

FINANCE DOCKET NO. 25864

ERIE LACKAWANNA RAILWAY COMPANY v.
PENN CENTRAL COMPANY

Decided December 22, 1969

Upon complaint, found that Penn Central Transportation Company, defendant, is in violation of certain conditions imposed in appendix 3 of the fourth supplemental report of the Commission on reconsideration and further hearing in *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 334 I.C.C. 25. Defendant required to restore certain train services in connection with interchange of traffic with complainant Erie Lackawanna Railway Company, at Maybrook, N. Y., to give notice to the public of such restoration of services, and to otherwise comply with the appendix 3 conditions within a stated period, and to advise Commission of actions taken. Proceeding held open for that purpose.

Harry G. Silleck, Jr., Richard Jackson, and Emmet McCaffery for complainant.

Carl Helmetag, Jr., and Margaret P. Allen for defendant.

REPORT OF THE COMMISSION

TUGGLE, *Commissioner*:

Erie Lackawanna Railway Company (Erie or EL), complainant herein, is a large trunkline railroad with lines extending westward from Hoboken and Jersey City, N. J., to Chicago, Ill., and serves numerous points in the territory traversed and a number of connections to points beyond. Prior to January 1, 1969, Erie participated in a substantial and continuous interchange of traffic at Maybrook, N. Y., with The New York, New Haven and Hartford Railroad Company (New Haven or NH). The New Haven, the largest railroad in New England, served a great many points in that region, particularly in the southern portion thereof, and maintained connections, at Boston, Mass., and other points, to many points beyond its lines. Since July 1961,

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New Haven had been a debtor in reorganization under section 77 of the Bankruptcy Act. To preserve that carrier's services to the public, this Commission, in approving the *Penn Central* merger,¹ imposed a condition requiring inclusion in that system of the New Haven and its subsidiaries. The final terms of inclusion were set forth in our fourth supplemental report on reconsideration and further hearing in that proceeding,² and, following inclusion, on January 1, 1969, New Haven ceased to exist as a railroad, and its lines, equipment and facilities on that date became a part of the Penn Central system.

In the *final inclusion* report we also reconsidered the effects of the Penn Central merger on Erie, and concluded that:

The viability of EL and the preservation of its service throughout its territory are matters of public interest and their frustration would be inconsistent with the public interest. We are convinced that by virtue of the substantial yield of the Maybrook route to EL, the atrophy of that route would be a serious blow to EL and the national transportation system. (334 I.C.C. at 83)

To preserve the interchange at Maybrook, we imposed certain conditions in the final inclusion report for maintaining the quality of service over the Maybrook route and prohibiting Penn Central, after inclusion of New Haven, from downgrading the interline service with EL at Maybrook. These conditions are set forth in appendix 3 to the *final inclusion* report, and are reproduced in the appendix hereto. As stated therein, Penn Central and Erie are required, as to traffic moving to and from all stations on or reached via the lines of New Haven and Erie, to maintain and keep open existing or comparable routes and channels of trade in full vigor as fast competitive service routes via Maybrook. Condition 6 of appendix 3 requires, among other things, that neither Erie nor Penn Central shall, without the written consent of the other:

*****make any substantial change in train schedules or take any other action, the effect of which would be to increase the time in transit via the aforesaid routes, or to otherwise adversely affect the standards of service.**

¹*Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475 (1966), approving the merger, subject to certain conditions, of The New York Central Railroad Company into The Pennsylvania Railroad Company. The merger was consummated on February 1, 1968. The merged company is now known as Penn Central Transportation Company (herein Penn Central or PC).

²334 I.C.C. 25, decided November 25, 1968, herein called the *final inclusion* report.

By complaint filed September 22, 1969, Erie alleges that Penn Central is in violation of certain of the appendix 3 protective conditions, and seeks an order (a) directing the defendant to cease and desist from such violations, and to restore train services to the standards prevailing on the date of the New Haven inclusion in Penn Central, (b) directing defendant to notify all shippers and receivers of freight of the restoration of such train services, (c) directing defendant to pay damages to Erie in an amount hereinafter discussed, and (d) granting such other relief as the Commission may deem appropriate. Erie subsequently filed a motion, on October 8, 1969, seeking immediate restoration by Penn Central of certain of the train services involved. Replies by Penn Central to the complaint and motion were filed on October 17, 1969. Defendant denied violation of the appendix 3 conditions, and requested oral hearing on the issues. In view of our decision herein, the motion is denied.

The interpretation, application, and enforcement of the appendix 3 protective conditions, as provided in condition 11 thereof, are governed exclusively by the procedures therein provided. All controversies arising thereunder are to be determined with finality by this Commission. Whenever a party considers that these conditions are being violated it may file a complaint with the other carrier and with the Commission's Board of Suspension. The board shall conduct an investigation of the matters referred to in the complaint, and, if requested by a party to the controversy, shall hold a hearing. If the board finds a violation of any of the conditions, it shall order termination of such violative conduct. Final decisions as to issues raised by a complaint are to be rendered within 90 days after the complaint is filed, with appeal therefrom lying to division 2 of the Commission.

By order dated October 15, 1969, the Board of Suspension referred the matter to an examiner for hearing, and provided for omission of the examiner's recommended decision and for certification of the record to the board for initial decision. A hearing has been held, at which Erie presented evidence by company and public witnesses, and Penn Central adduced evidence in opposition. We subsequently recalled the proceeding from the Board of Suspension for determination by the Commission. Briefs have been filed by the parties.

The regular interchange of traffic over Maybrook for movement over New Haven's lines to and from New England points

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is a longstanding practice from which Erie has derived considerable revenues. In 1968, for example, this traffic, exclusive of movements on which New Haven served only as a bridge carrier, yielded Erie some \$24 million, or 10 percent of its gross revenues for that year. The scheduling of trains in and out of Maybrook was characterized by a high degree of cooperation by both carriers, in a continuing effort to attain and maintain a fast, competitive, joint-line service between New England and the numerous points served by Erie and its western connections. To the public, Erie and New Haven held out second- or third-morning delivery at Boston from Chicago and at Chicago from Boston, and in some instances second-day delivery was effected on trailer-on-flatcar (TOFC) traffic. The number of loaded cars and loaded trailers interchanged annually at Maybrook during the period 1962 through 1968 aggregated as follows:

Year	EL to NH eastbound	NH to EL westbound	Total interchange
1962 -----	67,299	28,498	95,797
1963 -----	64,943	25,266	90,209
1964 -----	79,949	27,978	107,927
1965 -----	76,513	30,329	106,841
1966 -----	79,587	31,256	110,843
1967 -----	74,770	29,428	104,198
1968 -----	78,124	28,689	106,813

In contrast, during the first 10 months of 1969, only 56,174 loaded cars and trailers were interchanged eastbound and 13,427 westbound, a total interchange of 69,601 cars and trailers, as compared with 97,982 during the first 10 months of 1968. The Maybrook interchange in October 1969, the most recent month for which evidence is of record, had declined more than 52 percent below the interchange in October 1968.

Erie has alternate routing available to and from New England. At Binghamton, N. Y., on its main line, Erie has a connection with The Delaware and Hudson Railroad Corporation (D&H). D&H connects at Mechanicville, N. Y., with Boston and Maine Corporation (B&M), and B&M has a line extending through northern Massachusetts to Boston. Through-train service has been operated by these carriers over the Binghamton-Mechanicville gateways between Chicago and Boston, using through motive power since early 1968. These latter trains are used primarily for TOFC traffic, and provide second-morning delivery at Boston and Chicago. Erie also operates expedited trains in conjunction with Norfolk and Western Railway Company (N&W)

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using through motive power between Kansas City, Mo., and Jersey City, and the eastbound trains set off cars at Binghamton for pickup by Erie's Chicago to Boston trains. Erie and D&H, since April 1, 1968, and July 1, 1968, respectively, have been subsidiaries of Dereco, Inc., a subsidiary of N&W.³ From a standpoint of service, the Dereco route (EL, Binghamton; D&H, Mechanicville; B&M, Boston) is considered by Erie's traffic officials as equivalent to the Maybrook route on TOFC traffic to and from Boston, but from a gross revenue standpoint the Maybrook route affords Erie a greater return.

In conjunction with motor carriers, Erie participates in plan II1/2 and plan V TOFC⁴ operations to and from various points in New England, such as, from certain points in Connecticut (Stamford and Wallingford, for example) and between New Haven, Hartford, and Bridgeport, Conn., on the one hand, and Chicago, on the other. Effective August 30, 1969, Erie established TOFC routes and rates in connection with a motor carrier affecting some 99 points in Connecticut. Erie's TOFC operations in and out of New England over its ramp at Croxton, N. J., provide second-afternoon or third-morning service between Chicago and southern New England. Some TOFC traffic to New England points moves over Erie's ramp at Newburgh, N. Y. In connection with N&W, D&H, B&M, and certain motor carriers, Erie also moves TOFC traffic to and from Providence and other Rhode Island points, Attleboro, Mass., and Groton, Conn. No evidence was adduced of the volume of traffic moving over Erie's TOFC ramps or the Dereco route to or from New England, but it is indicated that the great bulk of Erie's New England traffic moves via Maybrook.

As of January 1, 1969, herein sometimes called the inclusion date, Erie operated three daily schedules eastbound to Maybrook and two daily schedules westbound. Eastbound to Maybrook, Erie's train No. CB-2 was scheduled to arrive at 6 a.m., train

³Pursuant to the terms of *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 324 I.C.C. 1 and 330 I.C.C. 780, B&M rejected the terms prescribed in that proceeding for its inclusion in the N&W system, but has again petitioned for inclusion in pending Finance Docket No. 23832 which is an application for merger of The Chesapeake and Ohio Railway Company (C&O) into N&W.

⁴Plan II½ is a railroad operation ramp-to-ramp, under all-rail rates, with the shipper providing highway service to the origin ramp and the consignee moving the loaded trailer from the destination ramp. Plan V pertains to joint rail-motor operations on an end-to-end basis, under which the railroad transports trailers under joint rail-motor rates, either after initial movement over the highway or for final movement over the highway.

No. TC-4 at 10 a.m., and train No. NE-74 at 2:25 p.m. Westbound from Maybrook, Erie had two schedules, trains Nos. NE-99 and NE-97. These trains were integrated with New Haven's trains to and from Maybrook. The latter consisted basically of two westbound trains operating daily from Boston and three daily eastbound trains to Boston. These trains also served several intermediate points in New England, principally Providence and New Haven. From the latter point, two daily trains were operated to Springfield, Mass., serving Hartford. There were certain modifications in these schedules on weekends.

The pertinent schedules of the connecting New Haven trains operating in and out of Maybrook on the inclusion date were as follows:

Eastbound

Trains Nos.	Depart Maybrook	Arrive		
		New Haven	Providence	Boston
CB-2 -----	6:30 a.m.	10:30 a.m.	1:40 p.m.	2:30 p.m.
OB-2 -----	2:00 p.m.	6:30 p.m.	11:45 p.m.	¹ 2:00 a.m.
OB-4 -----	5:00 p.m.	9:10 p.m.	¹ 2:00 a.m.	¹ 5:00 a.m.
ON-6 -----	9:30 p.m.	¹ 3:10 a.m.	-----	-----

	Depart New Haven	Arrive	
		Hartford	Springfield
NS-2 -----	1:15 a.m.	2:45 a.m.	4:45 a.m.
NS-4 -----	6:30 p.m.	8:00 p.m.	9:40 p.m.

Westbound

	Depart		Arrive	
	Boston	Providence	New Haven	Maybrook
BN-1 -----	6:00 a.m.	9:55 a.m.	2:40 p.m.	-----
ACB-1 -----	5:30 p.m.	6:25 p.m.	8:35 p.m.	² 1:35 a.m.
BO-1 -----	7:00 p.m.	8:40 p.m.	11:45 p.m.	² 7:30 a.m.

	Depart New Haven		Arrive Maybrook	
NO-1 -----	9:30 a.m.		3:30 p.m.	
NO-3 -----	10:00 p.m.		³ 5:00 a.m.	

¹Next day from Maybrook.

²Next day from Boston.

³Next day from New Haven.

The scheduled connection, eastbound was train No. CB-2 (EL) to train No. CB-2 (NH), train No. TC-4 to train No. OB-2, and train No. NE-74 to train OB-4, and westbound it was train No.

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ACB-1 to train No. NE-99 and train No. BO-1 to train No. NE-97. There was no interchange of engines or cabooses, apparently because Erie's equipment lacked cab signals required on New Haven's lines.

Meetings were held from time to time at which Erie and New Haven officials discussed problems arising out of the Maybrook interchange, and there was a regular exchange of letters, telegrams, and telephone calls relating to such problems. Such a meeting was held at New York, N. Y., on August 8, 1968, at which agreement was reached on, among other things, a new arrangement to govern Erie's connection with New Haven's train No. CB-2. At that time New Haven was making up train No. CB-2 at Maybrook, using cars received from Erie's trains Nos. EL-100 and TC-6, scheduled to arrive at Maybrook at 12:25 a.m. and 12:30 a.m., respectively. Train No. CB-2 was scheduled to depart Maybrook at 2:30 a.m. To improve the interchange and to insure early afternoon arrival of train No. CB-2 in Boston, Erie agreed to make up a train No. CB-2 at its Port Jervis, N. Y., yard, from cars arriving on train No. TC-6 and other trains, and to preclassify the train in four blocks of cars, namely, Maybrook, Cedar Hill,⁵ Providence, and Boston. Erie's train No. CB-2 was scheduled to depart Port Jervis at 4:30 a.m. for arrival at Maybrook at 6 a.m. After dropping the Maybrook block, which would include all cars requiring icing, all cars for destinations located in the Maybrook service area, and certain other categories,⁶ the train would be switched and moved promptly to Cedar Hill on the schedule, previously noted, in effect on the inclusion date. There, the Cedar Hill block would be dropped and the two remaining blocks filled out with any other Boston and Providence cars available for movement. Operations under this arrangement commenced on August 12, 1968.

New Haven had for many years maintained a regular icing station at Maybrook, and there had serviced cars requiring icing, including those received from Erie. Where close connections are maintained, as with train No. CB-2, cars requiring icing would be held over for movement on later departures. There is no appreciable movement westbound through Maybrook of cars requiring icing.

⁵ Cedar Hill, located adjacent to New Haven, Conn., was the primary classification yard of the New Haven.

⁶ Including: "high and wides" and "open-top" loads.

Prior to this rescheduling of train No. CB-2, the late arrival of many occasions of Erie's connecting trains had impeded the makeup of the train by New Haven, and had resulted in cars missing the connection and in the New Haven being unable to place cars at Boston early enough to satisfy consignees. The new arrangement, despite the brief half hour allotted at Maybrook, was expected to result in an expedited service. Under the revised arrangement, also, Erie undertook to tender to New Haven at least 40 cars per day to Cedar Hill and destinations beyond.

There was no undertaking by Erie to preclassify and block its train No. TC-4 for connection with New Haven's train No. OB-2. As seen, the schedules allowed 4 hours at Maybrook for this connection if the trains are on time, and Erie's traffic witness estimated that, on the average, classification of this train would be a 2-hour task. The parties are in dispute as to the obligation of Erie to preclassify and block train No. NE-74 for connection with New Haven's train No. OB-4. There is agreement that Erie, at least prior to July 24, 1967, was obligated to make up a Boston block of cars to move into Maybrook at the head end of train No. NE-74. The New Haven connection, train No. OB-4, had an advertised through service only to Boston, and no Providence block was required. According to Erie's traffic and sales officials, however, a meeting was held in June 1967 at which New Haven's officials are alleged to have requested that Erie discontinue making up the Boston block on train No. NE-74, and instead to make up a block of perishables, that is, cars requiring icing (icers) and cars with mechanical refrigeration (reefers). The position of the New Haven at that time, according to Erie's general superintendant who participated in the meeting, was that makeup of a perishables block would eliminate considerable delay in handling the train at Maybrook and would be more useful to New Haven in expediting the interchange than a Boston block. Erie, accordingly, thereupon instructed its employees to make up a block of perishables as requested, and to discontinue the Boston block.

On the other hand, the New Haven's freight symbol books, effective April 15, 1968, and prior thereto, governing service during this period, shows New Haven's understanding of this coordinated schedule to be that train No. NE-74 was to arrive Maybrook with Boston cars blocked on the head end. New Haven's manager of transportation during this period, now a consultant

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for Penn Central, testified that he had no knowledge of the July 1967 meeting or of any request by New Haven to alter the previous arrangement to make up a Boston block on train No. NE-74. The importance in this proceeding of the question of preclassification and blocking by Erie, stems from Penn Central's position, later discussed, that such changes as were made by Penn Central in the schedules of the connecting New Haven trains were attributable, in part, to alleged service deficiencies on the part of Erie.

As stated, Penn Central commenced operation of the New Haven lines as of January 1, 1969. Exactly 2 weeks later, without prior consultation with Erie, Penn Central canceled operation of eastbound train No. CB-2 east of Cedar Hill, effective January 14, 1969. As of the same date, and without prior notice to Erie, Penn Central also canceled operation of westbound train No. ACB-1 east of Cedar Hill. In an effort to have the through services of these trains restored, Erie requested a meeting with Penn Central's officials, and such a meeting was held on February 4, 1969, at New York. The matter was discussed, but no changes in service resulted.

Subsequently, on or about May 1, 1969, Penn Central discontinued the classification at Maybrook of trains Nos. OB-2 and OB-4, and commenced to make up the Boston and Providence blocks on these trains at Cedar Hill. As a result, cars received unclassified at Maybrook from Erie, destined to Providence or Boston, were set off at Cedar Hill and there classified and blocked for further movement on later trains. On or about June 5, 1969, Penn Central's Embargo No. 4, applicable generally throughout the Penn Central system, was made applicable to the Maybrook interchange. The substance of this embargo, with certain exceptions, is to limit Penn Central's acceptance of loaded flat-bed or open-top trailers in TOFC service to trailers tendered on the ground at Penn Central ramps. The effect at Maybrook was virtually to terminate the interchange, EL to PC, of flat-bed and open-top TOFC traffic.

From Cedar Hill to Hartford and Springfield, train No. NS-4 was discontinued on June 30, 1969, and train No. NS-2 was discontinued 10 days later. With the latter change, defendant commenced the operation of train No. NS-3, departing Cedar Hill at 8 p.m., and arriving at Hartford and Springfield at 9:30 p.m. and 11:45 p.m., respectively. Later, in September 1969, as a stopgap measure, train No. NS-1 was added from Cedar Hill to Hartford, but that operation is being phased out.

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By tariff supplement published to become effective September 30, 1969, defendant discontinued Maybrook as a regular icing station, and as a result all icing operations thereat have been terminated and the icing equipment dismantled.

Finally, as disclosed at the hearing, trains Nos. ON-6, Maybrook to Cedar Hill, and NO-1, Cedar Hill to Maybrook, were discontinued, effective November 10, 1969.

These and other schedule changes for the connecting trains operated by Penn Central at the time of the hearing are compared below with the trains and schedules as of the inclusion date (the latter are italicized):

Eastbound

Trains Nos.	Depart		Arrive	
	Maybrook	New Haven	Providence	Boston
CB-2-----	7:45 a.m.	12:45 p.m.	----- discontinued -----	
Do -----	<i>6:30 a.m.</i>	<i>10:30 a.m.</i>	<i>1:40 p.m.</i>	<i>2:30 p.m.</i>
OB-2-----	2:00 p.m.	7:00 p.m.	11:00 a.m.	12:30 a.m.
Do -----	<i>2:00 p.m.</i>	<i>6:30 p.m.</i>	<i>11:45 p.m.</i>	<i>12:00 a.m.</i>
OB-4-----	5:00 p.m.	10:00 p.m.	14:00 a.m.	16:35 a.m.
Do -----	<i>5:00 p.m.</i>	<i>9:10 p.m.</i>	<i>12:00 a.m.</i>	<i>15:00 a.m.</i>
ON-6-----	-----	-----	----- discontinued -----	
Do -----	9:30 p.m.	13:10 a.m.	-----	-----

	Depart	Arrive	
	New Haven	Hartford	Springfield
NS-1 (being phased out)-----	8:30 a.m.	10:15 a.m.	-----
NS-2 (discontinued)-----	<i>1:15 a.m.</i>	<i>2:45 a.m.</i>	<i>4:45 a.m.</i>
NS-3-----	8:00 p.m.	9:30 p.m.	11:45 p.m.
NS-4 (discontinued)-----	<i>6:30 p.m.</i>	<i>8:00 p.m.</i>	<i>9:40 p.m.</i>

Westbound

	Depart		Arrive	
	Boston	Providence	New Haven	Maybrook
BN-1-----	1:00 a.m.	4:55 a.m.	9:40 a.m.	-----
Do -----	<i>6:00 a.m.</i>	<i>9:55 a.m.</i>	<i>2:40 p.m.</i>	-----
ACB-1-----	-----	-----	-----	----- discontinued -----
Do -----	<i>5:30 p.m.</i>	<i>6:25 p.m.</i>	<i>8:35 p.m.</i>	<i>21:35 a.m.</i>
BO-1-----	7:00 p.m.	8:40 p.m.	11:45 p.m.	27:30 a.m.
Do -----	<i>7:00 p.m.</i>	<i>8:40 p.m.</i>	<i>11:45 p.m.</i>	<i>27:30 a.m.</i>

	Depart New Haven	Arrive Maybrook
NO-1-----	-----	----- discontinued -----
		<i>9:30 a.m.</i>
CB-1-----		<i>3:30 p.m.</i>
		9:35 p.m.
NO-3-----		31:35 a.m.
		10:10 p.m.
Do -----		34:55 a.m.
		10:00 p.m.
		35:00 a.m.

See footnotes on next page

¹Next day from Maybrook.

²Next day from Boston.

³Next day from New Haven.

It should be noted in the above schedules that while trains Nos. OB-2 and OB-4 show a next-morning service, Maybrook to Boston, it is now the practice of Penn Central, as previously discussed, to set off Boston and Providence cars at Cedar Hill for classification and subsequent movement on later trains.

Erie contends that the foregoing schedule changes and the changes made by Penn Central in its operating practices affecting the Maybrook interchange, as previously discussed, are in contravention of the appendix 3 conditions, in that they constituted a downgrading of the Maybrook route by substantially reducing the quality and standards of service on that route prevailing on the inclusion date. As a result, Erie alleges, traffic moving over that route has declined substantially and continues to decline at an accelerated pace, with serious, adverse effect on Erie's revenues. Erie seeks not only the immediate restoration of the schedules and service prevailing on the inclusion date, but also the prompt notification of such restoration to the shipping public by the defendant, and the payment by defendant to complainant of damages in an amount sufficient both to compensate Erie for the losses it has suffered as a result of the alleged violations and to insure that defendant will not again violate these conditions. In the matter of damages, Erie estimates that its losses as a result of defendant's actions, for the first 10 months of 1969, aggregated some \$6.6 million, and it seeks an award in that amount or in such other sum as the Commission finds appropriate.

The amount of the award sought is computed, briefly, as follows: The record shows that the number of units (loaded cars and loaded trailers on flatcars) handled over Maybrook during the first 10 months of 1969 was 28, 181 units fewer than were handled over Maybrook during the first 10 months of 1968. Multiplied by an average revenue per unit of \$236, the revenue loss to Erie totals approximately \$6.6 million. The average revenue per unit is derived from the findings in the *final inclusion* report, at pages 78-79, that traffic interchanged by Erie with New Haven during the first 6 months of 1968 consisted of about 53,000 cars yielding about \$11.9 million to Erie, or about \$225 per car. Adjusted to reflect rate increases of about 5 percent since put into effect, Erie reaches the adjusted figure of \$236 per unit. Erie recognizes that in computing indemnities to protect and com-

compensate competing railroads from the adverse effects of the Penn Central merger this Commission utilized a factor of 50 percent of the gross revenues from the traffic lost or expected to be lost, to allow for the corresponding operating expenses to be saved.⁷ However, Erie contends that such a factor should not be applied in this instance because some indeterminate portion of the traffic lost here will never be regained by Erie even if the Penn Central services are restored, and because Erie will suffer increasingly heavy losses over and above the \$6.6 million during the period between October 1969 and the date such services are ultimately restored.

Erie takes the further position that if we conclude that an award of damages is justified but are unable to fix the amount thereof on this record, further hearing on this issue should be held, and for this purpose Erie would waive the appendix 3 specification that decision thereon be reached within a 90-day period, providing an order requiring restoration of services is issued within that period.

The major impact of the schedule changes complained of and Penn Central's revised operating practices, according to Erie, was to increase considerably the transit time of the Maybrook interchange traffic to Providence and Boston, from Boston and Providence, and from Cedar Hill to Hartford and Springfield. For example, loaded cars and trailers on flatcars were formerly interchanged at Maybrook from EL's train No. CB-2 to NH's train No. CB-2, with the Providence and Boston blocks moving directly to destination; and a car departing Maybrook at 6:30 a.m. on train No. CB-2 would arrive in Boston at 2:30 p.m., the same day. With the discontinuance of train No. CB-2 beyond Cedar Hill, a Boston car, whether classified at Maybrook or Cedar Hill,⁸ now moves to Boston on the next scheduled train, No. OB-2 which arrives in Boston at 2:30 a.m. the following morning, or 12 hours later than former train No. CB-2. Similarly, Boston and Providence cars formerly scheduled to move on train No. OB-2 now cannot reach destination earlier than on train No. OB-4's schedule, and cars formerly scheduled to

⁷Supplemental report on reconsideration and further hearing in *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 330 I.C.C. 328, at 346-350.

⁸Classification of Train No. CB-2 is now by Penn Central, since it was agreed by EL and PC officials, after the February 4, 1969, meeting at which Penn Central refused to restore Train No. CB-2 east of Cedar Hill, that Continued classification of this train into Boston and Providence blocks at Port Jervis would be purposeless.

move on train No. OB-4 would now move on the next scheduled train No. OB-2. Thus, a Boston car coming into Maybrook at 10 a.m. on (EL) train No. TC-4 would have reached Boston at 2 a.m. the following morning on train No. OB-2 under the schedules in effect on the inclusion date. Now it would be scheduled to arrive Boston on train No. OB-4 at 6:35 a.m., or 4 hours 35 minutes later. Boston cars from (EL) train No. NE-74, formerly scheduled to move on train No. OB-4 for arrival at Boston at 5 a.m., would now arrive Boston at 2:30 a.m., the following day, or 21 hours 30 minutes later. Transit time to intermediate points has increased in proportion.

In the opposite direction, a westbound car, ready for movement from Boston at 5:30 p.m., would reach Maybrook under the inclusion date schedules at 1:35 a.m. the following morning on train No. ACB-1, for arrival at Chicago on (EL) train No. NE-99 at 5:15 a.m. on the second morning. Now it could move in either of two ways: On train No. BO-1, departing Boston at 7 p.m. for arrival at Chicago on (EL) train No. NE-97 at 6:30 p.m. on the third day, or 13 hours 15 minutes later than on train No. ACB-1, or departing Boston on train No. BN-1 at 1 a.m. the following morning, being transferred to train No. CB-1 at Cedar Hill, and interchanged to train No. NE-99 at Maybrook for arrival at Chicago 1 day later than on train No. ACB-1. As with the east-bound traffic, there are proportionate increases in the transit times to intermediate points.

Under the inclusion date schedules, Hartford and Springfield traffic arriving at Cedar Hill at 6:30 p.m. and 9:10 p.m. on trains Nos. OB-2 and OB-4, respectively, from the Erie connections at Maybrook, was scheduled to move out at 1:15 a.m. the following morning on train No. NS-2, arriving Hartford at 2:45 a.m. and Springfield 4:45 a.m. Train No. NS-4, which departed Cedar Hill at 6:30 p.m. for arrival 8 p.m. at Hartford and 9:40 p.m. at Springfield, had no published connection with the trains herein considered, but could have been, and was, used to move Hartford and Springfield cars arriving Cedar Hill on train No. CB-2, as well as traffic laying over from the previous day's trains. Under the present published schedules of record herein, however, the 8 p.m. scheduled departure time of train No. NS-3 from Cedar Hill does not permit connection with train No. OB-4, or as a practical matter with train No. OB-2 either, and Hartford and Springfield traffic from these trains must lay over a full day. Some of the Hartford traffic moves out the following morning

on train No. NS-1, arriving at 10:15 a.m., or 7 hours 30 minutes later than on train No. NS-2. Penn Central's general superintendent for the New Haven Division testified, on the other hand, that despite the published schedule, the departure time of train No. NS-3 is being delayed, up to midnight at times, in order to make connection with train No. OB-2. Under this practice, if continued, Hartford and Springfield traffic from train No. OB-2 receives better service than it did on train No. NS-2. Such traffic from train No. OB-4, on the other hand, if it misses connection with the midnight departure of train No. NS-3, has a somewhat longer layover at Cedar Hill.

The net effect of these increased transit times, Erie alleges, has been to discourage movement over the Maybrook route, and, as shown, such movements have suffered a significant decline since the inclusion date. Diminution in the scheduled service available over the former New Haven line to and from New England points east of Cedar Hill, moreover, coupled with elimination of the icing station at Maybrook and imposition of the flat-bed-open-top TOFC embargo, have left Erie with virtually no service basis on which to solicit traffic over this route in the future. Shippers are looking to other carriers and other modes not only for more expeditious movement of their traffic, but those using special equipment, whether carrier- or shipper-owned, are becoming increasingly wary of the greater turnaround time on empty equipment required under the revised PC schedules over Maybrook.

Erie introduced evidence of shipper reaction through witnesses for four shippers. These include Wilson & Company and Armour & Company, large processors of fresh meats and meat products in the Midwest. Both ship considerable traffic, in icers, reefers, and TOFC, over Chicago to points in the East, including Boston, Providence, and other points in New England, using Erie, among other railroads, eastward from Chicago. Wilson's records show, for example, that in a 6-month period April through September 1968, Wilson shipped 569 carloads via Erie over Maybrook, of which 441 went to Boston and 34 to Providence. During the same period and over the same route Wilson shipped 227 loaded trailers on flatcars, of which 42 went to Boston and 107 to Providence. During a comparable period in 1969, over the same route, Wilson's traffic had declined to 19 carloads, of which 5 went to Boston and 3 to Providence, and 20 trailer loads, of which 2 went to Boston and the remainder to other points in New England. Wilson's

general traffic manager attributes the drastic decline in traffic over this route to delays in transit which commenced in January 1969. Wilson's traffic volume to the Boston-Providence area has not declined, but has in fact increased somewhat. Wilson also routes via Erie over the Dereco route and continues to use that route for TOFC traffic. During the 6-month period in 1968, a total of 277 trailer loads moved to Boston over that route, and during 6 months 1969, that movement totaled 185 trailer loads. Over Maybrook the EL-NH service provided third-morning delivery at Boston. The afternoon arrival time of train No. CB-2 had facilitated the extremely early morning placement of cars and delivery of trailers required by Wilson's consignees.

Armour's traffic patterns show similar decline to Boston and Providence. Over the Maybrook route during the first 10 months of 1968, Armour shipped 402 carloads, of which 175 went to Boston and Providence and the remainder to other New England points, and 544 trailer loads, of which 371 went to Boston and Providence. During the first 10 months of 1969, over this route, Armour shipped 94 carloads, including 39 to Boston and Providence, and 143 trailer loads, including 109 to Boston and Providence. During these periods, Armour also used the Dereco route, but to a lesser extent. Armour's consignees also require early morning delivery.

Late in January 1969, Wilson and Armour urged Penn Central either to restore the New Haven service to preinclusion level or to provide comparable service over Penn Central's lines. On February 18, 1969, Wilson and Armour, joined by other major meatpackers, sent a telegram to Penn Central which stated, as here pertinent:

*** We also urgently need through Boston train for refrigerator cars and consistently reliable switching service from B&A yard to New Haven yard Boston. PC has deteriorated Maybrook connection with EL and must offer same service or restore Maybrook connection.

Within a matter of weeks after that, Penn Central put into operation a through TOFC train over its single-line route from Chicago to Boston. Wilson and Armour are using this new service and receiving satisfactory second-morning delivery at Boston. Both have also increased their use of Penn Central single-line service in the movement of carload traffic to New England points.

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Another public witness represented a motor common carrier authorized to handle freight forwarder traffic under plan I⁹ TOFC arrangements. This carrier, Midwest Haulers, Inc. (Midwest), handles traffic for a number of large freight forwarders, and has the option of moving this traffic over the highway in its own road equipment or by railroad under plan I. Midwest is handling traffic between Chicago and St. Louis, on the one hand, and Boston, Providence, New Haven, Hartford, Bridgeport, and other New England points, on the other. Some traffic is routed over the Dereco route, some Penn Central direct, and some over Erie's ramp at Croxton. Traffic routed over the Maybrook route has declined in 1969. A study of Midwest's traffic over this route for 1-month periods in 1968 and 1969 shows that loaded trailers moving in both directions between Chicago and Providence-Boston aggregated 143 in April 1968 and 87 in August 1968, while in April and August 1969 they aggregated 51 and 51, respectively. Midwest attributes the decline to the increased time in transit over the Maybrook route since January. The record does not indicate how the traffic formerly moving over Maybrook is now moving. It would not move on Penn Central's TOFC trains, however, as that carrier does not offer plan I TOFC rates on its system generally.

Finally, a shipping association at Los Angeles, Calif., ships general merchandise from a consolidating agent at Boston to member wholesalers in California, and during 1968 shipped about 580 carloads over the Maybrook route. Until September 1969, the association was moving this traffic in the same volume over this route, but has since diverted this movement to Penn Central's lines. The association was receiving adequate service over Maybrook, sixth-day delivery in California, but discontinued that routing after a "serious deterioration" in service over that route and after vigorous solicitation by Penn Central.

The loss of traffic from these and other shippers since the inclusion date has adversely affected Erie's overall financial posture. Erie is burdened with substantial debt; some \$35.7 million in bonds maturing in the next several years and sinking fund obligations in respect of government-guaranteed loans rising

⁹Under plan I, the railroad has no direct contact with the shipper but simply substitutes for the motor carrier on all or part of the road haul. The motor carrier solicits, bills, and handles movements to and from the rail terminal, and the railroad transports the motor carrier's trailer under a division of the motor carrier rate, or for a flat charge.

from \$0.75 million annually to \$2.25 million annually in 1972. As of September 30, 1969, Erie had \$2.2 million in working capital as compared with \$11.2 million in September 1968, and its working capital at the end of October 1969 was estimated at about \$185,000 as compared with \$14.2 million in October 1968. Erie's cash, including temporary investments, was estimated at about \$6.5 million as of October 30, 1969, as compared with \$18.4 million in October 1968. Although Erie's gross revenues increased 3 percent in 1969, its gross revenues for the third quarter show increase of only 0.32 percent, despite rate increases and despite improvements in operating efficiency that increased gross ton-miles per man-hour by 6 percent and car utilization by 7 percent during the first 9 months of 1969. It was in the third quarter of 1969, according to Erie's officials, that the full impact of the alleged violations was felt. Erie's efforts, since the inclusion date, to gain access to New England through joint rail-motor carrier arrangements are described by its chief executive officer as unsuccessful in piercing the "Chinese wall" that Penn Central has built around New England. As this witness put it: "***we have had 100,000 carloads a year going through the Maybrook gateway for years. And 50 percent of it is now gone."

In defense, Penn Central contends that certain of the actions complained of are not within the scope of appendix 3, and that such actions as may be found to be within the scope of the protective conditions are not in violation thereof. Defendant further contends that even if such violation is found and ordered terminated, no basis exists for additional relief in the form of damages. In broad scope, the Penn Central position is that the schedule and other changes it has made were based on considerations of transportation economics and were consistent with good railroad practices, that the protective conditions were never intended to place defendant in an operational straitjacket, that the New Haven train schedules to and from Maybrook in effect on the inclusion date were in large part "paper" schedules and the actual services being performed thereunder did not differ in material respect from those now available, and that the decline in complainant's traffic through Maybrook may be attributed in part to diversion of such traffic to Erie's Dereco route, in part to diversion to Penn Central's expanded and improved single-line route, and in part to market and other factors having no relation to the Maybrook interchange. Defendant would have us dismiss the complaint in its entirety.

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Turning first to the limited TOFC embargo imposed in June 1969, defendant points out that this restriction governs its interchange relations with *all* other railroads and has been effective systemwide since the merger and prior thereto on the New York Central lines. The embargo was first issued in 1966 on the latter lines (after a serious accident involving this type of equipment) to enable the carrier's technical officials to insure that such equipment meets appropriate safety standards.¹⁰ Penn Central insists that the embargo relates only to safety standards and does not come within the purview of appendix 3. The conditions there laid down were designed to preserve the competitive route via Maybrook, and defendant contends that the embargo does not constitute a device to downgrade Maybrook or to enable Penn Central to capture competitive traffic, and that even if it were Penn Central could be the beneficiary of a diversion of such traffic only if it went on the rails at a point where defendant also has a ramp and if the traffic qualified for acceptance under embargo exceptions. Defendant points out that in connection with the decline in Erie's traffic of this type over Maybrook, there has been no showing that the embargo was responsible for the decline.

Defendant justifies the discontinuance of icing at Maybrook on economic factors, and points to a significant trend among railroads generally to reduce the number of icing stations. Over a 10-year period, the number of ice bunker cars moving on the railroads has declined by 55.7 percent while the number of mechanical reefer cars has increased by 470 percent. During this period, both Erie and Penn Central have reduced the number of icing stations by almost 70 percent. The decline in the need for icing at Maybrook, according to defendant, is also influenced by the recent and continuing relocation of many receivers of perishables formerly served by NH at the Boston Market Terminal to a New England Produce Center served by PC at Chelsea, Mass. Defendant estimates that at the time the icing at Maybrook was

¹⁰ EMBARGO NO. 4: The Penn Central Company will not accept for TOFC-COFC service any loaded flatbed trailers and loaded opentop trailers in interchange. EXCEPTIONS: (1) Traffic will be accepted if delivered via highway at proper TOFC-COFC terminals. (2) Twenty Foot flatbed type wooden floor marine container with corner posts and horizontal bars at top of corner posts will be accepted in rail interchange. (3) Opentop trailers with sides and ends exceeding four feet (4') in height above trailer floor deck will be accepted in rail interchange providing sides and ends of trailer are a permanent non-removable part of the trailer unit and lading does not protrude above the sides and ends of the trailer.

discontinued, in September 1969, an average of only six cars per day were being serviced.

Defendant also makes the argument that icing at Maybrook was not only a deficit operation, the deficit ranging from \$505 to \$3,863 per month in 1969, but was an operation that New Haven, and *a fortiori* Penn Central, was under no tariff obligation to perform. Rule 235 of the governing tariff provides, as here pertinent, that:

At interchange points, where cars under refrigeration are required to be re-iced, it is the obligation of the delivering road haul carrier to perform such icing. In the absence of icing arrangements on delivering road haul carrier, it may arrange with receiving carrier to perform required reicing service.

Defendant points out that Erie maintains no icing station within 500 miles of Maybrook and has never assumed any of the costs of icing cars at Maybrook. In times past, NH officials had brought this matter to Erie's attention but no changes in the arrangements resulted. Defendant contends that insofar as interchange at Maybrook is concerned, Erie is the "delivering road haul carrier" and has the tariff obligation to perform the reicing or to make the necessary arrangements, at its expense, to have that done.

The principal complaint of Erie relates to the discontinuance of trains and to defendant's practices affecting transit time. As stated, Penn Central's position is that no changes have occurred which adversely affect transit time. In support, defendant alleges that on the inclusion date, and long prior thereto, complainant had failed consistently to bring its eastbound trains into Maybrook on schedule or properly classified and blocked, and had failed consistently to bring its westbound trains into Chicago on schedule in conformance with its holding out to the public, so that the service actually being performed on and prior to the inclusion date, as well as since, never even approached the scheduled, advertised service. Defendant regards the changes which it has made since inclusion as steps taken to conform its own schedules and practices to the actual, as opposed to printed, schedules and practices being observed by complainant. The net result, it insists, reflects no material increase in transit time or other adverse effect on the standards of service, and hence constitutes no violation of the conditions.

It is clear from the record that the occasions were numerous when one or another of Erie's connecting trains at Maybrook

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arrived there or at Chicago behind schedule. We have already referred to the circumstances leading to the EL-NH meeting in August 1968 and the agreement there reached on new arrangements to improve the interchange to NH's train No. CB-2. The testimony is conflicting as to the on-time performance of Erie's train No. CB-2 following commencement of service by that train on August 12, 1968, and the adequacy of Erie's classification and blocking of that train. Between that date and the end of the year, according to defendant's witness, Erie's train was on time 56 times, with "little or no blocking of cars," and New Haven's train No. CB-2 was "invariably 2 to 5 hours late arriving Boston." According to Erie's manager of operations, on the other hand, Erie was on time 51 times during this period, and was constructively on time an additional 24 times, or on time for a total of 54 percent of the days. In the latter connection, Erie contends that on 24 days during this period, New Haven had advanced its departure time from Maybrook by 2 hours to 4:30 a.m., because of track repair work on the line near Derby, Conn., thus making it impossible for Erie to make the connection. Erie contends that some difficulty was first encountered in performing the classification and blocking satisfactory to New Haven, but that with the assistance of New Haven operating officials that service was improved and after the first few weeks **Erie's classification and blocking of the train, by industry standards, was "excellent."**

The parties are in agreement that there was some disruption of service on New Haven's line in the fall of 1968 due to track repairs. According to defendant, this occurred only during a period of less than 2 weeks in December; Erie contends that the disruptions were more or less continuous between October 15 and the end of the year. Erie's position finds some support in letters, introduced by defendant, to Erie officials from New Haven's vice president of freight traffic, dated November 5 and December 4, 1968, in which the latter states, among other things: "On CB-2, we did change its schedule from Maybrook on October 9th through the month in order to complete some track work on our Maybrook line ***,", and "***we are doing some more track work between Danbury and New Haven which will require three to four weeks."

Subsequent to inclusion, Erie's train No. CB-2 connected with defendant's train No. CB-2 10 times out of the 13 times in January 1969 that the latter's train operated through to Boston. No complaints were received from defendant that the train was improperly

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blocked, and in support of its contention that the train was properly blocked on these and subsequent days Erie introduced computer runs of the daily consist of (EL) train No. CB-2 for January 1969 which, on their face, indicate that the train was, in fact, properly blocked on these days. As an attachment to its brief filed subsequent to the hearing, Penn Central submitted what appear to be daily worksheets made by personnel of its New Haven Division showing what purports to be the makeup of (EL) train No. CB-2 arriving at Maybrook. On the basis of these, defendant contends that this train was not properly blocked in January, and that although in many instances the order of the cars in the train as specified on Erie's computer runs was correct, the waybills show that the destination data relied on by Erie was erroneous.

This attachment to Penn Central's brief also contains other evidentiary matters not a part of the record, such as a compilation purported to be the daily train lists prepared by New Haven personnel to show the standing of the cars in (EL) train No. CB-2 on its daily arrival at Maybrook in November and December 1968. By motion filed December 4, 1969, Erie urges us to reject this attachment, on the ground that it is composed of extensive extra-record materials from defendant's files (and New Haven's), and that their submission in this manner is contrary to the Commission's rules and offends all sense of fair procedure, since complainant has had no opportunity for cross-examination thereon, and in the absence of provision for oral argument or reply brief will have no opportunity for reply or rebuttal. The motion is well taken. The attachment, designated appendix B to defendant's brief, is rejected and will not be considered. Appendix A to the brief is merely a reprint of our protective conditions and no action with respect thereto is necessary.

Defendant considers significant the fact that (NH) train No. CB-2 had an extremely tight schedule to Boston, and that in its day-to-day operation, even assuming a timely connection at Maybrook, was regularly late in arriving at Boston. As a consequence, the placement of cars and the unloading of trailers at the Boston ramps from train No. CB-2 conflicted with the making up and unloading of outbound trains Nos. ACB-1 or BO-1, depending upon the time of day. Since the outbound traffic took precedence, the net result was that delivery at Boston of cars and trailers as a practical matter was effected the following morning, the same result that would obtain, according to defendant, and does now obtain, from movement of the traffic on subsequent trains.

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Defendant contends also that (NH) train No. CB-2 was essentially a Cedar Hill train, with only 6 or less cars moved on a daily average to Providence and 10 or less cars moved daily to Boston, exclusive of defendant's own traffic or the traffic of other carriers picked up on train No. CB-2 at Cedar Hill for movement to these destinations.

We have mentioned defendant's contention that Erie has failed to make up a Boston block on train No. NE-74 as required. Defendant contends, in addition, that the on-time performance of this train was "horrible." During a 9-month period, February through October 1968, train No. NE-74 was on time only 97 out of 274 days of operation, and during a similar 9-month period in 1969 it was on time 90 out of 259 days of operation. The evidence is conflicting as to the number of times during these periods that train No. NE-74 missed its scheduled connection with train No. OB-4. According to defendant, train No. NE-74 failed to connect 102 times during the 9 months in 1968 and 117 times during the 9 months in 1969. Complainant claims connection was made about 50 percent of the time during the 9 months in 1968, and that during the first 7 months of 1969 connection was made about 65 percent of the time. Complainant points out that New Haven's commitment prior to the EL-NH meeting in August 1968 was to protect the connection with train No. OB-4 only to the scheduled 2:25 p.m. arrival of train No. NE-74, but that it was agreed at that meeting to grant Erie an additional 35 minutes tolerance, or until 3 p.m. Complainant contends that defendant consistently failed to observe this tolerance, and "ran away" from train No. NE-74 even when it arrived Maybrook well before 3 p.m. This occurred, according to Erie, on 20 days in 1969.

The connection with New Haven's train No. OB-2 on the inclusion date, as stated, was Erie's train No. TC-4 scheduled to arrive Maybrook at 10 a.m., or 4 hours before train No. OB-2's scheduled departure. During much of 1968 train No. OB-2 also connected with Erie's train No. NE-98, also scheduled to arrive Maybrook at 10 a.m. The record shows that train No. NE-98 was discontinued on or about October 31, 1968, but does not indicate exactly when train No. TC-4 commenced to operate. New Haven's schedules effective in April 1968, do not include train No. TC-4 among train No. OB-2's connections at Maybrook. The EL-NH meeting in August 1968 also brought out an agreement to work toward reaching a better connection with train No. OB-2 by

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trains Nos. TC-4 and NE-98, described as carrying heavy volumes of freight, including perishables. Defendant shows that during the 9-month period in 1968, February through October, train No. NE-98 was on time 101 out of 274 days of operation, and missed the connection with train No. OB-2 about 50 percent of the time. During a like period in 1969, train No. TC-4 was on time only 7 out of 241 days of operation, and missed the connection 210 times. Complainant insists that since trains Nos. NE-98 and TC-4 are not the same train, the foregoing does not indicate deterioration of service. However, complainant tacitly concedes that the performance of train No. TC-4 in 1969 was substantially the same as it was in 1968.

Westbound to Chicago, according to defendant, there was a surfeit of transportation offered from Boston on the inclusion date. Although, as previously shown, westbound traffic over the years has constituted only about 30 percent of the total traffic moving between Boston and Maybrook, the service offered in the schedules was not in this proportion but consisted of two westbound trains to the three eastbound. Moreover, defendant contends, as between the two westbound trains, Nos. ACB-1 and BO-1, the service performed on the latter in transporting a shipment to Chicago did not differ materially from service performed on the former. At the EL-NH meeting in August 1968 the conferees had agreed that train No. ACB-1 was arriving Maybrook 1 to 2 hours late as a rule, and that this was some improvement over previous performance. Early in 1969, after inclusion, Penn Central's on-time performance with train No. ACB-1, and later its successor train No. CB-1, was as bad or worse. The train was on time only once a month. Erie's policy generally was to hold up departure of train No. NE-99 for arrival of the Boston train or the successor train from Cedar Hill. As a result of this and other factors, the on-time at Chicago performance of train No. NE-99 as Erie's general superintendent put it, "was not what we would like." his counterparts on NH and PC insisted that train No. NE-99 was never on time. As a result, according to defendant, due to the late arrival at Chicago of train No. NE-99 the traffic thereon was not delivered to local consignees until the following morning, and traffic destined beyond Chicago missed the major westbound connections. Virtually the same service was provided, defendant argues, on traffic leaving Boston 90 minutes later on train No. BO-1, and offering third-morning delivery at Chicago on train No. NE-97.

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Complainant points out that train No. NE-99 also serves a number of major consignees at Chicago to whom second-day delivery is satisfactory regardless of how late the train arrives. Complainant's traffic official testified that train No. NE-99 made its western connections often, and, when late, made alternate connections equally expeditious to west coast destinations, and that notwithstanding a late arrival at Chicago, train No. NE-99 provides a faster turnaround of TOFC equipment than train No. NE-97. Even an on-time train No. NE-97 cannot make all the afternoon connections available to a late train No. NE-99. The evidence shows, moreover, that train No. NE-99 carries a substantial block of cars to be set off at Lima, Ohio, for interchange with N&W, and that this interchange for which some 8 hours margin is provided, is unaffected by later movement of train No. NE-99. Complainant argues that train No. NE-97 delivery at Chicago can hardly be regarded as a reasonable substitute for train No. NE-99 since the late arrival at Maybrook of train No. BO-1 forces Erie to hold up departure of train No. NE-97 with resultant late arrival at Chicago. During the first 3 months of 1969, for example, train No. BO-1 was on time at Maybrook only 13 times.

Defendant contends that trains Nos. NS-3 and NS-1 are adequate to handle Erie's Hartford and Springfield traffic, and that trains Nos. NS-2 and NS-4 were discontinued for good and compelling reasons. Train No. NS-2 had been established primarily to handle Hartford, Springfield, and other traffic received by New Haven from the former Pennsylvania Railroad in the New York City area, and the consist of this train was merely filled out with Erie's traffic to these points, which in August 1968 averaged about 32 cars a day. This traffic came into Cedar Hill primarily on train No. OB-2, but there were movements on trains Nos. CB-2 and OB-4 as well. Very little of Erie's Hartford-Springfield traffic moved on train No. NS-4, which had been established primarily to provide a connection with the Boston & Albany (B&A) line of the former New York Central at Springfield, for the purpose, among others, of enabling New Haven to dispose of empty cars prior to midnight and thus avoid further per diem charges. After consummation of the Penn Central merger and inclusion therein of New Haven, the Hartford-Springfield traffic of the former Pennsylvania was rerouted through defendant's new electronic classification yard at Selkirk, N. Y., and over the B&A line, thus diverting traffic from train No. NS-2. The

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main purpose for operating train No. NS-4 likewise disappeared with the inclusion. Defendant recognizes that Erie's Hartford-Springfield traffic has declined about 30 percent, August 1969 under August 1968, but attributes this not to any deterioration of service from Cedar Hill but to the superior service offered to these points by Penn Central's new "Trail Van Train."

By upgrading services since its merger and the NH inclusion and by funneling more and more traffic through Selkirk and over the B&A line, Penn Central is able to move larger revenue blocks of cars to and from major points in New England and offer single-line service to numerous points west of Selkirk served by Erie and its connections. Penn Central asserts that in approving the merger and the inclusion this Commission understood and expected that Penn Central would improve its services and develop its traffic, and that nothing in appendix 3 was intended to impede improvement of Penn Central's position provided this was not accomplished by downgrading the Maybrook route so as to divert substantial traffic therefrom. In other words, that appendix 3 was not designed to prevent diversion of traffic from Erie by Penn Central, but only to prevent such diversion by the cutting off or impeding of Erie's access to or egress from New England points over the Maybrook route or by the deterioration of that route. Penn Central insists that such traffic as it has diverted from Erie is attributable to the superior routings and services, and not to any actions it has taken with respect to the Maybrook route.

GENERAL DISCUSSION AND CONCLUSIONS

Our primary concern here is whether defendant's actions complained of were in violation of the protective conditions imposed in appendix 3 of the *final inclusion* report. We need not, for the purposes of this determination, decide whether defendant's actions were economically justified, or whether from a general transportation standpoint such actions were consistent with good railroad operating practices. Conceivably, defendant's actions may have been compelled by economic necessity and may have conformed with good operating practices, but if they increased the time in transit over the Maybrook route or otherwise adversely affected the standards of service thereon, to the end result that the Maybrook route has been or likely will be destroyed as a competitive service route, then there is violation of the protective conditions and we must require remedial steps.

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Such steps, as a minimum, would be those required to restore to full vigor the competitive service route and channels of trade existing over Maybrook when these conditions became effective on the inclusion date. On the question of damages, we confine our consideration to the circumstances of this proceeding, and since the evidence does not justify such an award, there is no need for a general finding as to whether an award of damages may be made under appendix 3 in other circumstances.

The decisions to impose Embargo No. 4 and to discontinue icing at Maybrook were apparently made somewhere in the corporate hierarchy of defendant, but the changes in train schedules and classification practices were made by defendant's general superintendent of transportation at New Haven, who, prior to the merger, had been with the Pennsylvania and who assumed his post at New Haven on the inclusion date. Just prior to that date he had been exposed to a detailed operating plan prepared by Penn Central for the inclusion proceeding under which the carrier expected to achieve substantial savings in the operation of the New Haven through consolidation of terminals, greater utilization of equipment, and other economies made possible by the inclusion. During the 14-day period which culminated in his decision to discontinue trains Nos. CB-2 and ACB-1 east of Cedar Hill, he consulted with his superiors and with operating personnel, but not with defendant's legal staff with regard to the effect of his contemplated changes on the appendix 3 conditions. He had familiarized himself with the conditions, and had discussed the matter with one of the operating officials who apparently was also an attorney, but it is clear that the actions taken effective January 14 in no way embodied a policy decision of defendant from a legal standpoint with respect to the appendix 3 conditions. Nor did the superintendent consult the legal staff prior to the July changes in the Hartford-Springfield schedules, but it was his understanding that someone in operations planning had done so.

The decision to discontinue classification of cars at Maybrook and to perform that operation at Cedar Hill was also made around January 15, and the shift to Cedar Hill commenced at that time, on a gradual basis, with crews being moved to cedar Hill from time to time until the transfer was completed. The record shows, on the other hand, that the first notice of this shift to the public, and to Erie, appeared in defendant's tariffs effective May 1, 1969. The tariff publication itself indicates that, effective May 1, Boston and Providence cars arriving Cedar Hill on train No. OB-2 would

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be set off to connect with train No. OB-4 and that such cars arriving on train No. OB-4 would be set off to connect with train No. OB-2. According to the PC operating witness, this was in error to the extent it signified a mandatory break in connection (because the intent was merely to transfer the classification process to Cedar Hill) and despite the wording of the tariff all EL traffic received at Maybrook in Boston or Providence blocks would be moved through without setoff.

Our purpose here in discussing the chronology of these events is simply this: The appendix 3 protective conditions were imposed after much litigation, and reflect the serious consideration given by this Commission, the courts, and the involved parties to Erie's need for protection of its Maybrook route. This deep concern, we had hoped, had been made manifest in the protective conditions themselves and we had contemplated that, at the very least, no hasty or precipitous action would be taken by either party to endanger the Maybrook interchange which we found to be so important to Erie, the shippers it serves, and the national transportation system. We are disturbed, therefore, to find that, despite our admonition to continue the existing traffic and operating relationships and to cooperate and employ their best efforts, Penn Central made its initial action affecting the Maybrook route without consulting EL or even giving that carrier prior notification, and that such action was taken on the authority of an operating official of 14 days tenure in post and without serious exploration of the possible effects on Erie. This is not to say that the official was without competence or experience, or that his actions to be valid must have some prior pronouncement from defendant's legal department. What we do say is that this action and the actions which followed do not demonstrate a considered effort on the part of Penn Central to cooperate with its interchange partner or the employment by Penn Central of its best efforts to protect and maintain the competitive nature of the route over Maybrook. We find that, from a procedural standpoint, Penn Central's actions were patently in contravention of the requirement which we wrote into the conditions, that they cooperate with each other and act in concert to protect the existing interchange.

Substantively, we must now consider whether the changes made by defendant with respect to the Maybrook-Boston trains were schedule modifications, as Penn Central characterizes them on brief, or the substantial changes in train schedules mentioned

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in condition 6 of the protective conditions. Maybrook trains Nos. CB-2 and ACB-1 each operated about 280 miles a trip on the inclusion date and served two of the largest population centers in southern New England, Providence, and Boston. Now, after their truncation on January 14, they operate only 128 miles and their eastern terminus is defendant's Cedar Hill yard. The action also reduces by one round trip daily the available rail service for freight moving between Boston-Providence and suppliers and markets in the Midwest and elsewhere. Regardless of the attending circumstances, this constitutes a substantial change in train schedules made without obtaining the prior consent of the protected carrier or authorization from this Commission as required by the protective conditions. It remains only to determine whether this change or any other action taken by defendant has had or will have the effect of increasing the time in transit over the Maybrook route or otherwise adversely affect the standards of service thereon.

Defendant does not dispute the decline in the traffic over Maybrook, but contends that the decline was evident prior to PC's action of January 14, and ascribes it to other causes as previously stated. Defendant shows, for example, that, as to Boston or Providence cars between January 1 and January 15, 1969, train No. CB-2 failed to include any on 5 days, and up to 37 on the other days, including cars interchanged from The Lehigh & Hudson River Railway (L&H); train No. OB-2 carried between 26 and 53 daily, including L&H cars; train No. OB-4 carried up to 26 daily, including L&H cars; and the daily aggregate of Boston-Providence traffic on all three trains ranged from 48 to 95 cars. Westbound, train No. ACB-1 carried between 12 and 41 cars daily from Boston-Providence, and train No. BO-1 carried between 18 and 35, for a daily total ranging between 34 and 61, including cars destined for L&H. In these circumstances PC officials concluded that the volume of traffic justified no more than a single round trip daily, but "in deference to appendix 3" decided to continue two eastbound trips. The defendant's operating witness indicated that, for the distance involved, economic justification for a train requires a minimum of 70 cars, loaded or empty, and without regard to revenue factors. No attempt was made, however, to develop operating costs, and there was no indication as to whether this rule of thumb was applied generally in the New Haven region or elsewhere on the system.

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It was on these grounds, as stated, declining traffic and the failure of Erie to meet its commitments at Maybrook, that Penn Central defends its action on the Maybrook trains. Its actions on the Hartford-Springfield trains are likewise based on traffic decline—for example, from a daily average of about 32 Erie cars in September 1968 to about 22 cars in September 1969—and on the other factors previously mentioned. And it was the declining movement of icers over Maybrook that led to defendant's termination of icing service at that point.

Defendant is quite correct that the Commission did not intend, by appendix 3, to place that carrier in an operational straitjacket. It was for this reason that condition 8 was included. Condition 8 is identical in purpose with condition 6 of the standard protective conditions imposed in appendix I of the *Penn Central* merger, at page 565. Circumstances and traffic patterns change, and protective conditions must be flexible enough to change with them. Condition 8 provides the means and the jurisdiction whereby protection of one carrier may be prevented from becoming oppression of another. Penn Central has the option, when it regards the protective conditions or any of them as becoming unduly burdensome to its operations and services to the public, of bringing the matter before us under condition 8. Penn Central chose not to do so, however, and by its unilateral actions sought to apply protective self-help in derogation of the procedures set out. The matter is now before us under condition 11, and, as we explain below, we find that defendant is in violation.

Were we to assume, contrary to the evidence, that the scheduled interchange at Maybrook never occurred with regularity, that the advertised service over Maybrook was never performed with regularity, and that the train schedules in issue were, in fact, paper schedules totally unrelated to reality, there would be some justification for considering that the formalization of this state of affairs in the publication by defendant of tariff schedules reflecting this situation would have no effect in increasing the time in transit over this route and no adverse effect on the standards of service thereon. This is not the situation with which we are confronted, however. The evidence shows that the performance of both partners to the exchange was consistently poor as to most of the scheduled connections, and that the on-time performance at both the eastern and western termini left much to be desired. But the service attracted and retained considerable traffic over a period of years, and was apparently something that the shippers

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could tolerate. The scheduled service, with its imperfections, was nevertheless an effective sales tool for Erie, and New Haven and its successor Penn Central shared in the benefits. For the New Haven, the Maybrook route afforded the long haul on traffic moving in and out of New England. For the much larger Penn Central system, the long haul on New England traffic is over Selkirk. Penn Central now stands in New Haven's shoes at Maybrook, however, committed to maintain at least the same standards of service as prevailed on the inclusion date and to endeavor to improve such service. Clearly, on this record, it has not met that commitment.

What defendant has done, and we so find, is to increase the time in transit for traffic moving over Maybrook to and from points east of Cedar Hill, and to adversely affect the standards of service on the Maybrook route to the extent that certain categories of traffic which formerly could and did move freely over that route now no longer can. We have detailed the delaying effect of defendant's revised schedules on Boston-Providence and Hartford-Springfield traffic. This deterioration in service also affects traffic which misses a connection at Maybrook or Cedar Hill or a departure of a westbound train from Boston, in that the "fall-back" service has been reduced. For example, if, prior to the inclusion, a car bound for Boston on train No. NE-74 missed connection with train No. OB-4, it could still reach Boston on the same arrival day on train No. CB-2, but now cannot reach destination before the following day on train No. OB-2. We are not convinced that a Boston car which would arrive destination at 5 a.m. on a Wednesday if timely connection is made at Maybrook, and could fall back on a 2:30 p.m. arrival that same day if connection is not made, receives equivalent service with a 2 a.m. arrival the following day.

With regard to the standards of service, there is no dispute that icers and certain types of TOFC traffic can no longer move eastbound over Maybrook. During the first 10 months of 1968 a total of 7,976 TOFC units moved over Maybrook to Boston, and during a comparable period in 1969 that total had declined to 3,335 units. It should be recognized that the decline commenced in January 1969, 6 months prior to the embargo, and therefore may be attributed at least in part to factors other than the embargo. It should also be noted that some of this traffic might well qualify under the exceptions to the embargo. The embargo does represent a restrictive change in the standards in effect at the time of the NH

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inclusion. However, its purpose is neither to downgrade the Maybrook interchange nor to divert TOFC-COFC traffic from EL routes competitive with PC. Having the sole purpose of improving safety, it, in that sense, amounts to an upgrading of service. It is applied not only to EL at Maybrook, but equally to all PC rail connections at all PC interchange points. In the circumstances here, we cannot find that the embargo constituted a downgrading of service at Maybrook, or that it had the effect of reducing EL's TOFC-COFC traffic or of diverting it to Penn Central. Exempting the Maybrook interchange from the embargo while applying it to all other interchanges on rail connections could amount to a discrimination in favor of the one over the others contrary to the intentment of section 3(4) of the Interstate Commerce Act.

Icers moving through Maybrook during the first 10 months of 1968 totaled 4,543, or an average of more than 450 per month, and, as noted, in the most recent month of record (in 1969) this traffic had declined to 6 cars per day. We acknowledge the carriers' dispute as to financial responsibility for icing under the tariff, but we cannot, on this record and within this special procedure, deal with it. The practice prevailing on the inclusion date was for this service to be performed by New Haven. The continued necessity for icing at Maybrook is apparent: the record shows almost 46,000 icers still in use, including more than 900 icers used by Wilson & Company, and the routing of icers via Maybrook was substantial until PC eliminated the icing service. Defendant's action was taken in the fall of 1969 when the need for icing service started its seasonal decline, and the full effect of the action may not be felt until the coming spring and summer. Under the requirements of the appendix 3 conditions, the defendant must restore the service at Maybrook. The issue as to responsibility for financing the service under the terms of the tariff may be pursued in another proceeding.

The volume of traffic which may have shifted to Erie's Dereco route is largely an unknown quantity on this record. This factor would be relevant to the issue of damages, for traffic lost to the Maybrook route but retained by Erie on the Dereco or other routes would reduce damages. Appendix 3 does not speak specifically in terms of damages, the underlying tenor of the conditions being the swift detection and correction of violations. Hence the 90-day limitation set on our own actions under condition 11. Policing of the conditions was left primarily to the interested parties, who are, after all, in touch with day-to-day operations on the Maybrook

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route. In these circumstances, we must take note of the fact that this matter was not brought before the Commission until September 1969, at a time when Erie's revenue losses attributed to the violations, by its own estimates, were approaching \$1.4 million a month. Erie was well aware of the possible impact of Penn Central's actions early in February when it met with defendant in an unsuccessful effort to restore the curtailed service. Its arguments on brief emphasize that traffic once lost may never be regained, and that atrophy of the Maybrook route can be avoided only by rigid enforcement of the protective conditions. And yet, each successive curtailment by Penn Central was met with inaction on the part of Erie until August 15, 1969, when the latter's president served formal notice on defendant requesting immediate restoration of services, and until the following month when formal complaint was filed with the Commission.

We believe that our firm commitment under appendix 3 to take all necessary corrective action when violations are brought to our attention is unaffected by the lack of diligence on the part of complainant in bringing the matter to us. An award of damages, on the other hand, if such a remedy exists under appendix 3,¹¹ would necessarily be discretionary with this Commission; and in this regard, we view complainant's conduct in these circumstances as something akin to *laches*, which is sometimes defined as:¹²

A want of activity and diligence in making a claim or moving for the enforcement of a right which will afford ground for presuming against it, or for refusing relief, where that is discretionary with the court.

We have considered complainant's request for an award of damages, and we conclude that it should be denied.

In making our findings below, we are aware that a number of important questions on tariff interpretation and service standards were raised by the parties but could not be resolved on this record. We again invite the attention of the parties to appropriate procedures set out in appendix 3, and remind the parties that we are committed to act promptly in furthering the overall purpose of the protective conditions.

¹¹The remedies specified in condition 11B(2) are cancellation of any violative tariff and, where no tariff is involved, a Commission order to terminate any violative conduct. To preclude the cumulation of serious injury from any violation, condition 11C(1) provides for the determination of any controversy within 90 days and condition 11A makes the Commission's determination final.

¹²Black's Law Dictionary, Third Edition.

After consideration of all the evidence of record, we find that defendant has violated and is in violation of the conditions imposed for the protection of complainant's routing via Maybrook in appendix 3 of the *final inclusion* report, in particular condition 6 thereof, in the manner and to the extent hereinbefore discussed. We further find that defendant should be required to cease and desist from such violations, to restore its train schedules and standards of service here involved to those prevailing on the date of inclusion of New Haven into Penn Central, and to take all reasonable and necessary steps to inform the public and interested shippers of the restoration of such schedules and service standards. Our order attached hereto will require defendant to comply therewith within 30 days after the date of service of such order, and to promptly advise the Commission of the action taken to accomplish such compliance. The proceeding will be held open for that purpose. If advice of such compliance is not received within 60 days from the date of service of this report, the matter will be given further consideration.

An order, into which this report was incorporated by reference, was served December 22, 1969.

COMMISSIONER BUSH, dissenting in part:

Schedule changes and efficient operating practices, with resultant economies, are goals sought to be achieved by the Penn Central Transportation Company as a result of the merger approved by us in *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475. The evidence of record does not, in my view, support the determination herein that the defendant has violated and is in violation of the conditions imposed for the protection of complainant's routing via Maybrook, N. Y. Before a violation of condition 6 of appendix 3 of the *final inclusion* report can exist, there must be a "***substantial change in train schedules**" or*** other action, the effect of which would be to increase the time in transit via the [involved] routes, or to otherwise *adversely* affect the standards of service." [Emphasis added.] The defendant's evidence indicates that complainant consistently failed to bring its eastbound trains into Maybrook on schedule or properly classified and blocked. This service deficiency also extends to Erie's Maybrook to Chicago, Ill., movement. As recognized by the majority "***It is clear from the record that the occasions were numerous when one or another of Erie's connecting trains at Maybrook arrived there or at Chicago behind schedule." Evidence of 338 I.C.C.

on-time performance by Erie trains is conflicting to the extent that the standard of proof has not been met by complainant on and prior to January 1, 1969. I would, therefore, resolve this controversy in favor of the defendant and dismiss the complaint.

APPENDIX 3

Conditions for the protection of EL

Upon inclusion of the NH in the transaction authorized by the Interstate Commerce Commission in Finance Docket No. 21989:

1. Penn Central and EL, as to traffic moving to and from all stations on or reached via the lines of the NH, to or from stations on or reached via the lines of EL, shall with respect to each other maintain and keep open existing or comparable routes and channels of trade in full vigor as fast competitive service routes via Maybrook, N. Y., unless and until otherwise authorized by the Interstate Commerce Commission.

2. The present neutrality of handling traffic inbound and outbound by NH shall be continued by Penn Central, insofar as such matters are within its control, so as to permit equal opportunity for service to and from the lines of EL without discrimination as to routing or movement of traffic and without discrimination in the arrangement of schedules or otherwise. Likewise, the present neutrality of handling traffic inbound and outbound by EL shall be continued so as to permit equal opportunity for service to and from the lines of NH included in Penn Central without discrimination as to routing or movement of traffic and without discrimination in the arrangement of schedules or otherwise.

3. The present traffic and operating relationships existing between NH, on the one hand, and EL, on the other, shall be continued, insofar as such matters are within the control of Penn Central, on the one hand, and EL, on the other.

4. Insofar as such matters are within its control, Penn Central shall, as to the lines of NH included in the transaction authorized in Finance Docket No. 21989, accept, handle, and deliver all cars inbound and outbound, loaded and empty, without discrimination in service as between cars destined to or received from EL, and carriers competing with EL, and irrespective of destination or route of movement. Likewise, EL shall accept, handle, and deliver all cars inbound and outbound, loaded and empty, without discrimination in service as between cars destined to or received from the lines of NH included in the transaction authorized in Finance Docket No. 21989 and carriers competing with said lines of Penn Central, and irrespective of destination or route of movement.

5. Penn Central shall not do anything to restrain or curtail the right of industries now located on the lines of NH to route traffic over existing or comparable routes via Maybrook in connection with EL. Likewise, EL shall not do anything to restrain or curtail the right of industries now located on its lines to route traffic over existing or comparable routes via

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Maybrook in connection with the lines of the NH included in the transaction authorized in Finance Docket No. 21989.

6. Insofar as such matters are within their control, Penn Central, on the one hand, and EL, on the other, shall cooperate with each other and each shall use its best efforts with its connections to obtain similar cooperation in order to continue the NH-EL route as a competitive service route for the movement of freight traffic between points located on or beyond NH's lines and points located on or beyond EL's lines, endeavoring at all times to improve such service and maintaining at least the same standards of service as prevail on the date of the inclusion of NH in Penn Central. Neither EL, on the one hand, nor Penn Central, on the other, shall without the written consent of the other, make any substantial change in train schedules or take any other action, the effect of which would be to increase the time in transit via the aforesaid routes, or to otherwise adversely affect the standards of service.

7. With respect to traffic presently handled jointly by the NH, on the one hand, and EL, on the other, Penn Central and EL will, insofar as such matters are within their control, continue to publish or concur in publication of rates so that rates to or from points on or reached via EL routes will always be competitive with other routes, including the local routes of Penn Central and as to the aforesaid traffic they shall also concur in divisions of such rates under the established bases of divisions, and in the event of any changes in joint rates proportionate changes shall be made in the divisions of Penn Central and EL.

8. Any party or person having an interest in the subject matter may at any further time make application to the Commission for such modification of the above conditions, or any of them, as may be required in the public interest, and jurisdiction shall be retained by the Commission to reopen the proceeding on its own motion for the same purpose.

9. These conditions shall become effective as of the date of inclusion of NH in Penn Central and upon their acceptance by EL, evidenced in writing to the Commission.

10. Penn Central and EL will distribute copies of this appendix, and any amendments which may from time to time be made or accurate summaries thereof, to all of their operating officers, traffic officers, and traffic representatives, in order that all operating and traffic personnel of EL, and Penn Central will be at all times advised of the purposes and effects of this appendix.

11. The interpretation, application and enforcement of the conditions of this appendix shall be governed exclusively by the following provisions:

A. All controversies arising under this appendix (except those relating to the modification of conditions referred to in condition 8) shall be determined with finality by the Interstate Commerce Commission in the manner indicated below. Orders of this Commission, made as provided hereinafter, shall not be reviewable in any court. Orders of this Commission determining any such controversy may be enforced by judicial order or judgment as provided in 49 U.S.C. § 16.

B. (1) Whenever EL or Penn Central considers that these protective conditions are being violated, it may file with the Commission, Board of 338 I.C.C.

Suspension, and with the other carrier, a complaint verified by an appropriate official of the complainant, containing a short and plain statement of the matters constituting the alleged violation and the relief sought.

(2) If, in the case of a complaint involving a tariff publication, such complaint shall include a prima facie showing that EL is a competitive factor as to traffic affected by such tariff, the Board of Suspension may, in the case of a tariff publication already effective, and shall in the case of a tariff publication not yet effective, forthwith suspend such tariff pending determination by the Board of the issues presented by such complaint. Said Board shall conduct an investigation of the matters referred to in any complaint and, if requested by any party to the controversy, shall hold a hearing. If, after such investigation and hearing, if any, said Board shall find no violation of any of the conditions of this appendix, it shall thereupon order the removal of any tariff suspension theretofore imposed. If, after such investigation and hearing, if any, said Board shall find a violation of any of the conditions of this appendix, it shall thereupon order the cancellation of any violative tariff provisions or, if no tariff be involved, the termination of any violative conduct.

C. (1) Final decisions as to issues raised by a complaint shall be rendered by the Board of Suspension within 90 days after the complaint is filed.

(2) Appeal shall lie to the Commission, division 2, from orders of the Board of Suspension.

(3) Special rules for proceeding before the Board of Suspension and appealing therefrom shall be promulgated by this Commission at a future time. Such rules shall include provisions which afford to Penn Central and to EL full and adequate opportunity to reply to any complaint filed under subdivision B and to present evidence, briefs and argument as to all issues.

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