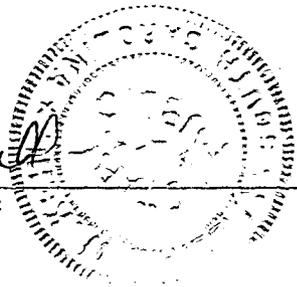
NORTH CAROLINA NATIONAL BANK

By *D. Douglas Buchanan*
Vice President

STATE OF ~~NORTH~~ ^{south} CAROLINA
COUNTY OF ~~MECKLENBURG~~ ^{Greenville}

On this 6 day of December, 1974, before me personally appeared John A. Muir, to me personally known, who, being by me duly sworn, says that he is the President of METAL FABRICATORS, INC., 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.

Will Clark
Notary Public



My commission expires:
11/19/79

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

On this 5th day of December, 1974, before me personally appeared D. Douglas Buchanan, to me personally known, who, being by me duly sworn, says that he is a Vice President of NORTH CAROLINA NATIONAL BANK, that one of the seals affixed to the foregoing instrument is the corporate seal of said association and that said instrument was signed and sealed on behalf of said association 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 association.

Jina H. Fort
Notary Public

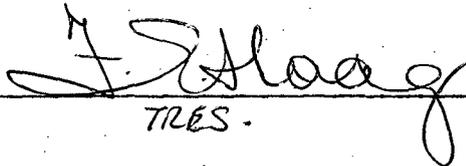
My commission expires:

My Commission Expires December 17, 1978

ACKNOWLEDGMENT OF NOTICE OF ASSIGNMENT

PICKENS RAILROAD COMPANY hereby acknowledges due notice of and consents to the assignment made by the foregoing Agreement and Assignment as of December 1, 1974.

PICKENS RAILROAD COMPANY

By 
TRES.