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February 10, 2017

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Dear Kim & Martin:

Re: Mid-Continent Railway Historical Society, Inc. & Roland Lichter, et al.

I have now come to a conclusion about the award in the above referenced matter.

I previously concluded that Mid-Continent (M-C) had not acted in good faith towards Roland 'Skip' Lichter. I have subsequently reviewed submissions from the legal representatives of both parties, and also documentation from M-C relating to the internal decision making and handling of the matter.

The documents reveal further detail as to how Mid-Continent moved from a position generally consistent with their responsibilities under the Stipulation to what is tantamount to a repudiation thereof.

Whereas Lichter devoted all his resources to the overhaul of the Saginaw #2, Mid-Continent made no significant attempt to raise funds. After Don Meyer ceased to be manager in 2010 the documents reveal an increasingly negative attitude towards the project.

This is not to say that Lichter was easy to work with or was not involved in a number of very unfortunate incidents. However in the context of the Stipulation, within the limitations of the individual, he probably did the best he could. By contrast, Mid-Continent, a well-respected non-profit organisation that has tremendous achievements in rolling-stock restoration to its credit, has clearly not done the best it could.

It is probably not a coincidence that the situation deteriorated once the President of Mid-Continent replaced Meyer as the Manager. Clearly the relationship between Jeff Bloohm and Lichter has not been good for years.

The Mid-Continent Board of Directors' minutes reveal how the relationship with Lichter and the #2 became increasingly an inconvenience and then something to be disposed of somehow.

Mid-Continent appears to have forgotten or ignored the fact that the obligation to overhaul the locomotive had arisen from their previous use of it. The Lease, without any future obligation to overhaul the engine again, represented a generous concession by the owner, influenced by a desire to see the engine running at M-C rather than his own financial interest.

Examples of how the Stipulation and the Lease were misrepresented include the 'Confidential opinion' given by the President to the Board of Directors on March 9, 2011 detailing the problems that could arise if the issues raised by the Scott Lindsay report were not addressed, leading to Mid-Continent being responsible for "*any and all repairs*" once it has used the engine.

The Arbitrator does not read the Lease in this way. 6.1 states that "*Lessee shall inspect the Locomotive as soon as possible after the return to service work is accepted by the FRA.*" This is to give the Lessee the opportunity to specify existing defects and deficiencies, and 6.2 makes it clear that written notice can be given to the Lessor that Lessee is not "*satisfied with and has (not) accepted the Locomotive in such good condition and repair*".

On March 30, 2015 President Bloohm wrote again to the Directors, raising a number of questions, and recommending that the Board cancel the Lease. Director Jeffrey Huttenburg was requested "*to go over this lease and make his recommendations to the board*". The Arbitrator does not accept that one party to the Stipulation and Lease could unilaterally 'cancel' or amend the Lease given that it was an integral part of the resolution of the issue.

An email from Bloohm dated July 2015, presumably addressed to the directors, goes through the Lease point by point, commencing by stating "*I was forced to sign this lease!*" and then that "*in my opinion the stipulation forced this lease on us*". This is not consistent with the facts: these statements are directly contradicted by the wording of the Stipulation signed by Bloohm (my emphasis).

On page 1 "*IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, and approved by their respective counsel as follows:*

2. Each party represents to the Court that this Stipulation was approved voluntarily and without force or threat or coercion. Paragraph 4 F states that: ***“Plaintiff and defendant will publicly and jointly confirm their enthusiasm for the new arrangement.”***

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The wording could not be clearer. Mid-Continent was not ‘forced’ to sign the Stipulation, which was a resolution of the dispute resulting from M-C’s failure to overhaul the #2 after using it rent-free for fifteen years. Far from being coercion, this was then seen as a favorable solution to a serious problem.

The remainder of this July 2015 document discusses various aspects of the Lease as if they had not been part of the Stipulation, and thus were open to renegotiation.

On July 20, 2015 a Special Board of Directors Meeting discussed the matter and appointed four men, including Huttenburg as chairman, to the *“ST #2 lease negotiation committee”*.

Huttenburg, a retired attorney, told me that he had read the Stipulation, although he was unaware of the history behind it, having only been involved at Mid-Continent for four years. In any event, despite the Lease clearly being integral to the Stipulation, at a meeting on December 12, 2015 Huttenburg’s committee informed Lichter that *“the most important issue to them is to limit the liability of MC in the future regarding the costs of any major repairs or rebuilds of the engine and the following conditions where items they wanted in the lease:*

- One year lease*
- Daily rental figure to cover major repairs and property insurance*
- Lessor responsible for major repairs and purchasing property insurance*
- Maintenance done by MC, with detailed checklist for maintenance provided by lessor.”*

Huttenberg explained to me that he was unaware that the Lease did not require Mid-Continent to overhaul the engine again after this Lease, despite the wording in 3.2 giving Lessee (ie M-C) the option if it desires *“to overhaul the Locomotive for a further period of operation extending beyond the initial term of this Lease on terms generally identical to those of this lease it **may** do so”* (my emphasis). Certainly the Lessee is not required to overhaul it again if it does not choose to.

6.1 and 6.2 give Lessee the opportunity to inspect and approve the quality of the work done, and 6.3 acknowledges that due to age of the Locomotive, which had already *“greatly exceeded its design life”* it could not be presumed that the Locomotive would be able to operate for the whole 15 year period.

There is no provision in the Stipulation for the Lease to be unilaterally altered, and in the Arbitrator’s opinion such demands constitute a repudiation of the Lease and thus the Stipulation. The committee appears to have taken Bloohm’s July 2015 documents as the basis for action, and ignored the Stipulation and the history behind it.

The Stipulation and Lease were very favorable to Mid-Continent. Clearly Lichter was not trying to obtain a financial advantage. He had had a long association with M-C even back in 2003 and it had been a big part of his life.

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Lichter was willing to be generous – he had received no rent for the first fifteen years of use and was asking no rent for the second fifteen, with the nominal \$100 a steaming envisaged in the lease set aside for repairs and maintenance to the locomotive, and not for the owner. M-C was getting up to thirty year's use for the price of one overhaul, capped at \$200,000, which is exceedingly good value, evidenced by the costs so far incurred on the other two engines in the Steam Program. And Lichter was undertaking to organise all of the repair work that he could himself.

When the Arbitrator negotiated the agreement he was very conscious of the fact that all Lichter wanted was to see #2 overhauled and operating again on Mid-Continent, and effectively took advantage of that fact to conclude an agreement that was favorable to M-C. Unfortunately for Lichter, although he has clearly done most of what was expected of him, and more, M-C has not. It has made no more than a nominal attempt to fulfil the spirit or the aims of the Stipulation, and now that the engine is nearly ready to run, has sought reasons to repudiate the agreement.

It is not possible for the Arbitrator to wind the clock back to November 2003, when the Stipulation was signed. At that point Lichter was 61 years old: now he is approaching 75. Mid-Continent has confirmed that it wants the Locomotive to leave its property, and Lichter has thus been denied the opportunity to see his engine operate again on M-C, three miles from his home. This was clearly his primary motivation in maintaining the relationship with M-C and signing the Stipulation.

What it is possible for the Arbitrator to do is to recognise the loss to Lichter from the failure of the other party to perform as they had contracted. Therefore, as Arbitrator of this dispute named in the Stipulation I award the following to Roland 'Skip' Lichter:

-Reimbursement by Mid-Continent of the first \$200,000 of expenditure on the Locomotive as previously reported to and recorded by M-C. This sum is due and payable now.

-Interest on the sums expended by Lichter on the Saginaw #2 locomotive up to the total of \$200,000 at 2.5% per annum, calculated on the relevant outstanding balance of principal and interest, for simplicity calculated from the first day of the year following the date the expense was incurred, and thereafter with interest compounded monthly. This sum is due and payable now.

-Reimbursement by Mid-Continent of all Lichter's reasonable (as determined by the Arbitrator) legal fees and expenses involved in this current dispute, to include his share of the costs of arbitration, and to include any legal fees and expenses involved in collection of the sums awarded. These sums are due and payable now.

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-The reasonable costs (as determined by the Arbitrator) of moving the Saginaw #2 locomotive and all its components and spare parts, such as the new tender tank, in a manner chosen by Lichter, to a location of his choosing within the Continental United States, such costs to be invoiced directly to Mid-Continent.

-Storage of the Locomotive and all its components and spare parts in suitable conditions on the Museum's premises for twelve months from the date of the Award (or such time as may subsequently be agreed with the Arbitrator) entirely free of charge.

- Until such time as the Saginaw #2 leaves Mid-Continent Lichter is to have full access to the locomotive and the facilities of M-C to enable him to undertake maintenance and repairs to the locomotive but not to operate it on the main line.

Conclusion

Mid-Continent had an obligation arising out of the Stipulation to work with Lichter to overhaul the engine. Essentially M-C failed to fulfil this commitment and eventually repudiated the Stipulation.

At any point during the thirteen years since signing the Stipulation either party could have asked the Arbitrator for an opinion or even to intervene to resolve any issue. During this period the Arbitrator made a number of donations to Mid-Continent, and visited at least once a year, often meeting Bloohm, Lichter or Meyer. The Arbitrator has always been accessible to both parties to this dispute.

The decision of Mid-Continent to bring a legal action against Lichter resulted in significant legal and arbitration costs that would not have been necessary if the Arbitrator had been involved at an earlier stage. M-C's attempt to void the Lease, let alone some of the spurious reasons put forward to justify it, could almost certainly have been avoided.

The Arbitrator understands from conversations with Bloohm and subsequent representations by Mid-Continent's attorney that the result of the award may be financial difficulty for the Museum. If so it will be a consequence of the actions of the President and the Board of Directors and not a consideration for the Arbitrator.

A handwritten signature in blue ink, appearing to read "W. Parker". The signature is fluid and cursive, with the first letter being a large, stylized 'W'.

William A. Parker, Arbitrator