

BEFORE THE ARBITRATION COMMITTEE

MICHAEL J. KNAPIK, et al.,	:	Case No. 69-722
Claimants,	:	
v.	:	
PENN CENTRAL,	:	
Carrier.	:	
	:	
	:	
ROBERT WATJEN, et al.,	:	Case No. 69-675
Claimants,	:	
v.	:	
PENN CENTRAL,	:	
Carrier.	:	
	:	
	:	
DAVID C. BUNDY, et al.,	:	Case No. 69-947
Claimants,	:	
v.	:	
PENN CENTRAL,	:	
Carrier.	:	
	:	
	:	
G.V. SOPHNER, et al.,	:	Case No. 74-914
Claimants,	:	
v.	:	
PENN CENTRAL,	:	
Carrier.	:	

CLAIMANTS' TRIAL BRIEF

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF THE FACTS.....	6
	A. HISTORY OF THE MERGER	6
	B. CAUSATION ELIMINATED AS REQUIRED ELEMENT.....	7
	C. TYPES OF BENEFITS UNDER THE MPA.....	9
	1. Lifetime Income Guarantee	9
	2. Displacement Allowance	10
	3. Separation Allowance	11
	D. EFFECT OF MERGER ON THE CLAIMANTS	11
	1. <i>Knapik</i> Claimants.....	11
	2. <i>Sophner</i> Claimants.....	15
	3. <i>Watjen</i> and <i>Bundy</i> Claimants.....	15
III.	CONTROLLING AUTHORITY	17
	A. <i>BUNDY V. PENN CENTRAL</i>	17
	B. 1976 ORDER	18
	C. 1979 ORDER	19
	D. 1980 ARBITRATION AGREEMENT.....	19
	E. 1998 STB	19
	F. ORDERS OF JUDGE OLIVER	20
IV.	BREACH OF THE MPA.....	21
	A. BREACH OF CONTRACT	21
	1. Contract Elements.....	21
	2. <i>Knapik</i> and <i>Sophner</i>	21
	3. <i>Bundy</i> and <i>Watjen</i>	22
	B. WAIVER, REPUDIATION AND BREACH	24
	1. Waiver.....	25
	2. Anticipatory Repudiation and Actual Breach	25
V.	DAMAGES.....	28
	A. DAMAGES IN BREACH OF CONTRACT.....	28
	B. METHODOLOGY OF ESTABLISHING WAGE GUARANTEE AND DISPLACEMENT ALLOWANCE IN THE <i>KNAPIK</i> AND <i>SOPHNER</i> CASES	29
	1. <i>Knapik</i>	29
	2. <i>Sophner</i>	30
	3. <i>Bundy</i> and <i>Watjen</i> Separation Allowances.	30
	C. INTEREST AWARDABLE.....	31
	1. Pre-Judgment Interest Is An Essential Element Of Damages.....	31
	2. Award Of Pre Judgment Interest Is The Norm In Federal Practice.	32
	3. Courts Presume That Prejudgment Interest Is Necessary For Complete Compensation.	33
	4. Prejudgment Interest Is Awarded In Labor Cases.	33

5. Adjusting for Inflation is not Enough Because It Does Not Compensate For Time Value of Money.....	34
6. Prime Rate Is The Appropriate Interest Rate.....	36
a. Prime Rate.....	38
b. 10 year Treasuries.....	39
7. Arbitration Panels Determine Interest, Then Bankruptcy Courts Determine Discharge And Collectability.	39
D. ATTORNEY FEES AND COSTS OF LITIGATION	41
E. PUNITIVE DAMAGES	43
VI. AFFIRMATIVE DEFENSES.....	43
A. WAIVER OF AFFIRMATIVE DEFENSES.....	43
B. BUSINESS DECLINE DOES NOT APPLY.	44
1. The Railroad Negotiated A Specific “Business Decline” Clause Which Excludes Other Extra-Contractual Business Decline Defenses.	45
2. The Railroad Cannot Satisfy The Specific Requirements of the Business Decline Clause.	46
3. Penn Central’s Expert Admits That His Report Is Not Relevant To the MPA’s Business Decline Clause.	47
4. Penn Central’s Expert Admits That None Of His Testimony Relates To The Claimants’ Rights Under the MPA.	48
5. Even Penn Central’s Counsel Recognized That Their Expert Had Failed To Opine On Any of The Relevant Issues.....	49
6. Penn Central Knows How To Properly Calculate “Business Decline” And Has Done So In the Past.	51
7. Business Decline Rejected Defense in Railroad Arbitrations.....	52
C. AVAILABILITY FOR WORK	52
D. FAILURE TO PLEAD MITIGATION WAIVES THIS AFFIRMATIVE DEFENSE.	53
1. Mitigation Must be Raised in the First Responsive Pleading.	53
2. Employer Must Provide Evidence That There Was Substantially Equivalent Work Available And That The Plaintiff Failed To Exercise Reasonable Diligence.....	54
3. Plaintiff Does Not Have To Accept A New Line Of Work, A Demotion, Demeaning Work, Or Work In Another City.	54
4. Unemployment Benefits Are Not Deductible From The Damage Award.....	55
5. Ambiguities As To The Amount Are Resolved In Favor of the Claimant.	57
VII. OTHER ISSUES.....	58
A. SPOILIATION OF EVIDENCE	58
B. AWARD OF THIS PANEL	61
VIII. CONCLUSION.....	62

I. INTRODUCTION

Claimants are railroad employees¹ who seek to recover damages for the refusal of Defendant Penn Central Company (“Railroad”, Penn Central” or “carrier”) to provide them with benefits under a 1964 “Agreement for Protection of Employees in Event of Merger of Pennsylvania and New York Central Railroads” (“MPA”) and the implementing agreements. Trial Exhibit 1. The MPA, effective January 1, 1964, was entered into between the carriers then contemplating a merger – the Pennsylvania and New York Central Railroads – and the unions representing the employees of those two carriers. The MPA established substantial protections and benefits for the employees of the two railroads, the most significant of which was a lifetime job guarantee. The Defendant breached the contract by failing to pay the Claimants benefits under the MPA.

Claimants were hired by the New York Central Railroad (“New York Central”) on various dates between 1944 and 1951. As employees of the New York Central Railroad the Claimants worked at a number of locations operated by the New York Central and the Cleveland Union Terminals Company (“CUT”). The CUT was a subsidiary of the New York Central.

Prior to the merger, which occurred on February 1, 1968, New York Central took the position that Claimants were employees of one of its subsidiaries, and that such subsidiaries were not included in the merger. The merged company, Penn Central, and its successors, Penn

¹ As used herein, the terms “Claimants” or “employees” refer to the employees and their estates who have instituted this action.

Central Corp. ("PCC") and American Premier Underwriters ("APU") continued to take that position for years after the merger.²

On February 25, 1968, all of Claimants in the *Knapik* case were furloughed *en masse*. Despite the Railroad's denial of their status as employees covered by the MPA, all of the *Knapik* Claimants nevertheless returned to work as eventually demanded by the carrier. Trial Exhibit 2 and Trial Exhibit 34 Ellert testimony at 85, 86. Similarly, the *Sophner* Claimants who worked at CUT locations were furloughed at various times after the merger, but all continued to report to work. Penn Central refused to provide MPA coverage to either group.

The *Bundy* and *Watjen* Claimants were rate revision clerks who worked continuously for New York Central since their dates of hire. Their jobs were abolished at various times in early 1969 as part of the consolidation of railroad operations. They attempted to exercise their seniority on their home district but were told there were no jobs available to them. Thereafter, they demanded their separation allowance pursuant to the MPA. The Railroad did not respond to their requests, but rather ordered them to return to work as utility employees "or forfeit all benefits." Trial Exhibit 3. The *Bundy* and *Watjen* Claimants returned to work in much worse working conditions and at reduced pay. They were never paid their separation benefits under the MPA.

The respective Claimants' groups filed four lawsuits at various times between 1969 and 1974 alleging breach of the MPA by the carrier. Claimants also sued their respective unions in those cases. The claims against the unions were dismissed by the trial court. In 1974 the Interstate Commerce Commission ("ICC") determined that the Claimants were employees of the

² The successor to Penn Central Transportation Company was Penn Central Corp. ("PCC"). In 1994, PCC changed its name to American Premier Underwriters ("APU"), a wholly owned

New York Central and were covered by the MPA.³ In 1976, Judge Lambros of the United States District Court for the Northern District of Ohio made several rulings on the merits of the cases:

1. Claimants were employees of the New York Central;
2. Claimants were covered by the MPA, not only as of 1969, but at all applicable times prior thereto. Trial Exhibit 4.

Because of the 1974 order of the ICC, making subsidiaries part of the merger, and the aforementioned 1976 order of the District Court, Penn Central was forced to concede that the Claimants in the *Knapik* and *Sophner* cases were, and always had been, employees of the merged railroad, and thus, were covered by the MPA.

Accordingly, Penn Central is now left to manufacture *post-facto* defenses to rationalize its action in denying benefits to the Claimants. These attempts at asserting affirmative defenses constitute revisionist history, to wit: the Railroad denied coverage to the *Knapik* and *Sophner* Claimants solely because it ostensibly believed that employees of CUT were not covered by the MPA.⁴ It has now been established as a matter of law that Penn Central was wrong. Penn Central was also wrong to deny coverage to the *Bundy* and *Watjen* Claimants. These Claimants who took every action required of them, but the Railroad still denied them their MPA separation allowance.

subsidiary of American Financial Group ("AFG").

³ In the intervening period, from the time the Claimants filed their lawsuits and the time the Court made these rulings in 1976, the ICC issued a decision in *Pennsylvania Railroad Company merger New York Central Railroad Company* 347 ICC 536 (1974) holding that employees of subsidiaries of the merged railroads were *ab initio* entitled to the protections of the MPA. Trial Exhibit 5 at 548.

⁴ As late as the 1990 arbitration, fourteen years after Judge Lambros determined that the claimants were New York Central employees, George Ellert, Assistant Director of Labor Relations, for the Railroad, still maintained that the claimants were not New York Central employees. Trial Exhibit 34 Ellert testimony at 78.

In 1976, the Lambros Court in *Knapik* held that the only remaining issue to be determined by the arbitration panel is “the entitlement of Plaintiffs to job guarantee benefits following [Plaintiffs’] February 15, 1968 furlough.” Trial Exhibit 4 at 22. *See also* Trial Exhibit 6 at 2. The Court further held that the ensuing proceeding was “best tried in the context of a damages question.” Trial Exhibit 4 at 15, 24.

After two arbitrations, the Surface Transportation Board (“STB”) remanded the *Knapik* Claimants for further proceedings.

In its order the STB definitively held that

“the record shows that the claimants who reported for work suffered losses as a result of the merger. Trial Exhibit 6 at 7.

* * *

“It is not clear what else claimant could have submitted to satisfy the panel that they suffered losses as a result of the merger.”
Id. at 8.

Upon remand, the STB ordered that

“for each individual claimant the parties, or an arbitration panel of the parties cannot agree, will have to gather facts that are relevant to determining the amount of compensation under the MPA. . .”.
Id. at 9.

Thus, the issue here is the amount of Claimants’ damages. For the *Knapik* and *Sophner* groups the damages are measured by the loss of income the Claimants suffered subsequent to the merger based on the Railroad Retirement Board (“RRB”) records.⁵ Trial Exhibit 8.⁶ Their loss

⁵ The RRB was established by Congress pursuant to the provisions of the Railroad Retirement Act of 1935 and 1937 as the agency governing the administration and application of benefits due railroad employees. The Congress in passing the law provided in part as follows:

Where complete records of all service and compensation which may be creditable toward benefits under the provisions of the

of income placed the Claimants in a worse position in violation of the MPA. Trial Exhibit 1. Under Appendix A, Section 5 of the MPA and Appendix E of the MPA these Claimants were entitled to displacement allowance. *Id.* The damages for the *Bundy* and *Watjen* groups are measured by computing separation allowances provided for in the MPA Appendix A. *Id.*

The losses of all three groups were computed and then adjusted to produce actual damages. Dr. Harvey Rosen calculated interest in two ways: 1) interest derived from ten year treasury bills; and 2) the prime rate. Trial Exhibit 9 at 3.⁷

Railroad Retirement Act of 1937 and the Railroad Retirement Act of 1935 are required for the Administration of said Acts; and Whereas such records with respect to service prior to January 1, 1937, are largely in the possession of employers subject to said Acts and are constantly subject to the danger of loss and destruction; and Whereas the loss or destruction of such records would jeopardize the establishment of the rights of individuals to annuities based in whole or in part on such prior service and would otherwise severely and permanently impede and impair the administration of said Acts; and the danger of loss or destruction presents a serious emergency; and Whereas the prompt transcription, compilation, and filing with the Railroad Retirement Board of such records will remove the data contained therein from the danger of their loss or destruction and make them expeditiously and permanently available for necessary operations of the Railroad Retirement Board and will result in a more efficient and economical administration of said Act.

The Railroad Retirement Board is an unimpeachable source of the reporting of the income of the employees from railroad work.

⁶ The Railroad Retirement Board records of the Claimants have been previously submitted to the arbitrators. Accordingly, these records have not been resubmitted here. They were previously provided in alphabetical order by case; 1.) *Knapik* claimants, 2.) *Sophner* claimants, and 3.) *Watjen* and *Bundy* claimants.

⁷ As in the case of the Railroad Retirement Board records, Dr. Rosen's report and the individual reports on each Claimant were previously produced to the Panel. They are also organized in alphabetical order by case; 1.) *Knapik* claimants, 2.) *Sophner* claimants, and 3.) *Watjen* and *Bundy* claimants.

II. STATEMENT OF THE FACTS

A. History of the Merger

The MPA, effective January 1, 1964 was entered into between the Carriers, the New York Central and the Penn Central. Huge changes were envisioned by the carriers in the operation of the merged company. Trial Exhibit 10. One of the goals of the merger was to maximize efficiency and to consolidate operation of the two carriers. The employees knew that these efficiencies would inevitably include furloughs and/or permanent layoffs and displacement of employees. The Unions knew that they had the power to block any merger that did not fully protect their current members. Accordingly, the Unions negotiated, and the ICC required, the MPA to protect all employees from loss of work after the consolidation of the railroads. The ICC was statutorily required to protect the interest of railroad employees. *See* 49 U.S.C. §5(2) (1973). The MPA covered all employees who worked for either carrier between January 1, 1964, and the date of consummation of the merger. Such employees were defined as “present employees.” Trial Exhibit 1. The MPA provided in part that, notwithstanding the merger:

None of the present employees of either of said carriers should be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment.

Id.

Publications of the New York Central trumpeted these provisions as the gold standard of employee protection. Trial Exhibit 11. To put the MPA in its historical context, the Chairman of the Board of the Pennsylvania Railroad Stuart T. Saunders touted these protections in order to gain approval from the unions and the ICC. “[T]his agreement protects those men not only against the loss of jobs by reason of merger **but for any reason other than** resignation, death or dismissal for cause – in other words dismissal for discipline. These men are protected for life

subject to retirement, death, resignation or discipline and **they can't lose their jobs for any reason.**" Trial Exhibit 12 at 21. (Emphasis added.)

B. Causation Eliminated as Required Element

Accordingly, the MPA eliminated any requirement that the employee show that his having been placed in a worse position was directly related to the merger. The earlier-negotiated WJPA provided that:

No employee of any of the carriers involved in a particular coordination who is continued in service shall, for a period not exceeding five years following the effective date of such coordination, be placed, **as a result of such coordination**, in a worse position with respect to compensation and rules governing working conditions than he occupied at the time of such coordination. (Emphasis added.). Trial Exhibit 1 at Appendix A.

However, the language in the MPA is significantly different:

The provisions of the Washington Job Protection Agreement of 1936 . . . shall be applied for the protection of all employees of Pennsylvania and Central...who may be adversely affected with respect to their compensation . . . **incident to approval and effectuation of said merger.** (Emphasis added.) *Id.*

The Railroad then petitioned the ICC for approval of the merger. The Railroad represented to the ICC that this expanded protection was superior to the protections in the WJPA⁸. The ICC, in approving the merger, ratified the lack of causal relationship necessary to invoke the protective conditions:

⁸ The ICC, in approving the merger, further held:

Disputes are to be arbitrated – **under a plan which we consider superior to that contained in the Washington Agreement.** Applicants [the Railroads] are willing to make the terms of the agreement available to all the employees whom

It must be recognized that applicants [the Railroad] have agreed to certain benefits greater than we have heretofore required of any section 5 applicant, e.g., the job-retention (attrition) and the limitations against reduction in force, which embrace protection from adverse effects **not causally connected** with the merger.” (Emphasis added.)

Pennsylvania Railroad Company – Merger – New York Central Railroad Company, 327 ICC 475, 545 (1966). The ICC’s decision interpreting the MPA is conclusive and binding on this panel.

The plain language of the MPA, as approved by the ICC, eliminated the WJPA’s causation element. The ICC’s order is part of the law of the case. It interprets the MPA and is conclusive as to the meaning of the labor protections required by the government before any merger could occur.

we are required by law to consider in evaluating the proposed merger, including those not represented by the signatory unions. (Emphasis added.)

Though they have in the past reduced the number of their employees by more than 50 percent over a ten-year period, the applicants,[the Railroads] under this agreement will not be free to reduce their work force unless business contracts by more than 5 percent in any 30-day period, in which event the work force may be reduced one percent for each one percent business decline in excess of the said 5 percent. If the plan of the merger successfully materializes, however, and company growth results, new and additional jobs will be created. This, along with normal attrition and voluntary separation from employment of those who would rather not move to a new location, should enable the Transportation Company to maximize the proficient utilization of the retained work force.

The cost of protection provided by the agreement is estimated as \$78 ¼ million, of which practically all would be payable over the first 8 years.”

Pennsylvania Railroad Company – Merger – New York Central Railroad Company, 327 ICC 475, 543-44 (1966). Trial Exhibit 5.

Certain implementing agreements covering the Claimants went even further. The Brotherhood of Railway Carmen, to which the 16 Claimants in the *Sophner* group belonged, entered into an implementing agreement with the Carrier, which shifted the burden of proof to the Carrier in any arbitration proceeding.

C. Types of Benefits Under the MPA

The MPA provided the following benefits:

1. Lifetime Income Guarantee

The phrase, “placed in a worse position” extended, without time limitation, the protection previously afforded railroad employees under Section 5(2)(f) of the Interstate Commerce Act and Section 6(a) of the Washington D.C. Merger Protection Agreement of May, 1936. (“WJPA”) The first portion of the above-quoted passage from the MPA (“none of the present employees of either of said Carriers shall be deprived of employment.”), presents a significant addition to the protection that had previously been established by the Interstate Commerce Act and the WJPA. That clause is unequivocal; it has only been interpreted in one way: a lifetime guarantee.

Where the prior agreements had only offered job protection for limited, finite periods of years, the MPA,

offered lifetime protection. Any person on the payroll at the time of the merger agreement was signed could not be dismissed except for cause. If any employee was laid, he had to be given a year's severance pay.

* * *

In exchange for this the unions agreed to drop their opposition to the merger.

* * *

Without the MPA the unions would not have withdrawn their opposition and the ICC would not have approved the merger.

See *Wreck of the Penn Central* Trial Exhibit 13 at 220 - 222. This is also the consistent interpretation of the Penn Central CEO, of the ICC, of Courts, and the Claimants.

2. Displacement Allowance

Under Section 6(a) of the WJPA as incorporated as Appendix A of the MPA, no employees shall be placed in a worse position with respect to compensation and working conditions

than he occupied at the time of such coordination as long as he is unable in the normal exercise of his seniority rights under existing agreements, rules and practices to obtain a position producing equal to or exceeding the compensation of the position held by him at the time of the particular coordination.

Trial Exhibit 1 at Appendix A. This protection is referred to as displacement allowance. *Id.*

Under MPA Appendix E, the displacement allowance is calculated as follows:

For purposes of determining whether, or to what extent, such an employee has been placed in a worse position with respect to his compensation, his total compensation, and total time paid for during the base period will be separately divided by twelve. If his compensation in his current position is less in any month (commencing with the first month following the date of consummation of the merger) than his average base period compensation (adjusted to include subsequent general wage increases), he shall be paid the difference less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average time paid for during the base period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the time paid for during the base period, however, that in determining compensation in his current position the employee shall be treated as occupying the position producing the highest rate of pay and compensation to which his seniority entitles him under the working agreement and which does not require a change in residence.

This benefit applied to the *Knapik* and *Sophner* Claimants, who were "continued in service" and never terminated,⁹ but were not able to obtain positions yielding even their pre-

⁹ Although a few of the *Knapik* Claimants received termination notices, the Railroad never terminated them and brought them back into service, albeit in sporadic jobs.

merger compensation as defined by their test period earnings and increased by daily rate increases.¹⁰

3. Separation Allowance

The separation allowance applies to the *Watjen* and *Bundy* Claimants. Under §9 of Appendix A of the MPA, an employee eligible to receive a coordination allowance may **at his option**, at the time of coordination, resign and in lieu of all other benefits and protection provided in the agreement accept, in a lump sum, a separation allowance based upon a schedule premised on length of service.¹¹ A coordination allowance is defined as a benefit given to those deprived of employment under MPA §7(c)(1) when the position the worker holds in his home road is abolished as a result of coordination and he is unable to obtain another position on his home road or a position in the coordinated operation.

D. Effect of Merger on the Claimants

1. Knapik Claimants

The Claimants were railroad employees in their 40's and 50's, most of whom had worked for the Railroad their entire working lives. As New York Central employees, they worked at any number of locations operated by the New York Central and the CUT. CUT operated a passenger station and terminal. Its operating costs were paid by the various railroads in direct proportion to the use of those facilities. CUT was used primarily by the New York Central, which eventually controlled approximately 97% of CUT operations. Trial Exhibit 34 Ellert testimony at 630 .

¹⁰ Daily Rate increases are schedules based upon union negotiated rates. Those schedules are attached as Exhibits to each of Dr. Rosen's individual reports. Trial Exhibit 9. *Knapik* Claimants belonged to the Brotherhood of Railroad Trainmen, which later became the United Transportation Union ("UTU"). *Sophner* Claimants belonged to Brotherhood of Railroad Carmen which later became the Transportation and Communication Union (TCU).

Knapik Claimants worked as brakemen, also known as switchmen, coupling and uncoupling railroad cars. Crews consisted of about five people, with a foreman of each crew referred to as a conductor.¹² Cognizant of the fact that the railroad wanted to rid itself of passenger service, which it perceived as a drain,¹³ the Brotherhood of Railroad Trainmen ("BRT"), negotiated an agreement with the Railroad, referred to as the "Top and Bottom Agreement", effective February 16, 1965. That agreement provided for, *inter alia*, seniority roster consolidation of the New York Central Cleveland Terminal District Yard Service Employees and CUT yard service employees¹⁴. The agreement stated that yard service employees of the CUT would be placed on the New York Central Seniority Roster, the Freight Yard Roster, following the most junior employee currently on that roster and that the CUT employees would then be placed on the roster in the same order as they

¹¹ All of the *Watjen* and *Bundy* Claimants were employed by the New York Central for at least fifteen (15) years prior to the merger. This entitled them to the maximum allowance of three hundred and sixty (360) days pay.

¹² All five worked as a team at CUT and New York Central location. When the merger came 90% of these people were protected, with the exception of the brakemen and the carmen. Trial Exhibit 34; Beedlow testimony at 203, 204.

¹³ See *Wreck of the Penn Central* at 13.

¹⁴ The Railroad's only witness at the arbitration hearing confirmed that the "Top and Bottom Agreement" was not an implementing agreement of the MPA:

Q. Didn't you just tell us that the 1965 top and bottom agreement was an implementing agreement to the 1964 merger protection agreement?

A. I think the record will show that it is not.

Q. That it is not an implementing agreement?

A. That's right.

Q. It had nothing to do with the 1964 agreement?

A. It was before the 1964 agreement because in our office we were not aware of the 1964 merger protective agreement. And this was made entirely separate from the 1964 merger agreement.

Mr. Ellert later confirmed his position:

Q. My question was [the 1965 Agreement] was not intended to extend to [the Claimants] the merger protection agreement benefits at the time it was drafted, was it?

A. It had no reference to it whatsoever.

Trial Exhibit 34 Ellert testimony at 101,102,111.

George Ellert thus contradicted a major element of the Railroad's defense.

appeared on the CUT company yard and seniority roster. However, under the Top and Bottom Agreement, all CUT employees were placed in the New York Freight Yard Roster receiving New York Central seniority date of September 10, 1964. This agreement was separate and distinct from the rights which Claimants had under the MPA.

The *Knapik* Claimants received a notice indicating that yardmen at the CUT were being reduced and, thus, they were being furloughed. Trial Exhibit 15. The notice further directed that they may stand for work at the NY Central freight yards. However, because the Claimants were placed on the bottom of the seniority roster with new September 10, 1964 seniority, they could mark-up for work but could not obtain work. Trial Exhibit 34 Beedlow testimony at 250 – 258. Being placed on the bottom of the freight yard roster meant for example that claimant Steimle lost more than 400 places of seniority on the consolidated roster. Trial Exhibit 16. When Steimle and other Claimants marked up, they marked up for non-existent jobs. Trial Exhibit 34 Steimle testimony at 467 – 469.

In May 1969, for the first time in fifteen months, some of the *Knapik* Claimants were called back to work.¹⁵ Trial Exhibit 17. Within the requisite period for response to the recall notice all of the remaining *Knapik* Claimants responded to work immediately and/or signed a letter saying that they were reporting to work under protest, and then reported for work. Trial Exhibit 18.

In an attempt to resolve the obvious inequity to the CUT men, an agreement was reached in late 1969 among the Penn Central, CUT and the employees of both Carriers represented by the U.T.U., formerly the B.R.T., which purported to extend merger protection benefits to the Claimants. Trial Exhibit 19. Several problems resulted from this agreement however. First, it

provided that 2.5 percent of the total yard work in the new merged yard territory would be designated for former CUT employees. This allocation established approximately seven to nine jobs depending on vacation or illness of other workers. Trial Exhibit 34 Beedlow testimony at 243, 470-471. As a result, most of the workers furloughed were still left without any jobs, in contravention of the lifetime job guarantee contained in the MPA. Second, the 1969 agreement did not become effective until more than 17 months after the date of the furlough. The agreement did not resolve the Claimants' entitlement to any compensation for the underemployment or unemployment they suffered during that period, again in violation of the MPA.¹⁶ The MPA was drafted to solve just such concerns. Third, a number of the furloughed employees had received multiple termination notices from Penn Central prior to the effective date of the 1969 agreement, the Railroad did not give effect to these notices, as every *Knapik* Plaintiff returned to work. Thus, even with the 1969 agreement the employees were excluded from coverage of the MPA. The 1969 agreement was never implemented to benefit workers who had clearly "been placed in a worse position". Even with the 2.5% allocation in place the *Knapik* Claimants didn't have enough seniority to get jobs other than to fill in for other men who were on vacation or sick leave. Thus at best the Claimants got sporadic employment during which they earned less than their guarantee. Trial Exhibit 34; Beedlow testimony at 252-255, Steimle testimony at 467-469.

¹⁵Some other *Knapik* Claimants had enough seniority to bump into part time work and they had already reported to work and therefore were not part of this recall. They marked up in the freight yard under protest. See i.e. Trial Exhibit 18 Letter of June 30, 1968.

¹⁶The Lambros Court however indicated in 1976 that the Claimants were in 1969 and at all times prior thereto were covered by the MPA, therefore the terms of the MPA should have applied to them as of their furlough dates.

2. *Sophner* Claimants

The *Sophner* Claimants were carmen who worked at both the CUT and the New York Central locations prior to the merger. The Railroad took the same position toward them as the *Knapik* Claimants; they were not covered. The *Sophner* Claimants were not furloughed all at once as a group as was the *Knapik* group. However, their loss of seniority had the same effect, in some years an inability to work enough to make their wage guarantees. Accordingly, they were placed in a worse condition as to compensation and working conditions in violation of the MPA. Unlike the *Knapik* Claimants there is no allegation that these sixteen Claimants failed to mark up for work. They all marked up but got less work as documented by their earnings in the RRB records.

3. *Watjen* and *Bundy* Claimants

These Claimants worked as rate revision clerks on the first shift performing duties such as reviewing freight bills, making refunds or collection and quoting rates. Based on a 1950 agreement, their seniority division was on the Detroit roster. Watjen, Franz and Feldscher received notice on January 10, 1969 that their jobs were abolished. Trial Exhibit 20. They wrote to the Manager of Freight Accounting, E. T. Scheper, in reply to the letter abolishing their jobs and advised him of their intent to obtain a position by the exercise of their seniority. Trial Exhibit 21. Mr. Scheper notified these clerks that they would not be allowed to exercise their seniority in their home district of Detroit. Trial Exhibit 3 at 19, 22. Upon receiving this information, all three requested their separation allowances. Trial Exhibits 22.

The *Watjen* and *Bundy* Claimants were not permitted to exercise their seniority rights on their home road as the MPA requires them to do. They also were not able to obtain "a position in the coordinated operation," within the seven to ten-day period required in the notice

abolishing their jobs. Accordingly, they exercised their option to submit resignations and demand the lump sum separation allowance. The Railroad never responded to those requests. Weeks later the clerks were demoted and ordered to report to jobs with worse working conditions and lower pay. Claimants Franz, Watjen and Feldscher reported to the work and served as utility clerks. The seniority they were given in those jobs were with their "new dates of hire", i.e. for Franz February 11, 1969, a loss of fourteen years of seniority. They worked various hours and often on the midnight trick with no advance notice. Their paychecks were always less than before the abolishment of their old jobs and was never consistent. They all attempted to bid on new jobs with hours and duties comparable to their old rate clerk jobs but they were outbid by employees of years less seniority – often with only one or two years of seniority.

They did everything required of them: 1) tried to exercised their seniority rights on their home road, but were told not to go to Detroit the only place they had seniority; 2) timely submitted separation allowance requests that were ignored; 3) reported to new jobs with new hire seniority dates, which by definition yielded them worse pay with worse working conditions in which they could not exercise their seniority. They never received their separation allowances.

Plaintiff Wilger was a 58 year old widow when her job was abolished. Her seniority was in Detroit but she was also told not to report. She requested the separation allowance. Without a response she was ordered to show up at a location in Eversmen, Ohio at reduced pay.

Plaintiff O'Neill worked in upstate, New York. He was also on the Detroit seniority roster. His request for separation allowance was ignored. He was assigned to various duties such as "engine crew caller". He was told there was no work for seven and one-half weeks.

David Bundy worked as lead clerk in Albany, New York. He was informed that his job was being abolished on February 7, 1968 as Penn Central was converting the former Albany central billing to the office of controllers in New York, New York. Again, his seniority was on the Detroit roster. Mr. Scheper also informed him not to seek a job in Detroit. Accordingly, he sent a letter dated February 13, 1969, requesting separation allowance. The Railroad never acknowledged his letter.

III. CONTROLLING AUTHORITY

Throughout the thirty-eight years of this litigation, certain agreements and orders of various tribunals have shaped the law of the case. In addition to the MPA, the Implementing Agreements, and the 1969 Agreement discussed *supra*, this panel must follow: *Bundy v. Penn Central*, 455 F.2d 277 (6th Cir. 1972), Trial Exhibit 23 the 1976 and 1979 Orders of the Lambros Court, Trial Exhibits 4 and 6 the 1980 Arbitration Agreement, Trial Exhibit 24 the 1998 decision of the STB, Trial Exhibit 7 and the 2005 and 2006 orders of Judge Oliver Trial Exhibit 25.

A. Bundy v. Penn Central

Prior to consolidation of all four cases in its 1979 order, the Court had granted summary judgment against the Claimants on their claims against both their union and the carrier. The Sixth Circuit remanded the case to the District Court for an evidentiary hearing on whether the railroad “frustrated the exercise of them [their seniority rights]” and “whether they [the *Bundy* and *Watjen* Claimants] were placed in a worse position” in violation of the agreement, the statute and the ICC order. Since the carrier in 1979 compelled the referral of this matter to arbitration, and the court granted its motion, this proceeding is the first opportunity these Claimants have had to conduct the evidentiary proceeding ordered in 1972 by the Sixth Circuit. Trial Exhibit 23.

B. 1976 Order

In 1976, the Court conducted a jury trial in the *Knapik* case. At the end of the presentation of evidence by the Claimants the Court issued certain findings and granted summary judgment in favor of the unions on Claimants' claims of unfair representation. The Court held

as a matter of law that the Plaintiffs are employees of New York Central Railroad as that term is defined in the Merger Protection Agreement and as that term applies to their job protection agreement and their guarantee entitlement under the merger agreement. Trial Exhibit 4 at 14.

* * *

Plaintiffs were entitled to the full benefits of the jobs protection agreement, based on their combined wages of CUT and New York Central work and ere entitled to this not only as of 1969, but at all applicable times prior thereto. *Id.* at 15.

Court also held with regard to ensuing litigation:

It would seem to me that the triable issue remaining in this lawsuit is one stemming out of the merger protection agreement. It is a contract issue, and it would seem to me that in view of the fact that the issues in this case were by agreement of the parties bifurcated at the outset, and we were to try only the liability issues at this time, and damage questions later, and as this Court is making a finding now relative to the applicability of the merger protection agreement to these plaintiffs and a findings as to their entitlement to job guarantee, and to the extent that there was any dispute between the parties, that issue is now resolved on that finding, and it would seem to me that the issue as to whether or not there was a breach of the agreement is best tried in the context of a damage question, . . . *Id.*

The Court continued:

It seems to me those issues [entitlement to benefits of job guarantee] must be tried in the context of a damage claim" *Id.* at 24.

C. 1979 Order

In 1979, Penn Central moved to compel arbitration on the remaining contract issues provided in the MPA. The Court granted the Defendant's motion, consolidated the cases and referred all of them to binding arbitration.

As to the *Knapik* claims, it referred to its 1976 Order as having framed the remaining issues. Regarding the *Sophner* Claimants, the parties were charged with framing the issues. The issues in *Watjen* and *Bundy* were framed by the Sixth Circuit in its remand to the trial court. *See Bundy v. Penn Central*, Trial Exhibit 23.

The Court mandated that the case be tried in a particular sequence.¹⁷ Trial Exhibit at 7. Ironically, almost thirty years ago, the Court indicated its referral to arbitration was "primarily for the sake of expediency; that of the litigants especially the former employees. . . ." Trial Exhibit 6 at 6. "Reference to arbitration of these disputes will result in resolution of all the paramount claims more quickly than in any proceeding which the Court could devise." *Id.*

D. 1980 Arbitration Agreement

In 1980, "Penn Central Corp., successor to Pennsylvania Central Transportation Company," negotiated and signed an agreement to arbitrate this case. Trial Exhibit 24. This arbitration agreement, entered into after the final consummation of Penn Central's bankruptcy compelled Penn Central to resolve these cases through final and binding arbitration by this panel. *Id.*

E. 1998 STB

In a decision issued in December, 1998, the STB held that the denial of benefits by a prior arbitration panel to those who returned to work constituted "egregious" error and failure to

¹⁷ That particular finding was modified by Judge Oliver. Trial Exhibit 25.

observe the imposed labor conditions. Trial Exhibit 7 at 5-6. Further, the STB held that the carrier presented no evidence to refute the voluminous evidence of injury submitted by the Claimants. *Id.* At the arbitration hearing the Railroad “made no effort whatsoever to identify specific periods of general business decline, emerging conditions or other supervening events that would justify non-payment of benefits under 1(b) of the agreement.” Since the original arbitration was bifurcated, the STB’s vacation of the award constitutes a decision on the merits as to liability as to the *Knapik* Claimants in any subsequent damage proceeding. The Claimants who failed to return to work filed an appeal to the Sixth Circuit. The Sixth Circuit affirmed. *See Augustus. et al. v. STB, et al.*, 2000 U.S. App. Lexis 33966 (6th Cir. 2000).

The Railroad cross-appealed that portion of the STB decision which held that the remaining ten Claimants who returned to work were entitled to their guarantees. The STB filed a motion to dismiss, and argued that the Sixth Circuit lacked jurisdiction because the Railroad’s appeal was interlocutory. The Railroad and the STB stipulated to the dismissal of that appeal.

F. Orders of Judge Oliver

Claimants filed a Motion to Reinstate these cases because the Carrier had refused to arbitrate the cases of the ten remaining *Knapik* Claimants and the *Sophner* case and the *Bundy* and *Watjen* cases which had not been arbitrated at all.¹⁸ In ordering the parties back to arbitration, the Court found that Penn Central “does not come with clean hands”. Trial Exhibit 25 February 28 Order at 8. The Court modified Judge Lambros’ 1979 Order in stating all parties should proceed to arbitration on the four cases simultaneously. Penn Central moved for

¹⁸ Claimants previously submitted a timeline detailing Carrier’s repeated refusal to proceed despite all of the prior orders of these many tribunals over the years. Between 1998 and Judge Oliver’s 2005 Order, Claimants repeatedly tried to reconvene the arbitration. Defendant refused to comply with the 1979 Order, the 1980 Agreement for Arbitration, and the 1998 STB Decision.

reconsideration of the Court's Order which was summarily denied. Judge Oliver then established procedures for the selection of the arbitration panel. After Defendant's failure to participate in the selection of a neutral arbitrator, Claimants contacted the Court, which issued an Order on June 23, 2006, selecting the neutral arbitrator on this panel. *Id.*

IV. BREACH OF THE MPA

A. Breach of Contract

1. Contract Elements

To prove the existence of a contract, a party "must show the elements of mutual assent (generally, offer and acceptance) and consideration." *CSX Transp., Inc. v. Occidental Chemical Corp.*, 65 Fed.Appx. 963, 966 2003 WL 21221986 (6th Cir. 2003) *citing Nilavar v. Osborn*, 127 Ohio App.3d 1, 711 N.E.2d 726, 732 (1998). "An offer is the manifestation of willingness to enter into a bargain," so that the offeree understands that his assent is invited and will conclude the contract. *Ford v. Tandy Transp., Inc.*, 86 Ohio App.3d 364, 620 N.E.2d 996, 1006 (1993). Acceptance is the "manifestation of assent" by the offeree. *Id.* The MPA satisfies the existence of a contract.

2. Knapik and Sophner

Penn Central breached the MPA by failing to pay benefits to the *Knapik* and *Sophner* Claimants. Each of the Claimants in the *Knapik* and *Sophner* groups, marked up for work and thus fulfilled his obligation to "obtain a position available to him in the exercise of his seniority rights in accordance with existing rules and agreements" pursuant to Section 1(b) of the MPA. Trial Exhibit 1.

See i.e. letters of carrier's counsel Kershner (with copies to Cioffi) refusing to appoint an arbitrator to participate in arbitration. Trial Exhibit 26.

3. *Bundy and Watjen*

The *Bundy* and *Watjen* Claimants were deprived of their employment pursuant to Section 7(c)(1) of the WJPA which states in pertinent part:

(c) An employee shall be regarded as deprived of his employment and entitled to a coordination allowance in the following cases:

1. When the position which he holds on his home road is abolished as result of coordination and he is unable to obtain by the exercise of his seniority rights another position on his home road or a position in the coordinated operation. . . .

Clearly these Claimants' jobs were abolished, which satisfies the first prong of the definition of deprivation in the prepositional phrase beginning with the word "when". The second conjunctive prong of the definition of deprivation is also satisfied because the prepositional phrase "by the exercise of his seniority rights" modifies both the phrase "another position in his home road" and the phrase "a position in the coordinated operation". These Claimants were instructed by E. T. Scheper, Manager of Freight Accounting for the carrier, that they were not to exercise seniority on their home road in Detroit. Therefore none of these Claimants could obtain **by the exercise of his seniority rights** a position in the coordinated operation.

Assumption of their positions as utility clerks in the coordinated operation did not constitute exercise of their seniority rights. The panel in *System Federation No. 121, Award No. 316* (1972), held that the claimant had been furloughed, was entitled to a coordination allowance and thus, had the option to request a separation allowance.

An employee who is deprived of employment as a result of the changes set out in Article I, Section 2 becomes eligible for protective benefits. He simultaneously becomes eligible to an option for a separation allowance, which he must exercise with due diligence.

* * *

It is too much to expect an employee to resign and forfeit years of accumulated seniority when the Carrier firmly contends that his furlough did not result from any of the conditions in Article I, Section e. If he had resigned and if the Board thereafter sustained the Carrier's position, the Claimant would never again have any reason to expect to be called for work by the Carrier. His employment would have been completely terminated. His years of accumulated seniority would have become a nullity. And he may then have been of an age when employment elsewhere would be difficult to obtain.

That rigid construction to the language in Article I, Section 7 cannot have been the intent of the parties. If that was so, it would be an open invitation to every Carrier to deny protective benefits to many employees in the hope that they would resign, and if the claim was denied, have no further obligation under the schedule agreement. It could result in perpetrating conditions far beyond the purpose and intent of the September 25, 1964 Agreement.

Claimant became eligible to a lump sum separation allowance under Article I, Section 7 of the September 25, 1964 Agreement of January 6, 1972, when Award No. 253 was issued. It was then that he also became eligible for monthly benefits under Section 6. Until then he was deprived of the eligible by the Carrier. a Carrier may not deny an employee protective benefits under Article I of that Agreement and at the same time expect that employee to exercise his option under Section 7 and resign his position. This is the only fair, reasonable and proper interpretation of the meaning and intent of Article I Section 7 when read and applied to the reasons and purposes of the September 25, 1964 Agreement.

Id. See also, System Federation No. 103 Elec. Workers, Award No. 46 (1967) (carrier violated MPA in denying benefits to electrical workers adversely affected)

Here, after more than fifteen years of service, the *Bundy* and *Watjen* Claimants were required to "forfeit years of accumulated seniority." They were relieved of their jobs, then demoted and considered as new hires as utility clerks. The *Bundy* and *Watjen* Claimants were given new seniority dates of 1969, no different than a man off the street in a new job. In *Special*

Board 570 Award No. 156 the arbitration panel held “it is merely a play on words to argue that claimant’s move and reemployment were purely voluntary”

As an employee deprived of employment and thus entitled to coordination allowance, under Section 9 of the WJPA these Claimants at their option chose to resign and in lieu of other benefits accept a lump sum separation allowance. The request for lump sum separation allowance was ignored by the Railroad. Failure to pay the separation allowance constitutes breach of the MPA.

B. Waiver, Repudiation and Breach

In 1968, the Railroad informed the Claimants that they were not protected by the MPA and would never be paid under the MPA. Now, the Railroad may argue that the Claimants were required to follow the MPA during the forty-year period during which Penn Central itself refused to follow the MPA and during which Penn Central refused to even allow them to file guaranty forms.

The Railroad may argue that certain Claimants in the *Knapik* case did not timely respond to recall notices. In fact, all remaining Claimants returned to work. *See* Records of the Railroad Retirement Board. This is why the STB allowed these remaining Claimants to go forward, but not the others. Moreover, records from the RRB show that they returned to work. Trial Exhibit 8. Further, the 1969 Agreement became effective.¹⁹ *See* Trial Exhibit 19. This argument fails for two reasons: 1) the carrier waived all application of all agreements including its threat to terminate the Claimants and 2) the railroad repudiated and breached the terms of the MPA.

¹⁹ By the Railroad’s own admission, the claimants marked up for work. Trial Exhibit 34. *Ellert Test.* At 577.

1. Waiver

As discussed *infra*, the 1969 Agreement was executed because of the inability of the CUT men to markup for any significant amount of work. That agreement effective August of 1969 allocated 2.5% of the freight yard work to them. Although this allocation still left them without regular jobs that met their test period guarantees under the agreement, they were explicitly recognized as covered under the MPA. *Id.* Due to pendency of the dispute which resulted in the 1969 agreement, the carrier agreed not to take any punitive action against the CUT men.

Due to circumstances involved, this Committee prevailed on Company to waive all the agreements involved until such time as we were able to resolve our dispute involving protective agreements for the CUT Yardmen. Such an agreement [the 1969 Agreement] was recently made. Trial Exhibit 27.

Thus, Penn Central and the Union agreed to waive their dispute over marking up until they could resolve the issue of whether CUT employees were covered by the MPA. Ultimately, the Courts determined that the MPA did cover the CUT workers. The compromise entered into above permitted the parties to return to work while still maintaining their rights to litigate the MPA.

2. Anticipatory Repudiation and Actual Breach

Ironically, the 1969 Agreement in which the Railroad claimed to recognize the Claimants as covered employees was never implemented to provide MPA benefits. Instead, Penn Central maintained (until at least 1976 when the Court ruled otherwise) that Claimants were never New York Central employees, and thus, that they were not covered by the MPA. *See i.e.* Answer of Penn Central, Trial Exhibit 28 at ¶1 (“CUT and its employees were not parties specifically provided for by the MPA.”) *See also* Trial Exhibits 35. The position taken by Penn Central at these different stages -- in pleadings, correspondence with unions and in prior testimony --

...makes it abundantly clear that the Railroad steadfastly refused to recognize Claimants as covered by the MPA. Penn Central told the Claimants that they would never be paid under the MPA.

Section 251 of the Restatement of Contracts 2d states: “(1) Where reasonable grounds exist to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 243, the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.” Repudiation “need not be absolute in order to justify non-performance by the other party, and in some cases at least it must be true that the privilege of non-performance will be or become permanent.” 5 *Williston on Contracts* (1937) 4102, Section 1467. *See also*, 84 *Ohio Jurisprudence* 3d (1988) 319, Specific Performance, Section 41 (“[I]f the other party repudiates the contract and makes it certain that he does not intend under any circumstances to comply therewith, or if he absolutely and unconditionally refuses to proceed with the contract, the law excuses the absence of tender on the part of the other party, as equity does not require idle acts.”)

In *Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264 (7th Cir. 1996) the Seventh Circuit considered whether a Defendant can announce that it will not perform a contract, but still demand strict compliance by the Plaintiff. The Seventh Circuit rejected this argument, noting that “[a]s our colleagues on the Second Circuit have held, New York law provides that ‘a party to a contract may be precluded from insisting on strict compliance by conduct amounting to a waiver or estoppel.’” *Id. quoting Peter A. Camilli & Sons, Inc. v. State*, 41 Misc.2d 218, 223, 245 N.Y.S.2d 521, 527 (Ct.Cl.1963); *See also, Sunshine Steak, Salad & Seafood, Inc. v. W.I.M. Realty, Inc.*, 135 A.D.2d 891, 892, 522 N.Y.S.2d 292, 293 (3d Dept.1987) (“where it becomes clear that one party will not live up to a contract, the aggrieved

party is relieved from the performance of futile acts or conditions precedent”); *Allbrand Discount Liquors, Inc. v. Times Square Stores Corp.*, 60 A.D.2d 568, 568, 399 N.Y.S.2d 700, 701 (2d Dept.1977) (“[o]nce it becomes clear that one party will not live up to the contract, the aggrieved party is relieved from the performance of futile acts”), appeal denied, 44 N.Y.2d 642, 405 N.Y.S.2d 1026, 376 N.E.2d 935 (1978). . . . In light of the forthright repudiation, requiring Credit to give Chameleon or CBI notice of a default would have been a pointless gesture.” *Credit Agricole*, 90 F.3d at 1275.

Moreover, the Seventh Circuit held that the plaintiff “is entitled to ‘expectation damages,’ which means Credit should be placed ‘in the same economic position it would have been in had both parties fully performed.’” *Bausch & Lomb Inc. v. Bressler*, 977 F.2d 720, 728-29 (2d Cir.1992); *See Menzel v. List*, 24 N.Y.2d 91, 97, 298 N.Y.S.2d 979, 246 N.E.2d 742 (1969).” *Id.* at 1276.

In a similar case, the Ninth Circuit, applying Arizona law, recently held that compliance with a two-day notice provision is not required where it would amount to a “useless gesture.” *L.K. Comstock & Co. v. United Eng’rs & Constructors Inc.*, 880 F.2d 219, 232 (9th Cir.1989) (citing 2 Corbin on Contracts § 1266, at 442 (C. Kaufman Supp.1984)); *See also Craddock v. Greenhut Constr. Co., Inc.*, 423 F.2d 111, 115 (5th Cir.1970) (contractual condition excused where it “was a useless gesture”) (applying Florida law). Thus, the Railroad is estopped from compelling a futile act. The Railroad waived the requirements of the MPA when it pointedly told Claimants that they would never be paid any guarantees.

A breach of contract excuses the non-breaching party from further performance under the contract. *Roberts v. GMS Management Co., Inc.*, 1999 WL 1068370 (Ohio App. 8 Dist.) *See also Software Clearing House, Inc. v. Intrak, Inc.* (1990), 66 Ohio App.3d 163, 170; *Pearson v.*

Huber Investment Corp. (Mar. 21, 1985), Franklin App. No. 84AP-526. Defendant's breach excuses the plaintiff from any further performance. See *Bd. of Commrs. of Clermont Cty. v. Village of Batavia* (Feb. 26, 2001), Clermont App. No. CA2000-06-039. In other words, a "material" breach entitles a plaintiff to stop performing. *Kersh v. Montgomery Dev. Ctr.* (1987), 35 Ohio App.3d 61, 62-63, 519 N.E.2d 665. See, also, *Shanker v. Columbus Warehouse Ltd. Partnership* (June 6, 2000), Franklin App. No. 99AP-772 ("Even if plaintiffs . . . breached the agreement, defendant's non-performance is not excused unless plaintiff's breach was material"); *Sun Design Sys., Inc. v. Tirey* (Apr. 19, 1996), Miami App. No. 95-CA-46 ("It is well-established that a 'material breach of contract by one party generally discharges the non-breaching party from performance of the contract'").

V. DAMAGES

It is fundamental to the law of remedies that parties damaged by the wrongful conduct of others are entitled to be made whole. *Collini v. Cincinnati*, 87 Ohio App. 3d 553, 663 N.E.2d 724 (Hamilton Cty. 1993); 30 O. Jur. 3d, Damages at Section 2. Thus, in any action involving the award of damages, the objective is to compensate the injured party for the loss and make the injured party, so far as possible, whole. 30 Oh. Jur. 3d, Damages at Section 2. Damages accrue at the time of injury and are intended to make the plaintiff whole for wrong done to the plaintiff by the defendant. *Fantozzi v. Sandusky Cement Prod. Co.*, 64 Ohio St. 3d 601, 597 N.E.2d 474 (1992); *Digital & Analog Design Corp. v. North Supply Co.*, 63 Ohio St. 3d 657, 590 N.E.2d 737 (1992).

A. Damages in Breach of Contract

"Damages for a breach of contract are those which are the natural or probable consequence of the breach of contract or damages resulting from the breach that were within the

contemplation of both parties at the time of the making of the contract.” *The Toledo Group, Inc. v. Benton Indus., Inc.*, 87 Ohio App.3d 798, 623 N.E.2d 205, 211 (1993). A party to a contract is entitled to his expectancy damages. *Anchor v. Linton*, 230 F.3d 1357 (Table), 2000 WL 1477224, *6 (6th Cir. 2000). A party’s expectation interest is defined as “his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed.” *Id.* citing *Brads v. First Baptist Church*, 624 N.E.2d 737, 745 (Ohio Ct.App.1993) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981)). In other words, the claimed damages are an award that is “designed to secure for [the injured party] the benefit of the bargain that [it] made by awarding a sum of money that will place [it] in as good a position as [it] would have occupied had the contract[s] been performed.” 24 *Williston on Contracts* § 64:2 (4th ed. 2002).

B. Methodology of Establishing Wage Guarantee and Displacement Allowance in the *Knapik* and *Sophner* cases

1. *Knapik*

Pursuant to the terms of the MPA:

For purposes of determining whether, or not or to what extent, such an employee has been placed in a worse position with respect to his compensation, his total compensation and total time paid for during the base period will be separately divided by twelve. If his compensation in his current position is less in any month (commencing with the first month following the date of consummation of the merger) than his average base period compensation (adjusted to include subsequent general wage increases), he shall be paid the difference.

In preparation for the prior proceedings the Railroad computed the wage guarantees based on test period, 1963 and 1964 earnings, and submitted them to Claimants. Trial Exhibit 29.²⁰

Dr. Rosen took these admitted wage guarantee figures and adjusted them to include subsequent general wage increases. These general wage increases are charts supplied by the UTU See pg. 9 of Rosen's individual reports, Trial Exhibit 9.

2. *Sophner*

To determine displacement allowance Dr. Rosen used the annual wages as reported to the Railroad Retirement Board. The RRB was established by Congress pursuant to the provisions of the Railroad Retirement Act of 1935 and 1937 as the agency governing the administration and application of benefits due railroad employees.

Again, these figures were adjusted to include subsequent general wage increases as supplied by their union, now known as the Transportation and Communication Union. See pg. 9 of Rosen individual reports, Trial Exhibit 9.

3. *Bundy and Watjen Separation Allowances.*

Separation allowances were computed pursuant to Section 9 of the WJPA. Trial Exhibit 1. Since all of the Claimants had service of at least fifteen years, they were entitled to twelve months of pay. Trial Exhibit 9.

Pursuant to subsection (b) one month's pay is computed by multiplying by thirty the day rate of pay received by the employee in the position last occupied. These Claimants are entitled to three hundred sixty days of pay.

²⁰ As part of the discovery in this matter Defendant submitted still other wage guarantee figures for the *Knapik* Claimants. See Trial Exhibit 30.

C. Interest Awardable

I. Pre-Judgment Interest Is An Essential Element Of Damages.

Prejudgment interest is “an element of complete compensation.” *West Virginia v United States*, 479 U.S. 305, 310 (1987). The U.S. Supreme Court stated: “[p]rejudgment interest is an element of complete compensation,” and explained in footnote 2: “[p]rejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress.” *Id.*

Though articulated in many different ways, the courts are mindful of the time-value of money when calculating the compensation for a damages award. As the court stated in *U. S. v. Atlantic Refining Co.*, 85 F.2d 427, 429 (3rd Cir. 1936), “delay in . . . (receiving) compensation is an element in determining the damages . . . and an award made on one date is not the equivalent of an award made at an earlier date.” The delayed compensation is a greater figure and “delay . . . enters into the late award as an element of loss.” *See, Harpum, Specific Performance With Compensation as a Purchaser’s Remedy-A Study in Contract and Equity*, 40 Camb.L.J. 47 (1981); *Oakey, Pecuniary Compensation For Failure to Complete a Contract for the Sale of Land*, 39 Camb.L.J. 58 (1980).

The aim of awarding damages is compensation. *United States v. City of Warren, Mich.*, 138 F.3d 1083, 1096 (6th Cir.1998) (“An award of prejudgment interest ‘ is an element of complete compensation’ in a Title VII back pay award,”); *Chandler v. Bombardier Capital, Inc.*, 44 F.3d 80, 83 (2nd Cir.1994) (“The purpose of a prejudgment interest award in a wrongful termination case is to compensate a plaintiff for the loss of use of money that the plaintiff otherwise would have earned had he not been unjustly discharged.”); *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1331 (7th Cir.1992) (“Prejudgment interest is an element of

complete compensation,” citing *West Virginia v. U.S.* and other cases); *Northern Natural Gas Co. v. Grounds*, 393 F.Supp. 949, 991 (1974) (“The object of this phase of the litigation is to assure that just compensation be paid . . . [and] an award of prejudgment interest is required in order to assure this result.”)

“Money today is not a full substitute for the same sum that should have been paid years ago.” *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1331 (7th Cir.1992). “Prejudgment interest, like all monetary interest, is simply compensation for the use or forbearance of money owed.” *Transmatic, Inc. v. Gulton Industries, Inc.*, 180 F.3d 1343, 1347 (Fed.Cir.1999). “Prejudgment interest is not awarded as a penalty; it is merely an element of just compensation.” *City of Milwaukee v. Cement Division, National Gypsum, Co.*, 515 U.S. 189, 197 (1995).

Such interest can be large and exceed the basic claim. *In the Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992), the Court upheld prejudgment interest of more than \$120 million, accrued over 13 years, on a damage award of \$61 million. *Id.* at 1335. Similarly, in *City of Milwaukee*, damages were \$1.67 million, and prejudgment interest amounted to \$5.3 million. *City of Milwaukee*, 515 U.S. at 192. However, because prejudgment interest is an element of “full compensation,” an award of such interest “no matter how large, cannot be called ‘punitive.’” *Matter of Milwaukee Cheese Wisconsin, Inc.*, 112 F.3d 845, 849 (7th Cir.1997).

2. Award Of Pre Judgment Interest Is The Norm In Federal Practice.

Federal Courts have agreed that prejudgment interest is the “norm in federal litigation” ; it is an “ordinary part of any award under federal law.” *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1331-32 (7th Cir.1992), citing *West Virginia v. United States*, 479 U.S. 305, 310 (1987); See also *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655-56 (1983); *Barbour v.*

Merrill, 48 F.3d 1270, 1278-79 (D.C.Cir.1995); *Lorenzen v. Employees Retirement Plan of Sperry & Hutchinson Co.*, 896 F.2d 228, 236 (7th Cir.1990).

3. Courts Presume That Prejudgment Interest Is Necessary For Complete Compensation.

Federal courts presume the inclusion of prejudgment interest is a necessary component of damages, unless circumstances justify otherwise. Many cases specifically articulate a presumption in favor of such inclusion. *Barbour v. Merrill*, 48 F.3d 1270, 1279 (D.C.Cir.1995); *Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436 (7th Cir.1989); *Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150, 154 (2nd Cir.1984). Indeed, courts that decline to award prejudgment interest are expected to justify this departure from the federal norm. *City of Milwaukee v. Cement Division, National Gypsum Co.*, 515 U.S. 189 (1995); Courts must justify failure to award prejudgment interest. *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1334 (7th Cir.1992).

4. Prejudgment Interest Is Awarded In Labor Cases.

Numerous courts and arbitration panels have awarded interest in labor cases. In *Shore v. Federal Express Corp.*, 42 F.3d 373, 380(6th Cir. 1994), the Sixth Circuit held that the plaintiff is entitled to an award of prejudgment interest for the delayed payment of monies due to employees, “for delays attributable both to Federal Express and to the judicial process.” Moreover, the court reversed the district court’s denial of prejudgment interest. *Id.* Similarly, the Sixth Circuit explained in *EEOC v. Wilson Metal Casket Co.*, 24 F.3d 836, 842 (6th Cir. 1994), that: “Prejudgment interest helps to make victims of discrimination whole and compensates them for the true cost of money damages they incurred.” *United States v. City of Warren*, 138 F.3d 1083, 1096 (6th Cir. 1998), stated that “victims of [employment]

discrimination should not be penalized for delays in the judicial process, and discriminating employers should not benefit from such delays.” *Id.* (citations omitted).

Arbitration panels have also held that employers must pay interest to employees in order to make them whole. *Laidlaw Transit Co.*, 109 LA 647 (1997)(prejudgment interest assessed at the rate of 10.5% per year where company delayed from May 1996 to September 1997 and “because of Laidlaw’s dilatory and bad faith conduct, the grievant was forced to wait more than an additional year to receive his back pay award. Therefore, it is appropriate to include interest on the back pay award.”). In *National Railroad Passenger Corporation and AMTRAK Service Workers’ Council*, NMB Case No. 67, 95 LA 617, 631 (1990), the neutral arbitrator Jessie Simons noted that the National Labor Relations Board “routinely” awards interest. *See also Vermont Dept. of Corrections*, 89 LA 383-84 (1987)(“We conclude that adding interest to the backpay award is necessary to make Grievant whole for income losses suffered as a result of his dismissal. By awarding interest, we were not imposing a penalty or punishment on management, but are simply compensating Grievant for the loss of the use of the money.”); *Dayco Products, Inc.*, 92 LA 876 (1989)(awarding additional interest on pension benefits where employer delayed case for three years.).

5. Adjusting for Inflation is not Enough Because It Does Not Compensate For Time Value of Money.

Courts which have only adjusted for inflation, without adding interest, have been reversed. “Recent cases hold, however, that adjusting for inflation is not a full substitute for prejudgment interest.

A consumer price index adjustment “simply ensures that inflation does not erode the value of money;” it does not “compensate for the lost use of the money in the intervening time.” *State of Kansas v. State of Colorado*, 2000 WL 34508307(US 2000)(U.S. Supreme Court

Magistrate's Report) citing *United States v. City of Warren, Mich.*, 138 F.3d 1083, 1096 (6th Cir.1998). See also, *Chandler v. Bombardier Capital, Inc.*, 44 F.3d 80, 84 (2d Cir.1994); *Clinchfield Coal Co. v. Federal Mine Safety and Health Review Commission*, 895 F.2d 773, 780 (D.C.Cir.1990).

In *United States v. City of Warren*, the Court reversed the district court's decision to award only inflation, but not interest. The Court held that:

Although we generally afford the district court great discretion in the calculation of prejudgment interest, no authority in the courts of appeals or in the Supreme Court supports the use of the CPI as a substitute for a market interest rate, and the circuit courts that have ruled on this issue explicitly hold that the CPI is not an adequate basis for prejudgment interest. Both the Second Circuit and the D.C. Circuit have held that merely adjusting the dollars the plaintiff would have earned to compensate for diminished purchasing power because of inflation does not compensate for the lost use of the money in the intervening time. See *Chandler v. Bombardier Capital, Inc.*, 44 F.3d 80, 84 (2d Cir.1994); *Clinchfield Coal Co. v. Federal Mine Safety and Health Review Comm'n*, 895 F.2d 773, 780 (D.C.Cir.1990) (Interest rates based on the CPI award claimants "compensation for losses through inflation but none for the capacity of wealth to generate more wealth (and lenders' insistence on corresponding compensation), which a market interest rate reflects.").

The lack of authority supporting the district court's use of the CPI, coupled with the failure of the CPI to make victims of discrimination whole according to the purposes of Title VII, clearly establish that the trial court improperly applied the law by using an erroneous legal standard. Therefore, we find that the district court abused its discretion. See *Phelan*, 8 F.3d at 372. Accordingly, we remand the issue of prejudgment interest to the district court to determine an appropriate interest rate for Fears's award."

Thus, the court held that the district court abused its discretion in limiting the award of prejudgment interest to the rate of increase in the Consumer Price Index, because such an award compensates the claimant only for inflation and not for the time value of the lost money. *Id.* Here, there is no question that the Panel should award damages for both interest and inflation.

6. Prime Rate Is The Appropriate Interest Rate.

The proper amount of interest is the prime rate.²¹ In *Natoli v. Carriage House Motor Inn, Inc.*, 1988 Westlaw 53397 (N.D. NY 1988), the Court held that “[t]he proper measure of the ‘fruits of wrongdoing’, however, is not what the corporation might have received had it invested sums diverted by the defendants, but rather the benefit the defendants derived from borrowing and using corporate funds without paying interest. See *Marcus v. Otis*, 169 F.2d 148 (2d Cir.1948) The proper measure of recovery, then, is the interest defendants would have had to pay if they had borrowed the funds from a lender rather than from the corporation.” See also, *Studiengesellschaft Kohle, m.b.H. v. Dart Industries, Inc.*, 862 F.2d 1564, 1579-80, 9 U.S.P.Q.2d (BNA) 1273 (Fed. Cir. 1988) (affirming award of prejudgment interest at the prime rate compounded quarterly).

Lam, Inc. v. Johns-Manville Corp., 718 F.2d 1056, 1066, 219 U.S.P.Q. (BNA) 670 (Fed. Cir. 1983) (“The district court may ‘fix’ the interest and select an award above the statutory rate, or select an award at the prime rate.” affirming award of prejudgment interest set at the prime rate, rather than the statutory rate, where patentee showed that during the period of infringement it paid more than prime on the money it borrowed for its business. *Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 939 F.2d 1540, 1545, 19 U.S.P.Q.2d (BNA) 1432 (Fed. Cir. 1991) (affirming award of prejudgment interest at prime rate compounded daily as a proper exercise of district court’s discretion, holding “A trial court is afforded wide latitude in the selection of interest

²¹Note also, that federal law controls the amount and calculation of prejudgment interest. In *Ford v. Uniroyal Pension Plan*, 154 F.3d 613 (6th Cir.), the court held that there was no obligation to follow State law because “the calculation of prejudgment interest is not an area ‘primarily of state concern’ for which there does not exist a substantial body of federal law. We therefore are not faced with a situation where the development of a federal common law rule

rates, and may award interest at or above the prime rate. The court's selection of the prime rate was not an abuse of discretion."

IMX, Inc. v. Lendingtree, LLC, No. Civ. 03-1067-SLR, 2006 WL 38918, (D. Del. Jan. 10, 2007) (awarding prejudgment interest at the average quarterly prime rate, and rejecting infringer's argument that the treasury bill rate should be used.) "Defendant further argues that if prejudgment interest is awarded, the U.S. Treasury Bill ('T-Bill') rate is most appropriate. Defendant reasons that plaintiff has not demonstrated that a higher interest rate is necessary to compensate plaintiff for the economic loss caused by infringement. Further, defendant cites to its expert's opinion that the court should take into account that plaintiff was not only deprived of the use of additional royalty income it would have received; plaintiff was also relieved of the risks associated with investing that income. '[I]t is not necessary that a [plaintiff] demonstrate that it borrowed at the prime rate in order to be entitled to prejudgment interest at that rate.' The court is satisfied that the appropriate prejudgment interest rate should be the Federal Reserve average prime rate, compounded annually, as set forth in the Declaration of Robert Wallace, plaintiff's accountant. Courts have recognized that the prime rate best compensate a [plaintiff] for lost revenues during the period of infringement because the prime rate represents the cost of borrowing money, which is 'a better measure of the harm suffered as a result of the loss of the use of money over time.'" *Id.* (citing, *Mars, Inc. v. Conlux USA Corp.*, 818 F. Supp. 707, 720-21 (D. Del. 1993), *aff'd*, 16 F.3d 421 (Fed.Cir. 1993). ("Accordingly, the court shall order defendant to pay prejudgment interest, compounded quarterly, at the prime rate.").

governing the award of prejudgment interest divests the states of authority over a matter which they traditionally have regulated." *Id.* at 617.

a. Prime Rate

Penn Central is liable for interest at the prime rate as a means of measuring the loss to Claimants as well as the benefits to Penn Central. The Claimants are entitled to be made whole. *Fantozzi v. Sandusky Cement Prod. Co.*, 64 Ohio St. 3d 601, 597 N.E.2d 474 (1992). For almost 125 years Ohio courts have recognized that under common law, prejudgment interest should be considered a component of compensatory damages, required to make the Plaintiff whole by accounting for the time value of money. As recently as 1995, the Ohio Supreme Court has confirmed that “Courts in Ohio have long recognized a common-law right to prejudgment interest.” *Royal Electric Constr. Corp. v. Ohio State University*, 73 Ohio St.3d 110, 114, 652 N.E.2d 687,690 (1995), citing *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638,656-57, 635 N.E.3d 331,346 (1994). The Court further held that “prejudgment interest does not punish the party responsible for the underlying damages . . . but, rather, ***it acts as compensation and served ultimately to make the aggrieved party whole.*** . . . Indeed, to make the aggrieved party whole, the party should be compensated for the lapse of time between accrual of the claim and judgment.” 73 Ohio St.3d at 117, 652 N.E.2d at 692 (citations omitted) (Emphasis added.).

Here, Penn Central has been benefited, and been unjustly enriched by having had the use of Claimants’ money for nearly forty years. “In such cases, the Defendant may be under a duty to give the plaintiff the amount by which he has been enriched”. Restatement of Restitution, Section 1, cmt. (e). For restitution it is well-settled that a plaintiff may recover as damages the amount the Defendant benefited. *U.S. Health Practices, Inc. v. Byron Blake, M.D.*, Franklin App. NO 00AP-1002, unreported, 2001 WL 277921 (March 22, 2001) (citing *Loyer v. Loyer*, Huron App. No. H-95-068, unreported, 1996 Ohio App. LEXIS 3432 (Aug. 16,1996)).

Dr. Rosen opines that the prime rate, short term used by the banks for its best commercial customers, is a reasonable measure of damages suffered by Claimants and the enrichment

received by the Railroad and its successor entities in having had use of the monies over this thirty plus year period. Trial Exhibit 9.

b. 10 year Treasuries

In the alternative, Dr. Rosen further opines that ten year U.S. Treasury bills constitute a reasonable measure of the lost time value of money that could have been invested by the Claimants had they had use of this money. Trial Exhibits 9. For each individual Claimant, Dr. Rosen has calculated the amount of this loss. *Id.*

7. Arbitration Panels Determine Interest, Then Bankruptcy Courts Determine Discharge And Collectability.

The Railroad claims that this Panel should not even consider the issue of interest. This is not the law. The law and practice is that an arbitration panel determines the amount of the claim, including interest, and then, if appropriate, the bankruptcy court determines whether the interest is collectible. *In re Clayton*, 195 B.R. 342 (Bkrtcy.E.D.Pa.,1996)

The Penn Central bankruptcy was filed in the United States District Court for the Eastern District of Pennsylvania. The bankruptcy court there recently decided this issue in the case of *In re Clayton, supra*. In *Clayton*, the Bankruptcy Court considered the proper division of responsibilities between the arbitration panels and the Bankruptcy Court. In *Clayton*, one of the issues was whether debts which had not been discharged in bankruptcy should be payable with interest. In its first bold subject-heading, the *Clayton* Court ruled that under its prior holdings that:

We Should Usually Only Determine Dischargeability And Allow Nonbankruptcy Courts To Liquidate Nondischargeable Obligations Supports The Conclusion That Nonbankruptcy Courts Should Be Free To Measure All Aspects Of Damages From Nondischargeable Obligations, Including Awarding Punitive Damages And Assessing Damages.” (original emphasis with all-capitalization omitted).

Id. The Clayton Court divided the responsibilities for determining the amount of the liquidated damages for the non-bankruptcy courts, on the one hand, from the bankruptcy court's responsibility of determining which debts had been discharged, on the other hand. "This approach results from the following general principle enunciated by us most recently in *In re Cohen*, 1995 WL 346948, at *3 (Bankr.E.D.Pa. June 5, 1995):

The role of a bankruptcy court in a dischargeability proceeding is merely to determine whether certain claims are dischargeable or not, not to liquidate those claims. *See In re Stelweck*, 86 B.R. 833, 844-45 (Bankr.E.D.Pa.1988), *aff'd sub nom. United States v. Stelweck*, 108 B.R. 488 (E.D.Pa.1989). **The task of liquidation falls to nonbankruptcy courts, ...**

Accord, e.g., In re Shapiro, 188 B.R. 140, 149 (Bankr.E.D.Pa.1995) (FOX, J.); and *In re Kelley*, 163 B.R. 27, 33 (Bankr.E.D.N.Y.1993). It seems to us that the assessment of punitive damages and **interest** by the C.C.P. or other applicable non-bankruptcy courts is simply an aspect of the liquidation of claims. . . ." *Id.* (emphasis added). Thus the *Clayton* Court determined that non-bankruptcy panels should determine the full liquidated amount of the injury, then the bankruptcy court determines which damages are recoverable or, alternatively, discharged.

Next, the *Clayton* Court considered whether to award interest. It noted that "consistent with this court's holding that the Plaintiff is entitled to nondischargeability of all sums liquidated as damages in connection with its nondischargeable fraud claim against the Debtor is **the general rule that sums such as interest, which are ancillary to a nondischargeable debt, are also nondischargeable.** *See, e.g., In re Hunter*, 771 F.2d 1126, 1131-32 (8th Cir.1985); *In re Levitsky*, 137 B.R. 288, 291-92 (Bankr.E.D.Wis.1992); and *In re Foster*, 38 B.R. 639, 640 (Bankr.M.D.Tenn.1984)." *Id.*

Of great significance here, is that the *Clayton* Court chose not to award interest because the Creditors had not requested interest during the non-bankruptcy court proceeding. This is exactly what the Railroad hopes will happen here: by attempting to convince the Panel to refrain from awarding interest, it can later argue to the bankruptcy court that Claimants' are barred from interest because this Panel did not allow it. That is not the proper procedure.

This is very important: in *Clayton*, there was no opportunity for the non-bankruptcy court to later correct its failure to award interest. The bankruptcy court never sent the case back to the Panel for a determination of interest. There was not an opportunity for remittitur. If this Panel does not award interest, there is a chance that the bankruptcy court will hold, as in *Clayton*, that interest could have been awarded, but is waived because it was not awarded by the non-bankruptcy court.

The Railroad's request to refrain from deciding the interest is simply its latest procedural trick to reduce its liability in this case. It recognizes that after 40 years, it has successfully reduced the value of Claimants' nominal damages. The majority of damages in this case is attributable to interest. The proper procedure is for this Panel to determine the entire amount of the liquidated claim, and then allow a court (of competent jurisdiction) to determine if interest is collectible.

D. Attorney Fees and Costs of Litigation

Arbitrators may award attorneys' fees. An arbitrator may choose to award attorneys' fees to make the claimants whole. See *Port of Tacoma, Wash*, 99 L.A. 1151 (Arb. South, 1992) where employer was ordered to pay the claimant's attorneys' fees in a sex discrimination case. Arbitrators may also award damages in the nature of punitive damage award for bad faith conduct. See *Detroit Bd. of Educ.*, 101 L.A. 1191 (1993) where the employer's continued violation of the agreement merited an award for attorney fees. Arbitrators also have the power to

award the costs of arbitration. *Sonic Knitting Industries, Inc.*, 65 LA 453468-69 (1975)(awarding “the costs of the arbitration proceeding itself and fees paid to its attorney and labor consultant for preparing and presenting the Union’s case.”). In *Sonic Knitting*, the arbitrator noted that even arbitration cases which do not award attorneys fees have ordered “the defendant company to reimburse the union in the amount of \$9,080.96 to cover all other litigation costs resulting from the arbitration, including the arbitrator’s fee.” *Id. citing, Leona Lee Corp.*, 84 LRRM 2165, 2167 (1973). Furthermore, in *Sunshine Convalescent Hospital*, the arbitrator ordered the award of attorneys fees. *In re Sunshine Convalescent Hospital*, 62 LA 276, 279 (1974); *John Morrell & Co.*, 69 LA 264, 280 (1977)(arbitrator awarded attorneys fees after noting the Congressional policy “in favor of the arbitrability of labor disputes, arbitrators must be vested with broad powers to fashion appropriate remedies in the cases before them.”)

Similarly, federal statute provides that: “Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” 28 U.S.C.A. §1927. Here, attorneys fees are necessary to make the Claimants whole and are appropriate in light of Penn Central’s forty-year delay of these cases. Nearly three years ago, Judge Oliver recognized that Penn Central had unreasonably delayed this case and had “unclean hands.” Nonetheless, Penn Central still refused to appoint a neutral arbitrator. Even after being ordered to arbitration, Penn Central tried to frustrate Judge Oliver’s Order by requesting numerous delays of this arbitration, seeking to remove the neutral arbitrator, and then, attempting an “end around” by asking the Eastern District of Pennsylvania to interfere with Judge Oliver’s order of arbitration.

E. Punitive Damages

Arbitrators may award punitive damages where the contractual violation and the adjudication of the violation were protracted, punitive damages are appropriate. *See Ralph Grocery Co.* 108 L.A. 718 (1997). In *Inter'l Assoc. of Machinists v. N. W. Airlines*, 858 F.2d 427 (Eighth Circuit 1988), the Court confirmed an arbitration award of punitive damages against the employer in a collective bargaining case under the RLEA, even when the collective bargaining agreement contained no specific provision authorizing punitive damages. Citing *BRAC v. St. Louis SW Ry.* 679 F. Supp. 628, the court held that custom and practice are valid bases for justifying remedies not explicitly excluded in the agreement. The *Intern'l Assoc. of Machinists* held that past railroad arbitration practice has been to award punitive damages and thus the arbitration panel did not exceed its jurisdiction under RLEA to award punitive damages for breach of the labor agreement even in the absence of any compensatory damages. *See also Local 416 Sheet metal Workers Int. v. Hedge Steel* 335 F. Supp. 812 (1971)

VI. AFFIRMATIVE DEFENSES

A. Waiver of Affirmative Defenses

Federal Rule of Procedure 8(c) states in pertinent part:

a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

Penn Central filed answers in these cases, *Knapik* in 1969, *Sophner* in 1975 respectively.

Trial Exhibit 28. The Answers do not raise any of the affirmative defenses set forth in the cited Civil Rule.

Penn Central has never sought to amend those answers. Affirmative defenses are waived if not timely asserted. *Edely v. Water and Power Auth.*, 756 F.3d 204 (2001).

In a recent case, the Court in *U.S. v. National RR Passenger Corp.* 2004 WL 1335250 (E.D.PA.) chastised this Defendant, American Premier Underwriters, Inc., the real party in interest here, for raising, for the first time, the affirmative defense of “release” ten years after the case was filed. The Court found that assertion of the release and/or discharge in bankruptcy defense would be highly prejudicial to the opposing party. American Premier Underwriters was therefore precluded from raising this affirmative defense because of the prejudice to the opposing party. Claimants object to any affirmative defenses which should have been raised in the first responsive pleading or within a reasonable time after the filing of these cases. Without limitation, Claimants object to any argument or evidence relating to the issues of bankruptcy, business decline, failure to mitigate damages or “any other matter constituting an avoidance or affirmative defense.” Accordingly Penn Central should be precluded from raising any of these affirmative defenses.

B. Business Decline Does Not Apply.

Section 1(b) of the MPA indicates the Railroad can only be released of its obligation to pay benefits based on business decline if the decline is in excess of 5% of gross operation revenue and net revenue ton mile in any thirty day period:

MPA Section 1(b) states the only “business decline” exception as:

[I]n the event of a decline in the merged company's business in excess of 5% in the average of both gross operating revenues and net revenue ton miles in a 30 day period compared by the average of the same period for the years 1962 and 1963, a reduction in forces in the craft represented by the organization signatory hereto may be made at any time during the said 30-day period below the number of employees entitled to preservation of employment under this Agreement to the extent of one

percent for each one percent decline the said decline exceeds 5%. The average percentage of decline shall be the total of the percent of decline in gross operating revenue and percent of decline in net revenue ton miles divided by two. Advance notice of any such force reduction shall be given as required by the current schedule Agreements of the organization signatory hereto and such reductions shall be made in accordance with existing Agreements.

Trial Exhibit 1.

Penn Central has never demonstrated the requisite percentage decline in business to justify its refusal to pay MPA benefits.

1. The Railroad Negotiated A Specific "Business Decline" Clause Which Excludes Other Extra-Contractual Business Decline Defenses.

The Railroad and the Unions knew how to negotiate a clause to permit furloughs caused by a business decline. They decided to carefully specify and limit the circumstances under which the Railroad would be relieved of some of its MPA obligations. They specifically drafted a "business decline" clause.

A basic canon of construction is that "the inclusion of one, is the exclusion of all others." *Uram v. Uram*, 65 Ohio App.3d 96, 98 (Summit 1989); 18 Ohio Jur.3d 29, Contracts §12. The inclusion of this clause demonstrates that the Unions and Railroads intended that the Railroad would be required to meet the specified "business decline" factors in order to avoid MPA payments. The Railroad can only be absolved of liability if it can satisfy this definition of "business decline".

In *NY Susquehanna and W. Railroad Co. and Brotherhood of Railroad Signalmen, Board of Adjustment*, 605, (Dec.8, 1969), the arbitrator found that the specific method of calculating allowable percentage reduction had not been submitted by the carrier and thus it had "no contractual authority to furlough the claimants." Trial Exhibit 35. Further, in *Brotherhood of*

Railway, Airline and Steamship Clerks and Missouri-Kansas-Texas Railroad, Special Board of Adjustment 605, (April 20, 1970) the arbitrator found that the business decline provision could not be invoked because the carrier had failed to give advance notice of any force reduction. Trial Exhibit 35. Similarly, if the Railroad cannot meet the contractual definition of “business decline” it cannot invoke such a defense.

2. The Railroad Cannot Satisfy The Specific Requirements of the Business Decline Clause.

MPA Section 1(b) states the only “business decline” exception as:

[I]n the event of a decline in the merged company’s business in excess of 5% in the average of both gross operating revenues and net revenue ton miles in a 30 day period compared by the average of the same period for the years 1962 and 1963, a reduction in forces in the craft represented by the organization signatory hereto may be made at any time during the said 30-day period below the number of employees entitled to preservation of employment under this Agreement to the extent of one percent for each one percent decline the said decline exceeds 5%. The average percentage of decline shall be the total of the percent of decline in gross operating revenue and percent of decline in net revenue ton miles divided by two. Advance notice of any such force reduction shall be given as required by the current schedule Agreements of the organization signatory hereto and such reductions shall be made in accordance with existing Agreements.

Trial Exhibit 1.

Penn Central has never demonstrated the requisite percentage decline in business to justify its refusal to pay MPA benefits. The MPA includes both freight and passenger service. In fact, the language of the equation is in “ton miles” which refers to freight. See Trial Exhibit 14 Weinman deposition at 50 lines 19-22

Defendant’s only witness, its expert Weinman, admitted that ton miles have nothing to do with passenger service:

A. Our mission was to determine the state of the passenger business. The Merger Protection Agreement doesn't really address the state of the passenger business, nor was it intended to.

* * *

Q. In your response you say, "The MPA formulae dealt only with freight indices. It was silent in regard to the passenger business which, according to most sources, was the single biggest cash outflow that Penn Central and many other railways had in this era." And then you go on there's another paragraph in that response. Is that accurate?

A. That's correct.

Trial Exhibit 14 at 49 line 22, 50 line 11.

3. Penn Central's Expert Admits That His Report Is Not Relevant To the MPA's Business Decline Clause.

The Railroad's expert Weinman was not asked nor did he give an opinion as to the nature or application of the job protection provisions of the MPA

Q. Your expert report, I'm correct, am I not, that it did not render an opinion as whether the Merger Protection Agreement applies to these particular plaintiffs?

A. That's correct, it does not indicate anything in that regard.

Q. You weren't asked to do that?

A. That's correct.

Q. You don't have -- do you have an opinion in that regard?

A. No, I don't.

* * *

Q. You didn't render any opinion in your expert report regarding the nature of the job protections in the Merger Protection Agreement; is that true?

A. That's true.

Q. And is it true that you've not been asked to do that?

A. That's true.

Q. And is it also true that you don't have any opinion in that regard? Is that true?

A. That's true.

Trial Exhibit 14 at 90 lines 4 – 14, 91 lines 1-11.

4. Penn Central's Expert Admits That None Of His Testimony
Relates To The Claimants' Rights Under the MPA.

Weinman freely admitted that he examined only some aspects of passenger service and never attempted to evaluate freight service or the existence of a general "business decline."

Q. And you're not in the position -- is it true that you're not in the position to determine whether the furloughs for any of the individual plaintiffs would be justified based on the paragraph that's in Exhibit 3?

A. That's correct, we are not in such a position.

Q. Okay. And you're not -- and you're not an expert in that area, are you?

A. Not in freight business areas.

Q. Have you been asked to provide any additional reports on any issues?

A. None that haven't been discussed here today.

Trial Exhibit 14 at 53 line 23, 54 line 11.

In fact, Weinman admits that he did not have data for the merged company to compare with 1962 and 1963 data.

Q. Is it -- without the New Haven data for '62 and '63, is it possible to compare data for the merged companies?

A. I don't believe we had any information on the New York Central in '62 and '63 either, and so it would not be possible to make a comparison of the two as predecessors of the merged company for those two years.

Trial Exhibit 14 at 62 lines 6-13.

5. Even Penn Central's Counsel Recognized That Their Expert Had Failed To Opine On Any of The Relevant Issues.

After receiving their expert's first inadequate report, Defense counsel asked expert Weinman to opine on specific issues relating to the MPA. In his reply, Weinman explains to Defense Counsel that his report cannot answer any of the issues relevant to this litigation. Four weeks later at his deposition, Weinman admitted that his report does not even address the business decline provision in the MPA Section 1 (b):

Q: Your report -- am I correct that your report does not address the issue of whether there was a business decline that necessitated a furlough based on the provision that you just read?

A. That's correct.

Q. You weren't asked to do that?

A. That's correct, we were not.

Q. You weren't. But you were asked -- you were asked if you -- you were asked to do that in the e-mail that Mr. Groppe sent you. That was his first issue, right?

A. We were asked to comment on it.

Q. Well, he says to you, "Did Penn Central have a business decline that necessitated a furlough based on Merger Protection Agreement formula." That's what you just -- that's the formula that you have in front of you?

A. That's correct.

Q. So he's asking you whether -- is he not asking you whether there was a business decline that necessitated a

formula or necessitated a furlough based on the formula in Exhibit 3?

A. That's correct. And our response, of course, was that it couldn't be determined since this, the Merger Protection Agreement as presented here in Exhibit 3, is silent on the business of passenger service.

* * *

Q. Theoretically, there would be data that could be input into that formula to get an answer as to whether -- as to whether it's been complied with or not; isn't that true?

A. The answer would be "yes" if you were asking with regard to freight issues and "no" if you were asking in regard to passenger issues.

Q. No if you were asking in regard to passenger issues because it doesn't deal with passenger issues; is that what you're saying?

A. That's correct.

Q. Do you have the data to determine whether the formula would necessitate a furlough based on freight data?

A. No, we do not have any information with regard to that.

Trial Exhibit 14 at 52 lines 23, 53 line 13.

Weinman admits that he could not help Penn Central prove the answer to whether there was a general business decline as the term is defined in the MPA, which is the only issue relevant to this defense.

Q. Did he know prior to the e-mail that you couldn't answer Question Number 1?

A. I can't answer that. I don't know what he knew.

Trial Exhibit 14. page 73 lines 14-17

Similarly, Weinman's latest affidavit provides no testimony regarding business decline. Weinman could not opine and has not attempted to compute the data necessary to determine whether the railroad could lay workers off without paying MPA benefits. Therefore, although Mr. Weinman has provided an interesting historical narrative of passenger service, it has no relevance to the specifically-defined equation mandated in the controlling language of the MPA with reference to applicable business decline.

Accordingly, the business decline defense mounted by the carrier cannot meet the requirements of the MPA Section 1 (b). Thus, not only must summary judgment be denied, but this panel should strike Weinman's irrelevant testimony and this defense as not applicable to the terms of the MPA.

6. Penn Central Knows How To Properly Calculate "Business Decline" And Has Done So In the Past.

Penn Central's purported uncertainty or inability to determine "business decline" is unusual. Over the years, the Railroad did in fact calculate the business decline percentage to determine whether it could reduce costs by laying off workers under other agreements which required the same or similar percentage of loss of gross revenue.

The Railroad regularly tracked these numbers to determine whether they could make furloughs. For example, in a memo from D.C. Bevan, Chairman of the Finance Committee of the Pennsylvania Railroad to Stuart Saunders of July 26, 1967, Bevan calculated that net ton miles were above the 1963-64 base period and thus are not sufficient to trigger the business decline clause. Bevan memo July 26, 1967. Ex C. See also memo of April 21, 1966, memo of Sept. 1, 1965. *Id.* Bevan wrote that "[r]ealistically, the language of the contract means that layoffs may be made only if the ton-mile-operating revenue average drops by 6 percent below the base period average Unless PRR traffic shrinks far more than now anticipated, it does

not seem that any layoffs can be accomplished during July 1967, under terms of this Agreement. The average percentage would have to drop by an additional 6.83 percent for the clause to be invoked.” *Id.* In the 1960s, the Railroad was tracking these numbers to determine in advance whether it could provide the notice necessary to invoke the business decline clause.

Under the MPA, Penn Central could reduce its workforce but only through attrition absent a demonstration by the railroad of a decline in business Which was defined as a specific equation: decline in excess of 5% of gross operating revenue and net revenue ton miles in any 30 day period compared with the average of the same period in 1962-1963. Further, Penn Central was required to give advance notice in order to invoke the business decline provision. Penn Central gave no advance notice of the invocation of the business decline provision to the employees. To date, Penn Central has never provided the calculations that comply with the dictates of this equation.

7. Business Decline Rejected Defense in Railroad Arbitrations.

As with other affirmative defenses, Penn Central has the burden of proof to demonstrate business decline as the cause of its furlough of employees. Multiple arbitration decisions under the MPA have held that the carrier failed to meet its burden of proving business decline. *See* Trial Exhibit 35. System Fed. No. 7, Award 321 (1972)(Purpose of MPA is to afford protective benefits to employees so requirement of proof of business decline not taken lightly).

C. Availability for Work

Claimants anticipate that Penn Central will argue that Claimants were not available for work and that this is a requirement in order to qualify for benefits under the MPA as articulated in the Court’s affirmance of the Blackwell Arbitration Award in *Augustus, et al. v. STB, et al.* 99-3014 (2000). This holding is not applicable to the claims before this panel because every single claimant returned to work. In fact, had *Augustus* been applicable, the Blackwell decision would

have been affirmed in its entirety and at least the *Knapik* case would be over. The *Augustus* holding affirms the viability of the other claims. The majority of those claims (10) remain as well as the *Sophner*, *Bundy* and *Watjen* claims because the facts are separate and distinct.

The key phrase here is “failure to obtain position available in the exercise of his seniority”. In the arbitration under the MPA in *System Federation No. 76, Award No. 414* (1976)(submitted as Trial Exhibit 35), the Claimants held seniority only at one location at which all jobs were abolished. If they had moved to any other location they would be placed on the bottom of the seniority roster. The arbitration panel held that since Claimants had seniority at only one location, they could not exercise their seniority elsewhere. “Simply stated they had no seniority to exercise. They could not therefore be considered deprived of employment for failure to exercise their seniority.” Trial Exhibit 35.

Again, in another arbitration interpreting the MPA, in *Carmen Award No. 159* (1969) the Claimants’ jobs were abolished. They had no seniority to exercise so they could not be found to have failed to exercise seniority. Similarly, another MPA arbitration, *System Fed. No. 172, Award No. 102* (1968) held that the alleged failure of worker to accept offer of work as an unprotected employee does not constitute a failure to obtain work. Unprotected work was the type of work offered to the *Knapik*, *Watjen* and *Bundy* Claimants -- jobs without protection. They were not jobs in which they could exercise their seniority. *See also Arbitration of Int’l of Machinists, Award No. 385* (1975)(offer of job with loss of seniority does not constitute available position).

D. Failure To Plead Mitigation Waives This Affirmative Defense.

1. Mitigation Must be Raised in the First Responsive Pleading.

Failure to mitigate is an affirmative defense as a matter of federal procedural law. *See, Lennon v. U.S. Theatre Corp.*, 920 F.2d 996, 1000 (D.C.Cir.1990); *Modern Leasing v. Falcon*

Mfg. of California, 888 F.2d 59, 62 (8th Cir.1989), and therefore must be pleaded. Failure to mitigate damages is an affirmative defense that must be raised in a responsive pleading—here, an answer—or generally it is waived. *See* Fed.R.Civ.P. 8(c); *WRS, Inc. v. Plaza Entm’t, Inc.*, Civ. A. No. 00-2041, 2007 WL 587250, at *6 (W.D.Pa. Feb. 20, 2007).

2. Employer Must Provide Evidence That There Was Substantially Equivalent Work Available And That The Plaintiff Failed To Exercise Reasonable Diligence.

In order to prove “mitigation”, an employer must ordinarily demonstrate two elements to establish failure to mitigate: (1) substantially equivalent work was available, and (2) plaintiff did not exercise reasonable diligence to obtain the available employment. *Booker*, 64 F.3d at 864 (citing *Anastasio v. Schering Corp.*, 838 F.2d 701, 708 (3d Cir.1988)). Substantially equivalent employment is that employment which affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status as the position from which the claimant has been terminated. *Id.* at 866 (quoting *Sellers v. Delgado Coll.*, 902 F.2d 1189, 1193 (5th Cir.1990)).

3. Plaintiff Does Not Have To Accept A New Line Of Work, A Demotion, Demeaning Work, Or Work In Another City.

In *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231, 102 S.Ct. 3057, 3065, 73 L.Ed.2d 721 (1982), the Supreme Court held that “an unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position.” A plaintiff need only pursue “substantially equivalent” work. *Id.* at 232, 102 S.Ct. at 3066. *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 32 Fair Empl.Prac.Cas. (BNA) 688, (6th Cir. 1983)(holding that claimants were not required to accept demotions, demeaning work, or work farther than 50 miles from home); *See also McCann Steel Co. v. NLRB*, 570 F.2d 652, 655 (6th Cir.1978) (“We believe that substantially equivalent employment refers to the hours worked . . .

as well as the nature of the work there.”); *Falls Stamping & Welding Co. v. International Union United Automobile, Aircraft and Agricultural Workers of America*, 667 F.2d 1026 (6th Cir.1981), *cert. denied*, 455 U.S. 1019, 102 S.Ct. 1715, 72 L.Ed.2d 136 (1982)(Older claimants need not exert as much effort as young claimants).

It is well settled that a claimant has not failed to make a reasonable effort to mitigate damages where he refused to accept employment that is an unreasonable distance from his residence. *Oman Construction Co., Inc.*, 144 NLRB Dec. (CCH) 1534 (1963), *enf’d.*, 338 F.2d 125 (6th Cir.1964), *cert. denied*, 381 U.S. 925, 85 S.Ct. 1561, 14 L.Ed.2d 684 (1965)(discharged employee properly refused to accept a job more than 200 miles from his home). In *Oman Construction*, the Sixth Circuit enforced the National Labor Relations Board order which held that the employee’s refusal did not constitute a failure to mitigate damages. Similarly in *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307 (D.C.Cir.1972), the court held that the duty to make reasonable efforts to find employment did not obligate claimants “to seek work in Louisville or other areas located over 50 miles from Madison, due to the excessive commute such jobs would have entailed.” *Id.* at 1314. *See, e.g., Florence Printing Co. v. NLRB*, 376 F.2d 216, 221 (4th Cir.1967), *cert. denied*, 389 U.S. 840, 88 S.Ct. 68, 19 L.Ed.2d 104 (1967); *Jackson v. Wheatley School Dist.*, 464 F.2d 411, 413-14 (8th Cir.1972); *Wells v. Hutchinson*, 499 F.Supp. 174, 205 (E.D.Tex.1980).

4. Unemployment Benefits Are Not Deductible From The Damage Award.

Unemployment benefits may not be deducted from awards intended to compensate a worker for lost back-wages. *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614 (6th Cir. 1983). The Sixth Circuit has on several previous occasions affirmed district courts which have held that unemployment benefits should not be offset against backpay awards. *See Falls*

Stamping & Welding Co. v. International Union United Automobile, Aircraft and Agricultural Workers of America, 667 F.2d 1026 (6th Cir.1981), *cert. denied*, 455 U.S. 1019 (1982); *Mabin v. Lear Siegler, Inc.*, 4 Fair Empl.Prac.Cas. (BNA) 679, 687 (W.D.Mich.1971), *aff'd*, 457 F.2d 806 (6th Cir.1972); *Oman Construction Co., Inc.*, 144 NLRB Dec. 1543, 1544 (1963), *enf'd*, 338 F.2d 125 (6th Cir.1964). A number of other courts have also refused to reduce backpay awards by the amount of unemployment compensation received by the claimant. *See, e.g., Winn-Dixie Stores, Inc. v. NLRB*, 413 F.2d 1008, 1009-10 (5th Cir.1969); *Isaac and Vinson Security Services, Inc.*, 208 NLRB Dec. 47 (1973), *enf'd*, 467 F.2d 213 (5th Cir.1972); *International Assoc. of Machinists & Aerospace Workers v. Champion Carriers, Inc.*, 470 F.2d 744, 745 (10th Cir.1972); *Tidwell v. American Oil Co.*, 332 F.Supp. 424, 437-38 (D.Utah 1971); *Abron v. Black & Decker Mfg. Co.*, 439 F.Supp. 1095, 1115 (D.Md.1977), *aff'd in part and vacated in part*, 654 F.2d 951 (4th Cir.1981).

In *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614 (6th Cir. 1983) the Sixth Circuit held that “disallowing the deduction [for unemployment compensation] does not have a detrimental effect on a claimant’s incentive to use “reasonable diligence” to find substantially equivalent employment. Moreover, if Congress did not intend for an employee to receive unemployment benefits in addition to back pay, the logical solution is a recoupment of the benefits by the state employment agency.”

The *Rasimas* Court emphasized “the significance of the reasoning in *Gullett Gin* where the “Supreme Court explicitly rejected the rationale for deducting the unemployment compensation from backpay awards. The rationale is summarized as follows: 1) where the contributions to the fund from which the benefits derive are made solely by the defendant, the collateral source rule does not apply; 2) the plaintiff would otherwise receive a double recovery;

and 3) the defendant would otherwise in effect be subject to punitive damages. *See Equal Employment Opportunity Commission v. Enterprise Association Steamfitters Local 638*, 542 F.2d 579, 591-92 (2d Cir.1976), *cert. denied*, 430 U.S. 911 (1976). The Supreme Court rejected these arguments, stating:

To decline to deduct state unemployment compensation benefits in computing backpay is not to make the employees more than whole, as contended by respondent. Since no consideration has been given or should be given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received.

But respondent argues that the benefits paid from the Louisiana Unemployment Compensation Fund were not collateral but direct benefits. With this theory we are unable to agree. Payments of unemployment compensation were not made to the employees by taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state [citations omitted]. We think these facts plainly show the benefits to be collateral. It is thus apparent from what we have already said that failure to take them into account in ordering back pay does not make the employees more than "whole" as that phrase has been understood and applied.

Gullett Gin Co., 340 U.S. at 364. The Claimants' damages are not offset by unemployment compensation.

5. Ambiguities As To The Amount Are Resolved In Favor of the Claimant.

Backpay should be awarded even where the precise amount of the award cannot be determined. *See, e.g., Equal Employment Opportunity Commission v. Detroit Edison Co.*, 515 F.2d 301, 315 (6th Cir.1975), *vacated on other grounds sub. nom. Utility Workers Union v. Equal Employment Opportunity Commission*, 431 U.S. 951. Any ambiguity in what the claimant would have received should be resolved against the discriminating employer. *See, e.g., Detroit*

Edison, 515 F.2d at 315. In *Detroit Edison*, the Sixth Circuit held that backpay equal to the maximum amount which could have been earned was appropriate where it was impossible to reconstruct the employment history of each claimant. 515 Other Issues

VII. OTHER ISSUES

A. Spoliation of Evidence

Claimants anticipate that Penn Central will argue that the Claimants cannot sustain their burden of proof on at least two issues: 1) as to which specific dates they performed compensated service and 2) production of their wage guarantee forms. Only the Railroad would have this information. The testimony of Claimants' witnesses will show that this information was never recorded or maintained by the employee. George Ellert, Assistant Director of Labor Relations for the carrier even admitted that the Railroad, not the employee was responsible for maintaining the personnel records and the wage guarantee data. Trial Exhibit 34 Ellert testimony at 626-628. Instead this information would have been in the sole possession of the employer. Penn Central was on notice since 1969 and 1974 respectively, of the nature of Claimants' allegations. It knew of the litigation prior to the transfer of personnel records to other railroads during and after the bankruptcy. Finally, as the STB determined the repository of these documents was the Railroad. "Because the carrier was litigating the issue of compensation, it was on notice to keep records of what forms were or were not submitted. Claimants had no duty to administer the compensation scheme and to act as record keeper for that purpose." Trial Exhibit 7 at 7.

It has a duty to maintain copies of this personnel information just as any other Defendant. Otherwise, any defendant could simply destroy or transfer records and then argue that plaintiff could not fulfill its burden of proof.

Claimants should not suffer because Penn Central lost, destroyed or transferred Claimants' work records. Even inadvertent destruction of evidence is sufficient to trigger sanctions where the loss of evidence disadvantages the opposing party. *American State Ins. Co. v. Tokai Seiki Limited*, 704 N.E.2d 1280 (Ct. Com. Pls. 1997). The court may remediate the prejudicial effect caused by the loss of evidence under Civil Rule 36. In fact, the imposition of sanctions for the spoliation of evidence is essential as a matter of public policy. *Luoknas v. Roto Rooter* 167 O App. 559 (2006).

As a sanction for the loss of such evidence, the *Tokai* court permitted the creation of an inference when the testing established that one of the parties was deprived of relevant evidence, not otherwise obtainable, as a result of the other parties abuse.

Secondly, evidence such as documents created for litigation purposes cannot substitute for the original personnel files.

The Third Circuit applies a three part test in *Schmid v. Milwaukee Electric Tool Corp.* 13 F3d. 74 (3rd Cir. 1994) to determine the appropriateness of a sanction such as inference of burden shifting:

1. degree of fault of the party that altered or destroyed the evidence;
2. the degree of prejudice suffered by the opposing party;
3. whether there is a lesser sanction that will avoid unfairness to the opposing party and when the offending party is seriously at fault, will serve to deter such conduct by others.

In this case Penn Central's representation of the whereabouts of personnel data is at best suspect. Railroad's current position is apparently that either Conrail or Amtrak might have possession of Claimants' personnel records, which could answer many of their own questions. However Penn Central produced approximately twenty-five boxes of documents which purportedly demonstrate wages of some of the Claimants in some months of 1968 and 1969. It

produced another group of boxes, which purport to be wage guarantee forms for other employees in the system, mostly from Indianapolis and Columbus. If Penn Central has no access to personnel and wage records, as it maintains, then how were they able to obtain these documents? Trial Exhibit 37.

Further, the Deposit Agreement between Penn Central Corporation (which is used synonymously with American Premier Underwriters in that document) and the Pennsylvania Historical Society indicates that Penn Central Corporation had custody and control of personnel files which it was donating to the Society, with the provision that they be “closed to research until twenty-five years after the death of the employee” Trial Exhibit 31 at 5. Further these documents will be returned to Penn Central Corporation “for litigation in which Depositor is engaged” *Id.* Agreement at 3. Clearly, Penn Central Corporation had custody of personnel files and under the terms of the agreement maintained control of said documents.²² The appropriate sanction here is to preclude any defense based upon claimants’ failure to file and/or maintain wage guarantee forms which claimants testified they did file with Penn Central, but which have now disappeared. The panel should also preclude any argument by Penn Central regarding the location or mark up dates of Claimants which would have been in their now non-existent personnel files, which were required to have been retained by Penn Central.

²² Throughout much of the duration of the Deposit Agreement, Penn Central’s current counsel served as Staff Vice President and Associated General Counsel for Penn Central Corporation in such litigation matters.

B. Award of This Panel

An award of damages, if any, made by this panel must be against the Defendant PCTC and its successor entities. In 1978, the bankruptcy court issued the final consummation order. Thereafter, the successor PCC moved to compel arbitration.

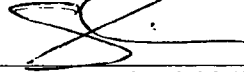
In 1980, the successor entity PCC signed the arbitration agreement. Trial Exhibit 24. In 1990, PCC participated in the arbitration. In 1999, the successor entity PCC participated as the intervenor in the Sixth Circuit Court of Appeals. In this arbitration, the Defendant has always represented itself to be "PCC". Trial Exhibit 33. Defendant's own expert stated that his client in this arbitration matter was American Premier Underwriters (APU). Trial Exhibit 14 at 91, 92. Until three weeks ago, the Defendant self identified as PCC or APU.

Accordingly any award of benefits to the Claimants should be against the Defendant and any successor entity.

VIII. CONCLUSION

For all the foregoing reasons, judgment should be rendered in favor of each Claimant for damages caused by Penn Central's breach of the MPA .

Respectfully submitted,



Carla M. Tricarichi (0014164)
Counsel for Claimants
Tricarichi & Carnes, L.L.C.
614 Superior Avenue NW Suite 620
Cleveland, Ohio 44113
Phone: 216.861.6677
fax: 216.861.6679
E-mail: ctricarichi@aol.com

Bernard S. Goldfarb (0007719)
55 Public Square Suite 1500
Cleveland, OH 44113
Phone: 216.696.0606
fax: 216.696-0679

Mark Griffin (0064141)
614 Superior Avenue, N.W. Suite 620
Cleveland, Ohio 44113
Phone : (216) 376-3006
Fax : (216) 861-6679
E-mail : Mark.D.Griffin@gmail.com

Randy J. Hart (0046793)
614 Superior Avenue, N.W. Suite 620
Cleveland, Ohio 44113
Phone: (216) 861-6677
Fax: (216) 861-6679
E-mail: rjhart@hahnlaw.com

CERTIFICATE OF SERVICE

A copy of the foregoing was sent via electronic mail to:

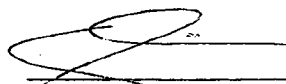
Michael L. Cioffi
Nathaniel R. Jones
Jason Groppe
Blank Rome, LLP
1700 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202
groppe@blankrome.com

Steven H. Steinglass
2374 Tudor Drive
Cleveland Heights, Ohio 44106
steven.steinglass@law.csuohio.com

Dennis R. Lansdowne
1900 East Ninth Street, Suite 2400
Cleveland, Ohio 44114
drl@spanglaw.com

Joseph P. Tomain
University of Cincinnati, College of Law
Clifton and Calhoun Streets
P.O. Box 210040
Cincinnati, Ohio 45221-0040
tomainjp@ucmail.uc.edu

on this 3rd day of December, 2007



Carla M. Tricarichi
Attorney for Claimants