

THE WESTERN PACIFIC RAILROAD COMPANY

WESTERN PACIFIC BUILDING, 526 MISSION STREET
SAN FRANCISCO, CALIFORNIA 94105
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ATTORNEYS

8854
RECORDATION NO. Filed & Recorded

RECORDATION NO. 8854-A
Filed & Recorded

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INTERSTATE COMMERCE COMMISSION

INTERSTATE COMMERCE COMMISSION
JUN 13 1977

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DELIVER

The Hon. Robert L. Oswald, Secretary
Interstate Commerce Commission
Washington, D. C. 20423

Dear Sir:

Enclosed for filing with and recording by the Interstate Commerce Commission is executed counterpart of a Conditional Sale Agreement, dated as of April 15, 1977, between Whitehead & Kales Company, 58 Haltiner, River Rouge, Michigan 48218 and United States Railway Equipment Co., 2200 East Devon Avenue, Des Plaines, Illinois 60018, Vendor, and The Western Pacific Railroad Company, 526 Mission Street, San Francisco, California 94105, Purchaser, and of an Agreement and Assignment, dated as of April 15, 1977, between said Vendor and Independence Savings Bank, 130 Court Street, Brooklyn, New York 11202, Assignee, covering the following railroad equipment:

- 10 tri-level auto rack cars, Railroad Serial Numbers WP R-601 through WP R-610, both inclusive. Identifying marks: The words "Western Pacific" and the words "Independence Savings Bank, Owner" printed on each side of each unit.
- 48 50' 1" 70-ton insulated boxcars, Railroad Numbers WP 60001-60003, 60005-60038, 60040-60050, both inclusive. Identifying marks: The words "Western Pacific" and the words "Independence Savings Bank, Owner" printed on each side of each unit.

Also enclosed is this company's voucher in the sum of \$50.00 payable to the Interstate Commerce Commission being the prescribed fee for filing and recording the foregoing document.

8854-A
RECORDATION NO. Filed & Recorded
JUN 13 1977-9 15 AM
INLANDERSTATE COMMERCE COMMISSION

AGREEMENT AND ASSIGNMENT

Dated as of April 15, 1977

between each of

WHITEHEAD & KALES COMPANY,

UNITED STATES RAILWAY EQUIPMENT CO.

and

INDEPENDENCE SAVINGS BANK

AGREEMENT AND ASSIGNMENT

TABLE OF CONTENTS

	<u>Page</u>
PARTIES	1
PREAMBLES	1
SECTION 1. Assignments by Each Builder to Assignee; No Recourse	1
SECTION 2. Each Builder Agrees to Construct Equipment and Warrant Title thereto; No Delivery Until Filing	2
SECTION 3. Indemnification of Assignee; Patent Indemnification	3
SECTION 4. Conditions to Obligation of Assignee to Pay Each Builder	4
SECTION 5. Further Assignments by Assignee	9
SECTION 6. Representation and Warranty and Agree- ment of Each Builder	9
SECTION 7. Law Governing	10
SECTION 8. Notice of Assignment to Railroad	10
SECTION 9. Counterparts	10
TESTIMONIUM	10
SIGNATURES	10
ACKNOWLEDGMENTS	
ACKNOWLEDGMENT OF NOTICE OF ASSIGNMENT	

AGREEMENT AND ASSIGNMENT, dated as of April 15, 1977, between each of the corporations named at the foot hereof (each such corporation being hereinafter called a Builder and together the Builders), and INDEPENDENCE SAVINGS BANK (being hereinafter called the Assignee).

WHEREAS, the Builders and The Western Pacific Railroad Company (hereinafter called the Railroad), 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, severally, and the purchase by the Railroad of the railroad equipment described in Schedule B to the Conditional Sale Agreement (said equipment being hereinafter called the Equipment and the Equipment constructed, sold and delivered by each Builder being hereinafter sometimes called "such Builder's Equipment" or "its 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 Assignee to each Builder, the receipt of which is hereby acknowledged, as well as of the mutual covenants herein contained:

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

(a) all the right, title and interest of such Builder 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 such Builder of the amount required to be paid under Section 4 hereof;

(b) all the right, title and interest of such Builder in and to the Conditional Sale Agreement (except the right to construct and deliver the Equipment and the right to receive the payments specified in the third paragraph of Article 3 thereof, in subparagraph (a) of the third paragraph of Article 4 thereof and in the last paragraph of Article 15 thereof and reimbursements for taxes paid or incurred by such Builder 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 such Builder under the Conditional Sale Agreement 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 such Builder's rights, powers, privileges and remedies under the Conditional Sale Agreement;

without any recourse against such Builder 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 such Builder to construct and deliver such Builder's Equipment in accordance with the Conditional Sale Agreement or with respect to its obligations contained or referred to in Article 14 of the Conditional Sale Agreement, or relieve the Railroad from its obligations to such Builder contained or referred to in Articles 2, 3, 4, 5, 13, 14 and 15 of the Conditional Sale Agreement, it being understood and agreed that, notwithstanding this Assignment, or any subsequent assignment pursuant to the provisions of Article 15 of the Conditional Sale Agreement, all obligations of such Builder to the Railroad with respect to such Builder's Equipment shall be and remain enforceable by the Railroad, its successors and assigns, against and only against such Builder. In furtherance of the foregoing assignment and transfer, each Builder hereby authorizes and empowers the Assignee, in the Assignee's own name or in the name of such Assignee's nominee, or in the name of and as attorney hereby irrevocably constituted for such Builder, to ask, demand, sue for, collect, receive and enforce any and all sums to which the Assignee is or may become entitled under this Assignment and to ask, demand, sue for and enforce 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. Each Builder agrees that it shall construct the Equipment in full accordance with the Conditional Sale Agreement and 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 each Builder. Each Builder 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 (other than those created by the Conditional Sale Agreement or, in the case of units delivered by United States Railway Equipment Co., those existing prior to the delivery of such units to United States Railway Equipment Co. for the purpose of rebuilding); and each Builder further agrees that it will defend the title to each unit of the 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 Railroad thereunder. No Builder will deliver any units of the Equipment to the Railroad under the Conditional Sale Agreement until the filings and recordations referred to in Article 19 of the Conditional Sale Agreement have been effected (each Builder and its counsel being entitled to rely on advice from special counsel for the Assignee that such filings and recordations have been effected).

SECTION 3. Each Builder agrees with the Assignee that in any suit, proceeding or action brought by the Assignee under the Conditional Sale Agreement for any instalment of, or interest on, indebtedness in respect of the Purchase Price of the Equipment or to enforce any provision of the Conditional Sale Agreement, such Builder 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 such Builder of any obligation with respect to the 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 Railroad by such Builder. Each Builder's obligation so to indemnify, protect and hold harmless the Assignee is conditional upon (a) the Assignee's timely motion or other appropriate action, on the basis of Article 15 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 such Builder of the asserted defense, setoff, counterclaim or recoupment and the Assignee's giving the 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 Railroad and not manufactured by such 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 Builder agrees, except as otherwise specifically provided in the Conditional Sale Agreement, 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 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 Assignee will give prompt notice to the appropriate Builder of any such liability or claim actually known to the Assignee 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 Railroad with respect to the Equipment, with the exception of amounts payable pursuant to subparagraph (a) of the third paragraph of Article 4 of the Conditional Sale Agreement (other than amounts owing under supplemental invoices as therein provided), 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 Assignee, 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 the Builder whose Equipment shall be included in such group and to each Builder who shall submit a supplemental invoice for settlement on such Closing Date as contemplated in Article 4 of the Conditional Sale Agreement, an amount equal to the portion of the Purchase Price of such Builder's Equipment as shown on the invoice therefor then being settled for which, under the terms of said Article 4, is payable in instalments, provided

that there shall have been delivered to the Assignee, as provided in Article 15 of the Conditional Sale Agreement, at least five business days (as defined in said Article 4) 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 Assignee transferring to the Assignee all right, title and interest in such Builder's 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 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 (other than those created by the Conditional Sale Agreement or, in the case of units delivered by United States Railway Equipment Co., those existing prior to the delivery of such units to United States Railway Equipment Co. for the purpose of rebuilding), 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;

(c) An invoice of such Builder for the units of the Equipment in such Group and any supplemental invoice for which settlement is then being made, in each case accompanied by or having endorsed thereon a certification by the Railroad as to the correctness of the prices stated therein;

(d) An opinion of Messrs. Cravath, Swaine & Moore, 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 such Builder and is a legal, valid and binding instrument enforceable against the Railroad and such Builder in accordance with its terms, (ii) this Assignment has been duly authorized, executed and delivered by such Builder and, assuming due authorization, execution and delivery thereof by the Assignee, is a legal, valid and binding instrument enforceable against such Builder in accordance with its

terms, (iii) the Assignee is vested with all the rights, titles, interests, powers and privileges purported to be assigned to it by this Assignment, (iv) the Assignee has a valid and perfected security title in the units of the Equipment in such Group, 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) (A) if such opinion is being rendered in connection with settlement for units of Equipment of Whitehead & Kales Company, financing statements in respect of the Conditional Sale Agreement and this Assignment have been duly filed and recorded with the Office of the Secretary of State of California in accordance with the applicable provisions of the Uniform Commercial Code of the State of California 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, or (B) if such opinion is being rendered in connection with settlement for units of Equipment of United States Railway Equipment Co., 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 (vii) registration of the Conditional Sale Agreement or this Assignment 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 Assignee;

(e) An opinion of counsel for the Railroad, dated as of such Closing Date, to the effect set forth in clauses (i), (iv), (v) and (vi) of subparagraph (d) above (said counsel in rendering such opinion, being permitted to assume due authorization, execution and

delivery of this Agreement by the parties thereto other than the Railroad), 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 such Builder, dated as of such Closing Date, to the effect set forth in clauses (iii), (iv) and (v) of subparagraph (d) above in respect of the Equipment 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 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 and is a legal and valid instrument binding upon such Builder; and

(g) A certificate of an officer of the Railroad, dated as of such Closing Date, to the effect that (i) no event of default, or event which with the lapse of time and/or demand provided for in the Conditional Sale Agreement could constitute an event of default, shall have occurred and is then continuing, (ii) no Federal tax liens (including tax liens filed pursuant to Section 6323 of the Internal Revenue Code of 1954, as amended) and to the best of his knowledge and belief no other tax liens have been filed and are currently in effect which would adversely affect the security interest of the Assignee in the Equipment, and (iii) no taxes, assessments or governmental charges or levies are delinquent which would adversely affect the security interest of the Assignee in the Equipment;

(h) A release or releases from such Builder in recordable form discharging and terminating all claims, liens, security interests and other encumbrances, if any, in the units of the Equipment in such Group and in any of the materials used in the construction thereof, which originated prior to the recording of the Conditional Sale Agreement pursuant to Article 19 thereof; and

(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 such 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;

provided, however, that with respect to Equipment for which a Final Supplemental Invoice (as defined in the Conditional Sale Agreement) is submitted by such Builder as permitted by Article 4 of the Conditional Sale Agreement, the only documents which must be delivered to the Assignee are those required by subparagraphs (c) and (i) of this Section 4.

In giving the opinions specified in subparagraphs (d), (e) and (f) of the first paragraph 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 subparagraphs (d) and (e), counsel may rely on the opinion of counsel for each Builder as to authorization, execution and delivery by such Builder of the documents executed by such Builder and as to title to such Builder's Equipment at the time of delivery thereof under the Conditional Sale Agreement; in giving the opinion specified in said subparagraph (d), counsel may rely on the opinion of counsel for the Railroad as to the matters referred to in clause (vi) of subparagraph (d) above and 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 or the opinion of counsel for the Railroad as to such matter; in giving the opinion specified in said subparagraph (e), counsel may rely on the bill of sale and opinion of counsel for such Builder as to claims, liens, security interests and other encumbrances arising from, through or under such Builder, except as to claims, liens, security interests and other encumbrances held by or running to the Railroad; in giving the opinion specified in said subparagraph (f), counsel may rely on the opinion of counsel for the Railroad as to any matter governed by the law of the State of California.

The Assignee shall not be obligated to make payment at any time after the commencement of any proceedings specified in clause (c) or (d) 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 could constitute an event of default, shall have occurred and be continuing under the Conditional Sale Agreement. In the event that the Assignee shall not make payment for any Group of the Equipment, the Assignee shall reassign to the appropriate Builder, 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.

SECTION 5. The Assignee 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 Railroad 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.

SECTION 6. Each Builder 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 Railroad, the Conditional Sale Agreement is, in so far as such Builder 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 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 California; provided, however, that the parties shall be entitled to all the rights conferred as provided in Article 23 of the Conditional Sale Agreement.

SECTION 8. The rights and obligations of the Builders under this Assignment are several in accordance with their interests and not joint. Accordingly, whenever this Assignment, by use of such designation as "each Builder", "such Builder" or other similar term, confers a right or imposes an obligation upon any Builder or its successor, such right or obligation shall be construed to accrue to or to be enforceable against only the specific Builder giving rise to such right or obligation and its successors as herein provided.

SECTION 9. The Assignee agrees to deliver an executed counterpart of this Assignment to the Railroad, which delivery shall constitute due notice of the assignment hereby made. Although this Assignment is dated for convenience as of the date first set forth above, 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.

SECTION 10. This Assignment may be executed in any number of counterparts, such counterparts together constituting but one and the same contract, but the counterpart delivered to the Assignee shall be deemed to be the original and all other counterparts shall be deemed to be duplicates thereof.

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

WHITEHEAD & KALES COMPANY,

by

C. E. Wieser
Vice President

C. E. WIESER VICE PRES.-FINANCE

[Corporate Seal]

Attest:

G. Konchal
G. KONCHAL
TREASURER

Treasurer

UNITED STATES RAILWAY EQUIPMENT CO.,

by Ralph E. Bell
Vice President

[Corporate Seal]

Attest:
[Signature]
Assistant Secretary

INDEPENDENCE SAVINGS BANK,

by [Signature] VICE PRESIDENT

[Corporate Seal]

Attest:
[Signature]

ASST. SECRETARY

STATE OF MICHIGAN,)
) ss.:
COUNTY OF WAYNE,)

On this 9th day of June 1977, before me personally appeared *C. E. Wiest*, to me personally known, who, being by me duly sworn, says that he is a Vice President of WHITEHEAD & KALES COMPANY, 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.

Ardis W. Hall

Notary Public

[NOTARIAL SEAL]

My Commission expires ARDIS W. HALL
Notary Public, Wayne County, Mich.
My Commission Expires Sept. 6, 1977

STATE OF ILLINOIS,)
) ss.:
COUNTY OF COOK,)

On this 8th day of June 1977, before me personally appeared *Ralph E. Bell*, to me personally known, who, being by me duly sworn, says that he is an Vice President of UNITED STATES RAILWAY EQUIPMENT CO., 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.

Janice Purdy

Notary Public

[NOTARIAL SEAL]

My Commission expires *4/21/81*

ACKNOWLEDGMENT OF NOTICE OF ASSIGNMENT

THE WESTERN PACIFIC RAILROAD COMPANY hereby acknowledges due notice of and consents to the assignment made by the foregoing Agreement and Assignment as of April 15, 1977.

THE WESTERN PACIFIC RAILROAD
COMPANY,

by



Vice President