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ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE SURFACE TRANSPORTATION BOARD

NO. 42094



PCI TRANSPORTATION, INC.

Complainant, .

v.

FORT WORTH & WESTERN RAILROAD COMPANY

Respondent.

ENTERED
Office of Proceedings

OCT 11 2005

Part of
Public Record

**DECLARATION OF COUNSEL IN SUPPORT OF RESPONSE
TO MOTION TO DISMISS OR, IN THE ALTERNATIVE
TO HOLD THE MATTER IN ABEYANCE, AND BRIEF IN SUPPORT**

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ATTORNEYS FOR COMPLAINANT
PCI TRANSPORTATION, INC.

October 11, 2005

**DECLARATION OF COUNSEL IN SUPPORT OF RESPONSE
TO MOTION TO DISMISS OR, IN THE ALTERNATIVE
TO HOLD THE MATTER IN ABEYANCE, AND BRIEF IN SUPPORT**

H. Allen Pennington, Jr., under penalty of perjury, makes the following declaration in support of the Response to Motion to Dismiss, or in the Alternative, to Hold the Matter in Abeyance, and Brief in Support submitted by Complainant PCI Transportation, Inc. ("PCI"):

1. I am one of the attorneys for Complainant PCI, and make this declaration based on personal knowledge of the facts stated herein.

2. Attached hereto are true and correct copies of documents obtained and identified as follows:

Exhibit 1 Opinion from the Fifth Circuit Court of Appeals in cause number 04-10965, delivered August 19, 2005;

Exhibit 2 Deposition of Charles Paul Godsey taken May 26, 2004;

Exhibit 3 Affidavit of Randy Gaston executed on October 11, 2004; and

Exhibit 4 Defendant Fort Worth & Western Railroad Company's Second Amended Answer and Counterclaim.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the *Declaration of Counsel in Response to Motion to Dismiss or in the Alternative to Hold the Matter in Abeyance, and Brief in Support* has been forwarded to counsel of record on this the 11th day of October, 2005, as indicated below:

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H. Allen Pennington, Jr.

United States Court of Appeals
Fifth Circuit

FILED

July 26, 2005

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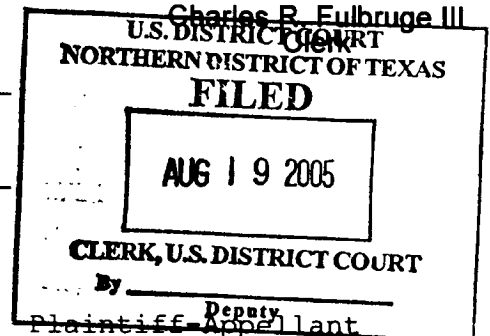
IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 04-10965

PCI TRANSPORTATION INC,

4:04-cv-2114



versus

FORT WORTH & WESTERN RAILROAD COMPANY,

Defendant-Appellee

On Appeal from the United States District Court
for the Northern District of Texas

Before HIGGINBOTHAM, WIENER and CLEMENT, Circuit Judges.

WIENER, Circuit Judge:

Appellant PCI Transportation, Inc. ("PCI") appeals the district court's orders denying (1) remand, and (2) a preliminary injunction. We affirm.

I. FACTS AND PROCEEDINGS

PCI receives and distributes rail cargo in Fort Worth, Texas, via a distribution warehouse serviced by a spur that comes off of railroad lines of the Union Pacific Railroad ("Union Pacific") and the Burlington Santa Fe Railroad ("BNSF"). Appellee Fort Worth & Western Railroad Co. ("FWWR") is a short-line railroad that



operates passenger and freight trains within Texas. FWWR operates a switching yard that, via PCI's spur, links its warehouse to the Union Pacific and BNSF railroads. Under various agreements, Union Pacific and BNSF deliver railcars to FWWR's switching yard, after which FWWR switches and delivers these cars to customers of Union Pacific and BNSF, such as PCI, for unloading. After the railcars are unloaded, FWWR returns the empty cars to the main railroads' lines. BNSF and Union Pacific compensate FWWR for its switching services, but the railroads also charge FWWR for the time that it retains the railcars at its switching yard. In turn, FWWR collects demurrage¹ fees from end-use customers such as PCI.

In August 2001, after a dispute had arisen concerning demurrage charges imposed on PCI by FWWR, these parties entered into a contract (the "contract") aimed at avoiding further conflict, a goal that the contract has obviously failed to attain. The entire contract is a one page letter, and is self-styled with two different names — "Confidential Demurrage Contractual Agreement" and "Confidential Contractual Agreement for Free Time." The language of the contract provides that (1) PCI will have four demurrage-free days, and (2) FWWR is committed to providing PCI with a minimum of one "switch" daily, seven days per week. The contract also establishes the demurrage rate applicable after free

¹ Demurrage is a charge assessed for detaining a freight car, truck, or other vehicle beyond any free time stipulated for loading or unloading.

time expires. (The contract was never placed in evidence before the district court, but following oral argument on appeal, it was submitted to us under seal.) PCI alleges that, since the execution of the contract and in conformity with common industry practice, FWWR has delivered cars to PCI on a first-in, first-out ("FIFO") basis.

In February 2004, more than two years after execution of the contract, a new dispute arose between PCI and FWWR concerning demurrage charges for the month of June 2003. PCI contends that FWWR had engaged in several practices that resulted in improper demurrage fees being charged to PCI, to wit: (1) FWWR varied from its practice of delivering cars to PCI on a FIFO basis, with the result that FWWR held cars intended for PCI's customers for longer than four days; (2) at times, FWWR had delivered rail cars on PCI's spur backwards, making it impossible for PCI to unload those cars and requiring FWWR to move the cars out, reverse them, then bring them back in again with the next group of cars; (3) FWWR provided PCI with a delivery schedule the effect of which virtually guaranteed that some of the cars would be held in the FWWR yard for more than four days, thereby unnecessarily incurring demurrage costs.

PCI filed suit in state court alleging that FWWR had breached the contract. PCI also claimed intentional interference with contractual relations and requested a TRO, a "temporary injunction," and a permanent injunction restraining FWWR for a

period of ten years from (1) "providing purported notice of cancellation of any agreements between PCI and FWR"; (2) "refusing to deliver less than ten (10) PCI-bound railroad cars with cargo per day to PCI on its spur, to the extent such cars are available"; (3) "delivering cars to PCI's spur on any basis other than on the basis of delivery of those PCI-bound cars which have been in FWR's possession the most number of days"; and (4) "imposing or attempting to impose any demurrage charges upon PCI, or in the alternative, imposing or attempting to impose any demurrage charges upon PCI when timely delivery of PCI's cars on a first-in, first-out basis would have resulted in no demurrage charges, and in those situations where no demurrage charges would accrue but for FWR's service failures". The state court granted PCI's request for a TRO.

FWR then removed the case to federal court, asserting that PCI's state law claims were completely preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA").² The ICCTA overhauled the Interstate Commerce Act ("ICA"), including the elimination of the Interstate Commerce Commission and replacing it with the Surface Transportation Board ("STB"). PCI filed a motion for remand, arguing that the suit was outside the ambit of the ICCTA. The district court denied PCI's motion, concluding that removal was proper under the doctrine of complete preemption.

² 49 U.S.C. §§ 10101, et. seq.

PCI filed a request for a temporary injunction and hearing in the district court, seeking essentially the same relief that it had sought in state court. This was PCI's second motion for injunctive relief. Its first motion was denied for procedural reasons. The district court denied PCI's motion without a hearing, holding that, as a result of PCI's failure to proffer into evidence the contract on which it based its claims for relief, it had not demonstrated, prima facie, that the district court, as distinguished from the STB, had jurisdiction to entertain PCI's requested injunctive relief. The district court also held that PCI failed to demonstrate that it would suffer irreparable injury absent an injunction. PCI appeals the district court's denial of its remand motion, denial of its motion for a preliminary injunction, and refusal to hold a hearing on the motion for a preliminary injunction.

II. ANALYSIS

A. Appeal of the Remand Order

An order denying a motion to remand is not appealable as a final decision within the meaning of 28 U.S.C. § 1291; standing alone, such a ruling cannot be appealed unless certified by the district court under 28 U.S.C. § 1292(b).³ PCI nevertheless contends that we have jurisdiction to consider its appeal of the

³ Poirrier v. Nicklos Drilling Co., 648 F.2d 1063, 1064-65 (5th Cir. 1981); Lewis v. E.I. Du Pont De Nemours & Co., 183 F.2d 29, 31 (5th Cir. 1950).

we could consider the order denying remand, we looked solely to whether the Eleventh Amendment immunity issue was non-frivolous and properly before us on appeal.⁸ Implicit in that decision is the conclusion that, once appellate jurisdiction has been established, we are compelled to address questions of federal jurisdiction.

In the context of the collateral order doctrine, we perceive no difference in the distinction between Eleventh Amendment immunity and remand. We thus conclude that PCI's appeal of the denial of its motion for a preliminary injunction is both non-frivolous and properly before us. Consonant with our holding in Real Parties in Interest, we first consider the jurisdictional question whether the district court erred in denying PCI's motion to remand the case to state court.

B. Removal and Remand

The district court denied PCI's motion to remand the case, relying primarily on (1) the Northern District of Iowa's reasoning in Cedarapids, Inc. v. Chicago, Central & Pacific Railroad Co.⁹ and (2) § 10501 of the ICCTA. Section 10501 provides:

(b) The jurisdiction of the Board over--

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

⁸ Id.

⁹ 265 F. Supp.2d 1005 (N.D. Iowa 2003).

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.¹⁰

PCI contends that removal was improper because the relief that PCI requests is expressly excluded from the reach of the ICCTA by § 10709 of that act. "We exercise plenary, de novo review of a district court's assumption of subject matter jurisdiction."¹¹

1. PCI's § 10709 Argument

FWWR establishes rates for its transportation services, as well as rules and practices related to those services, including specifically the rules relating to the imposition of demurrage fees.¹² The injunctive relief PCI seeks would regulate the operation of FWWR's switching yard and would therefore fall squarely under § 10501(b). PCI argues nonetheless that its dispute with FWWR is purely over FWWR's compliance with the contract, and that, under 49 U.S.C. § 10709, such contracts are not subject to

¹⁰ 49 U.S.C. § 10501.

¹¹ Hoskins v. Bekins Van Lines, 343 F.3d 769, 772 (5th Cir. 2003).

¹² 49 U.S.C. § 10701.

the ICCTA and thus not under the jurisdiction of the STB. Section 10709 provides in relevant part:

(a) One or more rail carriers providing transportation subject to the jurisdiction of the Board under this part may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions.

(b) A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.

(c)(1) A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.

(2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree.

None disputes that FWR is a rail carrier and PCI is a purchaser of its services.¹³

PCI's position on the applicability of § 10709 can be distilled to two arguments. First, PCI argues that the STB has no jurisdiction to hear claims even related to agreements governed by § 10709, citing the language of the statute and decisions of the

¹³ "[R]ail carrier' means a person providing common carrier railroad transportation for compensation," 49 U.S.C. § 10102(5), and a "railroad" includes a "switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation." § 10102(6)(C).

STB refusing to consider such disputes.¹⁴ We see nothing in the statutory language that supports PCI's "related to" argument, however, and PCI fails to direct us to any such language. In fact, § 10709(b) specifies that a party entering into such a contract has only "those duties specified by the terms of the contract." The decisions of the STB cited by PCI also fail to support its argument. H.B. Fuller Co. v. Southern Pacific Transportation Co.¹⁵ is inapposite because the contract at issue there was a comprehensive one that purported to govern the entire relationship between the litigants. Fuller, a manufacturer, sued Southern Pacific, alleging that the railroad had imposed unreasonable storage and demurrage charges. The transportation in question was subject to a "contract for carriage." Fuller argued that its claims fell outside that contract and thus within the STB's jurisdiction, because the contract did not explicitly address demurrage or storage charges. The STB rejected Fuller's argument and held that the claims fell outside its jurisdiction. Although the contract did not explicitly address those areas, it did incorporate by reference the "tariffs, rules and regulations which would apply" if there was no contract to govern those areas not covered by the contract. Therefore, held the STB, the referenced

¹⁴ Reply Brief at 6. PCI did discuss the STB cases in its initial brief, but appears to have asserted the "even related to" argument for the first time on reply.

¹⁵ STB Docket No. 41510 (Aug. 20, 1997).

tariff terms became part of the contract. The other two STB decisions that PCI cites add nothing to the analysis.¹⁶

In Cross Oil Refining & Marketing, Inc. v. Union Pacific Railroad Co.,¹⁷ a decision not cited by PCI, the STB considered whether a series of purported contracts were the kind governed by § 10709. Cross Oil argued that § 10709 did not apply because, under the agreements in question, service and equipment were to be provided on the same basis as those provided to other shippers. The STB rejected Cross Oil's argument, ruling that the transportation at issue was provided under the contracts: Each contract affirmatively stated that it was made pursuant to § 10709, identified the origins and destinations, and specified the terms of the contract and the rates for the commodities. As in Fuller, the STB held that rail contracts can incorporate tariff provisions by reference yet still fall outside the STB's jurisdiction.

Unlike the agreements at issue in the cited cases, the contract in the instant case is very limited in scope, and does not incorporate any tariff provisions. As such, any relief requested

¹⁶ Minn. Power Inc. v. Duluth, Missabe and Iron Range Ry. Co., STB Docket No. 42038 (July 7, 1999), merely states that movement governed by a rail transportation contract is "beyond our regulatory purview under 49 U.S.C. 10709(c)" without providing any further analysis. Parrish & Heimbecker, Inc., STB Docket No. 42031 (May 22, 2000), discusses the Staggers Act, stating only that the statute removed contract service from the authority of the ICC (predecessor to the STB).

¹⁷ STB Finance Docket No. 33582 (Oct. 19, 1998).

by PCI that falls outside of the contract's express coverage is not governed by § 10709.

The second argument made by PCI is that all relief requested is within the contract's coverage and therefore within the reach of § 10709. In its reply to FWWR's response to PCI's motion to remand, PCI contended in district court that even if the contract does not specifically address (1) whether FWWR was required to place cars at PCI's spur on a FIFO basis, or (2) whether FWWR is required to place a "full spot" of ten cars at PCI's spur each day, the consistent conduct of the parties under the contract constitutes their agreed interpretation, causing those requirements to be incorporated into the contract. On appeal, PCI no longer asserts that the parties' prior conduct interpreted or supplemented the contract, arguing instead that all requested relief is within the language of the contract, namely that the parties' prior conduct, as well as the Texas railroad industry's customs and practices, inform what the term "switch" means. PCI relies primarily on the deposition testimony of Charley Godsey, the operations manager for FWWR, to establish that the term "switch" encompasses the portion of injunctive relief that FWWR insists falls outside of the contract. FWWR counters that the "switch" language in the contract was solely meant to change the number of days per week that switching services would be provided to PCI, but does not provide an alternative definition of "switch."

Under Texas law, the primary concern of a court construing a contract is to "ascertain the true intent of the parties as expressed in the instrument."¹⁸ Even when there is neither patent nor latent ambiguity in the wording of a contract, "[e]xtrinsic evidence may, indeed, be admissible to give the words of a contract a meaning consistent with that to which they are reasonably susceptible."¹⁹ "A specialized industry term may require extrinsic evidence of the commonly understood meaning of that term within the specialized industry."²⁰ PCI provides a string of citations to the Godsey deposition to support its definition of "switch". A review of the cited portions of the record reveals, however, that Godsey was never asked to explain or define the meaning of providing a "switch." His deposition lays out how FWWR deals with customers and states that FWWR (1) does not impose demurrage charges when the mistakes are its own, (2) uses a FIFO method to determine which cars to deliver, and (3) will fill the spot available on a customer's spur each day. None of this, however, is ever tied by the deposition to the meaning of providing a "switch."

¹⁸ Dell Computer Corp. v. Rodriguez, 390 F.3d 377, 388 (5th Cir. 2004); Mescalero Energy, Inc. v. Underwriters Indem. Gen. Agency, Inc., 56 S.W.3d 313, 319 (Tex. App. - Houston [1st Dist.] 2001, pet. denied).

¹⁹ Nat'l Union Fire Ins. Co. v. CBI Indus. Inc., 907 S.W.2d 517, 521 (Tex. 1995).

²⁰ Royal Maccabees Life Ins. Co. v. James, 146 S.W.3d 340, 345-46 (Tex. App. - Dallas 2004, pet. filed).

Even if we were to accept PCI's broad definition of "switch," the injunctive relief it seeks is still broader than that which the contract governed. The last portion of PCI's request seeks to control FWWR's ability to impose demurrage charges under any circumstances, or in the alternative, any circumstance in which no demurrage charges would accrue but for FWWR's service failures, not just those situations in which FWWR fails either to provide a full spot of cars or to deliver the cars on a FIFO basis. We hold that, at the very least, a portion of FWWR's claims are governed by the ICCTA.

2. Complete Preemption

For the district court to have removal jurisdiction, 28 U.S.C. § 1441 requires that "the case be one over 'which the district courts of the United States have original jurisdiction.'"²¹ Whether a claim arises under federal law is a question determined by reference to the plaintiff's "well-pleaded complaint."²² As a defendant may remove a case only if the claims could have been brought in federal court, "the question for removal jurisdiction must also be determined by reference to the 'well-pleaded complaint.'"²³ "Under the well-pleaded complaint rule, 'federal

²¹ Johnson v. Baylor Univ., 214 F.3d 630, 632 (5th Cir. 2000) (citation omitted).

²² Hoskins, 343 F.3d at 772 (citing Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152 (1908)).

²³ Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 808 (1986).

jurisdiction exists only when a federal question is presented on the face of plaintiff's properly pleaded complaint.'"²⁴ "As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim."²⁵ Potential defenses, including a federal statute's preemptive effect, do not provide a basis for removal.²⁶

In Beneficial National Bank v. Anderson, the Supreme Court recognized two exceptions to this last rule: (1) when Congress expressly provides for removal and (2) when a federal statute wholly displaces the state-law cause of action through complete preemption.²⁷ The latter exception is the one that is at issue in the instant case. As stated above, standard preemption does not provide a basis for removal. In contrast, complete preemption is jurisdictional in nature and, as such, "authorizes removal to federal court even if the complaint is artfully pleaded to include solely state law claims for relief or if the federal issue is initially raised solely as a defense."²⁸

²⁴ Hoskins, 343 F.3d at 772 (quoting Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987)).

²⁵ Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6 (2003).

²⁶ Id. (citing Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1 (1983)) (emphasis added).

²⁷ Id. at 8.

²⁸ Johnson, 214 F.3d at 632 (citation omitted).

Prior to the decision in Beneficial, we considered complete preemption to be a narrow exception, noting that the Supreme Court had only recognized its existence in the areas of federal labor relations and the Employee Retirement Security Act of 1974 ("ERISA").²⁹ Our pre-Beneficial test for complete preemption required the defendant to show that

(1) the statute contains a civil enforcement provision that creates a cause of action that both replaces and protects the analogous area of state law; (2) there is a specific jurisdictional grant to the federal courts for enforcement of the right; and (3) there is a clear Congressional intent that claims brought under the federal law be removable.³⁰

In Hoskins, however, we modified the test in response to the Supreme Court's Beneficial decision, in which the Court extended the doctrine of complete preemption to the National Bank Act. It reasoned that because the National Bank Act provides the exclusive cause of action for claims of usury against a national bank, all such claims arise under federal law for purposes of federal jurisdiction.³¹ In light of the decision in Beneficial, we held in Hoskins that the proper focus of complete preemption analysis is on

²⁹ Id. (citing to Avco Corp. v. Machinists, 390 U.S. 557 (1968) and Metro. Life Ins. Co. v. Taylor, 481 U.S. 58 (1987)).

³⁰ Id. The district court, in concluding there was complete preemption, neither applied our circuit's test nor looked to the Supreme Court's decision in Beneficial.

³¹ Beneficial Nat'l Bank, 539 U.S. at 11.

whether Congress intended that the federal action be exclusive, as opposed to whether Congress intended that the claim be removable.³²

In Hoskins, we considered whether there is complete preemption of claims asserted under the Carmack Amendment to the Interstate Commerce Act.³³ As there is neither language in the statute expressing Congress's intent that the Carmack Amendment provide the exclusive cause of action for claims arising out of the interstate transportation of goods by a common carrier nor any legislative history to be examined, we looked to our own cases and those of the Supreme Court to determine whether Congress did indeed intend for the Carmack Amendment to provide the exclusive cause of action, holding that it did.³⁴ In the instant case, the plain language of § 10501 supports our conclusion that Congress intended actions regarding "rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers"³⁵ to be governed exclusively by the ICCTA. The House Report on the proposed ICCTA

³² Hoskins, 343 F.3d at 776. Our holding in Hoskins, reversing our prior holding that the Carmack Amendment did not support complete preemption, reflects Justice Scalia's conclusion that the majority's holding in Beneficial makes finding complete preemption easier than existed under Taylor. Beneficial Nat'l Bank, 539 U.S. at 16-19 (Scalia, J., dissenting).

³³ 49 U.S.C. § 14706. Section 14706 resides under the part of the ICA governing Motor Carriers. The Carmack Amendment also modified the Rail part of the ICA. 49 U.S.C. § 11706.

³⁴ Hoskins, 343 F.3d at 776.

³⁵ 49 U.S.C. § 10501(b)(1).

also supports the conclusion that the ICCTA provides the exclusive cause of action:

[Section 10501] replaces the railroad portion of former Section 10501. Conforming changes are made to reflect the direct and complete pre-emption of State economic regulation of railroads. The changes include extending exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or side tracks formerly reserved for State jurisdiction under former section 10907. The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system. Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive.³⁶

In light of the plain language of the statute and its legislative history, and in accordance with our holding in Hoskins, we hold that the complete preemption doctrine applies. And, as the ICCTA provides the exclusive cause of action for PCI's non-contractual relief, we hold that those claims "'only arise[] under federal law and could, therefore, be removed under § 1441.'"³⁷ The district court's denial of remand was thus appropriate.

C. PCI's Preliminary Injunction Request

³⁶ H.R. REP. NO. 104-311, at 95-96 (1995). The Conference Report emphasized that the conference version of the bill was meant to preserve the exclusivity of federal remedies in the area of rail regulation that existed prior to the passage of the ICCTA. H.R. CONF. REP. NO. 104-422, at 167.

³⁷ Hoskins, 343 F.3d at 778 (quoting Beneficial, 539 U.S. at 11).

We review the denial of a preliminary injunction for abuse of discretion.³⁸ "Even though 'the ultimate decision whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion, a decision grounded in erroneous legal principles is reviewed de novo.'"³⁹

To obtain a preliminary injunction, the applicant must show (1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) that his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) that granting the preliminary injunction will not disserve the public interest.⁴⁰ "We have cautioned repeatedly that a preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has 'clearly carried the burden of persuasion' on all four requirements."⁴¹

PCI fails to establish that there is a substantial likelihood that it will prevail on the merits. As the district court noted in its denial of the injunction, PCI never submitted the contract to the court for it to review. Without the contract, the district

³⁸ Lake Charles Diesel, Inc. v. Gen. Motors Corp., 328 F.3d 192, 195 (5th Cir. 2003).

³⁹ Id. (quoting Women's Med. Ctr. v. Bell, 248 F.3d 411, 419 (5th Cir. 2001)).

⁴⁰ Id. at 195-96.

⁴¹ Id. at 196 (quoting Miss. Power & Light Co. v. United Gas Pipe Line Co., 760 F.2d 618, 621 (5th Cir. 1985)).

court could not possibly evaluate whether PCI was likely to prevail on the merits. In addition, PCI fails to show that it would suffer irreparable injury if an injunction were not granted. PCI's doom-and-gloom prediction that without an injunction it would lose the use of the track and be forced out of business is not borne out by the record and the briefs. The only consequence of contract cancellation appears to be a reversion to the terms and conditions provided by the federal tariff that governs such operations. Any damage resulting from a shorter period before demurrage is charged can be compensated for monetarily.⁴² We hold that there was no abuse of discretion by the district court in denying the injunction sought by PCI.

D. Failure to Conduct a Hearing

PCI makes the additional argument that the district court erred in failing to conduct a hearing before denying its motion for a preliminary injunction. Federal Rule of Civil Procedure 65(a)(1) specifies that "[n]o preliminary injunction shall be issued without notice to the adverse party." "We have interpreted the notice requirement of Rule 65(a)(1) to mean that 'where factual disputes are presented, the parties must be given a fair opportunity and a

⁴² See Morgan v. Fletcher, 518 F.2d 236, 240 (5th Cir. 1975) (citations and quotations omitted) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weights heavily against a claim of irreparable harm.").

meaningful hearing to present their differing versions of those facts before a preliminary injunction may be granted.'"⁴³

PCI relies on our decision in Commerce Park as support for its contention that, before a preliminary injunction motion can be denied, a hearing must be held. In Commerce Park, however, we merely assumed for the purpose of our analysis that Rule 65 required that a hearing be held prior to the denial of a motion for a preliminary injunction.⁴⁴ The plaintiff has the burden of introducing sufficient evidence to justify the grant of a preliminary injunction.⁴⁵ PCI's motion for a preliminary injunction was predicated on the breach of a contract that was never put before the district court. PCI also failed to adduce any probative evidence that it would suffer irreparable injury in the absence of an injunction; its only factual offering was the conclusional statement that the demurrage charges would be too costly for it to remain in business. PCI's failure to introduce the contract into evidence and its failure to establish the existence of a factual

⁴³ Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 628 (5th Cir. 1996) (quoting Commerce Park at DFW Freeport v. Mardian Constr. Co., 729 F.2d 334, 342 (5th Cir. 1984)).

⁴⁴ Commerce Park, 729 F.2d at 341.

⁴⁵ Canal Auth. of the State of Florida v. Callaway, 489 F.2d 567, 578-79 (5th Cir. 1974).

dispute on the question whether it would suffer irreparable injury made a hearing unnecessary.⁴⁶

The district court's orders denying PCI's motion for remand and denying PCI's motion for a preliminary injunction — including its refusal to conduct a hearing — are, in all respects, AFFIRMED.

⁴⁶ Kaepa, Inc., 76 F.3d at 628 ("If no factual dispute is involved . . . no oral hearing is required.").

1 IN THE UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF TEXAS
 2 FORT WORTH DIVISION

3 PCI TRANSPORTATION,)
 INC.)
 4)
 VS.) CAUSE NO. 4:04CV-211-Y
 5)
 FORT WORTH & WESTERN)
 6 RAILROAD COMPANY, INC.)

7

8 -----

9 ORAL DEPOSITION OF

10 CHARLES PAUL GODSEY

11 Taken May 26, 2004

12 -----

13 ORAL DEPOSITION OF CHARLES PAUL GODSEY, produced
 14 as a witness at the instance of the Plaintiff, said witness
 15 being duly sworn, taken in the above-styled and numbered
 16 cause on May 26, 2004, from 10:31 a.m. to 2:46 p.m., before
 17 Kem M. Sutton, CSR No. 1655 in and for the State of Texas,
 18 reported by machine shorthand, at the offices of McDonald
 19 Sanders, 777 Main Street, Suite 1300, Fort Worth, Texas,
 20 pursuant to the Federal Rules of Civil Procedure and any
 21 agreements stated on the record.

22

23

24 JOB NUMBER: 040526KSS

25



1 A P P E A R A N C E S

2 FOR THE PLAINTIFF:

3 H. Allen Pennington, Jr., Esq.
4 PENNINGTON, HILL & BAKER, L.L.P.
5 777 Taylor Street, Suite 890
6 Fort Worth, Texas 76102

7 FOR THE DEFENDANT:

8 Richard C. DeBerry, Esq.
9 McDONALD SANDERS
10 777 Main Street, Suite 1300
11 Fort Worth, Texas 76102

12 Also Present: Randy Gaston
13 Steve George

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1 I N D E X

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11	1 -	Demurrage Invoice Using Straight Calculations for Cars Released		
12		from 7/01/03 thru 8/06/03	58	58
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19 CERTIFIED/UNANSWERED QUESTIONS

20 BEGINNING ON PAGE/LINE

21 Page 8, Lines 19 & 20
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25

1 THE REPORTER: Your objections pursuant to
2 the Rules?

3 MR. PENNINGTON: Well --

4 THE REPORTER: Federal Rules?

10:31 5 MR. PENNINGTON: We're in Federal Court,
6 yeah.

7 MR. DeBERRY: We're in Federal Court, yeah.

8 MR. PENNINGTON: So you want to agree to
9 reserve objections until time of trial, except as to form and
10:31 10 responsiveness?

11 MR. DeBERRY: Well, yeah, that's fine to
12 reserve objections to the time of trial, other than form or
13 responsiveness, with the exception of, obviously, privilege
14 or instruction not to answer.

10:31 15 MR. PENNINGTON: Okay. And then on these
16 depositions today, can we agree that an unsigned copy can be
17 used in a trial or hearing if -- if time hasn't run to make
18 changes?

19 MR. DeBERRY: If the time has run to make
10:32 20 changes?

21 MR. PENNINGTON: Has not run. In other
22 words, if we -- if we're in Court -- if we're in Court next
23 week and no changes have been made, can we agree to use the
24 depositions?

10:32 25 MR. DeBERRY: Yes.

1 MR. PENNINGTON: Okay. And we'll just make
2 that agreement for all three of the depositions today.

3 CHARLES PAUL GODSEY,
4 having been first duly sworn, testified as follows:

5 EXAMINATION

6 BY MR. PENNINGTON:

7 Q. State your full name, please, sir.

8 A. Charles Paul Godsey.

9 Q. Paul?

10:32 10 A. Paul.

11 Q. And where do you live?

12 A. Springtown, Texas.

13 Q. What's your address?

14 A. 154 Clay Court, 76082.

10:33 15 Q. Thank you. Where do you work?

16 A. Fort Worth & Western Railroad.

17 Q. Do you have a position there? What is your
18 position?

19 A. Manager of Operations Center.

10:33 20 Q. All right. Mr. Godsey, have you ever given a
21 deposition before?

22 A. Yes, but it's been years ago.

23 Q. Okay. Let me mention a couple of things that --
24 that I think will be helpful to you. I -- I realize you've
10:33 25 probably already spoken to the -- to your attorney.

1 It's -- it's going to be important that you
2 speak up because Ms. Sutton here is taking down everything
3 that we say; and she's one of the best court reporters in
4 Fort Worth, but she's got to be able to hear you.

10:33 5 And one other thing that -- that we can do
6 for her is try not to talk over each other. I tend to talk
7 pretty slow, because I think pretty slow. So if you'll let
8 me get my question out before you answer, I would appreciate
9 it.

10:34 10 If -- if I'm interrupting your answer,
11 please remind me of that. That's not my intent. I'll --
12 I'll rein it in and -- and let you finish your answer. Okay?

13 A. Okay.

14 Q. If you don't understand a question I ask, please
10:34 15 ask me to rephrase it. It's important to me and -- and to
16 both parties that you understand any questions that I ask
17 before you answer. So if you're not sure what it means,
18 don't answer it. Just tell me, --

19 A. Okay.

10:34 20 Q. -- you know, Mr. Pennington, if you wouldn't mind
21 rephrasing that or -- or repeating the question, I'll be
22 happy to do that.

23 Ms. Sutton can also read a question back to
24 you. If -- if you just -- if your mind was wandering and you
10:34 25 think the question was fine, you just didn't hear it, you

1 weren't sure you heard it, just ask Ms. Sutton to -- to read
2 it back to you, and she can do that.

3 A. Okay. All right.

4 Q. Any time you need a break, just let me know and
10:34 5 we'll -- we'll proceed in that fashion.

6 Where is your -- where is your business
7 address or your office?

8 A. 6300 Ridglea Place, Suite 1115, Fort Worth, Texas.

9 Q. So you actually office in a bank building?

10:35 10 A. Yes.

11 Q. Uh-huh. And how long have you worked for the
12 FWWR?

13 A. About 13 years.

14 Q. What other positions have you had with the
10:35 15 company?

16 A. Brakeman, conductor and engineer.

17 Q. Now, when you were a brakeman, conductor and
18 engineer, I take it you didn't work in a bank building?

19 A. No, sir.

10:35 20 Q. All right. When did you -- when did you start
21 working in the -- in the office tower?

22 A. Approximately seven years ago.

23 Q. How long have you been Manager of the Operations
24 Center?

10:36 25 A. Five years.

1 Q. Did I get that title right?

2 A. Yeah, Manager of Operations Center.

3 Q. For about five years, you said?

4 A. Yes, sir.

10:36 5 Q. All right. So what did you do for roughly two
6 years after you moved into the -- the bank building until you
7 became Manager of the Operations Center?

8 A. Basically, the same thing. We were just -- we had
9 expanded five years ago, and they actually moved me out of
10:36 10 the 12th floor down to the 11th floor and put me over the
11 offices on the 11th floor.

12 Q. Who do you report to?

13 A. Steve George.

14 Q. And that's the gentleman here in the deposition?

10:36 15 A. Yes.

16 Q. Now, have you had an opportunity to speak with
17 Mr. DeBerry about the deposition, generally?

18 A. Yes.

19 Q. Okay. And in the -- and how many conversations
10:37 20 did you -- did y'all have to prepare for the deposition
21 today?

22 MR. DeBERRY: Objection; privileged.

23 Instruct the client not to answer.

24 MR. PENNINGTON: I'm asking how many
10:37 25 meetings.

1 MR. DeBERRY: I'm -- I'm not -- he's not
2 going to answer any questions that have to do with meeting
3 with me, talking to me, anything.

4 MR. PENNINGTON: You're not going to let him
10:37 5 tell me how many times he's met with you?

6 MR. DeBERRY: I'm not going to let him talk
7 about anything that has to do with me, period.

8 MR. PENNINGTON: Okay. Certify the
9 question.

10:37 10 MR. DeBERRY: If you want to certify the
11 ques- -- question about how often people are talking to their
12 attorney, that's great, Allen.

13 MR. PENNINGTON: All right. Let's --

14 MR. DeBERRY: Let's --

10:37 15 MR. PENNINGTON: -- keep going.

16 MR. DeBERRY: -- get going.

17 MR. PENNINGTON: Let's keep going.

18 MR. DeBERRY: Let's not waste time. Let's
19 go.

10:37 20 MR. PENNINGTON: We are wasting time if
21 you're telling him not to answer a question about how many
22 times he has talked to you.

23 MR. DeBERRY: He's --

24 MR. PENNINGTON: That's a total --

25 MR. DeBERRY: He's not going to answer --

1 MR. PENNINGTON: -- waste of time.

2 MR. DeBERRY: He's not going to answer any

3 questions --

4 MR. PENNINGTON: I understand.

10:38 5 MR. DeBERRY: -- about talking to his

6 lawyer.

7 MR. PENNINGTON: I understand. Let's don't

8 argue about it.

9 MR. DeBERRY: Okay.

10:38 10 MR. PENNINGTON: Then let's go on.

11 Q. (BY MR. PENNINGTON) In your conversations that

12 you had preparing for the deposition, was Mr. George present?

13 A. Mr. George? Yes.

14 Q. Okay. Were there any other persons present in

10:38 15 those meetings to discuss the deposition?

16 A. Yes.

17 Q. Who else?

18 A. I -- my lawyer.

19 Q. And who is your lawyer?

10:38 20 A. I'm -- I'm bad with names. You'll have to --

21 Q. Mr. DeBerry?

22 A. Yes.

23 Q. All right. And how long did y'all meet to prepare

24 for the deposition?

10:38 25 MR. DeBERRY: Do you just -- do you just

1 want to keep talking about --

2 MR. PENNINGTON: I'm just giving you the
3 chance to instruct him not to answer, if you want to do that.

4 MR. DeBERRY: Okay.

10:38 5 MR. PENNINGTON: I think the jury is
6 entitled to know how long he has -- he has met with his
7 lawyer to prepare for the deposition. You disagree.
8 Instruct him not to answer and let's move on.

9 MR. DeBERRY: Okay. I instruct the witness
10:39 10 not to answer. Let's move on.

11 Q. (BY MR. PENNINGTON) All right. What is your
12 educational background?

13 A. I graduated high school.

14 Q. Where did you graduate from high school?

10:39 15 A. Granbury High School.

16 Q. Granbury?

17 A. Granbury, uh-huh.

18 Q. Okay. What year was that?

19 A. '83.

10:39 20 Q. And do you have any -- any education after high
21 school?

22 A. Not formal education. Just training courses
23 through the railroad and --

24 Q. Okay. What -- have you been to any training
10:39 25 courses outside of -- of company training? Have you, like,

1 been to seminars, or things like that, outside of the
2 company?

3 A. Outside of the railroad? No.

4 Q. Okay. So all of your training has been by the
10:39 5 company?

6 A. Right.

7 Q. And what type of training have y'all had,
8 generally?

9 A. Oh, car hire accounting classes, Atlanta. We'll
10:40 10 go up there every other year for training on how to -- the
11 computer systems. And then on --

12 Q. You go to --

13 A. -- alcohol.

14 Q. Okay. You go to Atlanta?

10:40 15 A. Atlanta.

16 Q. Texas or Georgia?

17 A. Georgia.

18 Q. Okay. And does the Fort Worth Railroad have an
19 office in Atlanta, Georgia?

10:40 20 A. No. Our computer system is based out of Atlanta.
21 And our company that -- does that once a year, puts on a
22 class on how to manage our systems.

23 Q. I understand. Okay. What's the name of that
24 company?

10:40 25 A. RMI.

1 Q. And what other training -- let's see. You said
2 you started to work for FWWR about 13 years ago. So that
3 would be about 1991?

4 A. Right.

10:41 5 Q. Okay.

6 A. Yeah, '90, '91. It was right there in that area.

7 Q. Okay. That's fine. I'm just trying to get an
8 estimate.

9 And since 1991, have you had any -- any
10:41 10 training for your job, other than these computer classes in
11 Atlanta and, of course, on-the-job training?

12 A. No.

13 Q. Okay. Do y'all have -- what kind of manuals do
14 you have, operations manuals, or things like that, do you
10:41 15 have at the FWWR?

16 A. Oh, we have manuals for everything. Movement, you
17 name it.

18 Q. Okay.

19 A. The railroad is full of books.

10:41 20 Q. Do you have any manuals that -- that tell you how
21 to do your job as Manager of the Operations Center?

22 A. We have guidelines we have to go by.

23 Q. Okay. My question is: Do you have a manual -- do
24 you have any manuals that tell you how to do your job as
10:42 25 Manager of the Operations Center?

1 A. I'm not understanding what you're asking me. I --
2 I mean, --
3 Q. Well, let me ask --
4 A. -- we -- we have rules and regulations, like I
10:42 5 say, on everything we do. And there's manuals telling me I
6 can do some stuff and I can't do some stuff. But on the
7 day-to-day operation of running the Operations Center, not on
8 everything.
9 Q. Okay. On some things?
10:42 10 A. On some things.
11 Q. These -- who keeps these manuals?
12 A. We have them in the office.
13 Q. Who -- who maintains the manuals? I mean, who
14 updates them and things like that?
10:42 15 A. That's a broad question. The government does
16 some. We do some locally. That's -- that's a real broad
17 question.
18 Q. Okay. Do you -- do you update any manuals?
19 A. No.
10:43 20 Q. Okay. What if -- what specific manuals do you
21 have that -- that have anything to do with your job as
22 Manager of the Operations Center?
23 A. We have the GCOR, the regulations, General Code of
24 Operating Rules on the railroad. We have dispatcher manuals.
10:43 25 We have manuals for the AAR, the American Association of

1 Railroads, have manuals and -- governing how you do stuff.

2 Q. Okay. Let's -- any others?

3 A. I'm sure there is, because like I say, we have --

4 Q. I want to know about them. What others do you

10:43 5 have that -- that you -- that -- that would govern how you do

6 your job?

7 A. We have a dispatcher's manual. There's --

8 Q. Uh-huh.

9 A. -- the General Code. We have a HAZMAT manual.

10:44 10 MR. DeBERRY: A what?

11 THE WITNESS: HAZMAT.

12 MR. DeBERRY: A HAZMAT.

13 THE WITNESS: A hazardous materials book.

14 We have all the manuals that Atlanta sends us.

10:44 15 Q. (BY MR. PENNINGTON) Now, that's for computer

16 stuff?

17 A. Right.

18 Q. All right. And -- and I take it the computer

19 program you use is one that's -- that this RMI has developed

10:44 20 for use by railroads?

21 A. Correct.

22 Q. Such as -- such as your operation?

23 A. Uh-huh.

24 Q. Is that right?

10:44 25 A. Right.

1 Q. Okay. All right. What other manuals do you have?

2 A. I'd have to say -- well, there's all kinds.

3 There's --

4 Q. Tell me about them.

10:44 5 A. I can't re- -- well, I'm trying to think. But

6 that governs most of them right there.

7 Q. Okay. Are there any other manuals? I'm going to

8 go back and ask you about a couple of these. But are there

9 any other manuals that you are aware of that FWWR has that

10:44 10 governs how you do your job as Manager of Operations Center?

11 A. No.

12 Q. That's it?

13 A. I believe so.

14 Q. Okay. All right. Let's go back and talk about

10:45 15 them. The GCOR manual?

16 A. The General Code of Operating Rules. It's --

17 Q. General Code of Operating Rules?

18 A. Uh-huh.

19 Q. Okay. Is that a manual that the FWWR authored?

10:45 20 A. No. I believe the FRA. I'm not sure on that.

21 But the -- it's a -- it's a book that all railroad employees

22 have to carry, and it's -- it governs all railroad employees.

23 Q. Who publishes that book?

24 A. I'm not sure.

10:45 25 Q. Does it come from the government?

1 A. That, I couldn't -- I know the -- all the -- if we
2 look in the front page of it, it lists about 50 different
3 railroads that are -- it governs, so... I'm not too sure who
4 publishes it.

10:45 5 Q. So is this a manual that the FWWR has adopted --
6 A. Right.

7 Q. -- to govern its operations?

8 A. Uh-huh.

9 Q. "Yes"?

10:45 10 A. Yes.

11 Q. Okay. And how -- how big is this manual? How
12 many pages?

13 A. Approximately 200, I would think.

14 Q. All right. That's -- that's just a guess?

10:46 15 A. Yeah, it's just a guess.

16 Q. All right. And is -- is this General Code of
17 Operating Rules manual updated from time to time?

18 A. Yes.

19 Q. Who updates it?

10:46 20 A. The -- they publish a new one every so often. I
21 couldn't tell you how many. And then they can -- the
22 railroads theirselves can --

23 Q. Okay. So --

24 A. -- adjust the rules.

10:46 25 Q. -- when they update the manual, do they just send

1 you some new pages, or do you get a whole new manual?

2 A. They'll send new pages. And sometimes we'll get a

3 whole new manual.

4 Q. All right. Who updates the manual at FWWR?

10:46 5 A. Steve George.

6 Q. Okay. Is there anything in the General Code of

7 Operating Rules manual that addresses how to charge for

8 demurrage?

9 A. No.

10:47 10 Q. Okay. Let's talk about the dispatcher manuals.

11 Are those manuals that are authored by FWWR?

12 A. Yes.

13 Q. Okay. Who -- who authors those?

14 A. Steve George put the manual together.

10:47 15 Q. What is Mr. George's position at FWWR?

16 A. Vice President of Safety and Operations? Yeah.

17 I'll have to think -- look at his card here, if you don't

18 mind.

19 Q. Sure.

10:48 20 A. Vice President of Operations Planning and Support.

21 Q. Okay. Is there anything in these dispatcher

22 manuals that governs how to charge for demurrage?

23 A. No.

24 Q. All right. What -- basically, what are the

10:48 25 dispatcher manuals for?

1 A. It governs the dispatchers on how to dispatch the
2 trains that are actually moving.

3 Q. And do you consult the dispatcher manuals?

4 A. Yes. That's part of my position; that I'm
10:48 5 supervisor over the dispatchers.

6 Q. Okay.

7 A. So, yes, I consult the dispatcher manuals.

8 Q. And you consult these -- this General Code of
9 Operating Rules manual?

10:48 10 A. Yes.

11 Q. All right. Do you have any manuals there at FWWR
12 that have anything to do with how to charge and when to
13 charge demurrage?

14 A. Yes. We have our tariff, FWWR tariff.

10:49 15 Q. Okay. Any -- anything else? Any other -- well,
16 that's kind of a bad question.

17 Any other manuals that -- that you have at
18 FWWR that govern how you charge demurrage, besides the
19 tariff?

10:49 20 A. No. The tariff governs how we charge demurrage.

21 Q. I understand that; that you're saying that. But
22 are there any other manuals that you use?

23 A. For educational, or just for --

24 Q. To run your operation.

10:49 25 A. Yeah. We have the RMI manuals from Atlanta, the

1 manuals they give us.

2 Q. And that shows how to use the computer?

3 A. Right.

4 Q. All right. Anything else?

10:49 5 A. No. That's it.

6 Q. That's it, okay.

7 All right. Now, let me expand my question

8 beyond manuals. Are there any documents of any kind at FWWR

9 that -- that address how you charge for demurrage, besides

10:50 10 the tariff?

11 A. Yes.

12 Q. What else is there?

13 A. We have the confidentiality agreement we have with

14 PCI.

10:50 15 Q. Okay. Anything else?

16 A. Well, we have other confidentiality agreements.

17 Q. Well, with other customers, you mean?

18 A. Right.

19 Q. Okay.

20 A. But the --

21 Q. With PCI.

22 A. No. The tariff and the confidentiality agreements

23 is all we have.

24 Q. Okay. So basically -- I want to make sure. This

10:50 25 is very important. You're saying there are no documents or

1 manuals or guidelines of any kind at FWWR on how you
2 are -- how you are to charge demurrage to your customers
3 besides the tariff and any agreement you might have with a
4 specific customer? Is that your testimony?

10:51 5 A. Well, no. We have guidelines. We have --

6 Q. Tell me about them.

7 A. -- books. That's what I was trying to -- trying
8 to tell you a minute ago, and you changed the subject on us.

9 Q. All right. My fault. Tell me about --

10:51 10 A. We have the Atlanta books. The Atlanta books.

11 The computer. Demurrage is all in the computer.

12 Q. Okay.

13 A. And --

14 Q. All right. My mistake.

10:51 15 A. -- Atlanta furnishes the manual, furnishes the
16 training up in Atlanta, actually, once a year. I go every
17 two years. And they go through and they tell you how to
18 compute it and how to charge it, calculate it and send it
19 off.

10:51 20 Q. Okay. And I take it that the demurrage bills that
21 my client has received were generated by this RMI software?

22 A. That's correct.

23 Q. Okay. And how long have y'all been using the RMI
24 software?

10:51 25 A. Since I've been employed.

1 Q. Okay.

2 A. Or since I've been the Manager of Operations.

3 Q. So at least the last seven years?

4 A. Yes.

10:51 5 Q. And, so, basically, the only guidelines and

6 anything in writing that you use in charging demurrage is --

7 would include the tariff, any agreement you have with the

8 customer and the RMI software manuals?

9 A. That's correct.

10:52 10 Q. Okay. No other documents are there that address

11 those issues?

12 MR. DeBERRY: Objection; form.

13 A. That's my three main items.

14 Q. (BY MR. PENNINGTON) I -- I understand those are

10:52 15 the main ones. Are there any others?

16 Are there any -- let me ask you this: Are

17 there any memos? Do y'all have -- do you have memos that

18 Mr. George, or anyone else, has circulated, saying, okay,

19 here's -- here's how we're going to charge demurrage, or

10:52 20 here's how we're going to deal with a -- a demurrage charge

21 when this happens or that happens? Anything else out there

22 in writing that addresses those issues?

23 A. Yes. There's all types of memos and --

24 Q. All right. Let's talk about the memos.

10:53 25 A. -- there's --

1 Q. Go ahead.

2 A. Well, I mean, the -- we're always discussing
3 day-to-day operations and demurrage. That's something that
4 comes up once or twice a week.

10:53 5 Q. Okay. Is that something -- is how to charge
6 demurrage something that changes from time to time?

7 A. Not how we charge it, no.

8 Q. Okay. When you charge it, does that change from
9 time to time?

10:53 10 A. No.

11 Q. Okay. Then what -- what's the purpose of the
12 memos?

13 MR. DeBERRY: Objection; form.

14 A. Well, the -- if we have a service failure.
10:53 15 Somebody might send me a memo, send me an e-mail saying: We
16 didn't switch PCI last night; or tell me: We had a service
17 failure; or PCI had problems and we had -- we need to charge
18 them for this day.

19 Q. (BY MR. PENNINGTON) So the memos would address
10:53 20 specific situations --

21 A. Right.

22 Q. -- that arose with a specific customer?

23 A. Right.

24 Q. All right. Okay. Do you have any memos that --
10:54 25 or letters that -- that address generally how and when to

1 charge demurrage?

2 A. No.

3 Q. Okay. So these memos address only specific

4 situations with specific customers as they arise?

10:54 5 A. Right.

6 Q. And you kind of handle it on an event-by-event

7 basis?

8 A. Right.

9 Q. Okay. Do y'all have a lot of disputes with your

10:54 10 customers about your demurrage charges?

11 A. No. Huh-uh. No.

12 Q. Okay. Do you charge demurrage to any other

13 customers besides PCI?

14 A. Yes.

10:54 15 Q. How many customers do y'all -- do y'all have that

16 you switch for?

17 A. Approximately 50 to 60.

18 Q. Okay. Where are they located?

19 A. From the Carrollton area to Brownwood.

10:55 20 Carrollton, Texas, down towards Brownwood, Texas.

21 Q. Okay. Who works for you? I mean, there at the

22 company.

23 A. I have four dispatchers, --

24 Q. Uh-huh.

10:55 25 A. -- two freight clerks. And that's all that

1 reports to me.

2 Q. What are their names?

3 A. I have Jimmy Locker. He's a dispatcher. I'll

4 give you my dispatchers first.

5 Q. Sure.

6 A. Jimmy Locker.

7 Q. Uh-huh.

8 A. Harold Koch, K-O-C-H. Reggie Mosley and Jimmy

9 Goldsmith.

10:56 10 Q. All right. Have you had any other dispatchers in

11 the last four years that -- who no longer work there?

12 A. Yes.

13 Q. Who is that?

14 A. Oh, I don't have the names in front of me. I

10:56 15 can...

16 Q. You don't remember any other dispatchers that have

17 worked for you --

18 A. I had --

19 Q. -- in the last four years?

10:56 20 A. -- Gary Lash.

21 Q. How do you spell that?

22 A. L-A-S-H.

23 Q. Uh-huh.

24 A. We had -- we had a lady. I can't remember her

10:56 25 name. And Roy McFarland comes to mind.

1 Q. Roy McFarland, okay.

2 A. We -- we had two ladies that come in and worked

3 for us. They wasn't there very long. I don't remember their

4 names.

10:56 5 Q. Okay. Any others?

6 A. There might be. But like I say, they were -- them

7 were -- them are the two that rings a bell, yeah.

8 Q. Right. How about in the last two years; do you

9 remember any others in the last two years?

10:57 10 A. I believe that group right there has been there

11 for the past two years.

12 Q. Okay. And then who are your freight clerks?

13 A. Don Fitzgerald.

14 Q. Spell that.

10:57 15 A. F-I-T-G-E-R-A-L-D (sic).

16 Q. Oh, Fitzgerald. Okay.

17 A. Fitzgerald.

18 Q. I'm sorry. Okay.

19 A. And Wanda McDaniel.

10:57 20 Q. Anybody else report to you besides the four

21 dispatchers and the two freight clerks?

22 A. No.

23 Q. All right. Who do you -- do -- do you ever, in

24 the last two years, interface with anybody at PCI?

10:57 25 A. Yes.

1 Q. Who?

2 A. Gary Hazard, Randy Gaston. And I talk with the --

3 their secretaries up front; the lady that calls in and

4 releases the cars. I couldn't tell you her name. I talk

10:58 5 with Joe Boggs off and on throughout the years.

6 Q. Anybody else?

7 A. No. That's it.

8 Q. Okay. Have you ever talked to a fellow named

9 Mario?

10:58 10 A. No, I don't believe I ever have, unless he calls

11 and releases a car.

12 Q. You don't remember ever having a conversation with

13 Mario?

14 A. No.

10:58 15 Q. Who -- who sends out the demurrage bills at FWWR?

16 A. I do.

17 Q. Do you have to get approval from anyone before a

18 bill goes out?

19 A. No. I approve them.

10:58 20 Q. Who prepares them for you?

21 A. Me and the two freight clerks.

22 Q. Okay. Are there any other freight clerks that

23 have worked for you in the last four years who are no longer

24 there?

10:59 25 A. No.

1 Q. Do you have the authority to adjust a demurrage
2 bill if -- if you have a conversation with a -- with a
3 customer?

4 A. Yes.

10:59 5 Q. So you don't have to talk to anybody about that?

6 A. No, sir.

7 Q. Is there some dollar limit that you can adjust, or
8 can you just -- you can adjust --

9 A. If it's --

10:59 10 Q. -- any size demurrage bill?

11 A. -- it's a dollar limit that gets -- let's just say
12 they called and it's \$500 or \$300. Then I will talk it over
13 with Mr. George before I adjust it --

14 Q. Uh-huh.

11:00 15 A. -- on a big dollar amount. But on the small
16 amounts, we adjust them and keep going.

17 Q. Okay. So what's your cutoff as to when you go
18 talk to Mr. George about it?

19 A. It depends on the situation. If it's \$500 and
11:00 20 it's just black and white that the customer is correct and
21 I'm wrong, --

22 Q. Uh-huh.

23 A. -- then I adjust it and go on. If it's a disputed
24 bill and it's \$500, I will go talk to Mr. George and...

11:00 25 Q. Okay. Well, with -- with certain exceptions, is

1 500 your typical number, or is it hard to say?

2 A. There's -- there's really not a number.

3 Q. Okay. Okay. Why would you ever -- why -- under

4 what circumstances would you ever send out a demurrage bill

11:00 5 that wasn't really owed? How could something like that

6 happen?

7 A. Well, you spot the oldest cars first. And if

8 the -- the oldest cars does not get spotted and the newer

9 cars gets spotted, then, of course, there's going to be a

11:00 10 charge on that older car.

11 If a boxcar needs to be turned. If they

12 call and say: Well, this car needs to be turned. And then

13 we have to pull it and it takes a day to take it and pull it

14 back.

11:01 15 Q. Okay. Any other reasons?

16 A. Failure to switch.

17 Q. Okay. Any other reasons for -- do you -- do you

18 remember the question?

19 A. Yeah. No, I'm thinking. I'm thinking.

11:01 20 Q. That's fine. That's fine.

21 A. Yeah. If a customer orders a car in, says: We

22 want this car on Monday. And we don't spot it till Tuesday,

23 and the car is not being spotted, you know, according to how

24 they requested it.

11:01 25 Q. Can we call that a failure to follow the

1 customer's instructions?

2 A. Yes.

3 Q. Okay. What else?

4 A. That pretty much covers it all.

11:02 5 Q. Okay. So in dealing with all your customers, if

6 you have failed to spot the oldest cars first and that

7 results in demurrage, you don't charge them for that?

8 A. Right.

9 Q. Or if -- if you spotted a boxcar backwards, you

11:02 10 don't charge them for that?

11 A. Right.

12 Q. Or if you -- there's demurrage as a result of your

13 failure to -- to place any cars on a -- a day you're --

14 A. Right.

11:02 15 Q. -- supposed to place, you don't charge for that?

16 A. Right.

17 Q. Failure to follow customer instructions on a

18 special car they want?

19 A. Right.

11:02 20 Q. You don't charge demurrage on that?

21 A. (Shaking head negatively.)

22 Q. Okay. As far as like a failure to spot the oldest

23 cars first, is your computer program not equipped to -- to

24 figure that out?

11:02 25 A. Yes, it is.

1 Q. Okay. Then how could you send a demurrage bill
2 out under those circumstances? How could the computer, if
3 you know, let you send out a bill in those circumstances?

4 A. Because the -- when the cars come in and you put
11:03 5 them in the system, the crew goes out and spots the cars.
6 And if you do not catch it, that the cars were spotted out of
7 order, then it -- the computer don't know it, --

8 Q. Well --

9 A. -- so it just keeps right on going.

10 Q. Okay.

11 A. You have to tell that computer that this car
12 was --

13 Q. So the computer --

14 A. -- spotted out of order.

11:03 15 Q. -- program is not smart enough to figure that out?

16 A. No, not unless you tell it to. Because the
17 computer program does not know what the crew is doing out at
18 the yard. We have to input that information into the
19 computer.

11:03 20 Q. Okay. But each day, you input into the computer
21 cars that have come in, and they're logged into your
22 system, --

23 A. Uh-huh.

24 Q. -- I assume?

11:03 25 A. Yes.

1 Q. And each day, you log the cars that are spotted?

2 A. Yes.

3 Q. And where they're spotted?

4 A. Yes.

11:03 5 Q. And you log in when they're removed from the

6 customer's location?

7 A. Yes.

8 Q. Okay. So explain to me how the computer can't

9 figure out --

11:03 10 A. Well, because you -- you missed a move. We

11 receive the cars from the railroads, okay? PCI has seven

12 cars or eight cars, whatever their full spot is, that they

13 have seven or eight cars on the track. But they have another

14 10 cars sitting on a side track.

11:04 15 Well, you spot -- it's called constructively

16 placing the cars. Basically, you're saying these cars are

17 placed, but they're not actually at the facility. So when he

18 releases these seven, you reach over to these 10 and get the

19 oldest seven and go to the spot.

11:04 20 Well, if the crew goes in and does not pull

21 the oldest cars and puts them in, that's how you get your

22 errors in your demurrage.

23 Q. Okay. All right. And, so, in that situation, the

24 computer spits out a bill, right?

11:04 25 A. Right.

1 Q. And you send it out?

2 A. Right.

3 Q. And if the -- and when you send these bills out,

4 you don't check to make sure that the cars were --

11:04 5 A. Oh, yes.

6 Q. -- placed on the first-in basis/ --

7 A. Yes.

8 Q. -- first-out basis?

9 A. Yes.

11:05 10 Q. You do?

11 A. Yes.

12 Q. Okay. Then how does a bill ever get sent out with

13 an error like that?

14 A. It's computer -- it's computer-generated. And a

11:05 15 lot of times, it will grab Saturday, where it wasn't supposed

16 to, or it might grab a Sunday, or we just flat overlook it,

17 you know.

18 Q. Okay. Well, you can overlook something on --

19 A. Right.

11:05 20 Q. -- a deal like this.

21 A. Right.

22 Q. Okay. But I guess my question is: If the -- the

23 computer spits out a bill, do you send it out?

24 A. If it's a good bill, I send it out.

11:05 25 Q. Okay. So you -- the computer doesn't just have to

1 spit out a bill. You look at it?

2 A. Correct.

3 THE WITNESS: May I get a drink of water?

4 MR. PENNINGTON: You may. Sure.

11:05 5 (Pause in the deposition.)

6 Q. (BY MR. PENNINGTON) What -- what percent of the

7 demurrage bills that you've sent out in the last three years

8 have -- have been questioned by customers?

9 A. Oh, I don't have that information in front of me.

11:06 10 Q. Do you have an estimate of that?

11 A. I would guess 10, 15 percent out of the last three

12 years, I've had calls on them.

13 Q. Okay. And then how -- on how many of those do you

14 make adjustments?

11:06 15 A. That -- that's -- that's real hard to say. Maybe

16 half.

17 Q. Okay. Do you keep any statistics to show how many

18 of these bills are being questioned --

19 A. No.

11:07 20 Q. -- and how many are being adjusted?

21 A. No.

22 Q. Why -- why would you -- why would you not do that?

23 A. Because we have the information if we wanted to

24 pull it and find that information, but it's not something

11:07 25 that we've ever pursued.

1 Q. Okay. Does anyone, besides you, review bills
2 before they go out?

3 A. Yes.

4 Q. Who?

11:07 5 A. Steve George.

6 Q. Anyone else?

7 A. Well, the freight clerks help me prepare them,
8 so...

9 Q. I missed that. I'm sorry.

11:07 10 A. The freight clerks help me prepare them, so
11 they're reviewing them. They're looking at them theirself.

12 Q. Okay. But when the freight clerks prepare a bill,
13 do you review it before it goes out?

14 A. Yes.

11:07 15 Q. And does Mr. George review it before it goes out?

16 A. On some bills.

17 Q. Okay. How long has Mr. George been reviewing any
18 bills that go out?

19 A. I would think a couple of years.

11:07 20 Q. Okay. Do you remember a certain time when he got
21 involved in reviewing bills, or a certain event that he --

22 A. Well, he was here for a year or so before he was
23 actually my boss.

24 Q. Okay.

11:08 25 A. And, so, prior to that, I wasn't -- whenever he

1 became my boss, then he started looking at bills.

2 Q. Okay.

3 A. But like I say, he -- that's just when I have

4 questions. I mean, he don't look at them, per se. Just if I

11:08 5 have a question, I walk in there and say: This don't look

6 right, or we need to talk about this one.

7 Q. Okay. And -- and you told me he reviews some of

8 the bills. Do you know how he determines --

9 A. When I take them in there. When I -- when I

11:08 10 decide that this needs to be looked at, then we look at it.

11 Or if he is looking in the computer and says: This don't

12 look right. Then we'll talk about that one.

13 Q. Okay. So what -- what's the procedure as to what

14 bills he reviews?

11:08 15 A. When he decides or if I decide that it needs to be

16 looked into, then we both look at it.

17 Q. Does he get your whole stack of bills each month?

18 A. No.

19 Q. So you may decide that he's not going to review a

11:08 20 bill and just send it out?

21 A. Yes.

22 Q. And, so, you -- each month you -- and I assume you

23 bill every month. Is that a fair statement?

24 A. That's correct.

11:09 25 Q. Okay. And, so, each month you decide which bills

1 he's going to look at?

2 A. The ones I have problems with, yes.

3 Q. Okay. And what -- why would you have problems

4 with a bill?

11:09 5 A. If there's exceptions to -- like if we have a

6 service failure. If the customer had a service failure --

7 Q. Uh-huh.

8 A. -- and there's something going on that we can help

9 the customer on the bill, or if there's something that's

11:09 10 not -- just don't look right about it, you know.

11 Q. Right.

12 A. You look at it every day and just say:

13 Something's not right; let's talk it over.

14 Q. Okay. But, basically, you're telling me there's

11:09 15 nothing in writing there at FWWR that -- besides the tariff,

16 that defines which circumstances justifies demurrage and

17 which circumstances don't?

18 MR. DeBERRY: Objection; form.

19 A. That's correct.

11:10 20 Q. (BY MR. PENNINGTON) Have -- do you know why PCI

21 was not sent any demurrage bills for several years?

22 A. They didn't incur any.

23 Q. Are you sure about that?

24 A. We -- we sent them some bills. Every bill that

11:10 25 would come out, they got sent on.

1 Q. I understand that. But in 1998 and 1999 and 2000,
2 you weren't -- were you there in charge of demurrage bills
3 for any of those years?

4 A. Yes.

11:10 5 Q. Okay. Do you know whether any demurrage bills
6 were sent to FWWR before 2001?

7 MR. DeBERRY: You mean PCI?

8 MR. PENNINGTON: I'm sorry. Thank you.

9 PCI.

11:11 10 THE WITNESS: I don't have the information
11 in front of me.

12 Q. (BY MR. PENNINGTON) Okay. Has there -- have you
13 been a party to any discussions there at FWWR about a need to
14 generate revenue through demurrage?

11:11 15 A. No.

16 Q. So you're telling the jury that there's no --
17 there's been no decision made, that you're aware of, to try
18 to increase demurrage revenue at the company?

19 A. That's correct.

11:11 20 Q. Has anything changed since the year 2000 in the
21 way you charge demurrage?

22 MR. DeBERRY: Objection; form.

23 A. I -- the tariff changes. We've had two or three
24 tariffs come out. I couldn't tell you if it actually
11:12 25 pertained to demurrage or not.

1 Q. (BY MR. PENNINGTON) Who -- who writes the
2 tariffs?

3 A. The -- oh, the ASLRA, I believe it's called,
4 American Short Line. We give them the information and they
11:12 5 publish the tariff.

6 Q. Who sets the rates in the tariff?

7 A. Marketing. Our marketing, Richard Lesikar.

8 THE REPORTER: What was the last name?

9 THE WITNESS: Lesikar, L-E-S-I-K-A-R, I
11:12 10 believe.

11 Q. (BY MR. PENNINGTON) Okay. So the numbers and
12 charges that are in the tariff are -- are provided to the ASL
13 by your company?

14 A. That's correct. All the information is.

11:12 15 Q. Okay.

16 A. ASLRA, I believe it was. American Short Line --

17 Q. ASLRA.

18 A. American Short Line Railroad Association.

19 Q. Got it. Thank you.

11:12 20 Okay. Who decides which cars are to be
21 delivered to PCI each night?

22 A. The oldest cars there. The conductor -- we print
23 the reports, and he gets the report on the oldest cars, and
24 then we -- the conductor on this train decides which cars
11:13 25 he's going to spot.

1 Q. Before I mark this as an exhibit, is this the --
2 the report the conductor sees?

3 (Attorney showing witness document.)

4 A. It's one of the reports.

11:13 5 Q. Okay. So, basically, are you -- do you have any
6 role in deciding what -- what cars are delivered to PCI each
7 night?

8 A. Other than my office generating the reports, no.

9 Q. Okay. So tell me about the reports that your
11:13 10 office generates.

11 A. We generate the conductor reports -- or the MTO
12 out at the yard will generate the reports.

13 Q. The MPO?

14 A. MTO, Manager of Train Operations. He is capable
11:14 15 of getting in the computer and printing his own reports. Or
16 we do it from up there.

17 Q. All right. Would you agree with me, at least in
18 the last four years, all of PCI's spots occur at night?

19 A. No.

11:14 20 Q. Okay. Do they all occur at night currently?

21 A. No.

22 Q. Have they ever occurred just at night?

23 A. No. It's as needed. It's always been as needed.

24 Q. All right. All right. Tell me about this report.
11:14 25 You're saying the conductor has a report. And is that

1 generated each day?

2 A. Yes.

3 Q. All right. And what will that report show?

4 A. It will show all the cars destined to PCI.

11:15 5 Q. It's just a manifest showing --

6 A. Right.

7 Q. -- these are all the cars that are destined to

8 PCI --

9 A. That's correct.

11:15 10 Q. -- that we have?

11 A. That's correct.

12 Q. Okay. All right. But it's not this document;

13 it's something different than this document?

14 A. It's something different than this one.

11:15 15 Q. Okay. That's fine.

16 So, basically, you don't -- you don't

17 generate anything for the conductor to show what cars are to

18 be delivered on the next spot?

19 MR. DeBERRY: Objection; form.

11:15 20 Q. (BY MR. PENNINGTON) Is that right?

21 A. Yes, we do. We send them the report that shows

22 them the oldest cars, so he'll know to spot the oldest cars.

23 Q. Okay. And are these reports, are they -- do they

24 list the cars in order of oldest to -- to youngest?

11:15 25 A. I believe the oldest are on top.

1 Q. Okay. So it should be very easy for someone to
2 just say: Okay. Well, they've got room for eight cars;
3 we're going to deliver these eight, the first eight, if
4 they're doing their job?

11:16 5 A. That's correct.

6 Q. And I -- it's my understanding the -- the cars
7 that are destined to PCI are either going to be located on
8 the old UP interchange or in the Hodge yard; is that correct?
9 Anyplace else they would be?

11:16 10 MR. DeBERRY: Did you say destined for?

11 MR. PENNINGTON: Yeah.

12 A. No. They -- we interchange our Union Pacific cars
13 down at Peach yard. That's right in Downtown.

14 Q. (BY MR. PENNINGTON) Peach?

11:16 15 A. Yeah. Downtown Fort Worth. And -- and we bring
16 them up in the Hodge yard and stage them there, and the old
17 UP interchange to be spotted into PCI.

18 Q. So the conductors -- what -- what do you call this
19 daily report that goes to the conductor?

11:17 20 A. Switch list.

21 Q. Switch list?

22 A. Yeah. They're all switch lists there.

23 Q. So each daily switch list will show all of the
24 cars that are destined for PCI and will show whether they are
11:17 25 on the old UP interchange, the Hodge yard or the Peach yard?

1 A. That's correct.

2 Q. All right.

3 A. Show the location wherever we...

4 Q. And the conductor on the train for the -- when he

11:17 5 does the next spot, is supposed to deliver the oldest cars,

6 regardless of where they are, correct?

7 MR. DeBERRY: Objection; form.

8 A. If they're already constructively placed. The

9 cars at Peach yard will not be constructively placed, because

11:17 10 they're not available to PCI. They are available to PCI when

11 they hit Hodge yard.

12 Q. (BY MR. PENNINGTON) Okay. Thank you for that

13 distinction.

14 So the daily switch report -- strike that.

11:18 15 The conductor, if he's following FWWR

16 policy, is to deliver the oldest cars in the Hodge yard and

17 the old UP interchange?

18 MR. DeBERRY: Objection; form.

19 A. That's correct.

11:18 20 MR. PENNINGTON: All right. What -- what's

21 the objection?

22 MR. DeBERRY: I'm sorry?

23 MR. PENNINGTON: What's the objection?

24 MR. DeBERRY: I said, "Objection; form."

11:18 25 MR. PENNINGTON: No. I mean, do you want to

1 tell me what the objection -- I may want to correct the
2 question.

3 MR. DeBERRY: Oh. You -- you've asked if
4 it's the policy of FWWR to deliver the oldest cars first, and
11:18 5 the question assumes that that's -- doesn't make a
6 distinction whether that's the general policy or the absolute
7 policy.

8 Q. (BY MR. PENNINGTON) Okay. How could the -- does
9 the conductor sometimes not do that? Does he sometimes not
11:19 10 deliver the oldest cars?

11 A. Yes.

12 Q. How -- well, how could that happen?

13 A. When you have a hundred railroad cars in your
14 yard, it's easy to reach over and grab the wrong one.

11:19 15 Q. Aren't they numbered?

16 A. Yes, sir. A big yard and lots of railroad cars.

17 Q. Okay. But, I mean, for him to grab the wrong car,
18 he's got to grab one with a different number than the one on
19 the -- on the manifest, right?

11:19 20 A. No. That number will be on his switch list. That
21 number will be there by pieces. I mean, here's the paper
22 right here, all of their cars. And you'd tell him to spot
23 the first seven, and he'd reach in and grab the first eight.
24 Tell him you want four, he might reach in and grab five.

11:19 25 Q. Okay. I'm just trying to understand how -- how

1 that could happen. Do you -- that's not really a question,
2 is it?

3 Under what circumstances could a conductor
4 grab the wrong car?

11:20 5 A. Tired. Long day. A lot of -- a busy yard.

6 Q. Okay. So that's something that -- is that
7 something that y'all tolerate at FWWR? You allow conductors
8 to make mistakes like that on a --

9 A. No.

11:20 10 Q. -- routine basis?

11 A. No.

12 Q. What other reasons would they not grab the -- the
13 oldest cars?

14 A. The customer requests --

15 Q. Okay.

16 A. -- a special order.

17 Q. All right. What other reasons?

18 A. If we tell them from the Operations Center: We
19 need to spot this car.

11:20 20 Q. Okay. So are there circumstances where the
21 Operations Center says: Don't deliver the oldest cars?

22 A. Yes.

23 Q. Okay. And would that be for any reason, other
24 than to -- to meet a customer's specific request?

11:21 25 A. It would be to meet the customer's specific

1 request.

2 Q. Any other reason --

3 A. No.

4 Q. -- you do that?

11:21 5 A. No.

6 Q. But what you're telling me is that if you did that

7 and it resulted on demurrage on a car, your computer is still

8 going to spit out a bill on that?

9 A. That's correct.

11:21 10 Q. Have y'all talked to the computer people about

11 fixing that in the system?

12 A. We talk -- we talk to them all the time. They --

13 Q. Okay.

14 A. It's a formula that is not as simple as just

11:21 15 fixing it. The computer only knows what you -- the

16 information you feed it.

17 Q. Yeah, yeah. Are -- is there any writing -- who

18 works with the computer company on -- on trying to make

19 corrections for things like that; who at your company?

11:22 20 A. I do.

21 Q. You do, okay. Do you have some correspondence

22 that you've sent to this RM -- RMI group, asking them to fix

23 things or change things in their programming?

24 A. Yes.

11:22 25 Q. Okay. And does some of that correspondence

1 address things like generating demurrage bills when the
2 oldest cars have not been delivered first?

3 A. No.

4 Q. Okay. What other -- what -- what other issues do
11:22 5 you remember corresponding with them about on the software?

6 A. In general?

7 Q. Yeah. Well, any issues you've asked them to try
8 to address.

9 A. I talk to them once a week on different items.
11:22 10 The computer system does more than just demurrage bills.

11 Q. Sure.

12 A. It manages the whole railroad. It manages every
13 railroad car that is on the railroad. And when there is a
14 problem with the printing, if there is a problem with
11:23 15 resequencing tracks, you know, we call and tell them and they
16 get on it and fix it.

17 Q. And do y'all -- do y'all pay them for making
18 changes to the software as you go along, or is that part of
19 your deal?

11:23 20 A. That's part of our deal.

21 Q. Have you ever been in litigation with this
22 company?

23 A. No.

24 Q. Have you ever threatened litigation against the
11:23 25 company?

1 A. No.

2 Q. But you have corresponded with them about software
3 issues concerning demurrage and demurrage bills?

4 A. Yes.

11:23 5 Q. You don't -- you just don't recall any of the
6 specific things you've asked them to address?

7 A. Yeah. I talked to them at the beginning of this
8 month, because they were not printing out correctly. I've
9 talked to them because it wasn't computing -- computing
11:23 10 correctly. I mean, I've talked to them -- I've talked to
11 them quite often.

12 Q. Okay. When -- when was this event where the bills
13 weren't computing correctly?

14 A. That's been, you know, several months ago. The --
11:24 15 and it was a code I had missed when I had billed payables.

16 Q. Okay. Have y'all looked at trying to replace that
17 software in the last three years?

18 A. We did about three -- a couple years ago when
19 Mr. George first come to work, but it didn't pan out.

11:24 20 Q. And, so, at that time y'all were -- y'all were
21 thinking about going to a different software?

22 A. Well, the new man had made some new software, but
23 it didn't -- there is one company that manages the offices
24 for the railroads, and that's RMI. Another guy tried to get
11:24 25 in the field, and his software didn't pan out.

1 Q. Okay. So are you basically saying you're stuck
2 with the RMI software because they're the only people that
3 provide it for your industry?

4 MR. DeBERRY: Objection; form.

11:25 5 A. As far as I know.

6 Q. (BY MR. PENNINGTON) Is that a "yes"?

7 A. To the best of my --

8 MR. DeBERRY: Same objection.

9 A. To the best of my knowledge, they're the only ones
11:25 10 that supply it for the industry.

11 Q. (BY MR. PENNINGTON) Okay. So my question is:
12 Are you stuck with them, whether their software works or not?

13 MR. DeBERRY: Objection; form.

14 A. No, I don't guess we're stuck with them.

11:25 15 Q. (BY MR. PENNINGTON) Okay. Well, what else can
16 you use?

17 A. We can go back to wooden pencil days and yellow
18 tablet, I mean.

19 Q. Okay. All right. If you're not willing to go
11:25 20 back to paper and pencil, --

21 A. Yeah.

22 Q. -- are you stuck with them?

23 A. Yes.

24 Q. All right. Life would be a lot simpler if we
11:25 25 didn't have any of these computers, wouldn't it?

1 A. Yeah, yeah.

2 Q. Especially the Internet.

3 Is it the custom and practice in the

4 railroad industry for a short line railroad company like

11:26 5 yourself to deliver the oldest cars first?

6 MR. DeBERRY: Objection; form.

7 A. Yes.

8 Q. (BY MR. PENNINGTON) Are you familiar with that

9 custom and practice?

11:26 10 A. It's -- all the tariffs that I've seen is, the

11 oldest car is spotted first.

12 Q. Okay. Do you -- I guess my question is: Are you

13 familiar with what the custom and practice is --

14 A. No.

11:26 15 Q. -- in Texas?

16 You're not?

17 A. Apparently I'm not understanding your question.

18 Q. Okay. Okay. Let me go back.

19 A. Okay.

11:26 20 Q. How long have you -- you've worked in the railroad

21 business in Texas since 1991?

22 A. Actually, since about '84.

23 Q. Okay. Because I didn't go back before. Where did

24 you work before '91?

11:26 25 A. I worked in Houston and worked in Mineral Wells.

1 Q. Who did you work for?

2 A. In Houston, it was Rescar, R-E-S-C-A-R.

3 Q. Uh-huh.

4 A. And in Mineral Wells, it was Mineral Wells and

11:27 5 Eastern.

6 Q. Okay. And, so, are you familiar, based upon

7 working in the -- there were those -- strike that.

8 Were those short line railroad companies?

9 A. Mineral Wells was. Rescar is a contract switcher.

11:27 10 Q. All right. And FWWR is a short line railroad

11 company?

12 A. Yes.

13 Q. All right. And based on your work with the

14 Mineral Wells company and the FWWR company, have you become

11:27 15 knowledgeable of what the custom and practice is in Texas

16 concerning the order of placement of cars with customers?

17 A. I -- yes, I'm knowledgeable of what -- how FWWR

18 handles it.

19 Q. Okay. But you don't know whether anybody else

11:27 20 does it that way?

21 A. From all the tariffs I've read, everybody else

22 does it that way.

23 Q. Okay. So are you familiar with the way everybody

24 else does it too?

11:27 25 A. Not everybody else, but I'm familiar with how the

1 Union Pacific does it and how the Burlington Northern does it
2 from people that I've associated with.

3 Q. Okay.

4 A. There's so many railroads out there, you don't
11:28 5 associate with all of them.

6 Q. Do you believe that the way that they do it is the
7 way that -- that the industry does it in Texas?

8 A. Yes.

9 Q. All right. And the way the industry has always
11:28 10 done it, as far as you know, is deliver the oldest cars
11 first?

12 MR. DeBERRY: Objection; form.

13 A. Yes.

14 Q. (BY MR. PENNINGTON) Have you adjusted demurrage
11:28 15 bills sent to PCI before?

16 A. Yes.

17 Q. And who have you worked with on that?

18 A. I've worked with Randy Gaston and -- and the other
19 guy.

11:28 20 Q. Gary?

21 A. Gary Hazard, yes.

22 Q. Have you ever sent a demurrage bill to PCI that
23 didn't have an error on it?

24 A. Yes.

11:29 25 Q. Okay. Which bill was that?

1 A. I don't -- couldn't tell you. I know we had some
2 adjustments on some a while back that the president adjusted.
3 And there was no errors on it, but he adjusted the bills.

4 Q. Okay. So you're telling me that -- that FWR --
11:29 5 FWWR has sent demurrage bills to PCI which did not have
6 errors on it?

7 A. Yes.

8 Q. Okay. But you don't know which bills those are?

9 A. No.

11:29 10 MR. PENNINGTON: I'll ask that those be
11 produced.

12 MR. DeBERRY: Ask that those be produced in
13 what fashion?

14 MR. PENNINGTON: Just if you could produce
11:29 15 them. I'd like to see any bills that have ever been sent to
16 PCI that didn't have errors on them. He says there are some;
17 he knows there are some. I'd like to see them. Not right
18 now. I mean, you know, I know you don't have them right now.

19 MR. DeBERRY: Okay. Well, I guess you'll --
11:30 20 you'll ask for them, then, in the appropriate way.

21 MR. PENNINGTON: Yeah.

22 Q. (BY MR. PENNINGTON) Okay. Are you familiar with
23 how PCI's spur is configured?

24 A. Yes.

11:30 25 Q. Have you been there?

1 A. Yes.

2 Q. Been on their property and seen it?

3 A. Yes.

4 Q. All right. What is a full spot of cars on PCI's

11:30 5 spur, to your knowledge?

6 A. We've got four on the A-frame side, and I want to

7 say six or seven on the boxcar side. But I deal with so many

8 customers that I can't --

9 Q. Yeah. Who knows that? Who knows that at FWWR,

11:30 10 what a full spot of cars is?

11 A. Oh, the MTOs know it, the conductors know it, and

12 I know it from sitting at my desk and having it in front of

13 me.

14 Q. Okay. If -- if we have records -- let me look at

11:30 15 something here.

16 I'm not going to mark this yet, but if we

17 have a record here from July 15 of 2003 that shows eight cars

18 were spotted to the PCI Track B -- is that what that says?

19 A. Yes.

11:31 20 Q. -- and five to the Track A -- is that what that

21 says? No, it doesn't say that. I'm sorry.

22 A. No, it don't say that.

23 Q. No. I'm sorry.

24 A. The A track does not have no cars on it.

11:31 25 Q. Okay. So if it shows that eight tracks (sic) were

1 delivered on July 15, 2003, is it reasonable to assume that
2 it will hold eight cars?

3 A. No. You can't go by this.

4 Q. Okay. Why not?

11:31 5 A. Because this is showing what cars are on the
6 track. But they cannot get to all of their cars. So if the
7 crew had six cars on the track and then two down by the
8 switch, then the computer is going to show them on track, but
9 they're not actually spotted, not actually where they can get
11:31 10 to them.

11 Q. Okay. But does that record show that eight cars
12 were actually delivered on July 15th?

13 A. Delivered to the customer?

14 Q. Right.

11:31 15 A. It shows eight cars that are on the track. It
16 don't show you how many cars were actually delivered where
17 they could unload them.

18 Q. Hmmm. So you're saying some of those eight cars
19 may have been there from the day before or something?

11:32 20 A. It -- this report does not show what day the car
21 was placed in there.

22 Q. Okay.

23 A. This report is showing when the -- what railroad
24 it come from and the date it come from that railroad.

11:32 25 Q. Okay. But you're saying if we look -- and this

1 is -- this is FWWR's record, isn't it?

2 A. Right.

3 Q. Okay.

4 A. That is the report that we generate for PCI.

11:32 5 Q. Okay. But you're telling me your understanding of

6 this report is that not all eight of these cars were

7 delivered on July 15, 2003?

8 MR. DeBERRY: Objection; form.

9 Q. (BY MR. PENNINGTON) Or weren't all necessarily --

11:32 10 A. From looking -- from looking at this report, I

11 cannot tell you all eight of them was actually available to

12 PCI.

13 Q. So your reading of this report is that some of

14 these may have already been there before July 15, 2003?

11:33 15 A. You'd have to look at the day before, yes.

16 Q. And I know --

17 A. See, this --

18 Q. -- you don't know what --

19 A. See, this -- this report is real vague.

20 MR. PENNINGTON: I don't know what that

21 means you wrote, but I'll talk to you during the break.

22 MR. GASTON: Okay.

23 Q. (BY MR. PENNINGTON) Okay. I'm just getting --

24 I'm just trying to get your --

11:33 25 A. Right.

1 Q. -- understanding of that report.

2 Is it possible that some of the eight cars

3 that are shown on Track B on this report were delivered on

4 a --

11:33 5 A. Yes.

6 Q. -- prior day?

7 A. Yes.

8 Q. That's your understanding --

9 A. Yes.

11:33 10 Q. -- of this report?

11 MR. PENNINGTON: Okay. Do y'all want to

12 take a break?

13 MR. DeBERRY: Sure.

14 MR. PENNINGTON: Let's take a break.

11:34 15 (Break taken 11:34 to 11:43 a.m.)

16 Q. (BY MR. PENNINGTON) Let me ask you a couple more

17 questions about the bills generated by the RMI software. Do

18 those bills frequently have mathematical errors in them?

19 A. Not if the formula is put in there correctly, the

11:44 20 tables.

21 Q. Okay. Let me show you what I'm going to mark as

22 Exhibit 1.

23 MR. PENNINGTON: Do you mind if I mark it on

24 here?

25 THE REPORTER: No, that's fine.

1 (Exhibit 1 marked & attached.)

2 Q. (BY MR. PENNINGTON) Let me show you what we've
3 marked as Exhibit 1 to your deposition. The columns over on
4 the right, are those correctly calculated on that bill?

11:44 5 A. Without a calculator in front of me, I'm not going
6 to be able to tell you that.

7 Q. Well, isn't -- if you look here, isn't this
8 supposed to be -- isn't the formula supposed to be this
9 column minus that column times \$30?

11:45 10 A. Yes.

11 Q. Okay. And, so, the bottom one is right, \$30.
12 These are right. That's right. But then 14 minus six is
13 eight, right?

14 A. Right.

11:45 15 Q. What's eight times 30?

16 A. 240.

17 Q. Okay. This much?

18 A. Uh-huh. Without figuring in your Saturdays and
19 Sundays, I cannot tell you if that's how this 300 come in
11:45 20 here.

21 Q. Well, we know that 300 is not eight times 30,
22 correct?

23 A. That's correct.

24 Q. Shouldn't that number be 240? Shouldn't all those
11:45 25 first seven numbers, the last column, shouldn't it be \$240?

1 A. That's correct.

2 Q. Okay. Is the computer -- is the computer program
3 so bad that it can't -- it can't do a simple mathematical
4 calculation like that?

11:46 5 MR. DeBERRY: Objection; form.

6 A. No.

7 Q. (BY MR. PENNINGTON) Okay. What -- how does
8 something like that happen?

9 A. Demurrage runs from 7:00 a.m. to 7:00 a.m. The
11:46 10 clock starts then, so... And I can't remember the details on
11 this one. But if the calculations are not -- if the tables
12 are not set up right and it computes something besides the
13 7:00 a.m., then it's going to add another day. And like I
14 say, unless I have it --

11:46 15 Q. Well, it added two days on those, didn't it?

16 A. Yeah. Like I say, I'd have to get in there and
17 look and find out what happened. I don't have this
18 information in front of me right now, other than what -- this
19 piece of paper.

11:46 20 Q. Did that bill get past your quality -- that
21 Exhibit 1, did that get past your quality control check?

22 MR. DeBERRY: Objection; form.

23 A. Yes.

24 Q. (BY MR. PENNINGTON) And did it get by
11:47 25 Mr. George's quality control check?

1 A. I probably didn't show it to him.

2 Q. Okay. So you don't automatically show PCI bills
3 to Mr. George; sometimes you just send those out?

4 A. Correct.

11:47 5 Q. What other type of errors do you have on the -- on
6 the -- the RMI-generated reports?

7 A. That's the main errors, is not figuring the days
8 correctly.

9 Q. What other -- what other errors do they have that
11:47 10 you've found?

11 A. That's the only error.

12 Q. Okay. Well, what are all these letters you're
13 sending to them about?

14 MR. DeBERRY: Objection; form.

11:47 15 A. Sending to who about?

16 Q. (BY MR. PENNINGTON) RMI. You told me you'd sent
17 some letters to RMI about --

18 A. Well, I sent the --

19 Q. -- demurrage issues.

11:47 20 A. Right. And I don't send them anything. I pick up
21 the telephone and call customer support.

22 Q. Okay. I misunderstood. I thought that you had
23 sent them some letters where you addressed --

24 A. No, I don't think we ever discussed letters. But
11:48 25 we discussed memos, and I said e-mails. The -- I -- normally

1 I pick up the telephone and call them. Last week, it was
2 because when we printed it out, only that much of it come on
3 the paper (pointing), --

4 Q. Okay. And -- and you're indicating --

5 A. -- so...

6 Q. We don't have a video camera. You're indicating
7 that last week the reports were -- were not printing the --
8 the right one-third of the report?

9 A. That's correct.

11:48 10 Q. I misunderstood, sir. I thought you said earlier
11 that you had sent some letters to RMI about issues with the
12 software concerning demurrage bills. Did I misunderstand?

13 A. Yeah, you misunderstood. I don't...

14 Q. Okay. Have you sent e-mails about demurrage
11:48 15 issues with the software?

16 A. I'd have to check my e-mails I sent them.

17 Q. Have you --

18 A. 99 percent of the time, I pick up the telephone.

19 Q. Okay. I -- I understand. I'm not asking about
11:48 20 the telephone.

21 A. Yeah.

22 Q. Do you -- do you still have all of your e-mails
23 you've sent them?

24 A. No.

11:49 25 Q. You haven't --

1 A. No.

2 Q. Where are those?

3 A. I deleted them.

4 Q. Okay. So you don't keep a record of -- of the

11:49 5 things you address with the computer company by e-mail?

6 A. No. Once it's resolved, it's resolved. There's

7 no...

8 Q. Do you have a secretary or an assistant of any

9 kind?

11:49 10 A. Yeah. Two freight clerks.

11 Q. Okay. Anybody else that --

12 A. No.

13 Q. -- is your assistant?

14 A. No.

11:49 15 Q. Okay. All right. In getting back to what we were

16 talking about before the break, you don't know how many cars

17 that PCI can service on its spur, on its Track B; is that

18 correct?

19 A. I do not have that information in front of me, no.

11:49 20 I know when I'm behind my desk.

21 Q. Oh, I see.

22 A. But, like I say, we have a lot of different

23 customers, a lot of different car spots. I can't remember

24 them all, no.

11:50 25 Q. Okay.

1 A. We just changed it up three or four months ago,
2 so...

3 Q. Okay. What is it -- what record do you look at,
4 at your desk to show how many boxcars can be serviced on
11:50 5 PCI's Track B?

6 A. We actually have an e-mail between me and Gary
7 Hazard on that.

8 Q. Did you delete that one, or do you still --

9 A. I printed it.

11:50 10 Q. -- have that one?

11 A. I'm sure -- I'm sure I still have it.

12 Q. Okay. And -- and you just don't know what that
13 says?

14 A. No, no.

11:50 15 Q. But you're saying it changed three or four months
16 ago?

17 A. Right.

18 Q. How did it change?

19 A. I -- I believe Mr. Hazard added some cars or took
11:50 20 one spot off. I -- I think he added a couple of cars to his
21 track that -- that he could handle.

22 Q. Okay. Meaning, he said you can now deliver more
23 than you could?

24 A. Right.

11:50 25 Q. Okay. But you don't know what the new number is

1 either?

2 A. No.

3 Q. Okay. And the same questions about Track A. Do

4 you know how many cars it can accommodate?

11:51 5 A. I believe A is four.

6 Q. Okay. Is it -- if -- if you -- if FWWR places

7 more cars on a spur than -- than PCI can handle, do you

8 charge demurrage on that situation?

9 A. Yes.

11:51 10 Q. Okay. And how -- describe to the jury how that

11 can come about.

12 A. The same as if we store -- store them on their

13 track or if we store them on our track. If they have more

14 than they can unload, then the cars are on demurrage.

11:51 15 Q. Okay. So y'all have a policy at FWWR that if --

16 strike that.

17 Generally speaking, do you know if you -- if

18 you put more cars on PCI's B track than can be unloaded, do

19 you know if it's -- do you know which cars can't be unloaded?

11:52 20 A. No.

21 Q. Meaning, is it the -- the front two or the back

22 two, or do you know?

23 A. No, not unless somebody calls and tells us that.

24 Q. And -- and you don't care? You don't care which

11:52 25 ones can't be unloaded? It doesn't matter?

1 MR. DeBERRY: Objection; form.

2 A. It doesn't -- yeah, it doesn't matter.

3 Q. (BY MR. PENNINGTON) Okay. And, so, basically,
4 the policy at FWWR is that if you deliver more cars than you
11:52 5 know they can unload or -- or put cars in spots where they
6 can't unload them, and they have to have those cars brought
7 back the next day, if that's the fifth day, then they get
8 charged demurrage on that?

9 MR. DeBERRY: Objection; form.

11:52 10 A. Not if it's our error, no. If the crew does not
11 switch them right, then they call and say: The crew spotted
12 me six cars and I can't get to these two.

13 Q. (BY MR. PENNINGTON) Okay.

14 A. Or he has a four-car spot. And went in there and
11:53 15 got spotted the four cars up; I can't get to them, you know,
16 you put them in front of a pole. There's a hundred things
17 that can go wrong. And, no, we do not charge on that day,
18 but...

19 Q. Okay. I mis- -- I misunderstood, then. So --

20 A. Yeah.

21 Q. -- if you put more in than you know they can
22 handle and you have to bring -- because of that, you've got
23 to bring a couple of those cars back on the fifth day, you
24 don't charge demurrage on that?

11:53 25 MR. DeBERRY: Objection; form.

1 Q. (BY MR. PENNINGTON) On that fifth day.
2 MR. DeBERRY: Same objection.
3 A. Yes, we will.
4 Q. (BY MR. PENNINGTON) You will?
11:53 5 A. Yes.
6 Q. Okay.
7 A. It's situational. I know that you're -- it's
8 situational. Let me explain it.
9 Q. It's -- yeah, okay. Go ahead.
11:53 10 A. Okay. In a four-car, five-car spot, we put five
11 cars in, and where we store the other two cars on the outside
12 of their track, on -- where they can't get to them; or if
13 they're stored on our track, they're still under demurrage.
14 They're still considered construct -- constructively placed
11:54 15 with PCI. They're still in their account.
16 Q. Okay. Do you -- do you -- do you know whether
17 that causes any problems for PCI if you place more cars there
18 than they can unload?
19 A. It has caused problems in the past.
11:54 20 Q. Okay. But that doesn't matter?
21 A. Yes, it matters.
22 MR. DeBERRY: Objection; form.
23 Q. (BY MR. PENNINGTON) Okay. Why does that matter?
24 A. Well, because if they can't unload their four cars
11:54 25 that they have, and if we stick -- I mean, they can't run

1 their forklift around it or just whatever, we're here to
2 serve them. They're not --

3 Q. Okay. But what do you mean, you're here to serve
4 them? What does --

11:54 5 A. We -- we take the railroad cars to them. If we
6 don't give it to them, they don't get their cars.

7 Q. All right. Do you -- is it the goal of FWWR to
8 provide good service?

9 (Phone interruption.)

11:55 10 MR. PENNINGTON: I'm sorry. I thought I
11 turned that off.

12 Q. (BY MR. PENNINGTON) Is it the goal of FWWR to
13 provide good service to PCI?

14 A. Yes.

11:55 15 Q. Do you have any -- does the company have any sort
16 of mission statement or -- or motto about customer service?

17 A. I haven't seen one.

18 Q. Do you have any policy regarding providing good
19 service --

11:55 20 A. Yes, --

21 Q. -- anywhere?

22 A. -- there's a policy.

23 Q. What is the policy?

24 A. You'll treat the customers with respect. Yeah,
11:55 25 there's a -- just a general policy, though. The -- the

1 rules -- everything we do is rules -- regulated in some way
2 or another, so it's not a...

3 Q. Are these policies in writing somewhere? Are they
4 posted on somebody's door, or are these just things that
11:56 5 y'all talk about at work?

6 A. Things we talk about, I assume.

7 Q. Okay. So, basically, you're telling the jury that
8 there's no -- the company has no written mission statement or
9 customer service goal of any kind that's written?

11:56 10 A. That, I couldn't answer.

11 Q. You've never seen one in 13 years?

12 A. No, no. I don't believe so.

13 Q. Okay. What steps are taken to make sure that PCI
14 gets a full spot of cars from available cars each -- each
11:56 15 night?

16 A. When they call and release their cars, we send it
17 down to the MTO, Manager of Train Operations, and he makes
18 sure that the cars get spotted that night. Once we send it
19 down to them, it goes out of our hands. So it's out of my
11:56 20 hands once we give it to the MTO. I mean, it's --

21 Q. Okay.

22 A. -- his job to get with the crews.

23 Q. The MTO works for you?

24 A. No.

11:57 25 Q. The MTO, again, is the --

1 A. Manager of Train Operations.

2 Q. That is not an FWWR employee?

3 A. Yes, he is. But he does not work for me.

4 Q. Okay. Who -- who are the -- are there -- is there

11:57 5 more than one Manager of Train Operations?

6 A. Yeah. I believe we have three.

7 Q. What are their names?

8 A. Rick Timmis.

9 Q. Dennis?

11:57 10 A. Timmis, T-I-M-M-I-S.

11 Q. Okay.

12 A. Joel Holton and David Worden.

13 THE REPORTER: Warden?

14 THE WITNESS: Worden, W-O-R-D-E-N.

11:57 15 Q. (BY MR. PENNINGTON) Okay. Let me ask my question

16 again. What steps do you take to make sure that PCI gets a

17 full spot of cars each night?

18 A. When we -- they call to release the cars, we

19 release them. We turn it over to the MTO. The MTO goes down

11:58 20 and switches it. That's basically how the -- how it works.

21 Q. Okay. And you've totally lost me, and that's

22 probably my fault.

23 The car -- you have cars -- let's say you

24 have 20 cars in the Hodge yard that are bound for PCI. All

25 right?

1 A. Uh-huh.

2 Q. And let's -- let's assume that they can
3 accommodate six of those boxcars on their Track B.

4 A. Okay.

11:58 5 Q. How do you make sure that they get six cars that
6 night out of the 20 that are available?

7 A. I turn it over to the MTO. It's his
8 responsibility to make sure the customer gets switched.

9 Q. Okay. I understand the getting switched part.

11:58 10 But how do you make sure that the MTO gets them six cars, as
11 opposed to three or four or some lesser amount than they --

12 A. Well, that's their job. They don't -- I mean, the
13 next morning, if you come in and PCI calls and says: Hey, I
14 only got three of my six. Then -- I mean, I don't go back
11:59 15 and double-check, you know. That's their job. They're going
16 to do their job.

17 Q. All right. So, basically, do the MTOs work for
18 you?

19 A. No.

11:59 20 Q. Who do they work for?

21 A. Vern Colbert.

22 Q. Vern Colbert?

23 A. Colbert, C-O-L-B-E-R-T, I believe.

24 Q. Okay. And where does he office?

11:59 25 A. Hodge.

1 Q. Okay. Is it generally your understanding in the
2 last three or four years that -- that PCI almost always gets
3 a full spot of cars?

4 A. When available, yes.

11:59 5 Q. Okay. And that's the policy of FWWR?

6 A. Uh-huh.

7 MR. DeBERRY: Objection; form.

8 Q. (BY MR. PENNINGTON) You have to answer out loud.

9 A. Yes, yes.

11:59 10 Q. She can't take down --

11 A. Yes.

12 Q. Okay. But there's nothing -- is there nothing
13 in -- strike that.

14 As far as -- is it your -- is it your policy
12:00 15 with all of your customers to -- to give them a full spot of
16 cars from available cars each time you switch them?

17 MR. DeBERRY: Objection; form.

18 A. Unless they order in otherwise.

19 Q. (BY MR. PENNINGTON) Yes, unless they order in
12:00 20 otherwise?

21 A. Yes, unless they order in otherwise.

22 Q. And that's been the policy of FWWR for all of its
23 customers for the last five years?

24 A. Yes.

12:00 25 MR. DeBERRY: Objection; form.

1 Q. (BY MR. PENNINGTON) And you're familiar with the
2 policies of FWWR?

3 A. Yes.

4 Q. Now -- okay. Going back to my question. I -- I
12:00 5 don't mean to beat this to death, but do you -- is there
6 anything that you do -- strike that.

7 Do you know the extent to which PCI has
8 received a full spot of cars each day?

9 A. No, I don't know the extent of which. If I'm
12:01 10 going to guess, here in the past six months, we haven't had
11 maybe two or three service -- service failures as far as not
12 switching them. We got the track in good shape and we've
13 been -- haven't missed much here lately.

14 Q. Okay. And is that because there's a lawsuit
12:01 15 pending? Are y'all trying harder, or what's --

16 A. We always try hard.

17 Q. Okay. All right. But how do you know -- I mean,
18 let's take last -- last Tuesday night. How do you know
19 whether they got a full spot of cars?

12:01 20 A. I've run reports, checks and balances. If -- if
21 they don't -- if they don't get a full set, if they -- if we
22 do not give them a full spot of cars, --

23 Q. Uh-huh.

24 A. -- I promise you, I'm going to get a phone call
12:01 25 from Gary Hazard or Randy.

1 Q. Okay. That's fine. But I -- my question is: Do
2 you monitor whether they're getting a full spot, or --

3 A. Yes.

4 Q. -- do you just wait for them to complain?

12:02 5 A. No, no. I run reports from -- on all the
6 customers.

7 Q. Okay. And -- and why is it important that they
8 get a full spot of cars each -- each time?

9 A. Because that's their --

12:02 10 MR. DeBERRY: Objection; form.

11 A. -- that's their business. They -- they need their
12 product, --

13 Q. (BY MR. PENNINGTON) All right.

14 A. -- you know.

12:02 15 Q. Do you understand that it's not -- that they're
16 not ordering these products for themselves; that they're
17 ordering them for -- for their customers?

18 MR. DeBERRY: Objection; form.

19 A. Can you repeat?

12:02 20 Q. (BY MR. PENNINGTON) Yeah. Do you know -- do you
21 know what business PCI is in?

22 A. Yes. They're a transloader.

23 Q. What does that mean?

24 A. Okay. They get it in, put it on an 18-wheeler and
12:02 25 haul it to wherever it's going.

1 Q. Okay. Do you know whether they're -- they're
2 buying those products for their own uses or whether they're
3 buying them for -- or -- or transporting them for use by
4 customers?

12:02 5 A. I assume they're going by use for customers.

6 Q. Have you always assumed that?

7 A. Yeah.

8 Q. Okay.

9 A. I mean, a transloader is a transloader.

12:03 10 Q. Okay. And, so, have you -- have you talked to
11 anyone at PCI in the past five years about the importance to
12 them of getting a full spot each night?

13 A. Yes.

14 Q. And what have they told you?

12:03 15 A. That they need their full spot. I mean, when
16 we're having service failures, they call and we discuss it
17 and find out what the problem was and get the problem
18 corrected.

19 Q. All right. And is it the policy of -- at -- for
12:03 20 the last five years, has it been the policy of FWWR to try to
21 give them a full spot every night, irrespective of any
22 agreement or tariff?

23 MR. DeBERRY: Objection; form.

24 A. If they release the cars, we give them a full
12:03 25 spot.

1 MR. PENNINGTON: Okay. Can you read that
2 question back, please, Kem?

3 Listen to the question, if you don't mind.

4 THE REPORTER: "All right. And is it the
5 policy of -- at -- for the last five years, has it been the
6 policy of FWWR to try to give them a full spot every night,
7 irrespective of any agreement or tariff?"

8 THE WITNESS: Yes.

9 Q. (BY MR. PENNINGTON) Okay. Now, is it also the
12:04 10 custom and practice in the railroad industry in Texas to give
11 customers full spots of cars to the extent they're available?

12 MR. DeBERRY: Objection; form.

13 A. I can't speak on what other railroads do, no.

14 Q. (BY MR. PENNINGTON) Okay. I thought you worked
12:04 15 for other railroads.

16 A. Well, I did. And when I worked in Mineral Wells,
17 we spotted all the cars that come available.

18 Q. Uh-huh.

19 A. Worked for Exxon in Houston, at Rescar, and we
12:04 20 spotted everything they asked for.

21 Q. Okay. And you're familiar with Burlington
22 Northern and Santa Fe's policies?

23 A. I don't work for them. No, sir.

24 Q. No. Are you familiar with their policies on that?

12:04 25 A. No. I've never switched for the Burlington

1 Northern/UP on that.

2 Q. Okay. So you don't know what their policies are
3 on that?

4 A. No.

12:05 5 Q. All right. You just know what FWWR's policy is?

6 A. Uh-huh.

7 Q. You have to answer --

8 A. Correct.

9 Q. Okay. I'm sorry. I have to --

12:05 10 A. Oh, I understand. I'm bad at that.

11 Q. She's got to get you -- we've got to get an
12 answer. You're doing fine.

13 To what extent are you aware -- strike that.

14 Are you also aware that -- that PCI each
12:05 15 night brings a crew in to unload cars?

16 A. I know they have in the past.

17 Q. Okay. And would you assume that if you don't
18 deliver them a spot of cars, that they're having to pay
19 people to sit there and do nothing?

12:05 20 MR. DeBERRY: Objection; form.

21 A. That's -- I assume they have something else for
22 their crew to do. I don't know. That's not --

23 Q. (BY MR. PENNINGTON) Really. What else do you
24 assume --

12:05 25 A. That's not my business.

1 Q. What else do you assume that they have to do?

2 MR. DeBERRY: Object --

3 A. That's not my business.

4 MR. DeBERRY: Objection; fom.

12:05 5 Q. (BY MR. PENNINGTON) Okay. Basically -- so,

6 basically, you're just -- you've never thought about what you

7 do to them economically if you don't provide them any cars?

8 MR. DeBERRY: Objection; form.

9 A. We do everything in our ability to -- to supply

12:06 10 their cars.

11 Q. (BY MR. PENNINGTON) Okay. But my question, sir,

12 is --

13 MR. DeBERRY: Give me -- give me a moment to

14 make my objection --

15 THE WITNESS: Oh, okay.

16 MR. DeBERRY: -- before you answer.

17 Q. (BY MR. PENNINGTON) But my question is: Have

18 y'all ever had any discussions there at FWWR about what you

19 do economically to PCI when you don't deliver cars?

12:06 20 A. Yes. Me and Randy have had discussion on it.

21 Q. Okay. You're talking about Randy Gaston?

22 A. Yes.

23 Q. Okay. And what has he told you?

24 A. He said that he has paid a crew to sit around and

12:06 25 do nothing.

1 Q. Okay. And is that of any concern to you and FWWR
2 whatsoever?

3 A. Well, of course it is.

4 Q. Okay. Why is that of some concern to you?

12:06 5 A. Because, like I say, they're our customers. If we
6 wasn't -- if they're not doing business well, then we're not
7 doing business well.

8 Q. All right. Have you, in the past, adjusted
9 demurrage charges to PCI, and other customers, where
12:07 10 demurrage would not been -- not have been incurred had a full
11 spot of cars from available cars been supplied?

12 A. Yes.

13 Q. Okay. And any time a customer approaches you with
14 that situation and can demonstrate that had you made a full
12:07 15 spot from available cars, there would be no demurrage; you
16 adjust the bill in their favor?

17 A. That's --

18 MR. DeBERRY: Objection; form.

19 A. That's correct.

12:07 20 Q. (BY MR. PENNINGTON) And that's the policy of the
21 FWWR?

22 A. That's correct.

23 MR. DeBERRY: Same objection.

24 Q. (BY MR. PENNINGTON) And the reason -- and the
12:07 25 reason you do that is because it would not be fair to charge

1 demurrage for a car being there five days when, if y'all just
2 delivered a full spot, it wouldn't have been there for five
3 days, right?

4 MR. DeBERRY: Same objection.

12:07 5 A. That's correct.

6 Q. (BY MR. PENNINGTON) Okay. And, again, this is
7 something that the computer program can't figure out on its
8 own?

9 A. That's correct.

12:08 10 MR. DeBERRY: Objection; form.

11 THE WITNESS: I paused that time.

12 MR. PENNINGTON: Yeah, you were a little
13 slow on that one.

14 MR. DeBERRY: Little slow.

12:08 15 MR. PENNINGTON: But you got it in there.

16 Q. (BY MR. PENNINGTON) Are you familiar with any
17 federal or state laws defining "demurrage," or when you, as a
18 company, can charge for demurrage?

19 A. Yes.

12:08 20 Q. What federal laws are you familiar with?

21 A. The federal laws -- I've not actually read them.
22 But the railroad will charge demurrage on railroad-controlled
23 cars and private cars.

24 Q. Okay. Are you familiar with anything else the
12:09 25 federal statutes say besides what you've just told me?

1 A. Regarding demurrage?

2 Q. Yes.

3 A. No.

4 Q. Okay. So you don't know of any federal law, other

12:09 5 than one that you think says that you are to charge

6 demurrage, you're supposed to charge demurrage?

7 A. That's correct.

8 Q. But you're not aware of what it says or in what

9 circumstances you're to charge or what circumstances you're

12:09 10 not? You don't know any of those things about the federal

11 law?

12 A. Not federal law, no.

13 Q. Okay. How about state law?

14 A. No.

12:09 15 Q. And -- and I don't mean to restrict myself to

16 laws. Do you know about any federal regulations on the same

17 subject matters?

18 A. Yeah, the fed- -- federal regulations, they govern

19 it too, --

12:09 20 Q. Okay.

21 A. -- so...

22 Q. Do you have any familiarity with the federal

23 regulations, if any, that govern the circumstances under

24 which you can charge demurrage?

12:10 25 A. Yes.

1 Q. Okay. What -- what regulations are you familiar
2 with?

3 A. Oh, there's a book out that -- that -- I can't
4 remember the name of the book. But it governs your railroad.
12:10 5 It tells you step-by-step instructions on how to -- when you
6 charge and when you cannot charge.

7 Q. And this is something you consult?

8 A. Yes.

9 Q. Okay. What -- what -- do you know the number of
12:10 10 that regulation?

11 A. No.

12 Q. Is this in one of the manuals --

13 A. Yes.

14 Q. -- you were talking about?

12:10 15 A. Yes.

16 Q. What -- what --

17 A. Actually, I forgot about it when we talked about
18 it earlier. There is another manual.

19 Q. Tell me -- that's okay. Tell me --

12:10 20 A. But I can't remember the -- Mr. George knows what
21 the FRA is, what the -- let me ask him. He can tell us what
22 book it's in.

23 MR. PENNINGTON: That's fine. Ask him, if
24 that's okay with your counsel.

25 MR. DeBERRY: That's fine.

1 MR. GEORGE: The -- the only one I know is
2 U.S. Code. But that's the law. I know of no regulation
3 of -- FRA regulation that specifies the --
4 THE WITNESS: I thought we --
12:11 5 MR. GEORGE: -- procedure of assessing
6 demurrage.
7 MR. DeBERRY: The code sections that are
8 cited in our legal briefing?
9 MR. GEORGE: Yeah.
10 MR. DeBERRY: Yeah.
11 MR. GEORGE: That's the -- the U.S. Code --
12 MR. PENNINGTON: Okay.
13 MR. GEORGE: -- is the only thing that I
14 know, that I'm aware of.
12:11 15 THE WITNESS: Well, I might be mistaken,
16 then.
17 MR. PENNINGTON: Well, that's okay.
18 Q. (BY MR. PENNINGTON) All right. So the U.S. Code
19 that Mr. George is talking about is the law you're talking
12:11 20 about?
21 A. No, no.
22 Q. No?
23 A. I was -- I was mistaken on that earlier.
24 Q. Okay. So are you familiar with any -- any -- any
12:11 25 laws or regulations, any federal laws or regulations

1 governing demurrage and under what circumstances you can
2 and --

3 A. No.

4 Q. -- can't charge for it?

12:11 5 A. No.

6 Q. Okay. Have you talked to your software company
7 about writing into the program the ability for it to
8 recognize when it's trying to charge demurrage which is a
9 result of the -- the railroad not giving a full spot?

12:12 10 A. No. Because the software is only capable of what
11 you put into it.

12 Q. Okay.

13 A. It's all -- everything is -- nothing is automatic
14 in the software.

12:12 15 Q. How much did y'all pay for this software?

16 A. A pretty penny, so...

17 Q. How much did you pay for it?

18 A. I couldn't tell you that. I don't know.

19 Q. Too much?

12:12 20 A. Yeah, too much.

21 Q. Now, if you -- so you're saying that there's not
22 even any way to tell this software what the capacity of a
23 customer's track is, a -- a customer's spur?

24 A. Yes, you can tell it what the capacity is.

12:12 25 Q. Okay. Have you done that?

1 A. Yes.

2 Q. Have you told -- does the computer know what the
3 capacity of PCI's Tracks A and B are?

4 A. Yes. It has it in feet.

12:12 5 Q. Feet?

6 A. Uh-huh.

7 Q. Why does that help anybody?

8 A. In the railroad, 99 percent of things are measured
9 by feet.

12:13 10 Q. Okay. But despite the fact that it -- this
11 software knows how many feet of workable track that PCI has
12 on its A and B tracks, it's not smart enough to figure out
13 that its charging demurrage when a full spot of cars hasn't
14 been provided?

12:13 15 A. That's --

16 MR. DeBERRY: Objection; form.

17 A. That's correct.

18 Q. (BY MR. PENNINGTON) Okay. Okay. Do you have
19 any -- any procedures there at the railroad -- when I say
12:13 20 "the railroad," FWR -- that alerts you to the fact that --
21 that a car has been sitting and not delivered over some
22 period of time?

23 A. Yes.

24 Q. Okay. What do you have that alerts you to that?

12:14 25 A. I run reports. There are reports that I run that

1 will tell me how many cars PCI has had and how many cars
2 they've released and how many cars they've had on hand.

3 Q. Do you do that every day?

4 A. I try to do it once a week.

12:14 5 Q. Okay. Okay. So even though you're charging your
6 customers demurrage on a daily basis, you only check for that
7 once a week?

8 A. That's correct.

9 Q. Okay. Let me ask you about this term you've used
12:14 10 a couple of times, "releasing cars." Are you talking
11 about -- are you talking about empty cars that PCI is
12 releasing for you to come get, or are you talking about
13 something that PCI is doing regarding cars that you're
14 holding?

12:14 15 A. I'm talking about empty cars, after they -- after
16 they have unloaded them and they're ready for us to come pick
17 them up.

18 Q. Okay. So I take it that you wouldn't -- you're
19 not going to spot any cars to PCI if they've got cars on
12:15 20 their track and they haven't released you to come pick them
21 up?

22 A. That's correct.

23 Q. Okay. Because you -- you would assume they hadn't
24 unloaded those cars yet, or didn't, for whatever reason,

25 A. If --

1 Q. -- want any more cars?

2 A. -- if they haven't called us or -- or sent us a
3 fax saying these cars are empty, then the cars are still
4 loaded.

12:15 5 Q. Okay. And, so, would that be true, even if there
6 was one car on the track?

7 A. If they have not contacted us, --

8 Q. Uh-huh.

9 A. -- the cars are still loaded.

12:15 10 Q. So you're saying that even if they have only
11 one -- your records show they've got one car on one track,
12 and you've got all these cars sitting out there, unless you
13 get something from them releasing that one car, you're not
14 going to deliver them any more to either track?

12:15 15 MR. DeBERRY: Objection; form.

16 A. No, we're going to deliver the cars if they have
17 more. But if -- they're not going to have one car on spot if
18 they have 20 outside. Because when we spotted the one, we
19 went ahead -- went ahead and spotted a full spot.

12:16 20 Q. (BY MR. PENNINGTON) Maybe they got the 20 after
21 you spotted the one.

22 A. What do you mean?

23 MR. DeBERRY: Objection; form.

24 It's just building speculation. That's
12:16 25 speculation. They --

1 A. Well, when they released that one car, then we'd
2 go ahead and give them a full spot.

3 Q. (BY MR. PENNINGTON) Okay. So the answer to my
4 question is, regardless of how many cars they have on their
12:16 5 spur, you're not going to deliver them any more until they
6 release what they've got?

7 MR. DeBERRY: Objection; form.

8 Q. (BY MR. PENNINGTON) Is that your policy?

9 A. That's correct.

12:16 10 Q. Okay. And has that been the policy the last five
11 years?

12 MR. DeBERRY: Same objection.

13 A. I could not answer that one.

14 Q. (BY MR. PENNINGTON) Okay. Why not?

12:16 15 A. It has changed. Like I say, we just changed a
16 full spot the other day -- you know, three or four months ago
17 on how many cars they could hold.

18 Q. Okay. But have you ever changed the policy about
19 not delivering them any cars until they released what cars
12:16 20 they have? Has that ever changed?

21 A. Not that I'm aware of.

22 Q. Okay. What happens when you look at this weekly
23 report and it shows you that a car has -- a PCI car has been
24 sitting somewhere for a week or 10 days or two weeks; what do
12:17 25 you do?

1 A. I call the MTO and find out what the problem is.
2 I check the computer to make sure it wasn't bad ordered.

3 Q. Okay. And do you take additional steps to make
4 sure that car is delivered?

12:17 5 A. If need be. And if there is something I can do
6 from the office to get the car spotted, then...

7 Q. Okay. Now, this -- the way this track is
8 configured, it's my understanding -- and I've got a rough
9 drawing here, and I'm going to see if you think this drawing
12:17 10 is good enough to mark it as an exhibit.

11 This is intended to be PCI's spur Track A
12 and Track B. Do you recognize those?

13 A. Yes.

14 Q. Okay. And then this is 33rd Street. This is
12:18 15 actually a city street. And Sylvania is a city street. And
16 my understanding of the configuration of this thing is that
17 if you say that you've got a car -- if your reports say
18 you've got a car on the old UP interchange, it's on this
19 track here to the south of the entrance to the spur?

12:18 20 A. That's correct.

21 Q. Okay. And this is blocked off. This is the UP
22 main line or "lin."

23 A. It's line.

24 Q. But you don't get these cars from here. You get
12:18 25 them from over here. And -- and you get -- put them on this

1 interchange, correct.

2 A. That's correct.

3 Q. Okay. And, so, anything on the old UP interchange

4 comes from north of PCI's spur?

12:18 5 A. Comes from Hodge yard. I couldn't tell you if

6 that's north or not.

7 Q. Okay.

8 A. If he says it's north, it's north. But I get out

9 there and I think it's west.

12:19 10 Q. Oh, okay. So, basically, you don't -- do you

11 think the -- can you identify this drawing as -- as fairly

12 and accurately representing the relative locations of the old

13 UP interchange, PCI's spur and the Hodge yard?

14 MR. DeBERRY: Where is the Hodge yard on

12:19 15 here?

16 MR. PENNINGTON: Well, I'm saying the Hodge

17 yard is up here. Why don't we say "To Hodge yard."

18 MR. GASTON: To the Hodge yard, to the

19 tracks.

12:19 20 Q. (BY MR. PENNINGTON) Okay. Are you familiar

21 enough with that to say that fairly and accurately it depicts

22 at least the -- what's the word I used, I used the right

23 word -- relationships of those three things?

24 A. Yeah, it's -- it's pretty close.

12:19 25 Q. Okay. Is it close enough to use for discussion

1 purposes?

2 A. Yes.

3 MR. PENNINGTON: All right. I'm going to

4 mark it, then.

12:20 5 (Exhibit 2 marked & attached.)

6 MR. GASTON: Steve has a question.

7 MR. PENNINGTON: Huh?

8 MR. GASTON: He wants to know if he can ask

9 it.

12:20 10 MR. PENNINGTON: Steve --

11 MR. DeBERRY: Apparent -- apparently

12 Mr. George says that's not entirely accurate.

13 MR. PENNINGTON: All right. Can we go off

14 the record for a minute?

12:20 15 MR. DeBERRY: Yeah.

16 (Off-the-record discussion had.)

17 (Break taken 12:20 to 12:21 p.m.)

18 Q. (BY MR. PENNINGTON) Okay. So does Exhibit 2

19 fairly and accurately depict the positions in relationship --

12:21 20 and certainly not to scale -- of the old UP interchange, the

21 PCI spurs and the Hodge yard?

22 A. Yes.

23 Q. Okay. Now, my question is: Does -- are you aware

24 of FWWR ever being in a situation with PCI where they've --

12:22 25 they've got a bunch of older cars that are way back up the

1 track here to the south on the old UP interchange?

2 A. Yes. When we stored the older cars down here

3 (pointing)?

4 Q. Right.

12:22 5 A. Yes.

6 Q. Okay. Okay. And where y'all have older cars

7 stored at the south end of the interchange, have you ever --

8 has the railroad ever decided, as far as you know, to deliver

9 newer cars because it would be too much trouble to -- to give

12:22 10 PCI the older cars at the end of the line?

11 A. We've had conductors spot newer cars ahead of

12 older cars before.

13 Q. Okay. Why would they do something like that?

14 A. There could be many, many reasons. It could be

12:22 15 the hours of service. There can -- there could be just lots

16 of different reasons.

17 Q. Hours of service?

18 A. Yeah. And it could -- seemed like one time we had

19 to give them newer cars years ago, because if we didn't, they

12:23 20 was not going to have no product the next morning.

21 Q. I don't understand that.

22 A. Well, the railroad crews only work 12 hours a day.

23 And, so, if you have 30 minutes left of work and it's going

24 to take you an hour to do this, or you can reach up and get

12:23 25 him some product the next morning, then you're going to go

1 that way. It's been -- years ago, that happened to us. And
2 just mistakes because the conductors don't spot the oldest
3 cars.

4 Q. Okay. And -- and is that something you fire them
12:23 5 over?

6 A. No.

7 Q. Why not? I mean, they are under instructions to
8 deliver oldest cars.

9 A. That's not my decision. I don't -- they don't
12:23 10 work for me.

11 Q. Okay. Well, why wouldn't somebody fire them if
12 they --

13 A. That's not -- they don't work for me.

14 Q. All right. Let me -- let me get my question out.
12:23 15 I mean, if they -- if they ignore your instructions -- the
16 instructions you give them is to deliver the oldest cars
17 first. You've given them a list that even have the numbers
18 of these oldest cars. And if they don't deliver the oldest
19 cars, why wouldn't you fire them?

12:23 20 MR. DeBERRY: Objection; form.

21 A. They don't work for me.

22 Q. (BY MR. PENNINGTON) Why wouldn't your company
23 fire them?

24 A. That's --

12:24 25 MR. DeBERRY: Objection; form.

1 A. That's not -- you know, that's the company.
2 That's not me.
3 Q. (BY MR. PENNINGTON) Well, if you don't follow
4 instructions, are you going to get fired?
12:24 5 MR. DeBERRY: Objection; form.
6 A. Yes.
7 Q. (BY MR. PENNINGTON) Okay. What's so special
8 about conductors? Are they some protected class of people
9 or something?
12:24 10 MR. DeBERRY: Objection; form.
11 Q. (BY MR. PENNINGTON) What's the deal?
12 A. I -- you're going somewhere I have no control over
13 now, so --
14 Q. Okay.
12:24 15 A. -- I mean...
16 Q. Okay. And you're saying that you -- is there some
17 law that says they can't work more than 12 hours?
18 A. That's correct.
19 Q. Really?
12:24 20 A. That's correct.
21 Q. Okay. Some federal law?
22 A. That's correct.
23 Q. Okay. Can you work more than 12 hours?
24 A. It depends on what job I'm doing.
12:24 25 Q. Okay.

1 A. Some days, I can only work nine hours.

2 Q. All right. Okay. In a situation where FWWR has a
3 bunch of cars on the old UP interchange, would those all
4 be -- necessarily be PCI cars, or would they be some for
12:25 5 other customers as well?

6 A. They could be for other customers as well.

7 Q. Okay. That was an -- and I'm sorry. That was a
8 horrible question.

9 The question was: Do you sometimes store
12:25 10 cars on the old UP interchange for customers besides PCI?

11 A. Yes.

12 Q. Okay. And, so, in situations where some of PCI's
13 cars get stuck back here on the south end of the old UP
14 interchange, as shown on Exhibit 2, and -- and you give them
12:25 15 newer cars first, and that results in demurrage on the older
16 cars, you don't -- you don't charge them demurrage, do you?
17 You don't charge --

18 A. No.

19 Q. -- PCI demurrage?

12:25 20 A. We credit it back to them.

21 Q. Because -- and the reason you don't is because
22 you're doing something for your convenience, not theirs?

23 A. That's correct.

24 Q. Okay. But you have sent out demurrage charges
12:26 25 where you've -- you have sent them demurrage charges in those

1 circumstances, haven't you?

2 A. Yes.

3 Q. Okay. But -- and that got past your quality

4 control?

12:26 5 A. Not necessarily.

6 Q. Did it get past Mr. George's quality control?

7 A. Well, if the customer -- if PCI calls and orders

8 cars in ahead of the oldest cars, then we're going to send a

9 demurrage bill --

10 Q. That's --

11 A. -- in on the --

12 Q. -- that's not part of my question. My question is

13 the simple situation where they haven't called in any special

14 cars, but they get cars stuck back here and you deliver them

12:26 15 newer cars for your convenience --

16 MR. DeBERRY: Is that the question?

17 MR. PENNINGTON: No.

18 MR. DeBERRY: Okay.

19 MR. PENNINGTON: It's the end of the

12:26 20 prepositional phrase. I'm getting to the question.

21 MR. DeBERRY: All right.

22 Q. (BY MR. PENNINGTON) -- and you don't deliver them

23 the oldest cars, have you charged them demurrage in that

24 situation?

12:26 25 A. Yes.

1 MR. DeBERRY: Objection; form.

2 THE WITNESS: I'm sorry.

3 MR. DeBERRY: Let me make my objection,

4 please.

12:27 5 Q. (BY MR. PENNINGTON) Okay. And when they

6 questioned that, you credited the demurrage bill, correct?

7 A. That's --

8 MR. DeBERRY: Objection; form.

9 A. -- correct.

12:27 10 MR. PENNINGTON: Okay. Now, he gave you

11 like three seconds.

12 MR. DeBERRY: You -- you just -- you're --

13 you just keep building a hypothetical and a hypothetical and

14 a hypothetical. You're not asking him a single factual

12:27 15 question. And I -- do you want to just give me a running

16 objection on form? Because if you just keep asking him

17 hypotheticals, I'm going to object to every question.

18 MR. PENNINGTON: I understand. There is --

19 there is no way. There is so many factors here, though,

12:27 20 Richard. There's no way to ask about all these factors at

21 once. You have to isolate them one at a time, and I don't

22 know how else to ask it.

23 MR. DeBERRY: Yeah. But, Allen, you're not

24 asking -- you're not asking about, like, the disputed

12:27 25 demurrage bill. You're just asking general hypotheticals.

1 MR. PENNINGTON: Policy. I understand -- I
2 understand your objection.

3 MR. DeBERRY: And that's -- that's my
4 problem.

12:27 5 MR. PENNINGTON: I understand your
6 objection.

7 MR. DeBERRY: And I'm not trying to -- I'm
8 not trying to -- I -- I want to get done with this as soon as
9 you do. I'm not trying to -- to -- to be disruptive. I
10 just --

11 MR. PENNINGTON: I didn't -- I didn't accuse
12 you --

13 MR. DeBERRY: To -- to the extent that
14 they're hypothetical questions, I'm going to keep objecting
12:28 15 to form.

16 MR. PENNINGTON: Okay. I didn't accuse you
17 of -- I'm not accusing you of -- of -- of interrupting or
18 trying to prolong anything.

19 MR. DeBERRY: I'll try to make my objections
12:28 20 quicker.

21 Q. (BY MR. PENNINGTON) All right. Okay. So my
22 question was: How did that get past your review of the
23 invoice?

24 MR. DeBERRY: Objection; form.

12:28 25 A. We overlooked them.

1 MR. PENNINGTON: Okay. All right. Let's go
2 off the record.

3 No, let's go back on the record. Let me --
4 I'll ask him a follow-up question.

12:28 5 Q. (BY MR. PENNINGTON) And, so, it would be -- it's
6 been the policy of FWWR not to charge demurrage in that
7 situation?

8 MR. DeBERRY: Objection; form.

9 A. That's correct.

12:28 10 Q. (BY MR. PENNINGTON) For the last five years, as
11 far as you know?

12 A. That's correct.

13 MR. PENNINGTON: All right. Now, let's go
14 off the record.

12:28 15 (Lunch break taken 12:28 to 1:40 p.m.)

16 Q. (BY MR. PENNINGTON) Let's get back into it. You
17 mentioned earlier in the deposition -- I think you used the
18 term "service failures." Did you use that term?

19 A. Yes, sir.

13:41 20 Q. What does that mean?

21 A. When we have a failure to switch. When we spotted
22 the newer car ahead of the older car, or if we didn't give
23 them a full spot, or something that the railroad had done --

24 Q. That's --

13:42 25 A. -- spotting its cars.

1 Q. Okay. Something that -- is a -- is a service
2 failure a mistake?

3 A. It don't have to be. It could be a derailment and
4 we couldn't get to somebody to spot his cars.

13:42 5 Q. Okay. And if you put a -- if you put a car in
6 backwards on a customer's spur or track, is that a service
7 failure?

8 A. No.

9 Q. Okay. Why -- why is that not a service failure?

13:42 10 A. Well, because we don't know if the car needs to be
11 turned or not until -- a lot of times they get over and try
12 to open the door and realize that they -- the lumber has
13 shifted against the door, or it's something that's out of our
14 control.

13:42 15 Q. Okay. Are the cars marked as to which is the --
16 which is the loading side?

17 A. Some are.

18 Q. Are -- not all cars?

19 A. Not all of them, no.

13:43 20 Q. Okay. And there's no federal standard --

21 A. No.

22 Q. -- for that?

23 A. No.

24 Q. So -- okay. And there's no requirement under the
13:43 25 federal law that -- that a shipper has to mark which side of

1 a -- a car is the unload side?

2 A. Not that I'm aware of.

3 Q. For those cars that are marked as to which side to

4 unload and they're put into a customer's spur backwards, is

13:43 5 that a service failure?

6 A. Yes.

7 Q. Okay. So, really, it comes down to -- whether

8 it's a service failure, it comes down to whether and how well

9 it's marked as to which side was supposed to be the unload

13:43 10 side?

11 A. Right.

12 Q. Okay. Now, does each car have a -- a bill of

13 lading associated with it?

14 A. Yes.

13:44 15 Q. And does that bill of lading ever show which is

16 the -- which is the --

17 A. Sometimes.

18 Q. -- unload side?

19 But not always?

13:44 20 A. Not always, no.

21 Q. Do boxcars generally have what's called an A side

22 and a B side?

23 A. Yes.

24 Q. And which is the side that is to be unloaded?

13:44 25 A. It depends on how they load the car. A lot of

1 times they unload it where it can unload on both sides --

2 Q. I want to make sure, though.

3 A. -- and it makes no difference. There's not a

4 standard on which side they're unloaded --

5 Q. Okay. So just --

6 A. -- every time it goes into their plant.

7 Q. Okay. So just because -- there's no standard as

8 to whether the A side or the B side is the unload side?

9 A. Right.

13:44 10 Q. To your knowledge?

11 A. Right.

12 Q. Okay. And, of course, a derailment is another

13 service failure you mentioned that wouldn't necessarily be

14 your fault, right?

13:45 15 A. But it's not the customer's fault either.

16 Q. Right. It's not -- it's certainly not -- it's not

17 the railroad's fault sometimes if there's a derailment?

18 A. Right.

19 Q. What other types of service failures are there?

13:45 20 How about a mechanical breakdown of an engine; would that be

21 one?

22 A. Right.

23 Q. Where you can't -- you just can't do a spot

24 that -- that day?

13:45 25 A. Right.

1 Q. Okay. What other -- what other service failures
2 are there?

3 A. Anything that would keep us from doing our job,
4 keep us from spotting the cars. It's -- it's a broad range
13:45 5 there. I mean, you could go on and...

6 Q. How about a flood?

7 A. Yeah. Flood, rain, fire.

8 Q. Okay.

9 A. I mean, just anything that you can imagine would
13:45 10 keep us from getting to a --

11 Q. All right. Now --

12 A. -- customer.

13 Q. Okay. And if there is a service failure, is it
14 the policy of FWWR not to charge demurrage if --

13:45 15 A. Yes, sir.

16 MR. DeBERRY: Objection; form.

17 Q. (BY MR. PENNINGTON) Yet -- and I didn't quite --
18 quite get my question out. If that service failure results
19 in demurrage that you wouldn't otherwise have, is it the
13:46 20 policy of FWWR not to charge demurrage?

21 MR. DeBERRY: Objection; form. Let me --
22 let's go off the record for a second.

23 (Off-the-record discussion had.)

24 MR. DeBERRY: Okay. Back on the record.

13:46 25 Q. (BY MR. PENNINGTON) Go ahead.

1 A. Yeah, if -- if we have a service failure, we
2 credit the customer.

3 Q. Okay. Any of the service failures we've talked
4 about?

13:46 5 MR. DeBERRY: Same objection.

6 A. Yes.

7 Q. (BY MR. PENNINGTON) Okay. Except -- and the one
8 you don't credit on is the -- is if you put a car in
9 backwards and you establish that it's not clearly marked?

13:47 10 A. No. We've -- we've covered this about two hours
11 ago. If a car has to be turned, then we give them a credit,
12 because it's his -- well, it's not our fault that the car
13 come in wrong, and it's not the customer's.

14 Q. Okay.

13:47 15 A. So if the car is turned wrong, that's what I'm
16 saying -- turned wrong, not clearly marked on what side to
17 unload from, we don't charge the customer, because it ain't
18 their fault.

19 Q. Okay. Okay. You -- we did cover that earlier,
13:47 20 and I apologize.

21 A. Yes, we did.

22 Q. Now, is there ever -- because of service failures,
23 is there ever a domino effect on -- on the delivery of cars
24 in future days?

13:47 25 A. Yes.

1 Q. Okay. And let's say, for instance, that if you
2 have a flood and you're not able to deliver cars on a certain
3 day, and that -- that results in there being demurrage on
4 cars three or four days from now that there wouldn't be, do
13:48 5 you charge demurrage?

6 A. Correct.

7 MR. DeBERRY: Objection; form.

8 THE WITNESS: I'm sorry.

9 A. For every day that we have failed to switch a
13:48 10 customer, they get one day credit applied to their cars that
11 are outstanding.

12 Q. (BY MR. PENNINGTON) Okay. So in my -- in my
13 situation, my -- my example I'm giving, there would not be a
14 demurrage charge if the customer can show you that, hey, if
13:48 15 we hadn't had that flood and we'd gotten a full spot of cars
16 that day and the next day and the next day and the next day,
17 then you don't charge demurrage?

18 MR. DeBERRY: Objection; form.

19 A. That's correct.

13:48 20 Q. (BY MR. PENNINGTON) Okay. And is that the policy
21 of FWWR?

22 A. Yes.

23 MR. DeBERRY: Objection; form.

24 Q. (BY MR. PENNINGTON) And has that been the policy
13:48 25 of FWWR for the last five years?

1 MR. DeBERRY: Objection; form.

2 A. Yes.

3 Q. (BY MR. PENNINGTON) Okay. What is a -- what is a
4 switch crew? Do you have a -- a unit or group of people you
13:49 5 call a switch crew?

6 A. They're the conductor and engineer and the
7 switchman that's actually switching the railroad cars in the
8 facility.

9 Q. Is each conductor, engineer and switchman
13:49 10 considered a switch crew?

11 A. The three of them make a crew, or two of them will
12 make a crew.

13 Q. Okay. Which -- which one can you do without?

14 A. I'm sorry?

13:49 15 Q. You said two of them -- well, you said two of them
16 can make a crew. Which one can you do without?

17 A. The switchman.

18 Q. Okay. See, I don't -- I've never worked on --

19 A. Yeah. That was just kind of an odd question.

13:49 20 Q. I've never worked on a railroad, so I apologize.
21 Okay. So, basically, as I understand what
22 you've told me this morning, the conductor is the one who
23 decides which cars to place on a customer's spur based upon
24 the information you give him?

13:50 25 A. That's correct.

1 Q. Okay. Do y'all have any way of keeping track
2 of -- of conductors who have ignored your instructions as to
3 placing the oldest cars first?

4 A. Yes.

13:50 5 Q. Who -- what is your record that you do that with?

6 A. We have a database, it's called Service
7 Resolution, when there's a failure, regardless of -- I mean,
8 it covers a broad range of everything. And we put it in
9 there and --

10 Q. Okay.

11 A. -- it's noted on the --

12 Q. And, so, that will show you -- that keeps a
13 tabulation and statistics on a -- on a conductor that is not
14 following instructions?

13:50 15 A. Not necessarily the conductor, but a customer.

16 Q. Hmmm.

17 A. It will -- it sorts, by the customer, the day it
18 happened, the crew, what actually it took to resolve it.

19 Q. All right. But my question -- and I'll get to
13:51 20 that in a minute. But how do you keep track of the extent to
21 which a particular conductor and his crew ignore the
22 company's instructions?

23 A. I couldn't answer that. That's not my area.

24 Q. Do you know if anybody keeps track of that?

13:51 25 A. I couldn't tell you. The conductors don't work

1 for me. So I don't know if anybody else is or not. I mean,
2 that's not something that I have to concern myself with,
3 so...

4 Q. Right. Would anyone else have access to the data
13:51 5 to be able to keep track of that, besides you?

6 A. Everybody that can get into the computer system
7 can do that. I mean, the MTOs and --

8 Q. Right.

9 A. -- Steve George.

13:51 10 Q. Okay. But you've never seen a report to show
11 which conductors are better at following the company's
12 instructions on placing cars on a -- on a first-received
13 basis?

14 MR. DeBERRY: Objection; form.

13:51 15 A. No.

16 Q. (BY MR. PENNINGTON) Okay. All right. Now, you
17 said that there are statistics kept per customer. Are these
18 statistics that are kept by this same RMI software program
19 that you like so much?

13:52 20 MR. DeBERRY: Objection; form.

21 A. Whether I like the software or not, that's beside
22 the point. But, no, it's not. It's a database that Steve
23 George actually --

24 Q. (BY MR. PENNINGTON) Okay.

13:52 25 A. -- created for us to monitor how we take care of

1 our customers.

2 Q. Okay. So he wrote the program for that, or he --
3 or is it a matter of him using some software that's out there
4 to keep statistics?

13:52 5 A. Yeah. He built it into some of Microsoft's
6 software.

7 Q. Okay.

8 A. But there's tables to --

9 Q. All right. When did he start doing that?

10 A. No, I better not say. No, that was just...

11 Q. To your knowledge -- to your knowledge, when
12 did he start --

13 MR. DeBERRY: That was actually a factual
14 question.

13:52 15 A. I want to say we've had it for a couple of years.

16 Q. (BY MR. PENNINGTON) Okay.

17 A. But I couldn't tell you how long.

18 Q. Do you get to see the results of this tabulation?

19 A. Yes.

13:53 20 Q. Okay. And is there -- are there statistics that
21 have been kept on the service provided to my client, PCI?

22 A. I don't -- couldn't tell you if it was just
23 specifically them; but, yes, they are in the database.

24 Q. Okay. Well, as far as you know, is he keeping
13:53 25 statistics on all customers?

1 A. Yes, they are on all customers. On every call
2 that we get in, it's logged in this database.

3 Q. Okay. As far as you know, is Mr. George doing --
4 continuing to do that this month?

13:53 5 A. This month? Yes.

6 Q. Is it current? I mean, is he keeping it
7 current --

8 A. Yes.

9 Q. -- as far as you know?

13:53 10 Okay. I'm going to ask you something I've
11 already asked you, but I want to make sure that -- that I can
12 eliminate a whole series of questions here.

13 It's my understanding that the MTO and the
14 conductors decide what cars are placed with each customer
13:54 15 each spot, correct? You just -- your office just provides
16 the information on what cars are there and how long each one
17 is there and the order of how long they've been there, oldest
18 to youngest. But you don't send them a list saying: Spot
19 these six or 10 cars at this customer's next spot?

13:54 20 A. The only time we send a list down is when a
21 customer specifically orders a car in.

22 Q. Okay.

23 A. And then we have to tell them that information.
24 And then we give it --

13:54 25 Q. Now, how do you --

1 A. -- to them.

2 Q. Okay. Did you finish? Are you finished? I don't

3 want to cut you off.

4 A. No, you can keep -- keep on.

5 Q. Okay. Thank you.

6 A. Take off.

7 Q. Okay. So how does -- how does the -- how does the

8 MTO and the conductors know that cars are ready to pick up on

9 a customer's track, such as PCI's?

13:55 10 A. When they release them, we can either call them

11 on the cell phone, or we send a fax down to the yard office

12 and --

13 Q. Okay.

14 A. -- tell them there that they are.

13:55 15 Q. So somehow -- is it the MTO that you communicate

16 with?

17 A. Yes.

18 Q. Are you the one that communicates?

19 A. Me or the dispatcher or the clerks, either one.

13:55 20 Whoever --

21 Q. Okay.

22 A. -- picks up the telephone and takes the release.

23 Q. All right. So you don't -- you don't have

24 somebody specifically on your staff in charge of -- of

13:55 25 communicating to the MTO whether cars have been released or

1 what special instructions there are? Anybody -- any of seven
2 people can do that?

3 A. That's correct.

4 Q. All right. Why is -- why have you not centralized
13:55 5 that function to one or two people? Why -- why do you let
6 any of seven people do the same thing?

7 A. Well, when you -- when we say "any of seven
8 people," we figure four of them work nights. So during the
9 daytime, there is only three of us in the office.

13:56 10 Q. Okay.

11 A. So the dispatcher is running, dispatching trains
12 and taking phone calls. I'm taking care of my business, and
13 the clerk is taking care of her business.

14 Q. All right.

13:56 15 A. So when somebody picks up the telephone, it's just
16 easy for whoever has it, to keep right on going and calls
17 them and be done.

18 Q. And what record is --

19 A. But that's policy that don't pertain to -- you
13:56 20 know, why we don't do something is not -- it's irrelevant.
21 It's not -- it don't make no difference on how we do it, as
22 long as it gets done.

23 Q. Okay. I understand what you're saying.

24 When you say that's the -- the -- your
13:56 25 policy to do it that way, is that -- is that a written

1 policy, or is that just how you do it?

2 A. That's just how we do it.

3 Q. Okay. There's no written policy --

4 A. No.

13:56 5 Q. -- for me to look at?

6 And -- and you -- the company has a lot of

7 policies that aren't written down, right?

8 A. That's correct.

9 MR. DeBERRY: Objection; form.

13:56 10 A. That is -- that's correct.

11 Q. (BY MR. PENNINGTON) And -- and we've talked about

12 some of those policies today?

13 A. Yes.

14 Q. All right. To what extent, if you know, does a

13:57 15 conductor have the authority to -- to honor customer requests

16 for specific cars?

17 A. If a conductor pulls into an industry and the guy

18 comes out -- the foreman comes out and says -- the foreman

19 comes out and says: I need this car and this car. The

13:57 20 conductor is going to do it, and he'll note it on his time

21 slip or just do it and -- and we'll worry about the -- what

22 ramifications later. You know, we've got to take care of the

23 customer, No. 1, and then all the other stuff is going to be

24 taken care of later.

13:58 25 Q. Okay. So you're saying the conductor can receive

1 oral communications from a customer and make a change in how
2 he was going to spot cars, make a change in whether to spot
3 the oldest cars first?

4 A. Yes.

13:58 5 Q. Okay. Is there anything in writing that you have
6 at your company that says that?

7 A. I don't -- I don't believe so.

8 Q. Okay.

9 A. There might be. I don't know.

13:58 10 Q. And is that -- is that the way that you do
11 business with PCI?

12 A. We have in the past. We don't no more.

13 Q. Okay. When did that change?

14 A. We changed it -- seven or eight months ago, it
13:58 15 went to all faxes now or e-mails between me and Mr. Hazard.

16 Q. Now, with your understanding of this policy, what
17 level of -- what level of person at a -- at a customer's
18 place can tell you to bring a certain car?

19 A. Tell me or the conductor?

13:59 20 Q. The conductor, yeah. Thank you.

21 A. I couldn't tell you. I'm not down there, so I'm
22 not --

23 Q. Okay. So could a -- could the guy doing the
24 yard -- mowing the yard --

13:59 25 A. No.

1 Q. -- do that?

2 A. No.

3 Q. Okay.

4 A. It would have to be somebody unloading the cars.

13:59 5 Somebody the conductor knows. You get to know your customers

6 out there and you know who to talk to and who not to talk to.

7 Q. So you're saying it couldn't be just anybody that

8 was employed by the customer?

9 A. Right.

13:59 10 Q. It would have to be somebody who unloaded cars; is

11 that what you said?

12 A. Unloaded cars or somebody you had daily contact

13 with.

14 Q. And you have nothing in writing at the company

13:59 15 that -- that states that policy?

16 A. Not that I'm aware of.

17 Q. How do you receive -- is it different -- with

18 regard to PCI, is it different at night versus in the daytime

19 as to what sort of instructions you can get for specific

14:00 20 cars?

21 A. Is what different? I'm not --

22 Q. How -- how they are allowed to order special cars.

23 A. PCI faxes it up to the office. And if they have a

24 special car that they're wanting us to spot in, then we relay

14:00 25 the information.

1 Q. Okay. So whether it's daytime or nighttime, you
2 require something in writing from PCI?

3 A. That's right.

4 Q. Okay. And then before you went to this written
14:00 5 instruction deal, was there any difference in how it worked
6 in the day and the nighttime --

7 A. No.

8 Q. -- that you remember?

9 A. It was all verbal before we went to the written
14:00 10 instruction.

11 Q. Okay. Now, how do you know that? If you're not
12 the one switching the cars during the night, how do you know
13 that it was the same?

14 A. Because when they call and release the cars, they
14:01 15 tell us whether -- if they have anything special, they call
16 and tell us then: We got these released and let's spot these
17 in.

18 (Exhibit 3 marked & attached.)

19 Q. (BY MR. PENNINGTON) Okay. Let me show you what
14:01 20 I'm going to mark as Deposition Exhibit 3. Do you recognize
21 that document?

22 A. That's their -- PCI's release they fax in to us.

23 Q. Okay. Is that the form that has always been used,
24 in your experience, for PCI to release cars?

14:02 25 A. I couldn't -- like I said, we used to -- they used

1 to call in. So I don't know how long they've been using this
2 form.

3 Q. Okay. To the extent they've done it in writing,
4 has it always been on this form?

14:02 5 A. I couldn't tell you if this form has changed or
6 not. I don't -- I mean, it -- it might have changed. It
7 might have been the same form they've used for however long
8 they've been doing it.

9 Q. Okay. Are you just not familiar with that form?

14:02 10 A. I'm familiar with this form.

11 Q. All right. Is that the same --

12 MR. DeBERRY: Can -- can -- can I be clear?
13 Are we talking about the form or the specific notations that
14 are on --

14:02 15 MR. PENNINGTON: The form.

16 MR. DeBERRY: -- on Exhibit 3?

17 MR. PENNINGTON: We're talking about the
18 form. I mean, this is just some random --

19 MR. DeBERRY: Okay.

14:02 20 MR. PENNINGTON: This has no meaning to the
21 case.

22 MR. DeBERRY: But you're not -- okay.

23 MR. PENNINGTON: This document has no
24 meaning to the case. It's a form.

14:02 25 MR. DeBERRY: Okay. That's right. Because

1 it's got lots of car numbers and --

2 MR. PENNINGTON: It does.

3 MR. DeBERRY: -- stuff on it and dates.

4 Q. (BY MR. PENNINGTON) Is this also the form that --

14:02 5 that is used to -- when special cars are ordered in writing,

6 is it -- is it put on a form like this?

7 A. That, I couldn't say. It seems like I've seen

8 another one that comes up, like a cover sheet of some type,

9 that it has it on there. But, like, what you see on this

14:03 10 form, they've got special instructions on the bottom down

11 here that the car needs to be turned around, so yeah.

12 Q. Right. Okay. So you don't know whether this form

13 is the one that is typically used to order special cars?

14 A. That's right.

14:03 15 Q. Who would know that?

16 A. I -- I'll know it if I get it at the office --

17 Q. Oh, okay.

18 A. -- and look at my paperwork. But you guys have

19 got to remember, I look at thousands of pieces of paper a

14:03 20 day. We have a bunch of different customers, so...

21 Q. Yeah, you and me both. Okay. I understand.

22 Let me ask it this way: When they -- when

23 you get a request for a special car, is it -- is it on the

24 same form where they've written the cars that they're

14:03 25 releasing?

1 A. I believe it's on the cover sheet that comes with
2 this. But like I said, I'm --
3 Q. So it comes -- it comes --
4 A. If -- if he has -- if he has room for it on here,
14:04 5 I'm sure they're going to put it on here. Like this one
6 here, he wouldn't have room to put six more cars on it. He'd
7 have to have something else with it.
8 Q. But it all comes as one document?
9 A. Right, whether it's one or two pages.
14:04 10 Q. Okay. And that's always -- that's always the way
11 it's been, as far as you can recall?
12 A. It's been that way for the past -- whenever we
13 went to the faxes, when we started faxing everything. Used
14 to, a lot of stuff was verbal.
15 Q. Okay.
16 A. There was a lot of verbal stuff going on for a
17 long time.
18 Q. Okay. So are you saying that -- that this -- that
19 they didn't -- they didn't communicate with you in writing
14:04 20 prior to eight months ago?
21 A. On some stuff, but it wasn't a hundred percent.
22 Now we're trying to do a hundred percent in writing, where if
23 they have something going on, need something special, we get
24 it in writing.
14:04 25 Q. So what was -- what was in writing prior to eight

1 months ago?

2 A. The same thing: I'd have to pull the file, I
3 mean. It's -- like I said, they might have been faxing this
4 in to us eight months ago.

14:04 5 Q. Okay. Or they could have been faxing that to you
6 for the last six years, couldn't they?

7 A. That's right.

8 Q. And, so, are -- is your testimony that before
9 eight months ago, they never ordered special cars in writing,
14:05 10 it was always oral?

11 MR. DeBERRY: Objection; form.

12 A. It was both.

13 Q. (BY MR. PENNINGTON) Both, okay.

14 Do you require that any of your other
14:05 15 customers order special cars only in writing?

16 A. Yes.

17 Q. Okay. Do you require that they all do that?

18 A. Yes.

19 Q. Okay. And is that a company-wide policy that
14:05 20 y'all instituted eight months ago?

21 A. I don't know when we instituted it; but, yes,
22 we've recently done it here. We've been working on it for
23 the past year or so.

24 Q. Okay. So within the past year, you've said to all
14:05 25 of your customers: We won't take requests for special cars

1 except in writing?

2 A. No. Because some customers just are not going to
3 fax. I mean, I have some customers that won't e-mail. They
4 like to pick up the telephone and call you, I mean. It's

14:06 5 just every -- every customer is different, so...

6 Q. Okay. So there are some customers who you -- you
7 move special cars for them without them requesting it in
8 writing?

9 A. When all else fails, to keep them happy, we do.

14:06 10 Q. Okay. And that's true today?

11 A. Yeah, it's true today.

12 Q. Okay. But you have a -- you have a company-wide
13 policy that you only move special cars if it's requested in
14 writing?

14:06 15 MR. DeBERRY: Objection; form.

16 Q. (BY MR. PENNINGTON) Is that the policy?

17 MR. DeBERRY: Same objection.

18 A. There's not anything actually written as far as
19 this is what we're going to do. This is just something we
14:06 20 had -- we had talked about, and we just started doing it.
21 There's not instructions anywhere.

22 Q. (BY MR. PENNINGTON) Okay. But you enforce it
23 against some customers, but not all customers?

24 A. No, we enforce it against all customers. By the
14:07 25 same token, if a customer is not going to do it and they want

1 their cars, of course, we're not going to hold somebody's
2 cars back just because they're not going to fax a piece of
3 paper.

4 Q. Okay. So why -- and why -- why are you
14:07 5 disagreeing with me that you don't enforce the policy in that
6 situation? You're -- you're moving a special car without
7 requiring that they ask you to do so in writing.

8 A. Right.

9 Q. But for PCI, my client, you won't do it unless
14:07 10 it's in writing?

11 A. We were in the past. Then we -- then we stopped
12 doing it, like I say, six or eight months ago.

13 Q. Okay. For my client right now, you won't move a
14 car -- you won't move a special car unless it's in writing?

14:07 15 A. That's correct.

16 Q. And by "special car," I mean -- you understand I
17 mean a car that's not the oldest car?

18 A. Right, unless in writing.

19 Q. A specific car.

14:07 20 A. A specific car. If he wants a specific car, we
21 need it in writing.

22 Q. That's a special car, --

23 A. Right.

24 Q. -- right?

14:08 25 Has anyone at PCI ever told you that a man

1 named Mario had authority to ask for specific cars?

2 A. Not to my knowledge.

3 Q. Okay. Has Randy Gaston, on -- on several

4 occasions, told you that the only people that can ask for

14:08 5 special cars are he and Gary Hazard?

6 A. He has in the past six or eight months.

7 Q. Okay. But you're -- you're saying he never told

8 you that before eight months ago; is that your testimony?

9 A. Yes.

14:08 10 MR. DeBERRY: I'm sorry. Who did you say it

11 was, besides Mr. Gaston?

12 MR. PENNINGTON: Gary Hazard.

13 MR. DeBERRY: All right.

14 Q. (BY MR. PENNINGTON) All right. Now, you -- you

14:09 15 mentioned that there is a confidential demurrage agreement

16 between FWWR and PCI, correct?

17 A. Yes. There was.

18 Q. Okay. And is it your understanding that agreement

19 is no longer in effect?

14:09 20 A. That's correct.

21 Q. Who told you that?

22 A. Who told us the agreements weren't in effect?

23 Q. Right.

24 A. Mr. George told me.

14:09 25 Q. Okay. When did he tell you that?

1 A. Six weeks ago.

2 Q. Do you have a date?

3 A. No, sir, but...

4 Q. Did he tell you why it was no longer in effect?

14:09 5 A. Because the lawyer said it was no longer in
6 effect.

7 Q. Do you -- when you -- so -- so you -- you're
8 proceeding on the assumption today that there is no contract
9 between PCI and the railroad, --

14:10 10 A. That's correct.

11 Q. -- correct?

12 Okay. And did you -- do you understand that
13 under the agreement, the demurrage was not charged for until
14 the fifth day?

14:10 15 MR. DeBERRY: Objection. Go off the record
16 for a second.

17 (Off-the-record discussion had.)

18 MR. DeBERRY: We've been off the record --
19 this is Richard DeBerry for Fort Worth & Western Railroad --

14:11 20 discussing an issue with regard to objections for the line of
21 questioning dealing with the confidential demurrage
22 agreement.

23 And I believe the agreement is that I
24 have a running objection with regard to questions involving
14:12 25 the confidential demurrage agreement, that the witness'

1 answer -- answering any of that line of questioning does not
2 operate as a waiver of the confidential demurrage agreement;
3 it being the Fort Worth & Western's position that the
4 contents and provisions of that agreement are and shall
14:12 5 remain confidential.

6 MR. PENNINGTON: So agreed that -- I'm
7 agreeing that you have a running objection.

8 MR. DeBERRY: Right.

9 MR. PENNINGTON: Substantively, I don't
14:12 10 agree with anything you've said, --

11 MR. DeBERRY: I understand.

12 MR. PENNINGTON: -- with all due respect.
13 But I agree that you have a running objection to these
14 questions on the basis of that.

14:12 15 Q. (BY MR. PENNINGTON) Okay. To the extent that you
16 believe there was a contract that was in effect between PCI
17 and -- and the railroad, FWWR, do you believe that your
18 company had an obligation to use its best efforts to perform
19 under that contract?

14:13 20 A. Yes.

21 Q. And do you know whether that was the policy of
22 your company?

23 A. Yes, it --

24 MR. DeBERRY: Objection; form.

14:13 25 A. -- was the policy.

1 Q. (BY MR. PENNINGTON) That was the policy of your
2 company?

3 MR. DeBERRY: Same objection.

4 A. Yes.

14:13 5 Q. (BY MR. PENNINGTON) To use best efforts to
6 perform under that agreement?

7 A. Yes.

8 Q. Okay. Have you ever had any knowledge about what
9 PCI's obligations were under its lease with the Sylvania
14:13 10 Industrial Park?

11 A. No.

12 Q. Have y'all ever discussed that at -- at PCI -- at
13 FWWR? I'm sorry.

14 A. No.

14:14 15 Q. Were you a party to any negotiations of the -- of
16 the demurrage agreement between FWWR and PCI?

17 A. Me and Richard Lesikar met with Randy and -- I
18 don't know how long ago it's been. Right before that
19 demurrage agreement was put into place, we come over and
14:14 20 talked to them and --

21 Q. And Lesikar's position, again?

22 A. He's the Vice President of Marketing and Sales.

23 Q. Okay. So you negotiated -- who -- who -- who
24 wrote the demurrage agreement?

14:14 25 A. Richard Lesikar.

1 Q. Is he still with the company?

2 A. Yes.

3 Q. So it's Mr. Lesikar's drafting that is contained

4 in that agreement?

14:15 5 A. Yes.

6 Q. And did he type the agreement?

7 A. Did he type it?

8 Q. Yes.

9 A. I couldn't tell you that. I wasn't there when

14:15 10 he -- I'm sure he did. I mean, --

11 Q. Can he --

12 A. -- I --

13 Q. -- can he type?

14 A. Yes, he can type.

14:15 15 Q. Does he have a secretary who does some typing for

16 him?

17 A. We have a secretary upstairs. Now, I don't know

18 if -- what she does for him. Like I say, I'm -- that's not

19 my job, so...

14:15 20 Q. Okay. Prior to July 2003, had you read the

21 demurrage agreement?

22 A. Yes.

23 Q. And was it -- was it your intent to honor that

24 agreement?

14:16 25 A. Yes.

1 MR. DeBERRY: Objection; form.

2 Q. (BY MR. PENNINGTON) Was it your intent, on behalf
3 of the company, to honor that agreement?

4 A. Yes.

14:16 5 Q. Were you at a meeting on March 2, 2004, attended
6 by Mr. Gaston and Mr. George and Mr. Martin?

7 A. No.

8 Q. Did you receive any memo or correspondence
9 regarding that meeting?

14:16 10 A. No.

11 Q. Do you know what was decided at the meeting?

12 A. No.

13 Q. Do you -- have you ever seen any notes of that
14 meeting?

14:16 15 A. No.

16 Q. Do you know if there are any notes of the meeting?

17 A. No.

18 Q. Do you know what I'm talking about? Do you know
19 what meeting I'm talking about?

14:16 20 A. Yes, I know what meeting you're talking about.

21 Q. You just weren't in there?

22 A. I just was not involved in that meeting.

23 Q. Why were you not in that meeting; do you know?

24 A. It was out of my level. I mean, once it went to
14:16 25 Steve's and Mr. Martin's level, I mean -- I mean, I'm low man

1 on the totem pole here, so...

2 Q. Okay. Had anyone, as far as you know, at FWWR,
3 prior to March 20, 2004, ever said that they thought that PCI
4 was in breach of the demurrage agreement?

14:17 5 A. No.

6 Q. Did anyone from -- has anyone from PCI ever told
7 you that they are not going to pay demurrage bills?

8 A. Yes.

9 Q. Who told you that?

14:17 10 A. Randy Gaston.

11 Q. On how many occasions was that statement made?

12 A. I couldn't tell you how many times. Several.

13 Q. Okay. What's the first time you remember?

14 A. Back when they first come in business. Back when
14:18 15 PCI first opened up on our railroad, so...

16 Q. When was that?

17 A. I -- I don't know when they come in.

18 Q. Would that have been about six years ago?

19 A. Six years ago, that's pretty close.

14:18 20 MR. GASTON: Yeah, six years. '98.

21 Q. (BY MR. PENNINGTON) Okay. And at that time,
22 Mr. Gaston told you that they were not going to pay any
23 demurrage bills?

24 A. That's correct.

14:18 25 Q. Okay. Has PCI paid any demurrage bills since that

1 time?

2 A. Yes.

3 Q. What's the next time that he said he wasn't --

4 that PCI wasn't going to pay any demurrage bills?

14:18 5 A. I can't -- couldn't tell you, I mean. Well, we've

6 had conversations, throughout the year, three or four

7 times, --

8 Q. All right.

9 A. -- so...

14:18 10 Q. Well, when he -- when he paid his first demurrage

11 bill for PCI, did you remind him of the fact that he had said

12 he wasn't going to pay his bills?

13 A. No. I wasn't -- no, no.

14 Q. Why not?

14:19 15 A. That's not professional.

16 Q. Okay. All right. Can you remember any other

17 circumstances where he has told you that PCI is not going to

18 pay any demurrage bills?

19 A. No.

14:19 20 Q. Okay. Has anyone else told you that -- strike

21 that.

22 Has anyone, besides Randy at PCI, ever told

23 you they weren't going to pay demurrage bills?

24 A. No.

14:19 25 Q. Okay. Has anyone at the railroad told you that

1 Randy told them that he wasn't going to pay demurrage bills?

2 A. Has anybody at the railroad told me that they --

3 he told them he was not going to pay them?

4 Q. Yes.

14:19 5 A. Yes, yes.

6 Q. Okay. Who told you that?

7 A. Okay. Richard Lesikar.

8 Q. Lesikar said that?

9 A. Yes.

14:19 10 Q. When did Lesikar say that?

11 A. It was back the same time we was having the

12 meetings. I mean, the -- it's been within the last six

13 years. I mean, you're...

14 Q. Okay. Was this back when you first started having

14:20 15 a business relationship with PCI?

16 A. I can't remember when Richard told me that, no.

17 Q. Okay. Can you remember what he said that Randy

18 said?

19 A. He said he'd wipe his ass with it and send it to

14:20 20 him.

21 Q. Okay. And when -- but you don't remember when

22 that --

23 A. The date was, --

24 Q. -- was said?

14:20 25 A. -- like I said, three or four years ago. I don't

1 pay much attention to -- I...

2 Q. Okay. What were the specific words that Lesikar
3 attributed to Randy Gaston?

4 A. That basically Randy Gaston said he would wipe his
14:20 5 butt with it and send it up to him -- send it to him -- send
6 it back to him.

7 Q. Okay. Did he indicate whether or not there would
8 be a check with the soiled invoice?

9 A. No.

14:20 10 Q. Okay.

11 A. No, Richard did not say that. I --

12 Q. Okay. Is there anything that was said besides
13 what you said?

14 A. Not that I'm aware of.

14:21 15 Q. Okay. But you took that to mean that he wasn't
16 going to pay any demurrage charges?

17 A. That's correct.

18 Q. All right. That's your interpretation of it?

19 A. That's my interpretation.

14:21 20 Q. All right. And you don't know when that
21 conversation occurred?

22 A. No. It's -- like I say, it's been in the last two
23 or three, four years. I couldn't tell you when.

24 Q. All right. Did -- was there any discussion at the
14:21 25 time amongst anyone at the railroad that: Oh, well,

1 they're -- they've just breached our agreement?

2 A. No.

3 Q. Did that even occur before -- I'm sorry. Strike
4 that.

14:21 5 Did Mr. Lesikar convey that -- that
6 statement to you before this new agreement was entered into
7 in August of 2001?

8 A. That, I couldn't tell you. I'm not a -- that's
9 above me on my level. I'm not involved on when the agreement
14:22 10 gets puts in place. I'm not going to even revoke them or
11 anything else.

12 Q. Okay. I -- I misunderstood. I thought that you
13 and Mr. Lesikar went to --

14 A. -- went to the meeting with Randy before that, --

15 Q. Okay. And --

16 A. -- right.

17 Q. -- was that in August 2001?

18 A. I believe that was the same time we had the
19 meeting.

14:22 20 Q. Okay.

21 A. As far as --

22 Q. If our records --

23 A. -- the letter of agreement goes, the -- that's
24 a -- well, that's Richard Lesikar's job, to put them in.

14:22 25 Q. I -- I understand. But that's not what I'm asking

1 you. What I'm trying to get to is whether August 2001 is
2 when Mr. Lesikar drafted this agreement you were telling me
3 about.

4 A. I can't tell you the date. What date was it
14:22 5 effective?

6 Q. Okay. It's August the -- August 2001 is the date
7 of the agreement. But does that sound about the time --
8 right for about the time you and Lesikar went and talked to
9 Randy about an agreement?

14:23 10 A. I believe so.

11 Q. Okay. Now, my question --

12 A. We're about to get there.

13 Q. The conversation about what Randy was going to do
14 with the demurrage bill, do you know whether that occurred
14:23 15 before or after this August 2001 agreement was signed?

16 A. I would say it happened before.

17 Q. Okay. All right. Any other conversations you've
18 ever heard about from anybody where Randy said he wasn't
19 going to pay demurrage bills or statements made that you --
14:23 20 you interpreted that he wouldn't pay demurrage bills?

21 A. No.

22 Q. Okay. Do you know anything about the -- the
23 timing of the railroad's decision as to when to terminate the
24 confidential demurrage agreement?

14:24 25 A. No.

1 MR. DeBERRY: Objection; form.

2 Q. (BY MR. PENNINGTON) That was a pretty bad
3 question, but...

4 What is bunching?

14:24 5 A. What is bunching?

6 Q. Yes, in the railroad.

7 A. The -- when Class 1 railroads -- cars gather on
8 their line in one spot and they deliver them to a short line
9 all at one time or to a customer at -- all at one time.

14:24 10 Q. Does that ever occur in your relationship with PCI
11 where they get a whole bunch of cars at once?

12 A. I don't monitor the shipments on the other
13 railroads, so I couldn't tell you if it's -- why -- what the
14 reason is they're getting --

15 Q. Okay.

16 A. -- 10 or 12, 15 at a time.

17 Q. Does bunching cause large quantities cars to -- of
18 cars to arrive at your yard at the same time?

19 A. If they were bunched, it would.

14:24 20 Q. Okay. Does you -- do you have any control over
21 that?

22 A. Nope.

23 Q. Does PCI have any control over it?

24 A. Nope.

14:25 25 Q. At about the time of this March 2, 2004 meeting

1 that I asked you about, were you asked to review this
2 July 2003 demurrage bill we've marked as Exhibit 1?

3 A. I don't believe so.

4 Q. But you -- you know what meeting I'm talking
14:25 5 about? I think you said you knew that Gaston met with Martin
6 and George on about March 2nd, 2004.

7 A. Right.

8 Q. Okay. You weren't in that meeting?

9 A. That's correct.

14:25 10 Q. And my question is: Either right before or right
11 after that meeting, were you asked to look at that bill and
12 give your opinions on it?

13 A. That, I couldn't answer, honestly. We look at
14 bills all the time, and I don't remember --

14:26 15 Q. You don't remember that one?

16 A. Huh-uh. We look at them all the time, so it's
17 not -- as far as this specific bill, no, I couldn't tell you,
18 honestly, one way or the other.

19 Q. Well, would it be fair to say, then, that you
14:26 20 don't remember Mr. George or Mr. Martin, or anyone else,
21 coming to you and saying: We want you to look at this bill
22 and analyze it and see if it's a good bill?

23 A. If I was going to be fair, I would say, yes, they
24 did come ask me to look at it.

14:26 25 Q. Okay. What did they say?

1 A. That's what I'm saying, "if." If they did.
2 Q. If?
3 A. Yeah, that's what I said. I don't know that.
4 Q. But you just don't remember that?
14:26 5 A. Right.
6 Q. Okay.
7 A. Yeah, I don't.
8 Q. That's fair.
9 So you don't know whether, for example, full
14:27 10 spots of cars were delivered on each of the days between
11 July 1st and July 15th, 2003?
12 A. Sitting right here today?
13 Q. Yeah.
14 A. No. But I can go to the office and pull the
14:27 15 records and show you that --
16 Q. But you've never --
17 A. -- it's like that.
18 Q. You don't recall ever being asked to do that?
19 A. No, I don't recall.
14:27 20 Q. Okay. We talked a little bit this morning about
21 demurrage bills to PCI back in '98, '99, and 2000. Do you --
22 do you now recall that there wasn't a single demurrage bill
23 sent to PCI for that three-year period?
24 A. That's -- I'd have to go back and check. I
14:27 25 couldn't tell you if there were -- sitting here today, I

1 can't tell you. I mean, --

2 Q. Okay.

3 A. -- that's too long ago.

4 Q. Okay. What has been -- how good a relationship

14:28 5 have you had with Gary Hazard and Randy Gaston over the

6 years?

7 A. A good relationship.

8 Q. When your -- when your switching crews or your --

9 I guess your conductor fails to switch cars on an oldest car

14:28 10 basis, do they generally have an excuse for -- for doing

11 that?

12 MR. DeBERRY: Objection; form.

13 Q. (BY MR. PENNINGTON) Do they usually give you an

14 excuse?

14:28 15 A. They give the MTO the excuse. They don't give me

16 the excuse, no, so...

17 Q. Back in July 2003, how many -- how many crews did

18 you have working?

19 MR. DeBERRY: Objection; form.

14:29 20 A. As in the whole railroad, or at Hodge yard or --

21 Q. (BY MR. PENNINGTON) Well, in -- in Fort Worth.

22 A. In Fort Worth in July of 2000, probably four,

23 maybe five.

24 Q. Okay. Do each one of these crews have their own

14:29 25 engine, or at least one engine?

1 A. No, no. They work different shifts.

2 Q. Okay. Do you know if you had any engines in
3 service or out of operation between July 1st and 15, 2003?

4 A. No. That's not my -- part of my duties.

14:29 5 Q. So you don't have any records to show -- in your
6 office to show when engines are out of service?

7 A. Not in my office, no. Not back then.

8 Q. And -- but you acknowledge that customers don't
9 owe demurrage when -- when it's a result of not getting a
14:30 10 spot which is a result of an engine not working?

11 A. Right. If it's a service failure like we
12 discussed a while ago, there is credits that are given and
13 taken to them.

14 Q. So is that another example of how -- of -- of a
14:30 15 situation where you might send out a demurrage bill that --
16 that just simply isn't due because you don't know about an
17 engine being out of service?

18 MR. DeBERRY: Objection; form.

19 A. That -- that's a broad question; but, yes, that
14:30 20 could happen.

21 Q. (BY MR. PENNINGTON) Okay.

22 A. It could happen.

23 Q. What records do y'all have at FWWR to show when
24 engines are out of service?

14:30 25 A. Well, here in the past six or eight months, a year

1 or so, we've -- now we keep a locomotive log on -- on records
2 of when a locomotive is in and out of service.

3 Q. Did you have that system in place in July of 2003?

4 A. I don't think so.

14:30 5 Q. Looking back at Exhibit 2, the old UP interchange,
6 how many cars will fit on the old UP interchange?

7 A. I couldn't tell you that right off the top of my
8 head, but 25, 30. It's a long track.

9 Q. And how many engines does it take to pull 20
14:31 10 loaded boxcars?

11 A. I couldn't tell you that. I'm not -- I'm in the
12 office. I'm not out on the railroad.

13 Q. Okay. Is that something you would know if you
14 worked out in the rail yard as opposed to in a bank tower?

14:31 15 A. And doing the same job I'm doing right now?

16 Q. Right.

17 A. No, I still wouldn't know that, because I'm not
18 out there doing it.

19 Q. All right. Because you work at the top of a bank
14:31 20 tower in West Fort Worth, does it cause you to not know about
21 some things that go on in the yard?

22 MR. DeBERRY: Objection; form.

23 A. Cause me to not know? You're right, I don't know
24 what the heck is going on in the yard. You can be down in
14:32 25 the yard and not know everything that's going on in the yard,

1 so...

2 Q. (BY MR. PENNINGTON) Okay. I'm not asking about
3 that. I'm asking about you. Do you find that you don't know
4 about things -- some things that happen in the yard because
14:32 5 you're -- you -- you're sitting in an office in a bank tower
6 in West Fort Worth?

7 A. Yeah, there's things that happen that we don't
8 know about; we find out after the fact.

9 Q. Do you know anything about some event where --
14:32 10 back in July of 2003, where Mario supposedly made an oral
11 request for one or more special cars?

12 A. The only thing I know about that is what -- the
13 memo that I've seen come across on it.

14 Q. Okay. So there are internal memos about that?

14:32 15 A. No, just what -- the same thing y'all have in
16 y'all's file.

17 Q. How do you know what I have in my file?

18 A. Well, the same thing everybody has in their files,
19 I guess. But there's communications between me and Gary.
14:33 20 Gary sent me the fax on it.

21 Q. Okay. You're talking about -- you're talking
22 about memos between you and --

23 A. Right.

24 Q. -- somebody at PCI?

14:33 25 A. Right.

1 Q. Gary Hazard?

2 A. Right.

3 Q. All right. Are there any internal memos about

4 that?

14:33 5 A. No.

6 Q. None --

7 A. Not --

8 Q. -- that you've seen?

9 A. -- that I'm aware of.

14:33 10 Q. Okay. But you've seen the memos between you and

11 Gary, --

12 A. Of course.

13 Q. -- right?

14 A. Yes.

14:33 15 Q. All right. And suppose -- what is your

16 understanding of what Mario told somebody?

17 A. That's secondhand, I mean.

18 Q. I don't care. I'll take secondhand. I'll take

19 thirdhand. What have you heard?

14:33 20 A. That Mario went to the yard and requested that

21 cars be spotted --

22 Q. Well, who --

23 A. -- around the shingle cars.

24 Q. Who did -- I'm sorry. What was the rest of it?

14:33 25 A. Around the shingle cars.

1 Q. Okay. Let's -- let's say it again. Mario said --
2 I'm going to write down exactly what you heard.

3 Mario --

4 A. Mario went to the yard -- the way I understand it
14:33 5 now. See, I wasn't out there. Mario went to the yard and
6 requested other cars be spotted beside the shingle cars.

7 Q. When did that occur?

8 A. I'd have to look at the letter and -- to tell you.
9 I mean, it's all in that one month right there. I mean,
14:34 10 you're asking me days that...

11 MR. PENNINGTON: Okay. Is -- is there just
12 this one memo? Is there just one memo about it?

13 MR. GASTON: That's the only memo I know of
14 that they could be talking about.

14:34 15 Q. (BY MR. PENNINGTON) Okay. Is this the memo
16 you're talking about?

17 A. (Pause to review document.)

18 Yeah, it's the memo.

19 Q. Okay. So that's the only piece of writing that
14:35 20 you know about concerning this statement that Mario
21 supposedly made?

22 A. That, and the e-mails that --

23 Q. That, and the e-mails.

24 A. Well, I mean...

14:35 25 Q. Okay. Tell me about the e-mails.

1 A. Our statements, you know, from our -- our
2 employees on what happened.

3 Q. Okay. Has there -- is there a statement that one
4 of your employees has made -- one or more of your employees
14:35 5 have made about some conversations with Mario?

6 A. Not that I know of.

7 Q. Okay. Well, why did you tell me --

8 A. I don't guess I understood the question, then.

9 Q. Okay.

14:35 10 A. Repeat it. Hey, --

11 Q. All right.

12 A. -- I'm as tired as you are.

13 Q. Okay. No, I'm not tired at all.

14 A. Well, you're a better man than I am if you ain't
14:36 15 tired.

16 Q. Oh, no, no, I'm -- I'm not. I just -- I just do
17 this nonsense all day, every day. I'm used to it.

18 A. Like I say, you're a better man than I am.

19 Q. Okay.

20 A. There were --

21 Q. It looks to me like --

22 A. -- there were some letters from Vern Colbert and
23 our trainmasters on what happened regarding this letter.

24 Q. Okay. Where are those documents?

14:36 25 A. The -- Steve George has a copy. I assume you have

1 copies.

2 Q. Okay. Have those statements ever been provided to

3 PCI?

4 A. That, I couldn't tell you.

14:36 5 Q. Okay. Did you ever ask whether PCI had seen these

6 statements?

7 A. That's none of my -- my business.

8 Q. Who asked that the statements be prepared?

9 A. Vern Colbert, wanting to know exactly what

14:36 10 happened.

11 Q. Okay. All right. So you were told -- I may have

12 missed this. Who told you what Mario said?

13 A. Told me the statement from the MTO and the -- I

14 think -- I think it was the MTO -- the two MTOs that made

14:37 15 statements on it.

16 Q. Okay. What are their names?

17 A. Rick Timmis. And I'm not sure of the -- I believe

18 it was David Worden, the other one.

19 Q. Okay. And the gist of it was that Mario went to

14:37 20 the yard and requested that other cars be spotted besides

21 shingle cars?

22 A. That's the gist of it.

23 Q. Okay. How many conversations do these statements

24 refer to by Mario?

14:37 25 A. I don't know. Two or three times. That's just a

1 guess.

2 Q. Okay. So you think the statements say Mario said
3 that two or three different times?

4 A. Yeah. It came -- come up -- come up more than
14:38 5 once, and requested it. And like I say, this is all hearsay,
6 so... I wasn't down there.

7 MR. PENNINGTON: Okay. Let me -- could we
8 take a little short break? I think I'm just about --

9 MR. DeBERRY: -- to understand this?

14:38 10 MR. PENNINGTON: Well, no. I think I'm --
11 I'm finished with my -- my questions, so I just need to talk
12 to my client for a minute and see if we can wrap it up.

13 MR. DeBERRY: Yeah, let's take a break.

14 (Break taken 2:38 to 2:45 p.m.)

14:46 15 MR. PENNINGTON: I'll pass the witness.

16 MR. DeBERRY: I reserve my questions for
17 trial.

18 (Off the record at 2:46 p.m.)

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1 CHANGES AND SIGNATURE

2 WITNESS NAME: CHARLES PAUL GODSEY TAKEN: May 26, 2004

3 PAGE LINE CHANGE REASON

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1 I, CHARLES PAUL GODSEY, have read the foregoing
2 deposition and hereby affix my signature that same is true
3 and correct, except as noted above.

4

5

CHARLES PAUL GODSEY

6

7 THE STATE OF TEXAS)

8 COUNTY OF)

9

10 Before me, , on this day
11 personally appeared CHARLES PAUL GODSEY, known to me (or
12 proved to me under oath or through)
13 (description of identity card or other document) to be the
14 person whose name is subscribed to the foregoing instrument
15 and acknowledged to me that they executed the same for the
16 purpose and consideration therein expressed.

17 Given under my hand and seal of office this
18 day of , 2004.

19

20

21 Notary Public in and for the
22 State of Texas.

23

24

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1 IN THE UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF TEXAS
3 FORT WORTH DIVISION

3 PCI TRANSPORTATION,)
4 INC.)
5 VS.) CAUSE NO. 4:04CV-211-Y
6 FORT WORTH & WESTERN)
7 RAILROAD COMPANY, INC.)

7 REPORTER'S CERTIFICATION
8 DEPOSITION OF CHARLES PAUL GODSEY
9 Taken May 26, 2004

9 I, Kem M. Sutton, Certified Shorthand Reporter in
10 and for the State of Texas, hereby certify to the following:

11 That the witness, CHARLES PAUL GODSEY, was duly
12 sworn by the officer and that the transcript of the oral
13 deposition is a true record of the testimony given by the
14 witness;

15 That the deposition transcript was submitted on
16 June 28, 2004, to MR. MR. DeBERRY, Attorney of record for the
17 witness, for examination, signature and return to me by July
18 30, 2004 (30 days);

19 That the amount of time used by each party at the
20 deposition is as follows:

21 MR. PENNINGTON: - 2 Hours: 45 Minutes
22 MR. DeBERRY: - 0 Hours: 0 Minutes

23 That pursuant to information given to the
24 deposition officer at the time said testimony was taken, the
25 following includes counsel for all parties of record:

1 Allen Pennington, Attorney for Plaintiff(s)
2 Richard DeBerry, Attorney for Defendant(s)

3 I further certify that I am neither counsel for,
4 related to, nor employed by any of the parties or attorneys
5 in the action in which this proceeding was taken, and further
6 that I am not financially or otherwise interested in the
7 outcome of the action;

8 Further Certification requirements pursuant to the
9 Federal Rules will be certified to after they have occurred;

10 Certified to by me this the 28th day of June,
11 2004.

12
13
14 Kem M. Sutton, CSR No. 1655
15 CSR Expiration Date: 12/31/05
16 Firm Registration No. 133
17 Notary Expires: 12/12/04
309 West 7th Street, Suite 600
Fort Worth, Texas 76102
Phone: 817-336-3042
Fax: 817-335-1203

18 FURTHER CERTIFICATION

19 The original deposition was/was not returned to
20 the deposition officer on _____, 2004;

21 If returned, the attached Changes and Signature
22 page contains any changes and the reasons therefor;

23 If returned, the original deposition was delivered
24 by regular mail / certified mail / hand-delivery to
25 MR. PENNINGTON, Custodial Attorney, for safekeeping on the

1 _____ day of _____, 2004;

2 That \$ is the deposition
3 officer's charges for preparing the original deposition
4 transcript and any copies of exhibits, to be charged to
5 MR. PENNINGTON, Attorney for the Plaintiff;

6 That the deposition was delivered in accordance
7 with the Rules, and that a copy of this certificate was
8 served on all parties shown herein;

9 Certified to by me this the _____ day of
10 _____, 2004.

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17 Job Number: 040526KSS

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25

Kem M. Sutton, CSR No. 1655
CSR Expiration Date: 12/31/05
Firm Registration No. 133
Notary Expires: 12/12/04
309 West 7th Street, Suite 600
Fort Worth, Texas 76102
Phone: 817-336-3042
Fax: 817-335-1203

DEMURPAGE INVOICE USING STRAIGHT CALCULATIONS

For cars released from 7/01/03 thru 8/06/03

In account of:

PCI TRANSPORTATION
3201 N. SYLVANIA
FT. WORTH TX 76111
Attn: RANDY GASTON

Please Remit to:

Ft Worth and Western RR

Attn:

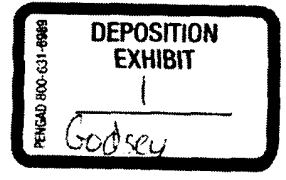
Station: 30 HODGE
Run Date: 8/06/03
Invoice Date: 8/06/03

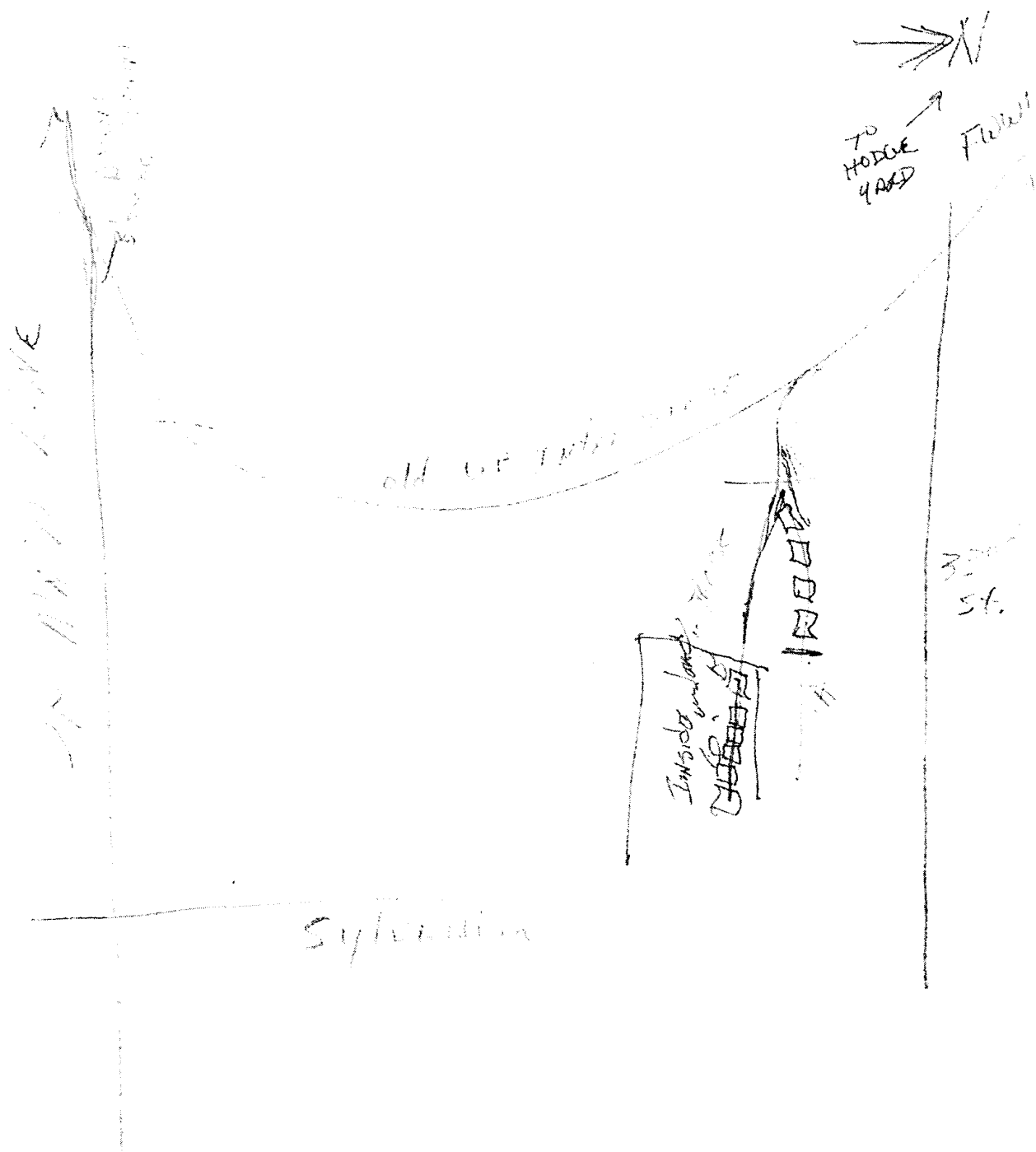
Demurrage Agreement: PCI

Invoice 1216
Page 1

Seq	Held	Car	Car	Car	Commodity	PCON/Ordered-	Placed---	Released---	Total	Credit	Amount
						Date	Date	Date	Days	Days	Due
1	UNLD	ADK	19131	A	WI RO STERN IORS	7/01/03 8:00	7/14/03 11:20	7/15/03 8:43	14	6	300.00
2	UNLD	ATW	140072	A	STEEL	7/01/03 8:00	7/14/03 11:20	7/15/03 8:43	14	6	300.00
3	UNLD	LW	470525	A	STEEL	7/01/03 8:00	7/14/03 11:20	7/15/03 8:43	14	6	300.00
4	UNLD	MP	261026	A	STEEL	7/01/03 8:00	7/14/03 11:20	7/15/03 8:43	14	6	300.00
5	UNLD	NKCR	65658	A	WI RO STERN IORS	7/01/03 8:00	7/14/03 11:20	7/15/03 8:43	14	6	300.00
6	UNLD	UP	354550	A	WI RO STERN IORS	7/01/03 8:00	7/14/03 11:20	7/15/03 8:43	14	6	300.00
7	UNLD	UP	354718	A	STEEL	7/01/03 8:00	7/14/03 11:20	7/15/03 8:43	14	6	300.00
8	UNLD	ALM	841318	B	PLYWOOD	7/01/03 8:00	7/09/03 1:00	7/09/03 9:00	8	6	300.00
9	UNLD	MRL	10017	A	BOARDS, SANDUST	6/27/03 8:00	7/02/03 5	7/07/03 18:25	10	6	120.00
10	UNLD	SP	231401	A	PLYWOOD	6/30/03 12:00	7/03/03 10:30	7/07/03 18:25	7	6	30.00
11	UNLD	SP	245191	A	PLYWOOD	6/30/03 12:00	7/03/03 10:30	7/07/03 18:25	7	6	30.00
TOTAL UNLOADING											2,340.00
TOTAL FOR HODGE											2,340.00
TOTAL FOR PCI TRANSPORTATION											2,340.00

3,710.00





PC: TRANSPORTATION, INC.

TO: FT. WORTH & WESTERN

FAX: 817-731-0602

PHONE: 817-731-1180

FROM: JOE BOGGS

817-222-1409

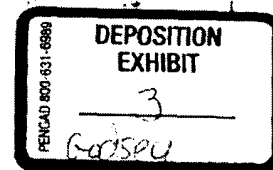
TIME:

DATE:

MESSAGE: THE FOLLOWING CARS ARE RELEASED.

3A

CAR NUMBER	DATE ARRIVED	DATE RELEASED	CONTACT PERSON
TT2X85964-A	2-12-04	Ready	2/13
TT2X84579-A	2-13-04	Ready	2/13
NOUL 731844-A	2-13-04	Ready	2/13
TNER 9268-A	2-13-04	NOT	X 2/13
BN249976-B	2-13-04	Ready	2/13
BN5F 726077-B	2-13-04	Ready	2/13
BN5F 726094-B	2-13-04	Ready	2/13
CNVK 155946-B	2-12-04	not	2/13 need to turn in
CNVK 155413-B	2-12-04	not	2/13 around



IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

PCI TRANSPORTATION, INC.,
Plaintiff,

v.

FORT WORTH & WESTERN
RAILROAD COMPANY, INC.,
Defendant.

§
§
§
§
§
§
§

CIVIL ACTION NO. 4-04CV-211-Y

AFFIDAVIT OF RANDY GASTON

STATE OF TEXAS §
 §
COUNTY OF TARRANT §

Before me, the undersigned authority, personally appeared Randy Gaston, a person known to me, and after being duly sworn, did upon his oath state as follows:

"My name is Randy Gaston, I am over eighteen years of age, and have never been convicted of a felony or a crime. I am fully competent to make this affidavit, and I have personal knowledge of the matters contained herein, by virtue of my position with PCI Transportation, Inc. ("PCI"), a company incorporated in Texas. Since 1993, I have been an officer of PCI and have been the manager of all of PCI's operations in Fort Worth, Tarrant County, Texas.

"Beginning in early, 1998, PCI rented approximately 150,000 square feet of warehouse space in the Sylvania Industrial Park adjacent to North Sylvania Avenue, in the central north side of Fort Worth, which sets on approximately seven to ten acres of land. This property is located on a railroad spur which, at the time PCI entered into its first lease with the Sylvania Industrial Park, was served by both the Union Pacific and



Burlington Northern Santa Fe "Class One" railroads.

"Prior to signing this original lease in 1998, Joe Boggs and I attended a meeting with Richard Lesikar of the FWWR and John Whitney, representing the Sylvania Industrial Park. At that meeting, I advised Mr. Lesikar and Mr. Whitney that PCI was considering entering into a multi-year lease of the railroad spur from Sylvania Industrial Park, specifically through January or February, 2004. Mr. Lesikar of FWWR emphasized at this meeting that PCI could get unlimited switches per day on this spur, and said FWWR's service had a great benefit in that they would switch, or place, cars on this spur off both the Union Pacific and Burlington Northern Class One Lines. He also expressed that the service would be great because the FWWR did not have much business at that time. PCI saw the benefit of this arrangement, only having to work with one switching railroad, but being able to take cars from both Class One railroads, and on the basis that this arrangement would keep the costs to PCI's customers the same as PCI's local competition. Prior to PCI signing its initial lease with the Sylvania Industrial Park in 1998, FWWR mentioned nothing to PCI about any demurrage charges or tariffs involved in using this spur; 100% of our arrangements with the FWWR were oral at that time. Based upon these oral commitments of FWWR, PCI was able to secure the initial lease agreement of its warehouse space and spur with the Sylvania Industrial Park, as described above. We went into this lease solely due to the fact that both the Burlington Northern and Union Pacific served this location and it would keep the cost to our customers delivering railcars into us the same as our competition.

"FWWR brought PCI its first cars to this spur in Fort Worth in approximately April, 1998. From the very beginning, PCI developed a facsimile sheet form to send

daily to FWWR to release delivered cars, and to give any other written instructions regarding cars which FWWR had delivered to PCI's spur. This form is still in use today, daily, with FWWR. From April, 1998 forward, PCI's operation in Fort Worth and FWWR's railroad car delivery business in Fort Worth both grew. On or about March 1, 1999, PCI signed a new lease with Sylvania Industrial Park, which ended in January or February, 2004. Prior to January, 2004, PCI had taken on additional space at the spur so that by that date, PCI rented approximately 320,000 square feet of space at the Sylvania Industrial Park. Over the next few years, the FWWR crews learned about the proper spotting of cars on the A-track and B-track, learned the capacity of these two tracks and things went smoothly.

"During this time, we, both FWWR and PCI, experienced growing pains but mostly the FWWR did so. Many, many times FWWR was unable to spot cars to PCI due to derails, bad track, no workable engines, crews not showing up, not enough people to make a crew, because all their engines were being used elsewhere, one time the crew was sent home because it was raining, and several times because of no communication between their main office and the yard office. We fixed that last excuse by faxing our daily instructions to both places.

"Still, PCI managed to grow and work through these difficulties. At some point, it appears the FWWR became unsatisfied with the arrangement, and decided to send us a demurrage bill.

"In August 2001, FWWR and PCI had a disagreement or dispute concerning a demurrage charge sought to be imposed at that time by FWWR. FWWR had let some PCI cars set in its yard or on its tracks, when there was room to deliver them to PCI's

spur, and then later tried to impose, and did impose, a demurrage charge upon PCI because FWWR had held these cars in Fort Worth for a period of time that they apparently deemed to be too long. Joe Boggs, another officer of PCI, and I met with the FWWR representative, Jim Martin, and I told him that their service failures were costing PCI money, that we had crews to unload cars that they were not being delivered when available and when we had room on our spur for those cars. At this meeting, Joe Boggs and I told Mr. Martin that the railroad could not have it both ways. They must bring us the cars, oldest first, and spotted properly as empty cars are released. We also expressed our desire to be reimbursed for bringing people in to unload cars when the FWWR failed to spot us if we were going to be expected to pay demurrage for cars. Mr. Martin said that they were the railroad and did not have to pay PCI for its losses. At about this time, PCI first learned from Mr. Lesikar about an alleged tariff that he said applied to our spur.

"We were told at this meeting that PCI would pay the demurrage bill, albeit questionable, they would not consider our losses, but in return FWWR would give us the confidential agreement involved in this suit, and that this agreement would be a contract between FWWR and PCI and their tariff would not apply. Mr. Martin told me at that meeting that PCI would sign this agreement as written, and pay the disputed bill, or FWWR would stop spotting cars to PCI except on a cash-only basis. We argued the bill was fraudulent and did not reflect FWWR's service failures and that FWWR had gone around older cars. Mr. Martin then agreed to cut the bill in half, but only if we would sign the agreement prepared by FWWR. PCI could not let them stop spotting cars and put us on go to a cash only delivery arrangement because that information

would spread through the industry like wildfire and virtually put us out of business. Customers would not use our services when they found out we had been put in that situation by the railroad. They would send their business to our competitors under these circumstances or under any situation where they learned we were having this kind of spotting problems with our railroad. Mr. Martin said, again, that FWR would always credit service failures (even though he was refusing to do so on this bill).

We figured four days was a fair deal and we certainly could not stand for them to hold our cars which would ruin us in the industry, so we reluctantly signed the August 23, 2001 Agreement (the "Agreement"), which would exempt PCI from FWR's tariff. I understood, and my interpretation of the written Agreement at the time, and at all times since, was that FWR's tariff would not apply to PCI in any way if PCI signed this Agreement. As part of this Agreement, which was written entirely by FWR and as to which PCI was given and allowed no input, or say, PCI was, in fact, required to pay one-half of the then disputed demurrage bill of FWR. Under this new Agreement, FWR agreed to provide PCI one switch or spot of loaded cars per day to PCI's spur and not to impose a demurrage charge to PCI unless it had to hold a loaded PCI-bound car for more than four (4) days. Since execution of this Agreement, the custom and practice of FWR has always been to deliver to PCI the oldest cars first, unless PCI requested one or more special cars in writing using the daily fax form discussed above. Since this Agreement was executed, FWR has always required that any variance from the delivery of the oldest cars must be requested in writing by PCI. This fact was verified in Mr. Martin's email to me dated March 2, 2004, attached hereto as Exhibit "F", but he is wrong in stating that this understanding was reached after July, 2003. This

has always been our understanding.

"Sometime around January, 2003, PCI received another demurrage bill from FWWR that was improper. Joe Boggs and I met with Jim Martin and Steve George of FWWR and attempted to show them with their own records that the bill was improper, and we presented them at that time with an invoice for PCI's expenses due to the FWWR's failure to spot available cars. In fairness, we made this bill match the demurrage charges, although our expenses were much greater. These FWWR officers told Joe and I that they were the railroad and were not paying any money to PCI, and that if PCI did not pay the disputed bill, FWWR would cancel the parties' Agreement, hold PCI's cars and spot them only on a cash basis. They did confirm again at that meeting that any changes to delivery of oldest cars first had to be based on a written request, and that FWWR's service failures would be considered with respect to demurrage. Nevertheless, they refused to look at PCI's records, which demonstrated that no demurrage was due on the current bill, and stated, as they had before, that PCI had to pay this bill or FWWR would hold our cars and spot them only on a cash basis. PCI reluctantly paid this false bill in two payments over the next couple of weeks under duress, having been given no choice but to do so, as we had done in August, 2001. They confirmed again that everything would be done in writing, and that all service failures would be considered, but they were unwilling to look at the records concerning this bill.

"All went well for about a year, demurrage bills were sent, service failures were considered and all bills resolved.

"In January, 2004, in reliance on the four day demurrage agreement we had with

FWWR, the recognized practices of FWWR in spotting cars described herein, as consistently recognized by FWWR over the years, and FWWR's acknowledgements of industry practices described herein, PCI entered into a five year renewal of its lease at Sylvania Industrial Park, extending through February, 2009, at a monthly rent in excess of \$60,000.

"In August 2003, PCI received the document attached hereto as Exhibit "A", which purports to be a demurrage charge for July 2003 car deliveries. I spoke to Charlie Godsey about this bill at that time. He said that one of PCI's yard employees told his crew to take some cars out of order. At that time, I pointed out to Mr. Godsey that this bill was not owed for two reasons: first, if FWWR's crew was claiming that they took cars out of order based upon something a PCI employee said, that would be outside the parties' agreement that all such requests had to be in writing (I also told him that our employee did not make such a request); and second, that no demurrage would be owed under this bill if full spots of cars had been delivered each day, regardless of any alleged oral instructions to take cars out of order.

"After this conversation, Mr. Godsey sent me the letter dated August 15, 2003, attached hereto as Exhibit "B". On September 12, 2003, I sent to him the letter attached hereto as Exhibit "C". On October 8, 2003, Mr. Godsey sent me a letter attached hereto as Exhibit "D". The October 8 letter references some statement of Mario, a forklift driver and crew leadman of PCI. Nothing has ever been provided to PCI showing any request by Mario for special cars or for any cars to be taken out of order. Mario of PCI would have no such authority of PCI to issue such a request to FWWR, and as noted above, FWWR had always recognized, on numerous occasions,

that such a request to bring a special car or otherwise bring cars out of order had to be in writing.

"PCI heard nothing more about the July, 2003 demurrage bill until February, 2004. Specifically, I received a February 3, 2004 letter by telecopy on February 26, 2004, and had no knowledge of its contents or existence prior to that date. A true and correct copy of such February 3, 2004 letter is attached hereto as Exhibit "E". This letter demands payment of \$2,340.00, the full amount of the July, 2003 demurrage bill, even though FWWR's October 8, 2003 letter had already recognized \$210.00 of such bill was improper and that PCI had demonstrated that the rest of the bill was not owed.

"On March 1, 2004, I met with Jim Martin and Steve George of FWWR to demonstrate, using FWWR's own records, that the cars for which the July 2003 demurrage charges were being imposed would not have been in FWWR's possession more than four days had the PCI-bound cars been delivered to PCI on an oldest car first basis. At that meeting, Mr. Martin stated to me that all the charges on the bill were a mistake, that the demurrage charge on such bill would be withdrawn, and Mr. Martin expressly told me at that meeting that any oral instructions (such as from Mario) 'don't matter unless it was in writing and my people know that'. Thus, to my understanding of his statements, Mr. Martin was indicating to me that the bill was not owed because if his people were claiming that the demurrage charge was a result of oral instructions from one of our employees stating that certain cars should be delivered out of order, that no demurrage charge could result from that since the parties had always operated under the agreement that any such instructions had to be in writing.

"Nevertheless, on March 2, 2004, I received a letter sent via email from Mr.

Martin, attached hereto as Exhibit "F", which was actually sent to me by Steve George, again demanding payment of the July 2003 demurrage charge and stating that FWWR would put PCI in default under the agreement if such bill was not paid by March 8, 2004. Despite what he had said to me the day before, the letter acknowledges that the oldest cars were not delivered first to PCI, but he states that this was done on the verbal instructions from one of PCI's (unnamed) 'yard employees'. I responded to this email by email dated March 2, 2004, a true and correct copy of which is attached as Exhibit "G", reminding Mr. George of the acknowledgements of FWWR the previous day, and asked or begged for reconsideration of the demand. No response has been received to this request to this day. Thus, based upon the history of FWWR's threat; PCI felt that it had no choice but to pay what it had demonstrated to FWWR was a false bill, and which FWWR had acknowledged to be an improper bill, or to file a request for a temporary restraining order in state court to enforce the parties' express agreement.

"I have reviewed the deposition of Charles Godsey taken in this case and agree with him that at all times he and all the other employees of FWWR have acknowledged and expressly stated to me and other PCI employees their intent to abide by the following policies and practices of the FWWR. Specifically, Mr. Godsey stated in his deposition (the following pages being references to his May 26, 2004 deposition taken in this case) that it is the practice of the FWWR not to charge demurrage to any of its customers in the following situations:

- a. where FWWR has not spotted the oldest cars first, absent instructions from the customer to the contrary (pp. 20-30, 43, 50, 52);

- b. where FWWR fails to provide a daily switch of cars (p. 30);
- c. where FWWR fails to deliver a full spot of cars (pp. 70-72, 75, 78);
- d. in the event of certain service failures, including:
 - (i) when FWWR turns a box car on the customer's spur the wrong way (resulting in an inability of the customer to unload the car) (pp. 30, 103);
 - (ii) when FWWR delivers cars to the customer's spur in a manner which results in an inability to unload the cars for other reasons (p. 65);
 - (iii) derailment (p. 101);
 - (iv) engine breakdown (p. 101); and
 - (v) flood, fire or rain (p. 102);
- e. when a customer's cars get "stuck" behind other customer's cars on an interchange, resulting in cars not being delivered to the customer on an oldest car basis (pp. 94-96); and
- f. when any of the above issues causes a "domino effect" on future days, FWWR doesn't charge demurrage on those affected cars (p. 104).

"All of the above policies or practices also represent the custom and practice of the railroad industry in the State of Texas at all times from the beginning of the relationship between FWWR and PCI to the present. I am personally familiar with these customs and practices in the Texas railroad industry based upon my 11 years of experience in working with railroad spotting operations all over the State of Texas

during that period.

"If PCI is forced to go to a two-day demurrage agreement or tariff with FWR, this will interfere with PCI's ability to perform delivery contracts with our current and prospective customers. PCI depends on FWR's spotting operation as its access in Fort Worth to the Union Pacific and Burlington Northern/Santa Fe railroads, and PCI cannot operate its Fort Worth spur without access to these two Class One Railroads. PCI operates on a certain margin with our customer delivery contracts, and the imposition of demurrage in the amounts which have been billed by FWR (since they have contended that we are on a two day demurrage arrangement) will reduce that margin to the point where it probably would no longer be profitable or practical to continue the customer unloading operation of PCI's Fort Worth facility at the Sylvania Industrial Park. In peak delivery season, the spring, for example, the demurrage bills could be \$7,500 – 10,000 per month on a two day agreement or tariff. Furthermore, our customers will not use us, and will not risk sending their freight to PCI for unloading, if they find out we are on a cash basis with the railroad, or even if they learn we are having problems with the railroad that switches our cars. We would lose most of our Fort Worth business if this information got to our customers, and we would have to close our Fort Worth operation. The customers and business we would lose could not be done out of our PCI operations in Houston and San Antonio. Customers ship freight to Fort Worth because the ultimate destination of the materials is in or near Fort Worth.

PCI has approximately 15 – 20 written agreements with higher volume customers in the United States and Canada to receive rail freight in Fort Worth, and PCI documents its agreement terms for each shipment received with dozens of other

customers, many of whom regularly deliver cars to PCI in Fort Worth. The contracts and business with these customers would be lost by PCI if FWWR follows through with its threats to hold PCI's cars and put them on a cash delivery basis, and PCI would be unable to enter written contracts with those customers with whom it does not yet have contracts, but for whom it regularly receives freight. The damages PCI would incur based upon closing of the Fort Worth operation would consist of the direct costs of closing the operation, costs of relocating Gary Hazard and potentially other employees, two weeks severance pay for the other Fort Worth employees, costs of transporting and storage of customer materials then at the PCI spur in Fort Worth, and rental to the Sylvania Industrial Park of \$60,737.65 per month from the date of closure of the operation through the month of February, 2009 when PCI's lease there ends.

"Since these proceedings began, I have been told of, and somewhat of a big deal has been made of, something I supposedly said, along the lines of "If you send me a demurrage bill, I will wipe my ass with it and send it back." I do not doubt I said this at some time. I do not know to whom or when I said it, if I said it. I deny ever making such a statement to Jim Martin, who has consistently used more colorful language in our business dealings than I could even aspire to. If I made the statement to someone else at FWWR, it would have more than likely been in a humorous manner to either Richard Lesikar or Charlie Godsey while talking about a disputed bill, more than likely early on in our companies relationship. PCI has facilities in Houston, San Antonio, and Fort Worth, and does business with at least three other railroads. We know we have to pay just demurrage bills. So if I said this, it was probably to lighten the moment in a conversation or something along those lines.

"When this issue came up in this lawsuit about my allegedly saying that I would 'wipe my ass' with one of FWWR's demurrage bills, I asked Richard Lesikar if he remembered me making such a statement. He said I did make a statement like that at some time, but does not recall any particular bill that was being talked about, or whether there was even a bill being discussed at that time, but he did say that the statement was made early on in our companies' relationship. Mr. Godsey said in his deposition that I made this statement to Lesikar three or four years ago but implied that he did not pay attention to this (Godsey Deposition, p. 130).

"PCI has always intended to honor the terms of the 2001 Agreement and has at all times since the date of filing of this lawsuit in state court on March 5, 2004, been pressing its request for a temporary injunction to prevent FWWR from seeking to cancel the parties' written Agreement. PCI has at all times, both before and after this lawsuit was filed, intended to pay all proper demurrage bills, when same were not the result of FWWR's service failures, failure to deliver oldest cars first, or failure to deliver a full spot of cars each day. PCI has paid at least two such bills after this lawsuit was filed, to the extent they were correct. I never intended, by casting disrespect or doubt on any particular false bill that was sent by FWWR, not to pay on behalf of PCI proper demurrage bills accruing under the Agreement.

"I would also note, as recognized by Charlie Godsey in his deposition, that there are often obvious errors in the bills generated by FWWR's computer system and sent to PCI. In fact, there are almost always errors in these bills, as demonstrated by my discussion of the July, 2003 bill and the March, 2004 bill below. After this lawsuit was filed, on Monday morning, April 12, 2004, PCI received in the mail a new purported

demurrage bill from FWWR, a copy of which is attached hereto as Exhibit "J" and incorporated by reference. The bill is, quite obviously, not based upon the four-day demurrage period required by the parties' agreement, but appears instead to be based upon only a two-day demurrage period. Thus, the demurrage bill is clearly not in compliance with the parties' Agreement. The bill also seeks to charge PCI two-day demurrage on several cars which were delivered in the weeks prior to the date of the March 2, 2004 letter from Mr. Martin referred to above. In other words, FWWR sent this invoice for two day demurrage for a period in which it recognizes that a four day demurrage agreement was in effect. Thus, this letter further demonstrates the false and consistently inaccurate billing practices of FWWR which necessitated the filing of this lawsuit in the first place.

"It was necessary for PCI to set forth some of the terms of the parties' 2001 Agreement, such as the four day agreement, in our state court proceedings and in this court to attempt to enforce those contract terms. It would not have been necessary to advise the court of certain terms of the parties' Agreement, such as the amount of the demurrage charged per day (which is the very same dollar amount per day as charged under FWWR's public tariff) under the Agreement and the number of days allowed before demurrage is charged, but for FWWR's March 2, 2004 email stating that FWWR intended to attempt to cancel the Agreement if PCI did not pay what we considered to be, and what their own senior personnel had expressly agreed was, an improper bill.

"It has never been communicated to me or anyone else at PCI by FWWR that it intended to try to cancel the parties' 2001 Agreement, prior to the time this lawsuit was filed, for any reason other than for the non-payment of a demurrage bill. It has never

been communicated to me, or anyone else at PCI, since this lawsuit was filed, any alleged basis for FWR's attempted cancellation of the parties' 2001 agreement other than those three bases set forth in the letter from Mr. Richard DeBerry, attached hereto as Exhibit "H". In other words, the attached letter from Mr. DeBerry is the only letter I have ever received, besides the March 2, 2004 email referenced above (Exhibit "F"), indicating any reasons for attempted cancellation of the Agreement. We would not have had to set forth any terms of the parties' Agreement in the state and federal court had FWR not tried to cancel the agreement based upon the nonpayment of the July, 2003 bill, which as shown below, PCI clearly does not owe in whole or in part, and PCI has set forth only those terms of the contract in court filings necessary to seek enforcement of its terms in this and the state court.

"The July, 2003 demurrage attached as Exhibit "A" is the one which prompted the filing of this lawsuit by PCI. As can be seen from a review of the bill, it states that there are demurrage charges owed on eleven (11) different railroad cars. All these were box cars which would be delivered to PCI's Track B. By letter dated October 8, 2003, attached as Exhibit "D", FWR conceded that no demurrage was due for the cars on lines 8, 9 and 10 of this bill, so I will discuss the demurrage charges on cars 1 – 7 and car 11 herein.

"Attached as Exhibit "H" are true and correct copies of the Daily Online Switchlists received by PCI from FWR for all days between and including July 1, 2003 and July 15, 2003. I will use the Online Switchlist dated July 8, 2003, which is part of this Exhibit "H" to explain the contents of these reports. First, each railroad car set forth on this report bears a unique designation and number. For example, the first car on the

July 8th Online Switchlist report is ALM 841318. The report also shows the commodity carried by the car, in the case of this car, "Plywood", and the origination of the car, in this case, BNSF0701, which in the case of this car, shows a box car received by FWWR on 7-01-04 from the Burlington Northern & Santa Fe Railroad. The first section of the July 8 report shows the PCI-bound cars which are on hand in Fort Worth and available for delivery, but not yet placed on PCI's spur. On this particular July 8 report, all these cars are located on the Old UP Interchange, which is a length of track which sets near the PCI spur and upon which FWWR sometimes stores its loaded cars in addition to those stored at the Hodge Yard. This report of FWWR often bears another section showing cars at the other FWWR location, the Hodge Yard, such as shown in the July 15, 2003 report, also attached as part of Exhibit "H". Going back to the July 8 report, as an example, the second and third sections show the cars delivered that day to the PCI track A - which is used for A-frame cars, and PCI track B, which is used for box cars. PCI's spur at the Sylvania Industrial Park consists of an A-track and a B-track, and has been so configured since PCI began renting it. PCI's A-track, at all times, has easily accommodated four (4) cars for unloading at one time and the B-track has easily accommodated six (6) box cars for unloading at one time (though the B-track will hold up to eight (8) total box cars).

"Comparing the Online Switchlists and the demurrage bill in dispute, it is obvious that FWWR did not deliver oldest cars first during this fifteen day period. For example, the July 8 report shows some cars received on July 4 by FWWR delivered that same day, while several older cars received on July 1 continue to sit on the old UP Interchange track. Also of note on the July 8 report is the fact that FWWR had

eighteen (18) cars available for delivery and only delivered seven (7) to PCI's empty spur. FWRW could have delivered two (2) more A-frame cars, to the extent any were available, and one (1) more box car that day which could easily have been unloaded that day by PCI.

"Based upon FWRW's records, attached as Exhibit "H", I have prepared the chart attached as Exhibit "I", which I believe will aid the Court in understanding the parties' documentation discussed herein. This chart accurately reflects the data contained in the Online Switchlists attached as Exhibit "H." The dates at the top of this chart coincide with the Online Switchlists attached as Exhibit "H". July 5 and July 12 are not included in this chart. These were Saturdays and FWRW typically does not deliver a report on Saturdays, and also did not do so for this particular month. FWRW also gives two free days of demurrage over a normal (non-holiday) weekend. The first row on the chart, "Cars Spotted", shows the number of cars delivered to PCI's B-track (for box cars) each day during this period. As shown, for example, on July 9, 2003, FWRW delivered zero (0) box cars, despite having numerous cars to deliver. When FWRW fails to provide service, such as on this day, it causes FWRW to incur substantial labor costs for its crew to sit on a shift with no cars to unload. The next row, "Rem. Workable Capacity", shows the number of box cars which could have been delivered to Track B and comfortably unloaded by PCI that day. The Third Row, "Rem. Full Capacity", shows the two (2) additional cars which could be delivered to PCI's Track B, if a full eight (8) cars were put on that track, which it will accommodate. The last row, "Total", is always eight (8), since it is the total number of cars Track B will hold for easy unloading. The purpose of this Chart is to show that even if FWRW had

delivered only six box cars per day during this period, a number which can easily be loaded each day by PCI, no demurrage charges would have resulted of course, on any of these days, FWWR could have delivered eight box cars as they did on July 15.

"The reason given for this bill by Charlie Godsey in his October 8 letter, Exhibit "D" was that our fork lift operator had told FWWR's switch crew to bring shingle cars first. (This contradicts Mr. Godsey's deposition in this case where he says his crew was told to bring all cars besides shingle cars, see p. 142 of his deposition). Regardless of any alleged statements by Mario, and FWWR's alleged compliance with any statements by him, the chart attached as Exhibit "I" clearly shows that none of the demurrage charges on the July, 2003 bill are proper. Working from the bottom of the bill (Exhibit "A"), starting with car no. 11, there was room for that car on July 1, since FWWR only delivered four (4) cars to Track B that day. That would result in car 11 being received, delivered and returned in two (2) days, thus no demurrage would be due under a four day demurrage agreement. As noted above, Mr. Godsey's October 8, 2003 letter states that no demurrage was due for cars 8, 9, and 10 on the July, 2003 bill, so they are not discussed. As shown on the chart, there was room for four (4) more box cars on Track B on July 2, which could have easily been unloaded by PCI that day. Thus, cars 4, 5, 6, and 7 could have been delivered that day, and would have been received (on July 1), unloaded and returned to FWWR in two (2) days, thus incurring no demurrage charges on a four-day demurrage agreement. Cars 3 and 2 could have been delivered by FWWR on July 3 and 4, respectively, since there was ample room for one more box car on Track B on each of these days, which could easily have been unloaded by PCI on those days. Had FWWR done that, these cars would have been

received (on July 1), unloaded and returned in less than four (4) days, thus no demurrage charge would be incurred. Car 1 on the July, 2003 bill could have been delivered on July 6, since there was room for one more box car that day on Track B, and of course it could have been delivered on any of the previous 14 days since Track B will hold 8 box cars. Excluding the weekend (which counts as 2 free days under the parties' Agreement by their consistent course of dealing), if Car 1 had been delivered on July 6, then that car that car would have been received on July 1, delivered, unloaded and returned in four (4) business days. Thus, no demurrage would be owed on this car on a four day demurrage agreement. (July 7 less July 1 is 6 days, less the 2 day weekend = 4 days).

"It is therefore clear, based on a review of the Chart and FWWR's Online Switchlists, that for whatever reason, FWWR did not deliver a full spot of cars from the supply in the possession of FWWR for any day between July 1 and July 10, and that no box cars whatsoever were delivered on July 9, when there were more than six of them sitting on the Old UP Interchange not 200 yards from PCI's spur. FWWR then later delivered 8 box cars on July 15, 2003, which it had allowed to stack up and then tried to charge demurrage to PCI on these cars since FWWR had held them for more than four days. Therefore, aside from obviously trying to take advantage of their own failure to give proper customer service to PCI, this is contrary to industry practice and FWWR's own policies and procedures as described in Charlie Godsey's sworn deposition taken in this case. No demurrage is owed for any of these cars, and thus PCI could not, in good conscience pay this bill, since it had previously been coerced into paying false bills under the same circumstances on two occasions, in August, 2001, and again in

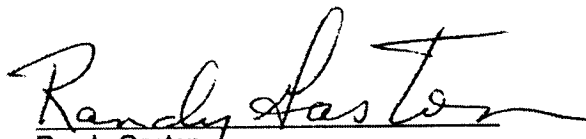
January, 2003. It was my judgment that it would do no good to pay this July, 2003 bill under protest or otherwise. In my mind, to pay the bill would have just encouraged FWR to demand payment of more of these false bills in the future, and I felt that paying the bill under protest would certainly cause FWR to try to cancel the parties' Agreement. Thus, I felt PCI had no choice but to seek relief in the Court when FWR threatened, once again, to cancel the parties' Agreement, and hold our cars, if PCI did not pay another false bill. I knew the parties could not work this out and that only the courts could help us in this dispute.

"Attached as Exhibits 'M', 'N' and 'O', are true and correct copies of the March 1, 1999 lease between PCI and Sylvania Industrial Park, Inc. Amendment Number Two to such lease agreement, and the January 8, 2004 letter renewing the lease agreement through February 28, 2009.

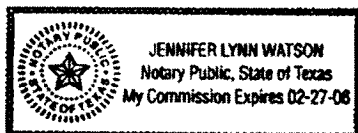
"As Manager of the Fort Worth operation of PCI, I am custodian of the records of PCI attached as Exhibits A – J, inclusive. The documents attached to this Affidavit are business records of PCI, either created and maintained, or just maintained in the case of documents received from FWR, in the regular course of business. The records attached to this Affidavit are kept by PCI in the regular course of its business. With respect to those documents created by PCI, it was the regular course of business for an employee or representative of PCI with knowledge of the act, event, condition or opinion recorded to make the records and reports, or to transmit information thereof to be included in such records and reports. These records and reports were made at or near the time of the act, event, condition, or opinion recorded, or reasonably soon thereafter. To the extent these are records sent to PCI by FWR, the attached were

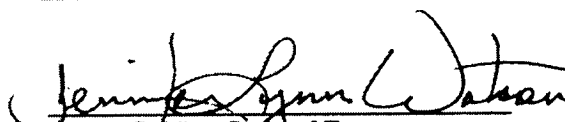
kept as received in the regular course of business of PCI. All of the documents attached hereto are exact duplicates of the original documents."

"FURTHER AFFIANT SAYETH NOT."


Randy Gaston

Sworn to and subscribed before me on this 11th day of October, 2004.




Notary Public - State of Texas
Commission Expires: 02-27-06

R:\110\PCI\Fed CI\Gaston Affidavit.doc

FORT WORTH & WESTERN RAILROAD

P. O. Box 122269
 Fort Worth, TX 76121-2269
 Phone (817)763-8297 • Fax (817)737-8402

INVOICE

Customer Copy

Date	08/08/03
Invoice No.	1216
Page No.	1
Customer Code	P1

Bill To:

PCI TRANSPORTATION
 3201 N. SYLVANIA
 FORT WORTH, TEXAS 76111
 USA

Ship To:

PCI TRANSPORTATION
 3201 N. SYLVANIA
 FORT WORTH, TEXAS 76111
 USA

Order #	Order Date	Customer PO	SM	Payment Terms	Ship Date	Frt	Shipped Via
1216	07/31/03			10TH OF MONTH	08/01/03	COL	

Qty Ordered	Qty Shipped	Qty Backordered	Product Code Description	UM	Disc%	Unit Price	Extension
1.000	1.000	.000	DEMURRAGE DEMURRAGE	EA		2340.00	2340.00

EXHIBIT

A

Subtotal	2,340.00
Shipping & Handling	0.00
TOTAL	2,340.00

Federal Tax ID Number: 75-2267711

000147

In Account of:
PCI TRANSPORTATION
320 N. SYLVANIA
FT. NORTH
At: RVDY CASTON TX 76111

Station 30 HODGE
Run Date: 8/06/03
Invoice Date: 8/06/03

DEMURRAGE INVOICE USING STRAIGHT CALCULATIONS
For cars released from 7/01/03 thru 8/06/03

Please Remit to:
Ft North and Western RR

Attn:

Demurrage Agreement: PCI

Invoice 1216
Page 1

Id	Car	Car Typ	Commodity	-PCON/Ordered- Date Time	---Placed--- Date Time	---Released--- Date Time	Total Days	Credit Days	Amount Due
1	UNLD AOK	A	MI NO STRN IORS	7/01/03 8:00	7/14/03 11:20	7/15/03 8:43	14	6	300.00
2	UNLD ATM	A	STEEL	7/01/03 8:00	7/14/03 11:20	7/15/03 8:43	14	6	300.00
3	UNLD LM	A	STEEL	7/01/03 8:00	7/14/03 11:20	7/15/03 8:43	14	6	300.00
4	UNLD MP	A	STEEL	7/01/03 8:00	7/14/03 11:20	7/15/03 8:43	14	6	300.00
5	UNLD NKCR	A	MI NO STRN IORS	7/01/03 8:00	7/14/03 11:20	7/15/03 8:43	14	6	300.00
6	UNLD UP	A	STEEL	7/01/03 8:00	7/14/03 11:20	7/15/03 8:43	14	6	300.00
7	UNLD ALM	B	PLYWOOD	7/01/03 8:00	7/14/03 11:20	7/15/03 8:43	14	6	300.00
8	UNLD WRL	A	BOAR DS, SANDUST	7/01/03 8:00	7/14/03 11:20	7/15/03 8:43	14	6	300.00
9	UNLD SP	A	PLYWOOD	6/30/03 12:00	7/03/03 10:30	7/07/03 18:25	10	6	120.00
10	UNLD SP	A	PLYWOOD	6/30/03 12:00	7/03/03 10:30	7/07/03 18:25	10	6	30.00
11	UNLD SP	A	PLYWOOD	6/30/03 12:00	7/03/03 10:30	7/07/03 18:25	7	6	30.00

TOTAL UNLOADING

TOTAL FOR HODGE

TOTAL FOR PCI TRANSPORTATION

11 CARS	130	66	2,340.00
11 CARS	130	66	2,340.00

617102

000143

FORT WORTH & WESTERN RAILROAD

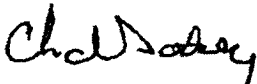
TO: Randy
From: Charlie Godsey
Subject: Demurrage invoice # 1216

Date: 08-15-2003

In review of the invoice the FWWR did not charge for the July 4th Holiday. Your cars were still on the allocated free time. You received a total of 6 free days on each car. The FWWR did not run around any cars because Mario requested special cars to be placed ahead of the older cars.

If you have any questions please call

Thanks,


Charlie Godsey

Cc: Steve George
Richard Lesikar

6300 Ridglea Place, Suite 1200, Ft. Worth, TX. 76116
Phone 817-731-1180 Fax 817-731-0602

000143



PCI

PCI
3201 NORTH SYLVANIA
FORT WORTH TEXAS
76111

Charley,

In response to your letter of Aug. 15th, Mario does not have the authority to order railcars into our yard. He has never called you office and requested a certain car. That is done by, myself, Randy or Billie Mae. Mario's responsibility is the off load of the cars.

We keep a daily record on every car that is coming to our facility. We note where the car is located, when it will spot etc.. We also keep a record on when a car was not spotted, and was ran around by a newer car. I will furnish you with a copy of this, to support our position on this matter.

On your demurrage bill Seq. numbers 1 through 7, my record clearly shows that they were ran around from July 7th until July 15th, for no other reason than they were the rear cars on the old UP interchange and were harder to get to.

Seq. number 8, was to be diverted to Lowes in Ennis, TX on July 2nd. This was not our car it was to be sent to Ennis TX.

Seq. number 9, was ran around on 6/30 and then again on 7/01. The car was spotted on the night of 7/02. You spotted 5 cars that night. This one was on the very west end of the track, with 6/30 cars in front of it, we could not reach it with our ramp, so we had to wait for another spot before offloading this car.

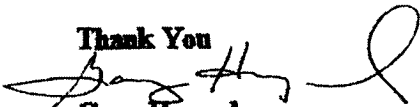
Seq. number 10 was diverted to Lowes in Ennis, TX on 06/25/03, and then diverted back to PCI, on 07/03/03. This car was not even our car until 07/03/03.

Seq. number 11, the Holiday got me I guess. I owe that one.

Charley, we watch these cars very closely, because as a small company, we can not afford to be throwing money away on demurrage bills. Please take a close look at the spot sheet and I think you will agree that these cars were not on demurrage due to any fault of PCI.

You can contact Randy or Myself @ 817-838-0333

Thank You


Gary Hazard
Operations Manager
09/12/03



FORT WORTH & WESTERN RAILROAD

TO: PCI Gary Hazard
From: Charlie Godsey
Subject: Demurrage

Date: 10-08-2003

Gary,

In response to your letter dated 9-12-03, I have spoken with the Manager Of Train Operations at Hodge Yard and they verified that Mario did in fact come over to the yard and request certain cars. Lines 1 through 7 on your demurrage bill stands as billed.

Line 8 will be credited in the amount of \$60.00 dollars

Line 9 will be credited in the amount of \$120.00 dollars

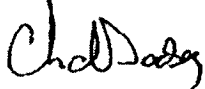
Line 10 will be credited in the amount of \$30.00 dollars

Amount originally billed \$2,340.00 dollars

Amount credited \$210.00 dollars

Amount owed FWR \$2130.00

Thanks,



Charlie Godsey

Cc: Steve George

6300 Ridglea Place, Suite 1200, Ft. Worth, TX. 76116
Phone 817-731-1180 Fax 817-731-0602

000151





PCI
3201 NORTH SYLVANIA
FORT WORTH TEXAS
76111

Charley,

In response to your letter dated, 10/08/03, Charley before our last correspondence, I had spoken to Marie, and he emphatically denies that he ever requested any specific cars. So we now have a, he said she said deal happening.

Here at PCI, and all the other places that I have worked, including the Santa Fe Railroad, we have what you call a chain of command. I assume that the FWWR also has that chain of command. A janitor does not have the authority to tell a fork lift driver what he can load, or a data entry person can not tell a dispatcher what loads he can ship, no more than a switchman tells an operations manager what cars he is going to spot. If PCI's management did not request the cars to be ran around, and your management did not request them to be ran around. Then why were they?

At the time in question, we did not have customers needing cars in ahead of any other cars, so there was no reason for these cars to be ran around.

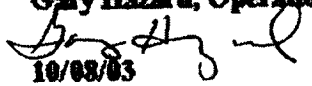
Randy had asked Richard about these cars the morning of July 14th, to see if we could get them spotted, and what the problem was on these cars. Now I got a bill because some one want's to say it was done because an employee, (that does not have the authority to order in cars) order them to be ran around. This is not right.

Charley, I truly hope that you will go back to your people, and try to make some sense out of this, because for the life of me all I see is a bunch of switchman trying to cover their butts, by saying Marie told me to do it. You have no documentation, and no one called PCI to check if that was the way we needed the spot. Its all he said she said and that's just not fair.

Charley, Please get back with me or Randy on this, we need to resolve it.

Thanks

Gary Hazard, Operations Manager


10/08/03



FORT WORTH & WESTERN RAILROAD
A Tarantula Corporation Company

CERTIFIED MAIL #7001 1940 0000 7584 7689
Return Receipt Requested

February 3, 2004

Mr. Randy Gaston
PCI Transportation Inc.
3201 N. Sylvania Ave.
Fort Worth, TX 76111

Dear Randy:

The invoice for July 2003 demurrage in the amount of \$2,340.00 has not been paid. Charlie Godey of our office has discussed this bill with you and has requested payment in full.

If payment in full is not received in our office by February 20, 2004, we will consider you in default of the Confidential Demurrage Contractual Agreement dated August 23, 2001 and demurrage provisions of FVWR Tariff 8001-F will be applied. Also, PCI will be placed on a cash basis and all cars destined to PCI will be held on constructive placement accruing demurrage until all outstanding invoices are paid.

To avoid FVWR taking these actions, please pay all outstanding invoices as outlined above.

Sincerely,

Jim M. Martin
President and COO

6300 Ridgely Place, Suite 1200, Fort Worth, TX 76116-5738
Phone 817-763-8297 Fax 817-738-9657

000153



FORT WORTH & WESTERN RAILROAD
A Tarantula Corporation Company

Via Email

March 2, 2004

Mr. Randy Gaston
PCI Transportation Inc.
3201 N. Sylvania Ave.
Fort Worth, TX 76111

Dear Randy:

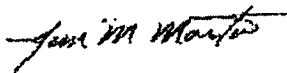
Thank you for meeting with Steve George and myself yesterday concerning the payment of the July 2003 demurrage invoice in the amount of \$2,340.00.

After further review it was determined that the outstanding demurrage due is \$2,130.00 as indicated in the letter you received from Charlie Godsey. The cars you indicated that were runaround were done so on the instructions of PCI. The instructions were verbal, but our managers have confirmed the verbal instructions from PCI personnel. You are aware of the discussions that ensued about the verbal instructions from PCI after receiving this demurrage bill and it was subsequently decided that the oldest cars would be placed first unless we received written instructions from PCI. The demurrage charges in the amount of \$2,130.00 are due and FWWR expects payment in full.

If payment in full is not received in our office by March 8, 2004, we will consider you in default of the Confidential Demurrage Contractual Agreement dated August 23, 2001 and demurrage provisions of FWWR Tariff 8001-F will be applied. Also, PCI will be placed on a cash basis and all cars destined to PCI will be held on constructive placement accruing demurrage until all outstanding invoices are paid.

To avoid FWWR taking these actions, please pay all outstanding invoices as outlined above.

Sincerely,



Jim M. Martin
President and COO

6300 Ridglea Place, Suite 1200, Fort Worth, TX 76116-5738
Phone 817-763-8297 Fax 817-738-9657

000154



-----Original Message-----

From: Randy Gaston [mailto:randy@thepcdgroup.net]
Sent: Tuesday, March 02, 2004 4:32 PM
To: Steve George
Subject: RE: July 2003 Demurrage Bill

Steve,

I beg you to reconsider your stand on this.

The scenario of blaming it on Mario is in direct contradiction of what Jim Martin said. He interrupted me when I said I had heard the reason the cars were gone around request and Jim said, "that doesn't matter unless it was in writing and my people I saying stating Mario denies asking for those cars to be gone around and even if it is not) he wouldn't of done it for 11 days.

Please reconsider,
Randy

-----Original Message-----

From: Steve George [mailto:spg@fwwr.net]
Sent: Tuesday, March 02, 2004 2:27 PM
To: randy@thepcdgroup.net
Subject: July 2003 Demurrage Bill

Randy,

After our meeting yesterday, we have looked into the circumstances of the attached letter explains FWWR's position and payment in the amount of \$ 2004.

Sincerely,

Steve George

3/3/2004



000155

McDonald Sanders

A Professional Corporation

ATTORNEYS AT LAW

777 Main Street, Suite 1300
Fort Worth, Texas 76102
817/336-8651
Metro 817/429-1150
Fax 817/334-0271

www.mcdonaldlaw.com

ATWOOD MCDONALD
1899-1989

EARNEST E. SANDERS
1906-1979

MARCUS GINSBURG
1915-1996

ROBERT S. NEWKIRK
JAMES WEBB

RICK G. SORENSON
A. GARY THOMPSON

GREG S. HARGROVE
KEVIN D. KUENZLI

ROBERT L. GINSBURG
RORY DIVIN

STUART B. LUMPKINS, JR.
GEORGE C. HARATSIS

RANDYL MEIGS

JOHN W. WRIGHT
NICHOLAS S. BETTINGER

RICHARD C. DEBERRY
WILLIAM L. LATHAM

JENNIFER N. COOK
VERONICA J. CHAVEZ

RUSSELL A. DEVENPORT
BRANDON R. WADE

MICHAEL CHAD PARSONS
LUCAS E. ALLAN

BARBARA ELLEN BUSH

Of Counsel

J. OLCOTT PHILLIPS
ROBERT D. MADDOX
GEORGE A. CROWLEY

April 20, 2004

rdeberry@mcdonaldlaw.com

Via Facsimile: 817-332-5054 &
CMRRR: 7002 3150 0004 5168 7371

Mr. H. Allen Pennington, Jr.
777 Taylor Street, Suite 890
Fort Worth, Texas 76102

Re: *PCI Transportation, Inc. v. Fort Worth & Western Railroad Company;*
Cause No. 141-204556-04

Dear Allen:

The purpose of this letter is to clarify the railroad's position concerning this litigation.

First, the Confidential Demurrage Agreement was automatically cancelled and/or terminated due to one or more of the following factors:

1. Your client's unequivocal repudiation of the Agreement by statements as to what he would do with future demurrage bills;
2. Your client's failure to pay past due demurrage charges; and
3. Your client's breach of the confidentiality of the Agreement by setting forth its contents in public filings.

Second, because the Confidential Demurrage Agreement has been cancelled and/or terminated, PCI is on a cash basis and demurrage will be charged pursuant to the enclosed Tariff FWWR 8001-G.

Third, if PCI continues to repeatedly refuse to pay demurrage charges as Mr. Gaston has stated, such bills will accrue interest as stated in the Tariff and the FWWR will be required under federal law to sue PCI for such bills, may refuse to deliver specific cars or remove specific cars that have accrued demurrage for which PCI fails to pay cash or its equivalent in advance, or both. As I have mentioned to you several times, neither the terminated Agreement, the Tariff, or federal law, require FWWR to extend credit to PCI. If PCI disputes FWWR's charges and related practices and cannot otherwise

000156



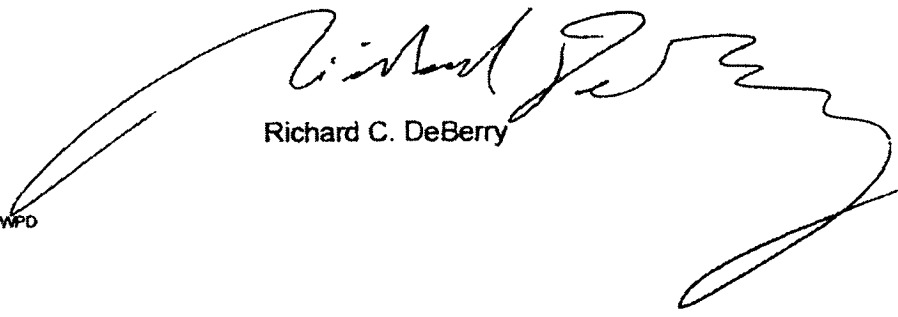
April 20, 2004
Page 2

resolve them with the FWWR, PCI is required to seek relief from the Surface Transportation Board.

I have discussed with you the issue of how demurrage would be calculated given the timing of my client's demand letters, the state's temporary restraining order, and the removal/remand issue. Without waiver as to the legally effective date of the termination, in order to simplify the analysis FWWR will calculate demurrage under the Tariff beginning March 20, 2004 (the day following March 19, 2004, or the date of removal of the case to federal court and automatic expiration of the state court temporary restraining order). To the extent PCI has received any billing with a different effective date, such billing will be recalculated by applying demurrage charges under the Tariff effective March 20, 2004.

If you have any questions, please do not hesitate to call.

Sincerely yours,



Richard C. DeBerry

RCD/kng
enclosures
I:\03704\0033\079602.WPD

000157

7/01/03 FWWR
6:06:27

Online Switchlist

Page 1
RSJOPFR

PCI

Station: 30		HODGE		HODGE4		HODGE 4	
Seq	Car	KD	LE	Block	To	Switch	Commodity --From--
1	WCCL	47657	A	L	PCI	HOD	ORINTD STR BNSF0630
2	KCS	125511	A	L	PCI	HOD	PLYWOOD BNSF0630
3	KCS	129289	A	L	PCI	HOD	PLYWOOD BNSF0630
4	SP	245191	A	L	PCI	HOD	PLYWOOD UP 0630
5	AERC	7325	F	L	PCI	HOD	LUMBER UP 0630
7	SP	231401	A	L	PCI	HOD	UP 0630

Station: 30		HODGE		OLDUPINT		OLD UP INTERCHANGE	
Seq	Car	KD	LE	Block	To	Switch	Commodity --From--
18	SRV	6035	A	L	PCI	HOD	FENCING,WO BNSF0627
19	BN	250102	A	L	PCI	HOD	SHINGLES A BNSF0627
20	BN	249037	A	L	PCI	HOD	SHINGLES A BNSF0627
21	BN	249506	A	L	PCI	HOD	SHINGLES A BNSF0627
22	BN	376799	A	L	PCI	HOD	SHINGLES A BNSF0627
23	MRL	10017	A	L	PCI	HOD	BOARDS,SAW BNSF0627
24	BN	249915	A	L	PCI	HOD	SHINGLES A BNSF0629
25	BN	249213	A	L	PCI	HOD	SHINGLES A BNSF0629

Station: 30		HODGE		PCI-A		PCI TRACK A	
Seq	Car	KD	LE	Block	To	Switch	Commodity --From--
1	WCTR	873149	F	L	PCI	HOD	LUMBER BNSF0627
2	WCTR	873102	F	L	PCI	HOD	LUMBER BNSF0627
3	SFLC	90276	F	L	PCI	HOD	LUMBER BNSF0628

Station: 30		HODGE		PCI-B		PCI TRACK B	
Seq	Car	KD	LE	Block	To	Switch	Commodity --From--
1	BN	249114	A	L	PCI	HOD	SHINGLES A BNSF0628
2	BN	249480	A	L	PCI	HOD	SHINGLES A BNSF0628

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Station: 30 HODGE PCI-B PCI TRACK B

Seq Car KD LE Block To Switch Commodity --From--
3 BN 249665 A L PCI HOD SHINGLES A BNSF0629
4 BNSF 725139 A L PCI HOD SHINGLES A BNSF0629

LOADS: 21 EMPTIES: 0
** END OF REPORT **

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PCI

Station: 30		HODGE		HODGE2		HODGE 2	
Seq	Car	KD	LE	Block To	Switch	Commodity	--From--
1	NKCR	65658	A	L PCI	HOD	WI RO STRN	UP 0701
2	LW	470525	A	L PCI	HOD	STEEL	UP 0701
3	UP	354718	A	L PCI	HOD	STEEL	UP 0701
4	ATW	140072	A	L PCI	HOD	STEEL	UP 0701
5	MP	261026	A	L PCI	HOD	STEEL	UP 0701
6	AOK	19131	A	L PCI	HOD	WI RO STRN	UP 0701
7	UP	354550	A	L PCI	HOD	WI RO STRN	UP 0701

Station: 30		HODGE		HODGE4		HODGE 4	
Seq	Car	KD	LE	Block To	Switch	Commodity	--From--
1	WCCL	47657	A	L PCI	HOD	ORINTD STR	BNSF0630
2	KCS	125511	A	L PCI	HOD	PLYWOOD	BNSF0630
3	KCS	129289	A	L PCI	HOD	PLYWOOD	BNSF0630
4	SP	245191	A	L PCI	HOD	PLYWOOD	UP 0630
5	AERC	7325	F	L PCI	HOD	LUMBER	UP 0630
7	SP	231401	A	L PCI	HOD		UP 0630
9	BN	249751	A	L PCI	HOD	SHINGLES A	BNSF0701
10	BN	249028	A	L PCI	HOD	SHINGLES A	BNSF0701
11	ALM	841318	B	L PCI	HOD	PLYWOOD	BNSF0701

Station: 30		HODGE		OLDUPINT		OLD UP INTERCHANGE	
Seq	Car	KD	LE	Block To	Switch	Commodity	--From--
18	SRV	6035	A	L PCI	HOD	FENCING,WO	BNSF0627
19	MRL	10017	A	L PCI	HOD	BOARDS,SAW	BNSF0627
20	BN	249915	A	L PCI	HOD	SHINGLES A	BNSF0629
21	BN	249213	A	L PCI	HOD	SHINGLES A	BNSF0629

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PCI

Station:	30	HODGE			PCI-B	PCI TRACK B		
Seq	Car	KD	LE	Block	To	Switch	Commodity	--From--
2	BN	249037	A	L	PCI	HOD	SHINGLES A BNSF0627	
3	BN	249506	A	L	PCI	HOD	SHINGLES A BNSF0627	

LOADS: 22 EMPTIES: 0
** END OF REPORT **

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PCI

Station: 30 HODGE HODGE2 HODGE 2

Seq	Car	KD	LE	Block	To	Switch	Commodity	--From--
22	TTZX	87624	F	L	PCI	HOD	LUMBER	UP 0702

Station: 30 HODGE OLDUPINT OLD UP INTERCHANGE

Seq	Car	KD	LE	Block	To	Switch	Commodity	--From--
18	SP	245191	A	L	PCI	HOD	PLYWOOD	UP 0630
19	SP	231401	A	L	PCI	HOD		UP 0630
20	BN	249751	A	L	PCI	HOD	SHINGLES A	BNSF0701
21	BN	249028	A	L	PCI	HOD	SHINGLES A	BNSF0701
22	ALM	841318	B	L	PCI	HOD	PLYWOOD	BNSF0701
23	NKCR	65658	A	L	PCI	HOD	WI RO STRN	UP 0701
24	LW	470525	A	L	PCI	HOD	STEEL	UP 0701
25	UP	354718	A	L	PCI	HOD	STEEL	UP 0701
26	ATW	140072	A	L	PCI	HOD	STEEL	UP 0701
27	MP	261026	A	L	PCI	HOD	STEEL	UP 0701
28	AOK	19131	A	L	PCI	HOD	WI RO STRN	UP 0701
29	UP	354550	A	L	PCI	HOD	WI RO STRN	UP 0701

Station: 30 HODGE PCI-A PCI TRACK A

Seq	Car	KD	LE	Block	To	Switch	Commodity	--From--
1	AERC	7325	F	L	PCI	HOD	LUMBER	UP 0630

Station: 30 HODGE PCI-B PCI TRACK B

Seq	Car	KD	LE	Block	To	Switch	Commodity	--From--
1	WCCL	47657	A	L	PCI	HOD	ORINTD STR	BNSF0630
2	KCS	125511	A	L	PCI	HOD	PLYWOOD	BNSF0630
3	KCS	129289	A	L	PCI	HOD	PLYWOOD	BNSF0630
4	SRY	6035	A	L	PCI	HOD	FENCING,WO	BNSF0627
5	MRL	10017	A	L	PCI	HOD	BOARDS,SAW	BNSF0627

LOADS: 19 EMPTIES: 0

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** END OF REPORT **

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PCI

Station: 30 HODGE						OLDUPINT	OLD UP INTERCHANGE	
Seq	Car	KD	LE	Block	To	Switch	Commodity	--From--
18	ALM	841318	B	L	PCI	HOD	PLYWOOD	BNSF0701
19	NKCR	65658	A	L	PCI	HOD	WI RO STRN UP	0701
20	LW	470525	A	L	PCI	HOD	STEEL	UP 0701
21	UP	354718	A	L	PCI	HOD	STEEL	UP 0701
22	ATW	140072	A	L	PCI	HOD	STEEL	UP 0701
23	MP	261026	A	L	PCI	HOD	STEEL	UP 0701
24	AOK	19131	A	L	PCI	HOD	WI RO STRN UP	0701
25	UP	354550	A	L	PCI	HOD	WI RO STRN UP	0701

Station: 30 HODGE						PCI-A	PCI TRACK A	
Seq	Car	KD	LE	Block	To	Switch	Commodity	--From--
2	TTZX	87624	F	L	PCI	HOD	LUMBER	UP 0702

Station: 30 HODGE						PCI-B	PCI TRACK B	
Seq	Car	KD	LE	Block	To	Switch	Commodity	--From--
1	MRL	10017	A	L	PCI	HOD	BOARDS, SAW	BNSF0627
2	SP	245191	A	L	PCI	HOD	PLYWOOD	UP 0630
3	SP	231401	A	L	PCI	HOD		UP 0630
4	BN	249751	A	L	PCI	HOD	SHINGLES A	BNSF0701
5	BN	249028	A	L	PCI	HOD	SHINGLES A	BNSF0701

LOADS: 14 EMPTY: 0
** END OF REPORT **

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PCI

Station: 30 HODGE										HODGE1 HODGE 1	
Seq	Car	KD	LE	Block	To	Switch	Commodity	--From--			
19	TR	400460	A	L	PCI	HOD	WIRE NEC	UP 0704			
20	ATW	140061	A	L	PCI	HOD	WI RO STRN	UP 0704			
25	TTZX	856674	F	L	PCI	HOD	LUMBER	UP 0704			

Station: 30 HODGE										HODGE4 HODGE 4	
Seq	Car	KD	LE	Block	To	Switch	Commodity	--From--			
1	NUEX	2004	E	L	PCI	HOD	STEEL	BNSF0705			

Station: 30 HODGE										OLDUPINT OLD UP INTERCHANGE	
Seq	Car	KD	LE	Block	To	Switch	Commodity	--From--			
18	ALM	841318	B	L	PCI	HOD	PLYWOOD	BNSF0701			
19	NKCR	65658	A	L	PCI	HOD	WI RO STRN	UP 0701			
20	LW	470525	A	L	PCI	HOD	STEEL	UP 0701			
21	UP	354718	A	L	PCI	HOD	STEEL	UP 0701			
22	ATW	140072	A	L	PCI	HOD	STEEL	UP 0701			
23	MP	261026	A	L	PCI	HOD	STEEL	UP 0701			
24	AOK	19131	A	L	PCI	HOD	WI RO STRN	UP 0701			
25	UP	354550	A	L	PCI	HOD	WI RO STRN	UP 0701			
26	BN	249703	A	L	PCI	HOD	SHINGLES A	BNSF0704			
27	BN	249223	A	L	PCI	HOD	SHINGLES A	BNSF0704			
28	BNSF	725115	A	L	PCI	HOD	SHINGLES A	BNSF0704			
29	BN	249822	A	L	PCI	HOD	SHINGLES A	BNSF0704			
30	BN	249974	A	L	PCI	HOD	SHINGLES A	BNSF0704			
31	BN	249465	A	L	PCI	HOD	SHINGLES A	BNSF0704			
32	BNSF	725797	A	L	PCI	HOD	SHINGLES A	BNSF0704			
33	BN	249906	A	L	PCI	HOD	SHINGLES A	BNSF0704			

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PCI

Station: 30 HODGE				PCI-A PCI TRACK A	
Seq	Car	KD LE Block To	Switch	Commodity	--From--
2	TTZX	87624 F L PCI	HOD	LUMBER	UP 0702

Station: 30 HODGE				PCI-B PCI TRACK B	
Seq	Car	KD LE Block To	Switch	Commodity	--From--
1	MRL	10017 A L PCI	HOD	BOARDS,SAW	BNSF0627
2	SP	245191 A L PCI	HOD	PLYWOOD	UP 0630
3	SP	231401 A L PCI	HOD		UP 0630
4	BN	249751 A L PCI	HOD	SHINGLES A	BNSF0701
5	BN	249028 A L PCI	HOD	SHINGLES A	BNSF0701

LOADS: 26 EMPTIES: 0
** END OF REPORT **

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PCI

Station: 30	HODGE	HODGE4	HODGE 4		
Seq	Car	KD LE Block To	Switch	Commodity	--From--
1	NUEX	2004 E L PCI	HOD	STEEL	BNSF0705
6	TR	400460 A L PCI	HOD	WIRE NEC	UP 0704
7	ATW	140061 A L PCI	HOD	WI RO STRN	UP 0704
8	TTZX	856674 F L PCI	HOD	LUMBER	UP 0704
16	WCCL	47500 A L PCI	HOD	ORINTD STR	BNSF0706
17	WCCL	47651 A L PCI	HOD	ORINTD STR	BNSF0706

Station: 30	HODGE	OLDUPINT	OLD UP INTERCHANGE		
Seq	Car	KD LE Block To	Switch	Commodity	--From--
18	ALM	841318 B L PCI	HOD	PLYWOOD	BNSF0701
19	NKCR	65658 A L PCI	HOD	WI RO STRN	UP 0701
20	LW	470525 A L PCI	HOD	STEEL	UP 0701
21	UP	354718 A L PCI	HOD	STEEL	UP 0701
22	ATW	140072 A L PCI	HOD	STEEL	UP 0701
23	MP	261026 A L PCI	HOD	STEEL	UP 0701
24	AOK	19131 A L PCI	HOD	WI RO STRN	UP 0701
25	UP	354550 A L PCI	HOD	WI RO STRN	UP 0701
26	BN	249703 A L PCI	HOD	SHINGLES A	BNSF0704
27	BN	249223 A L PCI	HOD	SHINGLES A	BNSF0704
28	BNSF	725115 A L PCI	HOD	SHINGLES A	BNSF0704
29	BN	249822 A L PCI	HOD	SHINGLES A	BNSF0704
30	BN	249974 A L PCI	HOD	SHINGLES A	BNSF0704
31	BN	249465 A L PCI	HOD	SHINGLES A	BNSF0704
32	BNSF	725797 A L PCI	HOD	SHINGLES A	BNSF0704
33	BN	249906 A L PCI	HOD	SHINGLES A	BNSF0704

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PCI

Station: 30		HODGE		PCI-A		PCI TRACK A	
Seq	Car	KD	LE	Block	To	Switch	Commodity --From--
2	TTZX	87624	F	L	PCI	HOD	LUMBER UP 0702

Station: 30		HODGE		PCI-B		PCI TRACK B	
Seq	Car	KD	LE	Block	To	Switch	Commodity --From--
1	MRL	10017	A	L	PCI	HOD	BOARDS,SAW BNSF0627
2	SP	245191	A	L	PCI	HOD	PLYWOOD UP 0630
3	SP	231401	A	L	PCI	HOD	UP 0630
4	BN	249751	A	L	PCI	HOD	SHINGLES A BNSF0701
5	BN	249028	A	L	PCI	HOD	SHINGLES A BNSF0701

LOADS: 28 EMPTYES: 0
** END OF REPORT **

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Online Switchlist

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RSJOPFR

PCI

Station: 30 HODGE		OLDUPINT		OLD UP INTERCHANGE	
Seq	Car	KD LE Block To	Switch	Commodity	--From--
18	ALM 841318 B L PCI	HOD	PLYWOOD	BNSF0701	
19	NKCR 65658 A L PCI	HOD	WI RO STRN UP	0701	
20	LW 470525 A L PCI	HOD	STEEL	UP 0701	
21	UP 354718 A L PCI	HOD	STEEL	UP 0701	
22	ATW 140072 A L PCI	HOD	STEEL	UP 0701	
23	MP 261026 A L PCI	HOD	STEEL	UP 0701	
24	AOK 19131 A L PCI	HOD	WI RO STRN UP	0701	
25	UP 354550 A L PCI	HOD	WI RO STRN UP	0701	
26	BN 249465 A L PCI	HOD	SHINGLES A	BNSF0704	
27	BNSF 725797 A L PCI	HOD	SHINGLES A	BNSF0704	
28	BN 249906 A L PCI	HOD	SHINGLES A	BNSF0704	
29	BNSF 727972 A L PCI	HOD	BOARDS, SAW	BNSF0707	
30	BNSF 728068 A L PCI	HOD	BOARDS, SAW	BNSF0707	
31	NUEX 2004 E L PCI	HOD	STEEL	BNSF0705	
32	TR 400460 A L PCI	HOD	WIRE NEC	UP 0704	
33	ATW 140061 A L PCI	HOD	WI RO STRN UP	0704	
34	WCCL 47500 A L PCI	HOD	ORINTD STR	BNSF0706	
35	WCCL 47651 A L PCI	HOD	ORINTD STR	BNSF0706	

Station: 30 HODGE		PCI-A		PCI TRACK A	
Seq	Car	KD LE Block To	Switch	Commodity	--From--
1	TTZX 84274 F L PCI	HOD	LUMBER	BNSF0707	
2	TTZX 856674 F L PCI	HOD	LUMBER	UP 0704	

Station: 30 HODGE		PCI-B		PCI TRACK B	
Seq	Car	KD LE Block To	Switch	Commodity	--From--
1	BN 249703 A L PCI	HOD	SHINGLES A	BNSF0704	
2	BN 249223 A L PCI	HOD	SHINGLES A	BNSF0704	

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PCI

Station: 30 HODGE		PCI-B PCI TRACK B					
Seq	Car	KD	LE	Block To	Switch	Commodity	--From--
3	BNSF 725115	A	L	PCI	HOD	SHINGLES A BNSF0704	_____
4	BN 249822	A	L	PCI	HOD	SHINGLES A BNSF0704	_____
5	BN 249974	A	L	PCI	HOD	SHINGLES A BNSF0704	_____

LOADS: 25 EMPTIES: 0
** END OF REPORT **

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Online Switchlist

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PCI

Station: 30 HODGE							OLDUPINT	OLD UP INTERCHANGE
Seq	Car	KD	LE	Block	To	Switch	Commodity	--From--
18	ALM 841318	B	L	PCI		HOD	PLYWOOD	BNSF0701
19	NKCR 65658	A	L	PCI		HOD	WI RO STRN UP	0701
20	LW 470525	A	L	PCI		HOD	STEEL	UP 0701
21	UP 354718	A	L	PCI		HOD	STEEL	UP 0701
22	ATW 140072	A	L	PCI		HOD	STEEL	UP 0701
23	MP 261026	A	L	PCI		HOD	STEEL	UP 0701
24	AOK 19131	A	L	PCI		HOD	WI RO STRN UP	0701
25	UP 354550	A	L	PCI		HOD	WI RO STRN UP	0701
26	BN 249465	A	L	PCI		HOD	SHINGLES A	BNSF0704
27	BNSF 725797	A	L	PCI		HOD	SHINGLES A	BNSF0704
28	BN 249906	A	L	PCI		HOD	SHINGLES A	BNSF0704
29	BNSF 727972	A	L	PCI		HOD	BOARDS, SAW	BNSF0707
30	BNSF 728068	A	L	PCI		HOD	BOARDS, SAW	BNSF0707
31	NUEX 2004	E	L	PCI		HOD	STEEL	BNSF0705
32	TR 400460	A	L	PCI		HOD	WIRE NEC	UP 0704
33	ATW 140061	A	L	PCI		HOD	WI RO STRN UP	0704
34	WCCL 47500	A	L	PCI		HOD	ORINTD STR	BNSF0706
35	WCCL 47651	A	L	PCI		HOD	ORINTD STR	BNSF0706

Station: 30 HODGE							PCI-A	PCI TRACK A
Seq	Car	KD	LE	Block	To	Switch	Commodity	--From--
1	NOKL 733033	F	L	PCI		HOD	LUMBER	BNSF0708

LOADS: 19 EMPTIES: 0
** END OF REPORT **

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7/10/03 FWWR
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Online Switchlist

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PCI

Station: 30	HODGE	OLDUPINT	OLD UP INTERCHANGE		
Seq	Car	KD LE Block To	Switch	Commodity	--From--
18	NKCR 65658	A L PCI	HOD	WI RO STRN UP	0701
19	LW 470525	A L PCI	HOD	STEEL	UP 0701
20	UP 354718	A L PCI	HOD	STEEL	UP 0701
21	ATW 140072	A L PCI	HOD	STEEL	UP 0701
22	MP 261026	A L PCI	HOD	STEEL	UP 0701
23	AOK 19131	A L PCI	HOD	WI RO STRN UP	0701
24	UP 354550	A L PCI	HOD	WI RO STRN UP	0701
25	BNSF 728068	A L PCI	HOD	BOARDS,SAW	BNSF0707
26	ABOX 50028	B L PCI	HOD	SHINGLES A	BNSF0709
27	ABOX 50155	B L PCI	HOD	SHINGLES A	BNSF0709
28	BN 249379	A L PCI	HOD	SHINGLES A	BNSF0709
29	BN 249823	A L PCI	HOD	SHINGLES A	BNSF0709
30	BNSF 724832	A L PCI	HOD	SHINGLES A	BNSF0709
31	BN 250038	A L PCI	HOD	SHINGLES A	BNSF0709
32	BNSF 725317	A L PCI	HOD	SHINGLES A	BNSF0709
33	BN 250251	A L PCI	HOD	SHINGLES A	BNSF0709
34	BN 250213	A L PCI	HOD	SHINGLES A	BNSF0709

Station: 30	HODGE	PCI-A	PCI TRACK A		
Seq	Car	KD LE Block To	Switch	Commodity	--From--
1	SRY 286151	F L PCI	HOD	LUMBER	BNSF0709

Station: 30	HODGE	PCI-B	PCI TRACK B		
Seq	Car	KD LE Block To	Switch	Commodity	--From--
1	BNSF 727972	A L PCI	HOD	BOARDS,SAW	BNSF0707
2	TR 400460	A L PCI	HOD	WIRE NEC	UP 0704
3	ATW 140061	A L PCI	HOD	WI RO STRN	UP 0704
4	WCCL 47500	A L PCI	HOD	ORINTD STR	BNSF0706

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7/10/03 FWWR
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PCI

Station: 30 HODGE

PCI-B PCI TRACK B

Seq	Car	KD	LE	Block	To	Switch	Commodity	--From--
5	WCCL	47651	A	L	PCI	HOD	ORINTD STR BNSF0706	

LOADS: 23 EMPTIES: 0
** END OF REPORT **

000173

7/11/03 FWWR
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Online Switchlist

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RSJOPFR

PCI

Station: 30 HODGE		OLDUPINT		OLD UP INTERCHANGE	
Seq	Car	KD LE Block To	Switch	Commodity	--From--
18	NKCR 65658 A	L PCI	HOD	WI RO STRN UP	0701
19	LW 470525 A	L PCI	HOD	STEEL	UP 0701
20	UP 354718 A	L PCI	HOD	STEEL	UP 0701
21	ATW 140072 A	L PCI	HOD	STEEL	UP 0701
22	MP 261026 A	L PCI	HOD	STEEL	UP 0701
23	AOK 19131 A	L PCI	HOD	WI RO STRN UP	0701
24	UP 354550 A	L PCI	HOD	WI RO STRN UP	0701
25	BNSF 728068 A	L PCI	HOD	BOARDS, SAW	BNSF0707
26	ABOX 50028 B	L PCI	HOD	SHINGLES A	BNSF0709
27	ABOX 50155 B	L PCI	HOD	SHINGLES A	BNSF0709
28	BN 249379 A	L PCI	HOD	SHINGLES A	BNSF0709
29	BN 249823 A	L PCI	HOD	SHINGLES A	BNSF0709

Station: 30 HODGE		PCI-B		PCI TRACK B	
Seq	Car	KD LE Block To	Switch	Commodity	--From--
1	BNSF 724832 A	L PCI	HOD	SHINGLES A	BNSF0709
2	BN 250038 A	L PCI	HOD	SHINGLES A	BNSF0709
3	BNSF 725317 A	L PCI	HOD	SHINGLES A	BNSF0709
4	BN 250251 A	L PCI	HOD	SHINGLES A	BNSF0709
5	BN 250213 A	L PCI	HOD	SHINGLES A	BNSF0709
6	KCS 129374 A	L PCI	HOD	PLYWOOD	BNSF0710

LOADS: 18 EMPTIES: 0
** END OF REPORT **

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7/13/03 FWWR
6:03:00

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PCI

Station: 30 HODGE						OLDUPINT	OLD UP INTERCHANGE	
Seq	Car	KD	LE	Block	To	Switch	Commodity	--From--
18	NKCR	65658	A	L	PCI	HOD	WI RO STRN UP	0701
19	LW	470525	A	L	PCI	HOD	STEEL	UP 0701
20	UP	354718	A	L	PCI	HOD	STEEL	UP 0701
21	ATW	140072	A	L	PCI	HOD	STEEL	UP 0701
22	MP	261026	A	L	PCI	HOD	STEEL	UP 0701
23	AOK	19131	A	L	PCI	HOD	WI RO STRN UP	0701
24	UP	354550	A	L	PCI	HOD	WI RO STRN UP	0701
25	TR	400376	A	L	PCI	HOD	CPR ROPE,W	UP 0711
26	TTJX	81983	F	L	PCI	HOD	PIPE IORS	BNSF0712
27	BNSF	519261	E	L	PCI	HOD	BARS IORS	BNSF0712
28	NS	164800	E	L	PCI	HOD	SHEET IORS	UP 0712

Station: 30 HODGE						PCI-B	PCI TRACK B	
Seq	Car	KD	LE	Block	To	Switch	Commodity	--From--
1	BNSF	728068	A	L	PCI	HOD	BOARDS,SAW	BNSF0707
2	ABOX	50028	B	L	PCI	HOD	SHINGLES A	BNSF0709
3	ABOX	50155	B	L	PCI	HOD	SHINGLES A	BNSF0709
4	BN	249379	A	L	PCI	HOD	SHINGLES A	BNSF0709
5	BN	249823	A	L	PCI	HOD	SHINGLES A	BNSF0709

LOADS: 16 EMPTYES: 0
** END OF REPORT **

000175

7/14/03 FWWR
6:06:40

Online Switchlist

Page 1
RSJOPFR

PCI

Station: 30 HODGE						OLDUPINT	OLD UP INTERCHANGE	
Seq	Car	KD	LE	Block	To	Switch	Commodity	--From--
29	NKCR	65658	A	L	PCI	HOD	WI RO STRN UP	0701
30	IW	470525	A	L	PCI	HOD	STEEL	UP 0701
31	UP	354718	A	L	PCI	HOD	STEEL	UP 0701
32	ATW	140072	A	L	PCI	HOD	STEEL	UP 0701
33	MP	261026	A	L	PCI	HOD	STEEL	UP 0701
34	AOK	19131	A	L	PCI	HOD	WI RO STRN UP	0701
35	UP	354550	A	L	PCI	HOD	WI RO STRN UP	0701
36	TR	400376	A	L	PCI	HOD	CPR ROPE,W	UP 0711
37	TTJX	81983	F	L	PCI	HOD	PIPE IORS	BNSF0712
38	BNSF	519261	E	L	PCI	HOD	BARS IORS	BNSF0712
39	NS	164800	E	L	PCI	HOD	SHEET IORS	UP 0712

Station: 30 HODGE						PCI-B	PCI TRACK B	
Seq	Car	KD	LE	Block	To	Switch	Commodity	--From--
1	BNSF	728068	A	L	PCI	HOD	BOARDS,SAW	BNSF0707
2	ABOX	50028	B	L	PCI	HOD	SHINGLES A	BNSF0709
3	ABOX	50155	B	L	PCI	HOD	SHINGLES A	BNSF0709
4	BN	249379	A	L	PCI	HOD	SHINGLES A	BNSF0709
5	BN	249823	A	L	PCI	HOD	SHINGLES A	BNSF0709

LOADS: 16 EMPTYES: 0
** END OF REPORT **

000176

7/15/03 FWR
6:06:11

Online Switchlist

Page 1
RSJOPFR

PCI

Station: 30		HODGE		HODGE4		HODGE 4	
Seq	Car	KD	LE	Block To	Switch	Commodity	--From--
2	CLC	9858	F	L PCI	HOD	LUMBER	UP 0714
4	SP	246324	A	L PCI	HOD	PLYWOOD	UP 0714
5	SP	246747	A	L PCI	HOD	PLYWOOD	UP 0714

Station: 30		HODGE		OLDUPINT		OLD UP INTERCHANGE	
Seq	Car	KD	LE	Block To	Switch	Commodity	--From--
29	TTJX	81983	F	L PCI	HOD	PIPE IORS	BNSF0712
30	BNSF	519261	E	L PCI	HOD	BARS IORS	BNSF0712
31	NS	164800	E	L PCI	HOD	SHEET IORS	UP 0712
32	BNSF	728029	A	L PCI	HOD	BOARDS,SAW	BNSF0714
33	KCS	129489	A	L PCI	HOD	PLYWOOD	BNSF0714

Station: 30		HODGE		PCI-B		PCI TRACK B	
Seq	Car	KD	LE	Block To	Switch	Commodity	--From--
1	NKCR	65658	A	L PCI	HOD	WI RO STRN	UP 0701
2	LW	470525	A	L PCI	HOD	STEEL	UP 0701
3	UP	354718	A	L PCI	HOD	STEEL	UP 0701
4	ATW	140072	A	L PCI	HOD	STEEL	UP 0701
5	MP	261026	A	L PCI	HOD	STEEL	UP 0701
6	AOK	19131	A	L PCI	HOD	WI RO STRN	UP 0701
7	UP	354550	A	L PCI	HOD	WI RO STRN	UP 0701
8	TR	400376	A	L PCI	HOD	CPR ROPE,W	UP 0711

LOADS: 16 EMPTIES: 0
** END OF REPORT **

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Car Deliveries to PCI Track B
July 1 – 15, 2003

Date:	7-1	7-2	7-3	7-4	7-6	7-7	7-8	7-9	7-10	7-11	7-13	7-14	7-15
Cars Spotted	4	2	5	5	5	5	5	0	5	6	5	5	8
Rem. Workable Capacity	2	4	1	1	1	1	1	6	1	0	1	1	-
Rem. Full Capacity	2	2	2	2	2	2	2	2	2	2	2	2	0
Total	8	8	8	8	8	8	8	8	8	8	8	8	8

R:\10\PCI\chart.deliveries.doc

000178



FORT WORTH & WESTERN RAILROAD**INVOICE**

P. O. Box 122269

Fort Worth, TX 76121-2269

Phone (817)763-8297 • Fax (817)737-8402

Customer Copy

Date 04/06/04

Invoice No. 1684

Page No. 1

Customer Code P1

Bill To:

Ship To:

PCI TRANSPORTATION
3201 N. SYLVANIA
FORT WORTH, TEXAS 76111
USA

PCI TRANSPORTATION
3201 N. SYLVANIA
FORT WORTH, TEXAS 76111
USA

Order #	Order Date	Customer PO	SM	Payment Terms	Ship Date	Fre	Shipped Via
1684	03/31/04			10TH OF MONTH	04/01/04	COL	
Qty Ordered	Qty Shipped	Qty Backordered	Product Code Description	UM	Disc%	Unit Price	Extension
1.000	1.000	.000	DEMURRAGE DEMURRAGE	EA		4080.00	4080.00

Subtotal 4,080.00

Shipping & Handling 0.00

TOTAL 4,080.00

Federal Tax ID Number: 75-2267711

EXHIBIT

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INITIAL	NUMBER	B TRACK	COMMODITY	PCON	TIME	FACT	TIME	REL	TIME	DAYS	CREDIT	AMOUNT DUE
RBOX	37642	B	FENCE PICKETS	2/27/2004	7:30	2/27/2004	18:25	3/1/2004	15:10	3	3	0
TR	526409	E	BAR,SHEET,IORS	2/27/2004	7:30	2/27/2004	18:25	3/1/2004	15:10	3	3	0
WLO	376443	A	BOARD,S,SAWDUST	2/28/2004	7:05	3/1/2004	21:20	3/2/2004	10:20	3	3	0
BCIT	504544	A	LUMBER	2/28/2004	7:05	3/1/2004	21:20	3/2/2004	16:40	3	2	30
BN	841668	A	LUMBER	3/2/2004	8:00	3/4/2004	18:00	3/8/2004	16:05	6	2	120
BN	250348	A	SHINGLES ASPHLT	3/2/2004	8:00	3/4/2004	18:00	3/8/2004	16:05	6	2	120
BN	249890	A	SHINGLES ASPHLT	3/2/2004	8:00	3/2/2004	20:20	3/5/2004	14:55	3	2	30
BN	249180	A	SHINGLES ASPHLT	3/2/2004	8:00	3/2/2004	20:20	3/4/2004	16:00	2	2	0
BN	249782	A	SHINGLES ASPHLT	3/2/2004	8:00	3/2/2004	20:20	3/4/2004	16:00	2	2	0
BN	249120	A	SHINGLES ASPHLT	3/2/2004	8:00	3/2/2004	20:20	3/3/2004	16:40	1	2	0
BN	250284	A	SHINGLES ASPHLT	3/2/2004	8:00	3/2/2004	20:20	3/3/2004	16:40	1	2	0
ABOX	52080	B	SHINGLES ASPHLT	3/2/2004	8:00	3/4/2004	20:20	3/5/2004	14:55	3	2	30
ABOX	52419	B	SHINGLES ASPHLT	3/2/2004	8:00	3/2/2004	20:20	3/5/2004	14:55	3	2	30
RBOX	1034	B	SHINGLES ASPHLT	3/2/2004	8:00	3/2/2004	20:20	3/4/2004	16:00	2	2	0
ABOX	61216	B	SHT IORS GLV/LM	3/4/2004	7:30	3/5/2004	20:00	3/8/2004	16:05	4	3	30
UP	354475	A	SHINGLES ASPHLT	3/5/2004	7:18	3/5/2004	20:00	3/8/2004	16:05	4	3	30
BN	249360	A	SHINGLES ASPHLT	3/5/2004	7:18	3/5/2004	20:00	3/8/2004	16:05	4	3	30
BNSF	726031	A	SHT IORS GLV/LM	3/8/2004	12:00	3/8/2004	18:25	3/11/2004	15:20	5	3	60
TBOX	670055	A	FENCE PICKETS	3/8/2004	12:00	3/8/2004	18:25	3/10/2004	16:55	4	3	30
CNW	156945	A	BOARD,S,SAWDUST	3/8/2004	7:05	3/8/2004	18:25	3/8/2004	16:30	3	3	0
BNSF	761155	A	SHINGLES ASPHLT	3/7/2004	7:05	3/11/2004	23:40	3/12/2004	17:00	5	2	80
BN	249626	A	SHINGLES ASPHLT	3/7/2004	7:05	3/10/2004	21:00	3/11/2004	16:20	4	2	60
BN	249094	A	SHINGLES ASPHLT	3/7/2004	7:05	3/10/2004	21:00	3/11/2004	16:20	4	2	60
BN	249811	A	SHINGLES ASPHLT	3/7/2004	7:05	3/10/2004	21:00	3/11/2004	16:20	4	2	60
BN	250407	A	SHINGLES ASPHLT	3/7/2004	7:05	3/9/2004	20:50	3/10/2004	16:55	3	2	30
BN	249611	A	SHINGLES ASPHLT	3/7/2004	7:05	3/9/2004	20:50	3/10/2004	16:55	3	2	30
BN	250276	A	SHINGLES ASPHLT	3/7/2004	7:05	3/9/2004	18:25	3/9/2004	16:30	2	2	0
BN	249570	A	SHINGLES ASPHLT	3/7/2004	7:05	3/9/2004	20:50	3/10/2004	16:55	3	2	30
ABOX	51219	B	STEEL	3/7/2004	7:05	3/10/2004	21:00	3/11/2004	16:20	4	2	60
NS	165175	E	BAR,S,IOBS,NEC	3/8/2004	8:00	3/11/2004	23:40	3/12/2004	17:00	4	2	60
CN	187471	E	PLYWOOD	3/9/2004	7:20	3/11/2004	23:40	3/12/2004	17:00	3	2	30
KCS	125681	A	BAR,S,IOBS,NEC	3/9/2004	8:00	3/11/2004	23:40	3/12/2004	17:00	3	2	30
IHB	419	G	PLYWOOD	3/10/2004	8:00	3/11/2004	23:40	3/12/2004	16:15	5	2	90
RBOX	31545	B	LUMBER	3/11/2004	8:00	3/12/2004	20:50	3/17/2004	16:15	6	3	90
CNW	716299	A	LUMBER	3/11/2004	8:00	3/12/2004	20:50	3/17/2004	16:15	6	3	90
WLO	505074	A	LUMBER	3/11/2004	8:00	3/12/2004	20:50	3/17/2004	16:15	6	3	90

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CSS	1723	E	SHEET,ORS,NEC	3/12/2004	20:51	3/12/2004	20:51	3/15/2004	16:15	3	3	0
BNSF	761178	A	BOARD,SAWDUST	3/13/2004	7:05	3/15/2004	20:30	3/16/2004	16:00	3	3	0
BN	248883	A	SHINGLES ASPHLT	3/14/2004	8:05	3/15/2004	20:30	3/16/2004	16:00	2	2	0
ABOX	62430	B	SHINGLES ASPHLT	3/14/2004	8:05	3/15/2004	20:30	3/16/2004	16:00	2	2	0
BN	250041	A	SHINGLES ASPHLT	3/15/2004	8:00	3/16/2004	16:35	3/18/2004	16:15	2	2	30
BN	250053	A	SHINGLES ASPHLT	3/15/2004	8:00	3/17/2004	19:55	3/18/2004	16:15	3	2	30
BN	250468	A	SHINGLES ASPHLT	3/15/2004	8:00	3/17/2004	19:55	3/18/2004	16:15	3	2	30
WP	38500	A	PLYWOOD	3/15/2004	13:01	3/15/2004	20:30	3/16/2004	16:00	1	2	0
RBOX	40853	B	LUMBER	3/15/2004	13:01	3/15/2004	20:30	3/18/2004	16:15	3	2	30
ABOX	52188	B	SHINGLES ASPHLT	3/15/2004	8:00	3/16/2004	16:35	3/17/2004	16:15	2	2	0
GVSF	763153	A	PLYWOOD	3/17/2004	8:00	3/19/2004	18:10	3/22/2004	14:40	5	5	0
UP	354722	A	PLYWOOD	3/17/2004	8:00	3/19/2004	18:10	3/22/2004	14:40	5	5	0
BN	249585	A	SHINGLES ASPHLT	3/17/2004	8:00	3/18/2004	19:40	3/19/2004	15:00	2	2	0
BN	249841	A	SHINGLES ASPHLT	3/17/2004	8:00	3/18/2004	19:40	3/19/2004	15:00	2	2	0
BN	250057	A	SHINGLES ASPHLT	3/17/2004	8:00	3/18/2004	19:40	3/19/2004	15:00	2	2	0
BN	250411	A	SHINGLES ASPHLT	3/17/2004	8:00	3/17/2004	19:55	3/19/2004	15:00	2	2	0
BN	250446	A	SHINGLES ASPHLT	3/17/2004	8:00	3/19/2004	18:10	3/23/2004	15:30	4	3	30
RBOX	38591	B	FENCE PICKETS	3/18/2004	9:00	3/19/2004	18:10	3/22/2004	14:40	2	2	0
BN	250327	A	SHINGLES ASPHLT	3/19/2004	8:45	3/19/2004	18:10	3/23/2004	15:30	4	3	30
CSS	1738	E	SHEET,ORS,NEC	3/21/2004	11:15	3/22/2004	19:30	3/23/2004	15:30	2	2	0
TBOX	680517	B	PLYWOOD	3/22/2004	8:00	3/22/2004	19:30	3/23/2004	15:30	1	2	0
BN	249015	A	SHINGLES ASPHLT	3/24/2004	19:05	3/24/2004	19:05	3/25/2004	10:55	1	2	0
BN	249037	A	SHINGLES ASPHLT	3/24/2004	19:05	3/24/2004	19:05	3/25/2004	10:55	1	2	0
BN	249598	A	SHINGLES ASPHLT	3/24/2004	19:05	3/24/2004	19:05	3/25/2004	10:55	1	2	0
BN	250424	A	SHINGLES ASPHLT	3/24/2004	19:05	3/24/2004	19:05	3/25/2004	10:55	1	2	0
BN	249020	A	SHINGLES ASPHLT	3/24/2004	18:40	3/26/2004	16:40	3/29/2004	16:10	3	3	0
BN	249915	A	SHINGLES ASPHLT	3/26/2004	16:40	3/26/2004	16:40	3/29/2004	16:10	3	3	0
BNSF	725633	A	SHINGLES ASPHLT	3/26/2004	16:40	3/26/2004	16:40	3/29/2004	16:10	3	3	0
SF	245853	A	LUMBER	3/27/2004	20:00	3/27/2004	22:36	3/31/2004	15:15	4	3	30
BCOL	60321	A	LUMBER	3/28/2004	14:00	3/28/2004	17:20	3/31/2004	15:15	3	2	30
NS	405006	A	ORINTD STRND BD	3/28/2004	9:00	3/28/2004	9:10	3/29/2004	16:10	1	2	0
BN	250165	A	SHINGLES ASPHLT	3/29/2004	17:20	3/29/2004	17:20	3/30/2004	14:50	1	2	0
BN	250303	A	SHINGLES ASPHLT	3/29/2004	17:20	3/29/2004	17:20	3/30/2004	14:50	1	2	0
RBOX	40573	B	SHINGLES ASPHLT	3/29/2004	17:20	3/29/2004	17:20	3/31/2004	15:15	2	2	0
ABOX	50470	B	SHINGLES ASPHLT	3/29/2004	17:20	3/29/2004	17:20	3/31/2004	15:15	1	2	0
BN	249158	A	SHINGLES ASPHLT	3/30/2004	8:00	3/30/2004	22:15	3/31/2004	15:15	1	2	0
										209	169	\$1,590.00

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INITIAL	NUMBER	B TRACK	COMMODITY	PCON	TIME	PACT	TIME	REL	TIME	DAYS	CREDIT	AMOUNT DUE
TTZX	85410	F	LUMBER	2/24/2004	8:00	2/27/2004	18:25	3/1/2004	15:10	6	2	120
BCOL	730074	F	LUMBER	2/28/2004	8:20	3/1/2004	20:20	3/2/2004	10:20	5	3	60
CLC	10003	F	LUMBER	2/28/2004	8:20	3/1/2004	20:20	3/2/2004	10:20	5	3	60
BCOL	730377	F	LUMBER	2/28/2004	8:20	2/27/2004	18:25	3/1/2004	15:10	4	3	30
CRLE	20505	F	LUMBER	2/28/2004	8:20	2/27/2004	18:25	3/1/2004	15:10	4	3	30
SRV	286188	F	LUMBER	2/28/2004	7:18	2/27/2004	18:25	3/1/2004	15:10	4	3	30
CN	824182	F	LUMBER	2/27/2004	7:30	3/2/2004	20:15	3/4/2004	16:00	6	3	90
TTZX	863891	F	LUMBER	2/27/2004	7:30	3/2/2004	20:15	3/4/2004	16:00	6	3	90
CLC	9972	F	LUMBER	2/27/2004	7:30	3/1/2004	20:20	3/2/2004	10:20	4	3	30
CRLE	20289	F	LUMBER	2/27/2004	7:30	3/1/2004	20:20	3/2/2004	10:20	4	3	30
TTZX	863289	F	LUMBER	2/28/2004	7:05	3/2/2004	20:15	3/3/2004	16:40	4	3	30
ATW	50038	F	LUMBER	2/29/2004	11:05	3/3/2004	19:20	3/4/2004	16:00	4	2	60
TTZX	862249	F	LUMBER	2/29/2004	7:05	3/2/2004	20:15	3/3/2004	16:00	4	2	60
CLC	9857	F	LUMBER	3/1/2004	7:30	3/4/2004	18:00	3/8/2004	16:05	7	2	150
CLC	9902	F	LUMBER	3/1/2004	7:30	3/4/2004	18:00	3/8/2004	16:05	7	2	150
TTZX	862841	F	LUMBER	3/1/2004	7:30	3/4/2004	18:00	3/5/2004	14:55	4	2	60
BCOL	866504	F	LUMBER	3/1/2004	9:31	3/3/2004	19:20	3/4/2004	16:00	3	2	30
BNSF	564008	F	LUMBER	3/1/2004	8:31	3/3/2004	19:20	3/4/2004	16:00	3	2	30
NOKL	730847	F	LUMBER	3/2/2004	15:00	3/5/2004	20:00	3/8/2004	16:30	7	2	150
BNSF	582185	F	LUMBER	3/2/2004	8:00	3/4/2004	18:00	3/5/2004	14:55	3	2	30
TTZX	863232	F	LUMBER	3/3/2004	7:17	3/6/2004	18:15	3/8/2004	16:30	6	2	120
NOKL	732970	F	LUMBER	3/3/2004	7:17	3/6/2004	18:15	3/8/2004	16:30	6	2	120
CRLE	20510	F	LUMBER	3/4/2004	7:30	3/8/2004	18:15	3/8/2004	16:05	5	2	90
SRV	873036	F	LUMBER	3/5/2004	7:18	3/8/2004	18:15	3/11/2004	15:20	8	3	90
HLSC	2263	F	LUMBER	3/6/2004	12:00	3/9/2004	20:45	3/12/2004	17:00	6	3	90
CHTT	273226	F	LUMBER	3/6/2004	12:00	3/9/2004	20:45	3/12/2004	17:00	6	3	90
TTZX	861282	F	LUMBER	3/8/2004	8:00	3/8/2004	20:45	3/12/2004	17:00	4	2	60
CHTT	864459	F	LUMBER	3/8/2004	7:30	3/11/2004	23:40	3/15/2004	16:15	6	2	120
CHTT	273285	F	LUMBER	3/10/2004	8:00	3/11/2004	23:40	3/15/2004	16:15	6	2	120
BNSF	545919	F	LUMBER	3/11/2004	7:21	3/12/2004	20:55	3/19/2004	16:15	5	2	90
CLC	9846	F	LUMBER	3/12/2004	8:00	3/15/2004	18:45	3/17/2004	16:15	4	3	30
CLC	9886	F	LUMBER	3/12/2004	8:00	3/15/2004	18:45	3/17/2004	16:15	5	3	60
SSAM	38760	F	LUMBER	3/12/2004	8:00	3/15/2004	18:45	3/19/2004	16:00	4	3	30
CLC	9917	F	LUMBER	3/12/2004	20:55	3/12/2004	20:55	3/15/2004	16:15	4	3	30
CLC	9853	F	LUMBER	3/13/2004	7:05	3/15/2004	20:30	3/19/2004	16:00	3	3	0

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CLC	9705	F	LUMBER	3/14/2004	11:00	3/18/2004	18:30	3/18/2004	15:00	5	2	90
BNSF	564153	F	LUMBER	3/15/2004	8:00	3/16/2004	18:30	3/17/2004	16:15	2	2	0
BNSF	562712	F	LUMBER	3/16/2004	8:00	3/16/2004	18:30	3/18/2004	15:00	3	2	30
CLC	9884	F	LUMBER	3/18/2004	8:00	3/18/2004	18:15	3/22/2004	14:40	4	3	30
CN	624346	F	LUMBER	3/18/2004	9:00	3/18/2004	18:15	3/22/2004	14:40	4	3	30
GTW	623580	F	LUMBER	3/18/2004	9:00	3/18/2004	18:15	3/22/2004	14:40	4	3	30
TR	165557	F	LUMBER	3/18/2004	9:00	3/18/2004	19:45	3/18/2004	15:00	1	2	0
UP	273344	F	LUMBER	3/18/2004	9:00	3/18/2004	19:45	3/18/2004	15:00	1	2	0
SRY	286089	F	LUMBER	3/18/2004	8:46	3/22/2004	18:30	3/23/2004	15:30	4	3	30
TTZX	84594	F	LUMBER	3/18/2004	8:30	3/18/2004	18:15	3/23/2004	15:30	4	3	30
BNSF	545808	F	BOARDS.SAWDUST	3/23/2004	8:30	3/23/2004	20:10	3/24/2004	11:40	1	2	0
TTZX	861600	F	LUMBER	3/25/2004	23:30	3/25/2004	28:30	3/28/2004	14:55	1	2	0
BCOL	730100	F	LUMBER	3/26/2004	16:30	3/26/2004	15:30	3/30/2004	14:50	4	3	30
TTZX	864594	F	LUMBER	3/27/2004	20:00	3/27/2004	22:30	3/30/2004	14:50	3	3	0
										204	125	\$2,480.00

TOTAL	AMOUNT	DUE
		\$4,080.00

000183

Fax Transmission

Date: Wednesday, March 11, 1998

Time: 7:32:00 AM

2 Pages

To: Randy Gaston
PCI Transportation INC.

phone:
fax: 847-0228

From: Richard Lesikar
Fort Worth & Western Railroad

phone: (817)763-8297
fax: (817)738-2445

Re: Randy/Joe

Included is list of some potential users for your new operation. I've got a few more, but at this time I am unable to figure out where I stashed them.

We're really excited that you are locating on our railroad. With our commitment to provide you with two or more switches daily six days weekly, your transload operation will be second to none.

Thanks again for selecting this site on our railroad.

Richard

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FORT WORTH & WESTERN RAILROAD				
A Tarantula Corporation Company				
CUSTOMER	CONTACT	Product	AC	PHONE
LJB Remanufacturing	Guy Stanton	Lumber	800	552-5627
Armco Steel	Mick Waggoner	Steel coil	513	425-2624
Louisiana Pacific	Winona Speed	Lumber	409	756-0511
Nordbord Inc.	Yvonne Parag	Lumber	416	360-2262
Nordbord Inc.	Karen Fleming	Lumber	416	360-2231
Payless Cashways	Dave Nichols	Lumber	254	497-4061
Tiaga Forest Products	Mark Goode	Lumber	800	663-1470
Tru-Mark	Dick Hoesly	Lumber	509	534-0644
Buckeye Pacific	Gary Allen	Lumber	800	767-9191
Ganahmsa San Antonio	Henrietta	Steel coil	210	736-7150
Georgia Pacific	John Hein	Lumber	303	706-8001
Welded Tube	John Albert	Steel tubing	800	731-5683
6300 Ridglea Place, Suite 1200, Fort Worth, TX 76116				
Phone 817-763-8297 Fax 817-738-9657				

⊗

000185

Richard Lesikar

From: "Richard Lesikar" <fwwrll@hotmail.com>
To: "Randy Gaston" <pcigroup@flash.net>
Sent: Friday, March 30, 2001 5:13 PM
Subject: Fw: PCI - Free Time on rail carloads - April 1, 2001

Randy

Confirming our conversation of today regarding FWWR instituting new free time rules/privileges for your company (PCI TRANSPORTATION INC.) at Hodge(Fort Worth), Texas commencing April 1, 2001.

Effective April 1, 2001, free time for PCI TRANSPORTATION INC. at your Fort Worth location will be four(4) days after first seven a.m. notification and/or placement whichever occurs first. Our normal demurrage rules/free time are covered in ITEM 530 of FWWR TARIFF 8001-F with allowed holidays described in ITEM 495 not being chargeable demurrage days. If you do not have a copy of FWWR TARIFF 8001-F, I will be sending you one via U.S. MAIL next Monday.

FWWR will be obligated to switch(spot) cars to PCI TRANSPORTATION INC. one(1) time daily seven(7) days per week except on allowed holidays. FWWR will do its best to provide additional switches when schedule permits provided PCI TRANSPORTATION INC. has all cars unloaded in track(s) where switch is being requested. FWWR will not be obligated to provide additional switches other than the one(1) switch daily which will occur between 6 p.m. and 6 a.m. each day.

We hope you understand our position of having to institute this new rule and procedure. As discussed with you during the past several weeks, our car hire(per diem) expense on your freight has increased dramatically and in some cases, we paid out more in car hire than we collected on switching revenue from either the BNSF or UP.

We appreciate all of the business you have brought to our railroad and we want you to keep growing; however, we simply can't afford to load onto cars without compensation and have to rely on your company to unload cars within the time frame allowed.

The rules/procedures outlined herein are generous and will enable FWWR to provide your company and your individual accounts with consistent service that exceeds service provided other trans-load operations. By working together, there should never be a need to invoice your company for demurrage.

We will be pleased to discuss this matter with you personally if you so desire.

Sincerely,

Richard Lesikar

000186



7/29/2004

COPY

LEASE

THIS LEASE ("Lease") is made as of the 1st day of March, 1999, by Sylvania Industrial Park, Inc., a Texas corporation ("**Landlord**"), 3201 North Sylvania Avenue, Building 100B, Fort Worth, Texas 76111, and PCI Transportation Inc., a Texas corporation ("**Tenant**"), 3201 North Sylvania Avenue, Building 800K, Fort Worth, Texas 76111.

WITNESSETH:

Landlord, for and in consideration of the rents, covenants and agreements reserved, mentioned and contained below on the part of the Tenant, to be paid, kept and performed, agrees to lease to Tenant and Tenant agrees to lease from Landlord, for the Term (as defined in **Section 2**) and subject to the terms and conditions expressed below, the following portions of the Sylvania Industrial Park located in the City of Fort Worth, Texas and certain related rights, all of which are more particularly described as follows:

- (a) The Portions of Building 800, containing approximately 276,128 square feet, outlined in red on the sketch attached as **Exhibit "A"**.
- (b) The portion of Building 100, containing approximately 963 square feet, outlined in green on the sketch attached as **Exhibit "B"**.
- (c) The non-exclusive right of ingress and egress ("**Non-Exclusive Right of Ingress and Egress**") over the areas designated for that purpose on **Exhibit "A"**, the use of the exclusive and non-exclusive rail spur ("**Rail Spurs**") designated for that purpose on **Exhibit "A"** including the extension of said Rail Spurs to tracks of the Fort Worth and Denver Railway Co. and St. Louis & Southwestern Railway Co. Landlord reserves the right from time to time to alter truck and automobile routes as Landlord deems necessary.
- (d) The non-exclusive right to use the common area ("**Common Area**") outlined in yellow on the sketch attached as **Exhibit "B"**.
- (e) Employee, tractor and trailer parking areas ("**Parking Areas**") as designated on attached **Exhibit "A"**, Landlord reserves the right to change the location of the Parking Areas from time to time; however, such area shall always be located within reasonable proximity of the Buildings.
- (f) Outside storage area ("**Outside Storage Area**") as designated on attached **Exhibit "A"**.

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(g) The bridge cranes ("**Cranes**") as listed on attached **Exhibit "C"**. Tenant has requested and Landlord agrees to provide a lifting magnet for Tenant's use, such use will be subject to an "if available" condition, such determination to be made by Landlord in its sole discretion.

(h) The heating/cooling units ("**Heating/Cooling Units**") as listed on attached **Exhibit "C"**.

All of the foregoing included in clauses (a) through (f), inclusive, are sometimes referred to below as the "**Demised Premises**". The portions of Building 100 and Building 800 that are being leased to Tenant and covered by this Lease are sometimes collectively referred to below as the "**Buildings**". The Cranes and the Heating/Cooling Units are sometimes collectively referred to below as the "**Equipment**".

THIS LEASE IS UPON THE FOLLOWING TERMS AND CONDITIONS, ALL AND EVERY ONE OF WHICH THE PARTIES COVENANT AND AGREE TO PERFORM:

1. **Primary Term Of Lease.** The term of this Lease shall be for the period beginning March 1, 1999 (the "**Commencement Date**") and ending at 5:00 p.m., local time, on February 29, 2004 (the "**Primary Term**").

2. **Option To Extend Term.** Provided that no Event of Default then exists, Tenant shall have one option to extend the term of this Lease, such option being for an additional period of five years (the "**Extended Term**"). The Extended Term shall commence immediately after the expiration of the Primary Term. Tenant may exercise its option to extend only by so notifying Landlord in writing at least 180 days prior to the expiration of the Primary Term. If Tenant fails to timely exercise its option for the Extended Term, Tenant shall be deemed to have waived and released such extension option. The Extended Term shall be upon the same terms, provisions and conditions as set forth in this Lease for the Primary Term; provided, however, the Fixed Rent for the Extended Term shall be increased as provided in Section 4. As used in this Lease, "**Term**" includes both the Primary Term and, if Tenant exercises its option to extend, the Extended Term.

3. **Covenant To Pay Fixed Rent.** (a) From and after the Commencement Date, Tenant shall pay Landlord fixed rent (i) with respect to the 276,128 square feet space in Building 800, at the annual rate of \$552,256 payable in monthly installments of \$46,021 per month, or any increased amount payable as a result of adjustment pursuant to Section 4, and (ii) with respect to the 963 square feet space in Building 100, at the annual rate of \$7,704 payable in monthly installments of \$642 per month, or any increased amount payable as a result of adjustment pursuant to Section 4 (the fixed rent described in Section 3(a)(i) and Section 3(a)(ii) collectively being defined as "**Fixed Rent**").

(b) Fixed Rent shall be payable in equal monthly installments in advance and on or before the first day of each and every month during the Term.

(c) Tenant covenants and agrees to pay the Fixed Rent reserved in this Lease as and when due, together with all other sums of money, rental adjustments, charges and other sums required to be paid by Tenant to Landlord or to another person pursuant to this Lease ("**Additional Rent**"). At least seven days prior to the beginning of a month, Landlord shall give Tenant a Rent Invoice. A "**Rent Invoice**" is an invoice for the next month's Fixed Rent and Tenant's Share of Taxes (as defined in Section 17), and Property Insurance (as defined in Section 19). The Rent Invoice shall be due and payable by Tenant on or before the first day of such next month. On a monthly basis, Landlord shall also give Tenant a Utility Invoice. A "**Utility Invoice**" is an invoice for gas, electric, water and sewer charges. The Utility Invoice shall be due and payable by Tenant within 15 days of Tenant's receipt of such Utility Invoice. All other items that constitute "**Additional Rent**" not discussed above shall also be included on the Rent Invoice. Fixed Rent and Additional Rent are collectively referred to in this Lease as "**Rent**". The covenant to pay Rent shall be independent of any other covenant set forth in this Lease, except as otherwise set forth in this Lease.

(d) Rent (as defined in Section 3(c)) shall be payable in lawful money of the United States of America at the office of Landlord at 3201 North Sylvania Avenue, Building 100B, Fort Worth, Texas 76111, or to such other recipient or at such place as Landlord shall designate by written notice to Tenant, without prior demand therefor and without any deduction or set off whatsoever, except as otherwise specifically set forth in this Lease.

4. Adjustment Of Fixed Rent.

(a) For purposes of this Section 4, the following terms shall be defined as follows:

- (i) "**Base Month**" means March 1, 1999;
- (ii) "**Base Month for First Adjustment**" means January 1, 2001;
- (iii) "**Base Month for Second Adjustment**" means January 1, 2004;
- (iv) "**Base Month for Third Adjustment**" means January 1, 2007;
- (v) "**Fixed Rent Adjustment Dates**" means the 1st day of March in the years 2001, 2004 and 2007; and
- (vi) "**Index**" means the Consumer Price Index for All Urban Consumers - U.S. City Average - All Items (1982-84 = 100), or any later substitute for said Index, as published by the Bureau of Labor Statistics of the U.S. Department of Labor.

(b) Effective on each of the Fixed Rent Adjustment Dates, the Fixed Rent shall be fixed and adjusted, but only upward, by 100% of the increase, if any, in the Index as provided below. The increased Fixed Rent shall equal the sum of (i) the Fixed Rent, plus (ii) the product of the Fixed Rent multiplied by the following applicable fraction:

(i) For the first Fixed Rent Adjustment Date:

$$\frac{\text{Index for Base Month for First Adjustment} \\ \text{minus Index for Base Month}}{\text{Index for Base Month}}$$

(ii) For the second Fixed Rent Adjustment Date:

$$\frac{\text{Index for Base Month for Second Adjustment} \\ \text{minus Index for Base Month}}{\text{Index for Base Month}}$$

(iii) For the third Fixed Rent Adjustment Date:

$$\frac{\text{Index for Base Month for Third Adjustment} \\ \text{minus Index for Base Month}}{\text{Index for Base Month}}$$

(c) If the Bureau of Labor Statistics discontinues the use of the Index (including any substitute therefor), then comparable statistics on the purchasing power of the consumer dollar, as published at the time of said discontinuation by a U.S. federal government financial periodical or recognized authority, shall be used for making such computations.

5. **Use of Demised Premises.** Tenant shall use and occupy the Demised Premises only for the purpose of operating a reloading facility, i.e., the transfer of non-hazardous materials from railroad cars to trucks, and related general office use ("**Tenant's Business**").

6. **Signs.** Subject to the requirements of this Section 6, Tenant shall, at its own cost and expense, place or erect such signs relating to Tenant's Business as Tenant may deem appropriate on the Demised Premises. Tenant shall comply with all applicable requirements of law pertaining to such signs. All signs placed on the exterior of the Building or erected on portions of the Demised Premises not within the Building must be approved in writing by Landlord prior to placing or erection of such signs, which approval shall not be unreasonably withheld, conditioned or delayed so long as they are not inconsistent with the general aesthetic appearance of the Sylvania Industrial Park at the time such approval is requested.

7. **Condition of Premises.** Tenant has examined and accepts the Demised Premises and the Equipment on an "AS IS" and "WHERE IS" basis with all faults and Tenant,

except as otherwise specifically provided for in this Lease, assumes responsibility for the same as provided in this Lease.

8. **Compliance with Laws.** (a) Tenant shall comply in all respects with all federal, state, county and municipal laws and ordinances and all rules, regulations and orders of any governmental authority, present or future, affecting or applicable to the Demised Premises and the Equipment, Tenant's use of the same and Tenant's operation of Tenant's Business. Tenant shall be solely responsible for obtaining all permits and authorization necessary for the lawful conduct of Tenant's Business on the Demised Premises and Tenant's use of the Demised Premises and the Equipment.

(b) Tenant acknowledges that (i) Tenant has been operating Tenant's Business on the Demised Premises without having first obtained a certificate of occupancy ("**Certificate of Occupancy**") from the City of Fort Worth ("**City**"), and (ii) the City will not issue the Certificate of Occupancy unless and until certain improvements (e.g., the installation of a sprinkling system) are made to the Buildings ("**Required Improvements**"). As of the date on which this Lease is being executed, neither Tenant nor Landlord is aware of the total cost of the Required Improvements. At such time as the scope and cost of the Required Improvements ("**Required Improvements Cost**") becomes known to the parties, Landlord shall have the unilateral and unconditional right to terminate this Lease if either (i) Landlord decides not to pay for the Required Improvements Cost, or (ii) Landlord and Tenant are unable to mutually agree upon the manner (e.g., amount and terms) in which Tenant is to reimburse Landlord for the Required Improvements Cost.

9. **Environmental Matters.** (a) For purposes of this Lease, the following terms shall have the following meanings:

- (i) "**Affected Assets**" means all the Demised Premises and the Equipment or other real or personal property owned, leased, operated or used by Landlord at the Sylvania Industrial Park.
- (ii) "**Environmental Action**" means any investigation, removal action, remedial action, excavation, transportation, handling, treatment, storage, disposal, testing, environmental sampling, analytical services, consulting services, or any other type of action reasonably necessary and appropriate to identify, characterize, correct or dispose of an Environmental Condition concerning the Affected Assets.
- (iii) "**Environmental Claim**" means any summons, citation, complaint, lien, directive, order, claim, litigation, liability, investigation, removal action, remedial action, information request, proceeding, judgment, letter or other communication, written or oral, actual or threatened, from any federal, state, county or local agency or authority or any other

person (including without limitation, any governmental instrumentality or any corporation, partnership or other business entity, or individual) concerning an Environmental Condition or which in any way relates to pollution, natural resource damage, property damage, or personal injury, illness or death alleged to have occurred, in whole or in part, by virtue of environmental matters related to Tenant's Business or to Tenant's ownership, lease, operation or use of the Affected Assets or the conduct of an Environmental Action.

- (iv) **"Environmental Condition"** means any condition which (I) causes the Release of a Hazardous Substance, (II) requires an Environmental Action under any Environmental Law, and/or (III) results in an Environmental Claim under any Environmental Law.
- (v) **"Environmental Law(s)"** means any federal, state, county or local law, code, regulation, rule, ordinance or order now or hereafter in effect, as the same may be amended from time to time.
- (vi) **"Hazardous Substance"** means (I) any substance regulated by any Environmental Law, and (II) any materials similar to dynamite, nitroglycerine, commercial gases or other flammable materials, acids and any other material that will increase Landlord's insurance rate.
- (vii) **"Release"** means any releasing, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, disposing or dumping of any Hazardous Substance into the environment.

(b) Except as otherwise permitted by all applicable Environmental Laws, Tenant shall not cause or permit any Hazardous Substances to be brought upon, kept or used in or about the Demised Premises or the Equipment by Tenant, its agents, employees, contractees, or invitees. Items such as paint, fuel oil, etc., if stored on the Demised Premises, shall be (i) kept in a contained area to be constructed by Tenant, (ii) approved by Landlord's insurance carrier, and (iii) stored and used in compliance with all Environmental Laws.

(c) Any Hazardous Substance permitted on the Demised Premises and the Equipment as provided in this Section 9, and all containers of the same, shall be used, kept, stored, and disposed of by Tenant in a manner that complies with all applicable Environmental Laws related to the Hazardous Substance involved.

(d) Except as otherwise permitted by all applicable Environmental Laws, Tenant shall not discharge, leak, or emit, or permit to be discharged, leaked or emitted, any material, into the atmosphere, ground, sewer system, or any body of water, if that material pollutes or contaminates the same, or is reasonably likely to adversely affect (i) the health, welfare or

safety of persons, whether located on the Demised Premises or the Equipment or elsewhere within the Sylvania Industrial Park, or (ii) the condition, use or enjoyment of either of the Buildings or any other real property or personal property located within the Sylvania Industrial Park.

(e) Tenant shall be responsible for all costs and expenses related to the use, presence, storage, and disposal of Hazardous Substances (including without limitation, asbestos-containing material and polychlorinated biphenyls) used in connection with Tenant's Business at the Demised Premises (including use of the Equipment) and Tenant shall give immediate notice to the Landlord of any violation or potential violation of the provisions of this Section 9. Tenant shall defend, indemnify, and hold Landlord and its agents harmless from and against any claims, demands, penalties, fines, liabilities, settlements, damages, costs, or expenses (including, without limitation, reasonable attorneys' and consultants' fees, court costs, and litigation expenses) (collectively "**Damages**") of whatever kind or nature, known or unknown, contingent or otherwise, to the extent arising out of or to the extent related to (i) the presence, Release, or threatened Release of any such Hazardous Substances that is on, from, or affecting the soil, water, vegetation, buildings, personal property, persons, animals, or otherwise due to the presence or operations of Tenant's Business; (ii) any personal injury (including wrongful death) or property damage (real or personal, arising out of or related to any such Hazardous Substances due to the presence or operations of Tenant's Business; (iii) any lawsuit brought or threatened, settlement reached, or government order relating to any such Hazardous Substances; (iv) any violation of any Environmental Laws due to the presence or operations of Tenant's Business. The provisions of this Section 9 shall be in addition to any other obligations and liabilities that Tenant may have to Landlord at law or in equity and shall survive the termination of this Lease.

10. **Net Lease.** This Lease is a net lease. As such, except as otherwise explicitly provided for in this Lease, Tenant shall be solely responsible for the payment of all costs relating to utilities, insurance, Taxes, interior and exterior maintenance and repair of the Demised Premises and the Equipment and the use of the Demised Premises and the Equipment.

11. **Utility Services.** Landlord represents and warrants that the Buildings are currently serviced by the following utilities (i) water, (ii) gas, (iii) sewer, and (iv) electric. Except as specifically provided otherwise in this Section 11, Tenant shall be solely responsible for the cost of bringing any additional utility connections to the Demised Premises required for its use and occupancy thereof; provided, however, that (i) Tenant must obtain Landlord's prior written consent, such consent not to be unreasonably withheld, and (ii) Landlord would have the right, at Landlord's cost, to tie into any such utility connection to service the Sylvania Industrial Park. Tenant shall be solely responsible for the payment of all charges relating to water, electricity and gas which are separately metered on the Demised Premises. If any utility or other service benefiting the Demised Premises is metered or otherwise based upon consumption determined under a formula for purposes of allocating charges payable to others,

then Tenant shall pay its share of such charges based upon meter readings, such formula or a combination of both. If a service is not separately metered or Tenant's share is determined by a formula, then Tenant shall pay to Landlord Tenant's share of the utilities for which Tenant's use and consumption are not otherwise determined. Sewer charges are based on water usage. Any increase in cost to Landlord for any utility shall be passed on to and paid for by Tenant.

12. **Maintenance and Repairs.** (a) Tenant shall, at its own expense, keep in good condition and repair the entire Demised Premises, including without limitation, the Equipment, the Rail Spurs, the interior and exterior of the Buildings, the Parking Areas, the Outside Storage Area, electrical, lights, windows, doors, etc.; provided, however, that the cost of repairing the roof, structural portions and foundations of the Buildings (unless damage is a result of Tenant's act or omission or the act or omission of Tenant's employees, agents, contractors or invitees) and maintaining the Common Area and the areas of Non-Exclusive Right of Ingress and Egress for trucks and automobiles shown on **Exhibit "A"** shall be paid by Landlord and will be performed by Landlord or Landlord's contractor.

With reference to the Rail Spurs, any repairs made to the Rail Spurs will be at Tenant's sole expense. Landlord and Tenant agree that additional spur lines may be installed to the existing Rail Spurs: if by Landlord (in its sole discretion), it will be installed at Landlord's expense and will work with Tenant as to not unreasonably interrupt Tenant's use of the existing Rail Spurs; and, if by Tenant (in its sole discretion), Tenant shall obtain written approval from Landlord, which approval will not be unreasonably withheld, conditioned or delayed, and any such addition will be at Tenant's expense.

(b) Tenant expressly waives the benefit of any current or future statute which would otherwise afford Tenant the right to terminate this Lease because of Landlord's failure to keep the Demised Premises, the Equipment, the Common Area or the areas of Non-Exclusive Right of Ingress and Egress for trucks and automobiles in good order, condition and repair.

(c) Any additions, modifications or changes which, because of Tenant's use or occupancy of the Demised Premises are required by any governmental agency, including without limitation, the Federal Occupational Safety & Health Act and the Americans With Disabilities Act, shall be made by Tenant at its sole expense.

(d) Tenant specifically acknowledges that Crane B-17, listed on **Exhibit "C"**, is not in working order. If Tenant desires to use Crane B-17, Tenant may, at Tenant's sole expense, repair said Crane B-17 and make operable for Tenant's use under this Lease, subject to the terms and conditions of this Lease (including without limitation, **Section 8** and **Section 12**).

13. **Clean and Orderly Premises.** Tenant shall keep the Demised Premises, including without limitation, the lights, signs, the exteriors and sidings of the Buildings, in a clean and orderly condition, free of debris, and perform such maintenance as Landlord may from time to time reasonably request. Notwithstanding any other provision of this Lease to the

contrary, if Tenant fails to keep these areas in a clean and orderly condition, Landlord may from time to time have said outside premises put in a clean and orderly condition and shall then charge the cost of the same to Tenant and Tenant shall immediately pay such charge.

14. Alterations and Improvements. (a) Tenant may, from time to time during the Term, make, in a reasonably manner and at Tenant's own expense, interior changes, improvements, alterations and additions in and to the inside of the Buildings; provided, however, Tenant shall not remove, relocate or modify columns, crane rails, foundations, or the outer walls or roof of either of the Buildings nor remove any Equipment without the prior written consent of Landlord, which shall not be unreasonably withheld, conditioned or delayed.

(b) Tenant shall have the right from time to time to install in Building 800, at Tenant's sole expense, in a reasonable manner without Landlord's consent, trade fixtures, machinery and equipment, including without limitation, partitions and shelving. All such trade fixtures, machinery and equipment shall be and remain the property of Tenant, notwithstanding that, as a matter of law, any such items would otherwise be deemed a part of the realty, and shall be removed by Tenant prior to the expiration of the Term or earlier termination of this Lease; provided, however, that any damage or disfigurement to Building 800 caused by such removal shall be repaired by Tenant prior to the expiration or termination of this Lease.

(c) No change, alteration or improvement shall be undertaken until Tenant shall have procured and paid for all required permits and approvals of governmental authorities having jurisdiction.

(d) No structural change, alteration or improvement shall be undertaken with respect to the roof, exterior walls or columns of either of the Buildings until detailed plans and specifications have first been submitted to and approved in writing by Landlord, which approval shall not be unreasonably withheld, conditioned or delayed.

(e) As to all other material changes or alterations or improvements, Tenant shall deliver to Landlord plans and specifications and/or engineering drawings and/or operating manuals or reports to the extent the same are available, as Landlord may reasonably request.

(f) All work done in connection with any change, alteration or improvement shall be done promptly and in a good and workmanlike manner and in compliance with applicable laws, ordinances, orders, rules, regulations and requirements of all federal, state and municipal governmental authorities, and in accordance with the orders, rules and regulations of the Board of Fire Underwriters, or any other body exercising similar functions. All such work shall be prosecuted with reasonable dispatch, delays due to strikes, lockouts, acts of God, inability to obtain labor or materials, governmental restrictions, or similar causes beyond the control of Tenant excepted. Tenant shall defend, indemnify and hold Landlord harmless from

and against all Damages incurred by Landlord with respect to all liability and expense and obligation arising out of such work.

15. **Discharge Of Mechanics' Liens.** If any mechanic's lien shall at any time be filed against the Demised Premises or the balance of the Sylvania Industrial Park by reason of any work undertaken for the Tenant, Tenant shall cause the same to be discharged of record within five days after Tenant receives notice of filing of the same. If Tenant shall fail to discharge such mechanic's lien within such period, then, in addition to any other right or remedy of Landlord, Landlord may, but shall not be obligated to, discharge the same either by paying the amount claimed to be due or by procuring the discharge of such lien by bond, deposit in court or other security or in such other manner as may be permitted by law. Any amount paid by Landlord for any of the aforesaid purposes, and all attorneys' fees and other expenses reasonably incurred by Landlord in discharging such lien shall be payable by Tenant to Landlord on demand together with interest thereon at the rate of four percent per annum over the publicly announced "prime rate" of the Federal Reserve Bank of Dallas in effect until payment by Tenant. Nothing contained in this Section 15 shall imply any consent or agreement on the part of Landlord to subject Landlord's interest in the Demised Premises to any mechanic's lien for work performed or materials furnished to or at the instance of Tenant.

16. **Waste.** Tenant shall not commit or suffer any waste on the Demised Premises.

17. **Real Estate Taxes.** Tenant shall pay for its share of all real estate taxes and assessments ("Taxes") which may be assessed or charged against the Demised Premises. Tenant's share shall be based upon an apportionment related to square footage under roof. Tenant shall be provided with a copy of the Tax bill and the computation of Tenant's share. Such Taxes shall be paid to Landlord on a monthly basis (presently in the amount of \$2,157) as Additional Rent.

18. **Personal Property Taxes.** If applicable, Tenant shall pay, prior to delinquency, all taxes on the Equipment and on trade fixtures, equipment and other property owned or leased by Tenant and situated on or in or used at the Demised Premises. Upon request by Landlord, Tenant shall promptly provide Landlord with official receipts of the appropriate taxing authority or other proof satisfactory to Landlord evidencing the payment of the same.

19. **Insurance.** (a) Landlord shall provide and maintain adequate insurance on the Buildings against losses or damages, under the special property coverage form issued by Landlord's insurance carrier ("**Property Insurance**"). Tenant shall pay the premium for the Property Insurance (presently in the amount of \$1,420 per month) covering the Demised Premises. The Property Insurance covers the Buildings against loss or damage by fire, lightning and other risks, including without limitation, windstorm, hail, earthquake, explosion, riot and civil commotion, vandalism, and damage from aircraft and vehicles, in an amount not less than full replacement value of the Buildings. Tenant's annual cost for Property Insurance

shall be determined by multiplying the annual cost by a factor to be determined by Landlord. Such computation shall be provided to Tenant whenever a change in cost occurs or when requested by Tenant. Property Insurance shall be paid to Landlord by Tenant on a monthly basis as Additional Rent. All proceeds payable under the Property Insurance shall be paid only to Landlord. Upon written request by Tenant, Landlord will deliver to Tenant a certificate of insurance to evidence the Property Insurance.

(b) Tenant will, at Tenant's sole cost and expense, maintain insurance on the Demised Premises and the Equipment, with an insurance company licensed to do business in the State of Texas and of nationally recognized financial standing legally qualified to issue such insurance, having a Best's rating of A or better and reasonably satisfactory to Landlord. The insurance shall be written on the standard forms used by such companies. The insurance shall provide coverage:

- (i) Against loss or damage to Tenant's assets (whether owned or leased) that are located on the Demised Premises and the Equipment (such insurance as to the Equipment to be comprehensive and to provide for full replacement value);
- (ii) Against claims for bodily injury, death or property damage occurring on, in or about the Demised Premises, including without limitation, the areas of Non-Exclusive Right of Ingress and Egress, the Parking Areas, the Outside Storage Area, the Rail Spurs and the Common Area in amounts not less than \$2,000,000 per occurrence for bodily injury or death to any one person, \$4,000,000 per occurrence for any one accident, and \$2,000,000 per occurrence for property damage;
- (iii) Against workers' compensation to the extent required by the laws of Texas (including employer's liability insurance with limits not less than \$500,000 each accident, \$500,000 policy limit for disease, and \$500,000 each employee for disease) and to the extent necessary to protect Landlord and the Demised Premises against all workers' compensation claims; and
- (iv) Against claims for bodily injury, death or property damage (in amounts not less than \$2,000,000 per occurrence for bodily injury or death to any one person, \$4,000,000 per occurrence for any one accident, and \$2,000,000 per occurrence for property damage) arising out of or from Tenant's operation of owned, hired or non-owned vehicles.

The limits of any said insurance shall not limit the liability of Tenant under this Lease.

(c) Every policy of insurance maintained in accordance with clause (i) of Section 19(b) with respect to the Equipment shall provide for payment of loss thereunder to Tenant and Landlord as co-loss payees. Every policy of insurance maintained in accordance with clauses (ii), (iii) (as to employer's liability coverage) and (iv) of Section 19(b) shall name Landlord as an additional insured. Every policy referred to in Section 19 shall provide that it will not be canceled except after not less than 30 days' prior written notice to Landlord or Tenant, as the case may be, and that it shall not be invalidated or limited by any act or negligence of Landlord or Tenant, nor by occupancy of the Demised Premises nor use of the Equipment for purposes more hazardous than permitted by such policy, nor by any foreclosure or other proceeding relating to the Demised Premises, nor by termination of this Lease, nor by change in title to the Demised Premises. All insurance policies described in Section 19(b) shall be written as primary policies not contributory with and not supplemental to the policies that Landlord may carry on its own. The insurance coverage described in clause (ii) of Section 19(b) shall include, without limitation, personal injury and contractual liability coverage for performance by Tenant of its indemnity obligations under this Lease.

(d) Tenant shall deliver to Landlord certificates of insurance and all renewals thereof, satisfactory to Landlord, evidence of the existence of all insurance which is required to be maintained by Tenant herein; such delivery to be made (i) promptly after the execution hereof and (ii) within 30 days prior to the expiration of any such insurance. Tenant shall not obtain or carry separate insurance concurrent in form or contributing in the event of loss with that required by this Section 19 unless Landlord is named as an additional insured or loss payee therein. Tenant shall immediately notify Landlord whenever any such separate insurance is obtained and shall deliver to Landlord the certificates evidencing the same.

(e) Any insurance required under this Section 19 may be provided under blanket policies which comply with this Section 19.

(f) If Tenant does not obtain or maintain insurance in the forms and amounts required, Landlord shall have the right to obtain such insurance on behalf of Tenant and Tenant agrees to repay Landlord the cost of such insurance.

20. Indemnity. (a) Tenant shall defend, indemnify and hold Landlord harmless from and against any and all Damages by or on behalf of any person or persons, entity or entities, firm or firms, corporation or corporations arising from any act, omission or negligence of Tenant or any of Tenant's agents, contractors, customers or employees in connection with any activity or work done, permitted or allowed by Tenant on or about the Demised Premises or the Equipment. Further, Tenant shall defend, indemnify and hold Landlord harmless from and against all Damages incurred by Landlord as a result of (i) failure by Tenant to perform any covenant required to be performed by Tenant under this Lease, (ii) any accident, injury or damage which shall happen on or about the Demised Premises or the Equipment to the extent such accident, injury or damage arose from any act, omission or negligence of Tenant or any of Tenant's agents, contractors or employees, or (iii) failure by

Tenant or any of Tenant's agents, contractors or employees to comply with any requirements of any governmental authority.

At Tenant's request, Landlord shall cooperate with Tenant in order to properly prosecute any proceedings against or affecting the Demised Premises or the Equipment, provided Landlord shall be fully indemnified by Tenant against all Damages in connection therewith, and provided that Landlord shall not be subjected to any liability for the payment of any Damages in connection with any proceedings brought by or against Tenant, except for those Damages which relate to an occurrence for which Landlord is found to be liable.

(b) Landlord shall defend, indemnify and hold Tenant harmless from and against all Damages incurred by Tenant as a result of (i) failure by Landlord to perform any covenant required to be performed by Landlord under this Lease, (ii) any accident, injury or damage which shall happen on or about the Demised Premises or the Equipment to the extent such accident, injury or damage arose from any act, omission or negligence of Landlord or any of Landlord's agents, contractors or employees or (iii) failure by Landlord or any of Landlord's agents, contractors or employees to comply with any requirements of any governmental authority.

21. **Indemnification Procedure.** The obligation of each party as indemnitor under this Lease is conditioned upon indemnitor receiving from indemnitee prompt notice of the assertion or institution of a claim for indemnification or of the occurrence of an event which indemnitee reasonably believes could lead to the assertion of such a claim (such claims and events being collectively referred to as a "Claim"). Upon written unqualified acknowledgment of its indemnification obligation with respect to a Claim, indemnitor shall have the absolute right, in its sole discretion and expense, to elect to defend, contest, settle or otherwise protect against any such Claim with legal counsel of its own selection. Indemnitee shall have the right, but not the obligation, to participate, at its own expense, in the defense thereof through counsel of its own choice and shall have the right, but not the obligation, to assert any and all cross-claims or counterclaims it may have. Indemnitee shall cooperate in all reasonable ways with, make its relevant files and records available for inspection and copying by, and make its employees available or otherwise render reasonable assistance to, indemnitor in defense of any action being indemnified under this Lease. If indemnitee, without the written consent of indemnitor, makes any settlement with respect to any Claim, indemnitor shall not be bound to such settlement. If indemnitor fails timely to defend, contest or otherwise protect against any suit, action, investigation, claim or proceeding related to a Claim, indemnitee shall have the right, but not the obligation, to defend, contest, assert cross-claims or counterclaims or otherwise protect against the same and may make any compromise or settlement thereof and recover and be indemnified for the entire cost thereof from indemnitor including, without limitation, legal expenses, disbursements and all amounts paid as a result of such suit, action, investigation, claim, proceeding, cross-claim or counterclaim or compromise or settlement thereof.

22. Damage or Destruction. (a) In case of any damage or loss to the Equipment by reason of fire or otherwise, Tenant shall give immediate notice thereof to Landlord. If the Equipment or any part thereof shall at any time be damaged or destroyed by fire or otherwise, Landlord shall agree to exercise its co-loss payee rights in favor of Tenant and Tenant shall promptly repair or replace the same at Tenant's expense, so as to make the Equipment at least equal in value to the Equipment existing immediately prior to such occurrence and as nearly similar to it in character as shall be practicable and reasonable. Such repairs or replacements shall be completed free and clear of mechanics' or other liens, the possibility of such liens, conditional bills of sale and security, and in accordance with the local building code and all applicable laws, ordinances, regulations or orders of any state, municipal or other public authority affecting the same, and also in accordance with all requirements of the Texas insurance rating organization, or similar body, and of any liability insurance company, insuring Landlord or Tenant against liability for accidents in or connected with the Equipment.

There shall be no abatement of Rent pending the repairs or replacements of Tenant's assets (whether owned or leased) or the Equipment.

(b) If either of the Buildings are destroyed or damaged by the elements, fire or other casualty, so as to render it unfit for occupancy or use by Tenant, except as provided below in this Section 22(b), Tenant shall not be liable to pay Rent for said premises so damaged from and after the time of such destruction and until the same is made whole and usable by the Landlord. If the Demised Premises are damaged by the fault or neglect of Tenant or its agents, employees, contractors or invitees, Tenant shall, at its own expense, repair any such damage within 60 days and Tenant shall thereupon have the right to use for this purpose all insurance proceeds received by Landlord or Tenant by reason of such damage and Tenant shall be obligated to pay the full rental. Landlord shall have the right and option to determine whether it shall repair said premises or declare this Lease at an end and Tenant shall have the right and option to declare this Lease at an end unless the premises are repaired and rendered fit for occupancy or use by Tenant within 60 days after the damage occurs, with neither party having any further obligation to the other.

If either of the Buildings are damaged by the elements, fire or other casualty, (except as otherwise provided in the immediately preceding portion of this Section 22(b)) but not in a manner which renders it unfit for occupancy or use by Tenant, Landlord shall repair such damage, and shall have the right to use for this purpose all insurance proceeds received by Landlord or Tenant by reason of such damage, and the Rent payable under this Lease shall be equitably reduced until the damage to the Building so damaged is repaired.

Landlord waives any claim it may have against Tenant, its employees or agents for damage to said premises from any casualty to the extent such damage is covered by fire and extended insurance of the Landlord or for which Landlord is otherwise reimbursed during the Term.

Tenant waives any claim it may have against Landlord, its employees or agents for any damage or loss to the contents of the Demised Premises owned by Tenant during the Term to the extent that such damage or loss is covered by insurance or Tenant is otherwise reimbursed.

23. **Eminent Domain and Condemnation.** (a) If all of the Demised Premises shall be taken by any public authority under the power of eminent domain, then the Term shall cease and there shall be no further obligation on the part of either Landlord or Tenant and any monies received therefrom on account of ownership of the Demised Premises shall be and remain the sole property of Landlord. If only a part of the Demised Premises shall be taken by any public authority under the power of eminent domain, any monies received therefrom on account of ownership of the Demised Premises shall be and remain the sole property of the Landlord, and thereupon the Term shall cease on the part so taken from the date the possession thereof shall be taken for any public purpose, the Rent shall be paid up to that date and for the 30-day period immediately following that date, Tenant shall have the right to terminate this Lease by giving a written notice thereof to Landlord if such partial taking makes the Demised Premises unsuitable for the use and occupancy of Tenant. If such partial taking does not render the Demised Premises unsuitable for the use and occupancy of Tenant, then Tenant shall continue in possession of the remainder of said premises not so taken under the terms hereof, and the Rent shall be reduced after such taking by an amount which bears the same proportion to the total Rent as the rental value of the part of the Demised Premises so taken bears to the rental value of the entire Demised Premises. Anything in this Section 23 to the contrary notwithstanding, Landlord, at its option, may reconstruct or restore all or any part of the Buildings and/or improvements on the Demised Premises to the extent that such reconstruction or restoration may be needed by reason of said taking and required to make the Demised Premises reasonably satisfactory to Tenant for its use thereof. Anything hereinbefore to the contrary notwithstanding, the amount payable by Landlord for such reconstruction and/or restoration and the total amount of the Rent reduction from the time of such taking to the expiration of the Term shall not, in the aggregate, be in excess of the total amount of the condemnation award received by Landlord. In the event of such excess, the aforementioned rent reduction shall be decreased thereby proportionately over the balance of the Term as may be applicable and in the event that the amount of Landlord's condemnation award shall be less than the cost of such reconstruction or restoration, Landlord shall not be obligated to decrease the Rent paid by Tenant.

(b) Tenant shall not be entitled to any portion of the award received by Landlord in the event any portion of the Demised Premises or the Equipment shall be taken as the result of any condemnation or the exercise of the right of eminent domain; provided, however, that Tenant shall have the right to appear in any eminent domain or condemnation proceeding and to claim and receive any award which may be made for damages to Tenant's fixtures and equipment, business interruption, and for moving expenses.

24. **Landlord's Right to Perform Tenant's Covenants.** If Tenant shall at any time fail to make any payment or perform any other act on its part to be made or performed after 30 days' written notice thereof to Tenant, then Landlord, after not less than 10 days' written notice to Tenant (or without notice if Landlord, in its sole discretion, reasonably deems the situation to be an emergency) and without waiving or releasing Tenant from any obligation of Tenant contained in this Lease or from any default by Tenant and without waiving Landlord's right to take such action as may be permissible under this Lease as a result of such default, may (but shall be under no obligation to) make any payment or perform any act on Tenant's part to be made or performed as provided herein and may enter upon the Demised Premises for any such purpose and take all action thereon, as may be necessary therefor. If, in the performance of Tenant's covenants under this Lease, Landlord pays any obligations of Tenant, Tenant shall repay such amounts to Landlord as Additional Rent.

25. **No Waiver.** No failure by either party to insist upon the strict performance of any agreement, term, covenant or condition of this Lease or to exercise any right or remedy consequent upon a breach thereof, or no acceptance of full or partial Rent during the continuance of any such breach, shall constitute a waiver of any such breach or of such agreement, term, covenant or condition. No agreement, term, covenant or condition of this Lease to be performed or complied with, and no breach of this Lease, shall be waived, altered or modified except by a written instrument executed by the party to be bound by such waiver, alteration or modification. No waiver of any breach shall affect or alter this Lease, but each and every agreement, term, covenant and condition of this Lease shall continue in full force and effect with respect to any other then existing or subsequent breach of this Lease.

26. **Events of Default.** Any one or more of the following events shall constitute an "Event of Default" under this Lease:

(a) the Demised Premises are abandoned by Tenant for a period in excess of 30 days and Tenant has removed or is in the process of removing its assets from either of the Buildings; or

(b) if Tenant fails to pay Fixed Rent or Additional Rent for more than five days after the same become due; or

(c) if Tenant shall default in the performance or observance of any other covenant or agreement contained in this Lease for more than 10 days after written notice of such default to Tenant; provided, however, that if the covenant or agreement to be performed by Tenant is of such nature that the same cannot reasonably be performed within such 10-day period, such default shall be deemed to have been cured if Tenant commences such performance within said 10-day period and thereafter diligently undertakes to complete the same; or

(d) if Tenant shall file a voluntary petition in bankruptcy or shall be adjudicated a bankrupt or insolvent, or shall file any petition or answer seeking any reorganization,

arrangement, composition, readjustment, liquidation, dissolution or similar relief under the federal Bankruptcy Code or any other present or future federal, state or other bankruptcy or insolvency statute or law, or shall seek or consent to or acquiesce in the appointment of any bankruptcy or insolvency trustee, receiver or liquidator of Tenant or of all or any substantial part of its properties or of the Demised Premises; or

(e) if within 90 days after the commencement of any proceeding against Tenant seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under the federal Bankruptcy Code or any other present or future federal, state or other bankruptcy or insolvency statute or law, such proceeding shall not have been dismissed or if, within 120 days after the appointment, without the consent or acquiescence of Tenant, of any trustee, receiver or liquidator of Tenant or of all or substantially all of its properties or of the Demised Premises, such appointment shall not have been vacated.

Tenant acknowledges that the occurrence of any of the foregoing Events of Default shall constitute a material default and breach of this Lease by Tenant.

27. **Remedies.** (a) Upon the occurrence of an Event of Default, Landlord may, at any time thereafter while such Event of Default continues, give written notice to Tenant specifying such Event of Default and stating that this Lease and the Term shall terminate on the date specified in such notice, which shall be at least 10 days after the giving of such notice, and upon the date specified in such notice this Lease and the Term and all rights of Tenant under this Lease, including the option for the Extended Term whether or not exercised, shall expire and terminate, and Tenant shall remain liable as provided in this Section 27.

(b) Upon any termination of this Lease pursuant to this Section 27, Tenant shall quit and peacefully surrender the Demised Premises and the Equipment to Landlord, and Landlord, upon or at any such termination, may without further notice, enter upon and reenter the Demised Premises and possess and repossess itself thereof, by force, summary proceedings, ejectment or otherwise, and may dispossess Tenant and remove Tenant and all other persons and property from the Demised Premises and may have, hold and enjoy the Demised Premises and the right to receive all rental income of and from the same.

(c) If this Lease shall be terminated pursuant to this Section 27, Landlord may relet the Demised Premises or any part thereof, or the Demised Premises, with additional premises for such term or terms (which may be greater or less than the period which would otherwise have constituted the balance of the Term and on such conditions (which may include concessions or free rent and alterations of the Demised Premises) as Landlord, in its sole discretion, may determine and may collect and receive the rents therefor. Landlord shall in no way be responsible or liable for any failure to relet the Demised Premises or any part thereof, or for any failure to collect any rent due upon such reletting; provided, however, Landlord will make a reasonable attempt to mitigate its Damages (e.g., engage a real estate broker to list the Demised Premises).

(d) (i) No termination of this Lease pursuant to this **Section 27** shall relieve Tenant of its liabilities and obligations under this Lease, whether or not the Demised Premises shall be relet. In any such event, Tenant shall pay Landlord the Rent required to be paid by Tenant up to the time of such event. Thereafter:

(A) (1) Tenant, until the end of the current Term or what would have been such Term in the absence of any such event, shall be liable to Landlord as damages for Tenant's default, the equivalent of the amount of the Rent which would be payable under this Lease by Tenant if this Lease were still in effect, less the net proceeds of any reletting effected pursuant to the provisions of **Section 27(c)** which is applicable to the Demised Premises, after deducting all Landlord's expenses in connection with such reletting, including, without limitation, all repossession costs, brokerage and management commissions, operating expenses, legal expenses, reasonable attorneys' fees, alteration costs, and expenses of preparation for such reletting.

(2) Tenant shall pay such current damages (herein called "**deficiency**") to Landlord monthly on the days on which the Fixed Rent would have been payable under this Lease if this Lease were still in effect, and Landlord shall be entitled to recover from Tenant each monthly deficiency as the same shall arise.

(3) At any time after termination of this Lease pursuant to this **Section 27**, in lieu of collecting any further monthly deficiencies as aforesaid, Landlord shall be entitled to recover from Tenant, and Tenant shall pay to Landlord, on demand, as damages, in addition to the damages provided for in **Section 27(d)(iv)**, damages for such breach, in addition to any damages becoming due under **Section 27(d)(ii)** and **Section 27(d)(iii)**, an amount equal to the difference between the Rent reserved in this Lease from the date if the Event of Default which resulted in the termination to the date of the expiration of the current Term and the then fair and reasonable rental value of the Demised Premises for the same period. In the computation of such damages, the difference between any installment of Fixed Rent and Additional Rent thereafter becoming due and the fair and reasonable rental value of the Demised Premises for the period for which such installment was payable shall be discounted to present worth.

(ii) If the Demised Premises or any part thereof be relet by Landlord for the unexpired Term of this Lease, or any part thereof, before presentation or proof of such liquidated damages to any court, commission or tribunal, the amount of Rent reserved upon reletting to an unaffiliated third party in an arms' length transaction shall prima facie be the fair and reasonable rental value for the part or the whole of the Demised Premises so relet during the term of the reletting. Nothing contained in this **Section 27** shall limit or prejudice the right of Landlord to prove and obtain as damages by reason

of such termination, an amount equal to the maximum allowed by any statute or rule of law in effect at the time when, and governing the proceedings in which such damages are to be proved, whether or not such amount be greater, equal to, or less than the amount of the difference referred to above.

(iii) If this Lease be terminated pursuant to this Section 27, by summary proceedings or otherwise, and whether or not the Demised Premises be relet, Landlord shall be entitled to recover from Tenant, and Tenant shall pay Landlord, in addition to any damages becoming due under this Section 27, the following: an amount equal to all expenses, if any, including reasonable attorneys' fees, incurred by Landlord in recovering possession of the Demised Premises, and all reasonable costs and charges for the care of the Demised Premises while vacant, which damages shall be due and payable by Tenant to Landlord at such time or times as such expenses are incurred by Landlord.

(iv) If this Lease be terminated pursuant to this Section 27, Tenant covenants and agrees, any other covenant in this Lease notwithstanding:

(A) That the Demised Premises shall be in the condition required by Section 35;

(B) That Tenant, on or before such termination, shall perform all covenants contained in this Lease for the making of any improvements, alteration or betterment to the Demised Premises, or for the restoring or rebuilding any part thereof (if Tenant fails to do the same, Landlord may complete such work and all such costs are to be added to the recoverable damages of Landlord from Tenant); and

(C) That, for the breach of any covenant above stated in this Section 27(d)(iv), Landlord shall be entitled to recover and Tenant shall pay, without notice or other action by Landlord, the then cost of performing such covenant.

(v) Tenant expressly waives, so far as permitted by law, the service of any notice of intention to reenter provided for in any statute, and except as is otherwise provided in this Lease, Tenant, for and on behalf of itself and all persons claiming through or under Tenant, also waives any and all right of redemption or re-entry or repossession in case Tenant shall be dispossessed by a judgement or by warrant of any court or judge or in case of re-entry or repossession by Landlord or in case of any expiration or termination of this Lease. The terms "enter" "reenter," "entry" or "re-entry" as used in this Lease are not restricted to their technical legal meanings.

(vi) In the event of any Event of Default or threatened Event of Default by Tenant, Landlord shall be entitled to enjoin such Event of Default or threatened Event of Default and shall have the right to invoke any right and remedy allowed at law or in equity or by statute or otherwise as though reentry, summary proceedings, and other remedies were not provided for in this Lease.

(vii) Each right and remedy provided for in this Lease shall be cumulative and shall be in addition to every other right or remedy provided for in this Lease or now or hereafter existing at law or in equity or by statute or otherwise, and the exercise or beginning of the exercise by Landlord or Tenant of any one or more of the rights or remedies provided for in this Lease or now or hereafter existing at law or in equity or by statute or otherwise shall not preclude the simultaneous or later exercise by the party in question of any or all other rights or remedies provided for in this Lease or now hereafter existing at law or in equity or by statute or otherwise.

28. Late Payments. Tenant shall pay Landlord for late payments of Rent (subject to applicable grace periods) a late payment charge equal to three percent of the amount late for each 30-day period such payment is late. Acceptance of such late payment charge by Landlord shall not constitute a waiver of Landlord's rights or release Tenant from any obligations under this Lease.

29. Transfer of Landlord's Interest; Attornment. If the interests of Landlord in the Demised Premises and under this Lease are transferred to a third party ("Transferee") of the Demised Premises pursuant to a contract of sale, foreclosure, deed in lieu of foreclosure or the exercise of a right of a trustee under a deed of trust or other loan documents, Tenant will attorn to the Transferee, and the Lease will continue in full accordance with the terms of this Lease. Upon transfer of the interest of Landlord in the Demised Premises and its interest under this Lease to a Transferee and assumption of this Lease in writing by the Transferee, Tenant shall thereafter look to the Transferee under this Lease to the extent that the Transferee has assumed this Lease.

30 Subordination and Non-Disturbance. This Lease shall, at Landlord's option, be subordinate to any mortgage ("Mortgage") that may now or hereafter be place on the Demised Premises, provided, however, such subordination is conditioned upon the execution of a standard non-disturbance agreement, the terms of which are to be reasonable. The holder of any such Mortgage being herein referred to as a "Mortgagee". From time to time as necessary in the future, Tenant will, upon demand, without cost, execute any instrument necessary to effectuate such subordination required by this Section 30 (which instrument or collateral instrument is to contain a standard non-disturbance agreement). If within five business days after submission of such instrument, Tenant fails to execute the same, Landlord is hereby authorized to execute the same as attorney-in-fact, coupled with an interest, for Tenant, the cost of such execution to be borne by Tenant. Notwithstanding the subordination provided for herein, Tenant's right to quiet possession of the Demised Premises shall not be

disturbed if and so long as an Event of Default does not exist, unless this Lease is otherwise terminated pursuant to its terms.

31. **Leasehold Mortgages.** Tenant may not mortgage the leasehold estate under this Lease.

32. **Estoppel Certificates.** Each party agrees at any time and from time to time upon not less than 15 days' prior written request by the other, to execute, acknowledge and deliver to the other a statement in writing certifying that this Lease is unmodified and in full force and effect (or if there have been modifications, that the same is in full force and effect as modified and stating the modifications), and the dates to which the Fixed Rent and Additional Rent have been paid, if any, and that to the actual knowledge of such Party, no Event of Default has occurred or, if an Event of Default has occurred, specifying the same; it being intended that any such statement delivered pursuant to this Section 32 may be relied upon by any prospective purchaser of the fee, a Mortgagee, Leasehold Mortgagee, or assignee of any of them.

33. **Assignment and Subletting.** Tenant may assign this Lease or sublet the Demised Premises or any part thereof only with the prior written consent of the Landlord, which consent shall not be unreasonably withheld, conditioned or delayed. Tenant shall not offer to assign or sublease any portion of the Demised Premises, or provide services to, any of Landlord's other tenants of space in the Sylvania Industrial Park. Landlord shall not be obligated to consent to any assignment or subleasing of space in the Demised Premises if the proposed sublessee is a customer of Landlord. Regardless of Landlord's consent, no assignment or subletting shall release Tenant from Tenant's obligation or alter the primary liability of Tenant to pay Rent and to perform all other obligations to be performed by Tenant under this Lease. Under no circumstances shall any permitted assignment or sublease by Tenant release Tenant from Tenant's obligation or alter the liability of Tenant to pay Rent and to perform all other obligations to be performed by Tenant under this Lease. The acceptance of Rent by Landlord from any other person shall not be deemed to be a waiver by Landlord of any provision of this Lease. In the event of default by any assignee or sublessee in the performance of any of the terms of this Lease, Landlord may proceed directly against Tenant without the necessity of exhausting remedies against said assignee or sublessee. Any consent by Landlord to assignment or subletting under this Lease shall not constitute a waiver of the necessity of obtaining that consent as to any subsequent assignment or sublease. Any attempted assignment for the benefit of Tenant's creditors or otherwise by operation of law shall not be effective to transfer or assign Tenant's interest under this Lease.

If any of the corporate shares of stock of Tenant are transferred by sale, assignment, bequest, inheritance, operation of law, or otherwise, so as to result in a change of the control or structure of Tenant, the same shall be deemed to be an assignment for purposes of this Section 33.

34. **Attorneys' Fees.** If Tenant requests the consent of Landlord to sublet or assign the Demised Premises or if Tenant requests the consent of Landlord with respect to any other matter requiring the Landlord's consent under this Lease, then Tenant shall pay Landlord's reasonable attorneys' or engineering fees incurred in connection with such request.

35. **Surrender.** Upon termination of this Lease for any reason whatsoever or upon the last day of the Term, as the case may be, Tenant shall surrender to Landlord, in a "broom clean" and good condition, the Demised Premises and the Equipment at least equivalent to that existing on the Commencement Date, except for reasonable wear and tear, casualty and condemnation, together with all additions, alterations, improvements and replacements thereof installed by Tenant which become the property of Landlord. Good condition of the Demised Premises and the Equipment shall include the requirement that all Hazardous Substances (placed thereon by Tenant) have been removed.

36. **Quiet Possession.** Landlord represents and warrants that it has full right and lawful authority to enter into this Lease. Tenant, upon paying Rent and observing the covenants of this Lease, may lawfully and quietly hold possession and enjoy the Demised Premises, together with all appurtenances and rights appertaining thereto, during the Term without hindrance, ejection, molestation or interruption.

Tenant will (at no cost to Tenant) cooperate with Landlord in the granting of easements and other rights in the nature of easements necessary or useful to the business of the Sylvania Industrial Park, provided such grants do not unreasonably restrict or interfere with Tenant's Business.

37. **Entry.** (a) Landlord and Landlord's authorized representatives or agents shall have the right to enter the Demised Premises during normal business hours for the purpose of examining the same (except in the case of emergencies). Nothing in this Section 37 shall imply any duty upon the part of Landlord to do any such work which, under the provision of this Lease, Tenant may be required to perform, and the performance thereof by Landlord shall not constitute a waiver of Tenant's default in failing to perform the same.

(b) Landlord shall have the right to enter the Demised Premises during the last six months of the Term for the purpose of exhibiting the same, and to display on the Demised Premises in such manner as will not unreasonably interfere with Tenant's Business "For Sale" or "To Let" signs.

38. **Holding Over.** If Tenant continues to hold possession of the Demised Premises after the expiration of the Primary Term without extension thereof or after the expiration of any Extended Term, Tenant shall remain a Tenant at a monthly rental equal to 125% of the last monthly Fixed Rent payable under this Lease (in addition to Additional Rent). Such occupancy shall be a tenancy from month to month and otherwise the tenancy shall be upon the

same terms and conditions as contained in this Lease, except such tenancy shall be terminable by either party by giving 30 days' advance written notice of termination.

39. **Modification of Lease.** This Lease contains all agreements of the parties with respect to any matter mentioned in this Lease. No prior agreement or understanding pertaining to any such matter shall be effective. As of the execution of this Lease, the lease, dated March 13, 1998 ("**Prior Lease**"), that was previously executed by Landlord and Tenant shall be terminated; provided, however, any accrued but unsatisfied obligations of either of the parties under the Prior Lease shall survive such termination. No agreement hereafter made between Landlord and Tenant shall be effective to change, modify, waive, release, discharge, terminate or effect an abandonment of this Lease in whole or in part, unless such agreement is in writing, refers expressly to this Lease and is signed by both parties. The failure of either party to insist in any one or more cases upon the strict performance of any term, covenant or condition of this Lease to be performed or observed by the other party hereto shall not constitute a waiver or relinquishment of that party's right to take recourse for any subsequent failure to perform any such term, covenant or condition, but the same shall continue and remain in full force and effect with respect to any subsequent breach, act or omission.

40. **Notices.** All notices, demands, directions, requests, designations, consents, approvals, instructions and other communications required or permitted by the terms of this Lease shall be in writing and shall become effective upon the earlier of its receipt or the lapse of five business days after being deposited in the United States mail, certified or registered, postage prepaid or, if delivered in person or in the form of telex, telegram, facsimile or cable, when received, and if mailed, shall be addressed to the party at its address set forth above or at such other place as the party may from time to time designate by like notice.

41. **Sylvania Industrial Park Rules and Regulations.** Tenant, its servants, employees, agents, invitees, licensees, contractors and subcontractors shall observe and strictly comply with any Rules and Regulations as Landlord or its agents may, after notice to Tenant, from time to time reasonably adopt. Landlord shall include in leases of other space in the Sylvania Industrial Park a similar requirement obligating tenants to comply such Rules and Regulations as may be adopted by Landlord. Landlord shall make reasonable efforts to enforce said Rules and Regulations, to the extent applicable, and to enforce the terms, covenants or conditions in any other lease against any other tenant; provided, however, that Landlord shall not be liable to Tenant for violation of the same by any other tenant, its servants, employees, agents, invitees, or licensees.

42. **Headings.** The headings contained in this Lease are inserted only for convenience and reference and in no way define, limit or enlarge the scope or intent of this Lease or in any way affect the terms and provisions of this Lease.

43. Severability. If any provisions of this Lease shall be declared by proper authority to be invalid or unenforceable, the remainder of this Lease shall continue in full force and effect.

44. Time. Time shall be of the essence of the performance by Tenant of all payments, covenants and agreements in this Lease, subject to grace periods specifically provided for in this Lease.

45. Governing Law. This Lease shall be governed by the internal laws of the State of Texas.

46. Successors and Assigns. The terms, covenants and conditions of this Lease shall be binding upon and shall inure to the benefit of Landlord, and its successors and assigns, and Tenant, and its successors and permitted assigns.

47. Counterparts. This Lease may be executed in one or more counterparts, each of which shall be deemed an original but which together shall constitute one and the same document.

48. Incorporation by Reference. The preamble and the WITNESSETH clauses set forth above and the Exhibits referred to above are incorporated into this Lease as if the same were fully set forth in this Lease.

IN WITNESS WHEREOF, each of the parties has caused this Lease to be signed by its duly authorized agents as of the date first above written.

"Landlord":

Sylvania Industrial Park, Inc., a Texas corporation

Attest:

Sarah N. Surlay

By:

[Signature]
Name: John A. Whitney
Title: General Manager

"Tenant":

PCI Transportation Inc., a Texas corporation

Attest:

F. Cheryl Whitney

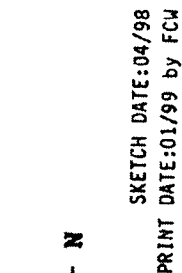
By:

[Signature]
Name: Joe D. Beggs
Title: VP & GM

EXHIBIT A
BUILDING 800

000211

**SYLVANIA INDUSTRIAL PARK, INC. PROPERTIES
BUILDING 100 - SECTION A**



C = CLOSET
EC = ELECTRICAL CLOSET NUMBER
ED = EXTERIOR DOOR NUMBER
H = HALLWAY NUMBER
R = ROOM NUMBER
RR = RESTROOM NUMBER
V = VAULT NUMBER

* = THERMOSTATS / UNIT NUMBER
= HVAC UNIT No. / LOCATION

000212

EXHIBIT C

BRIDGE CRANES

<u>Crane Number</u>	<u>Location</u>	<u>Mfg.</u>	<u>Cap./Tons</u>	<u>Span</u>	<u>Under Hook</u>	<u>Serial Number</u>
B-18	800I	Champion	20	65'	24'	_____
B-17	800H	Bedford	10	65'	24'	539
B-15	800A & B	Aimco	20	77'6"	28'	_____

HEATING/COOLING UNITS

Three(3) Reznor Gas Units - Section K - Bldg. 800
One (1) Reznor Gas Unit - Section M - Bldg. 800
One (1) Trane HVAC Unit - Section A - Bldg. 100
One (1) Frigidaire HVAC Unit - Section C - Bldg. 800

000213

COPY

AMENDMENT NUMBER TWO TO LEASE

THIS AMENDMENT NUMBER TWO TO LEASE ("**Amendment**") is entered into as of the 1st day of January, 2001 ("**Effective Date**") by Sylvania Industrial Park, Inc., a Texas corporation ("**Landlord**"), and PCI Transportation Inc., a Texas corporation ("**Tenant**").

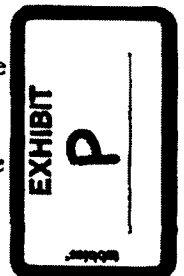
RECITALS

- A. Landlord and Tenant have previously entered into a Lease, dated March 1, 1999 ("**Original Lease**").
- B. Landlord and Tenant have previously entered into an Amendment Number One to Lease, dated December 1, 1999.
- C. Tenant now desires to lease Building 105 containing an additional 2,442 square feet of building space and an additional 19,419 square feet in a portion of Sections B & C in Building 200, all as shown on the sketch attached as **Exhibit A-2** (collectively "**Additional Space**").
- D. The parties are entering into this Amendment to modify the Original Lease and the Amendment Number One to Lease ("collectively "**Lease**") to reflect the leasing of the Additional Space and the other matters set forth below.

NOW, THEREFORE, in and for good and valuable consideration, the receipt and sufficiency of which are acknowledged, the parties agree, as of the Effective Date, as follows:

- 1. Unless defined in this Amendment to the contrary, each capitalized term used in this Amendment shall have the meaning assigned to it in the Lease.
- 2. The Demised Premises shall include the Additional Space.
- 3. The term for the lease of the Additional Space shall run concurrent with the term set forth in Section 1 of the Lease (i.e., commencing on March 1, 1999 and expiring on February 29, 2004, both dates inclusive).
- 4. The base annual Fixed Rent provided for in Section 3 of the Lease shall be increased by \$46,920.00 and the monthly installments shall be increased by \$3,910.00.
- 5. Tenant's proportionate share of Taxes under Section 17 of the Lease shall be increased by \$171.00 per month.
- 6. Tenant's proportionate share of Property Insurance premiums under Section 19 of the Lease shall be increased by \$117.00 per month.
- 7. Electricity, natural gas and water for the Additional Space will be metered and sewage charges will be based on water usage.

000214

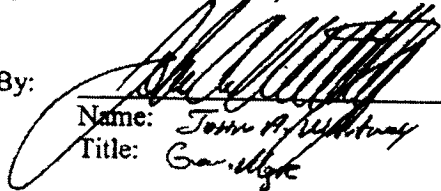


8. Tenant shall also have the right to use the Non-Exclusive Access Road which is outlined in gray on the sketch attached as **Exhibit A-2**. This Non-Exclusive Access Road shall be treated as a "Non-Exclusive Right of Ingress and Egress" for all purposes under the Lease. Tenant shall also have the right to use the (i) Employee-Automobile Parking Only area which is outlined in yellow on the sketch attached as **Exhibit A-2**, and (ii) Truck/Trailer Parking area which is outlined in red on the sketch attached as **Exhibit A-2** (collectively "**Additional Parking Areas**"). The Additional Parking Areas shall be treated as "Parking Areas" for all purposes under the Lease.
9. Exhibit C of the Lease is also now amended to include one 20-Ton Cab Operated Bridge Crane Number B-10 (located in Building 200, Section C) and one Janitrol HVAC Unit, S/N MARS329649 (located in Building 105). This Crane and HVAC Unit shall be treated as "Equipment" for all purposes under the Lease.
10. Except as modified by this Amendment, the Lease remains in full force and effect. In addition, except as otherwise specifically provided for in this Amendment, all of the terms and provisions of the Lease shall apply to the Additional Space.
11. This Amendment shall be governed by the internal laws of the State of Texas.
12. The preamble and the Recitals set forth above and the Exhibit and the Lease referred to above are incorporated into this Amendment as if the same were fully set forth in this Amendment.
13. For purposes of enforcing the Lease and this Amendment, the Lease shall be read as if the provisions of this Amendment were fully set forth in the Lease.

IN WITNESS WHEREOF, each of the parties has caused its corporate name to be hereunto signed by its duly authorized officers.

"Landlord":

Sylvania Industrial Park, Inc.

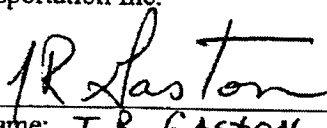
By: 

Name: *John A. Whitting*

Title: *Gen. Mgr.*

"Tenant":

PCI Transportation Inc.

By: 

Name: *J. R. GASTON*

Title: *VP SALES*

STATE OF TEXAS
COUNTY OF TARRANT, to-wit:

I, Denise McKinstry, a Notary Public in and for the said County, do certify that
John A. Whitney who signed the writing above, bearing date the 15th day of December,
2000, for Sylvania Industrial Park, Inc., a Texas corporation, has this day in my said County, before
me, acknowledged the said writing to be the act and deed of said corporation.

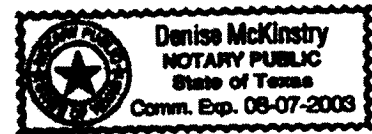
Given under my hand this the 15th day of December, 2000.

Denise McKinstry
NOTARY PUBLIC

SEAL:

My commission expires

08/07/2003.



STATE OF TEXAS
COUNTY OF TARRANT, to-wit:

I, Denise McKinstry, a Notary Public in and for the said County, do certify that
J.R. GASTON who signed the writing above, bearing date the 15th day of December,
2000, for PCI Transportation Inc., a Texas corporation, has this day in my said County, before me,
acknowledged the said writing to be the act and deed of said corporation.

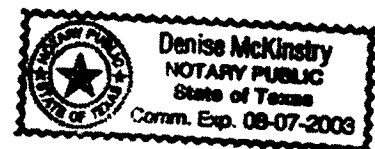
Given under my hand this the 15th day of December, 2000.

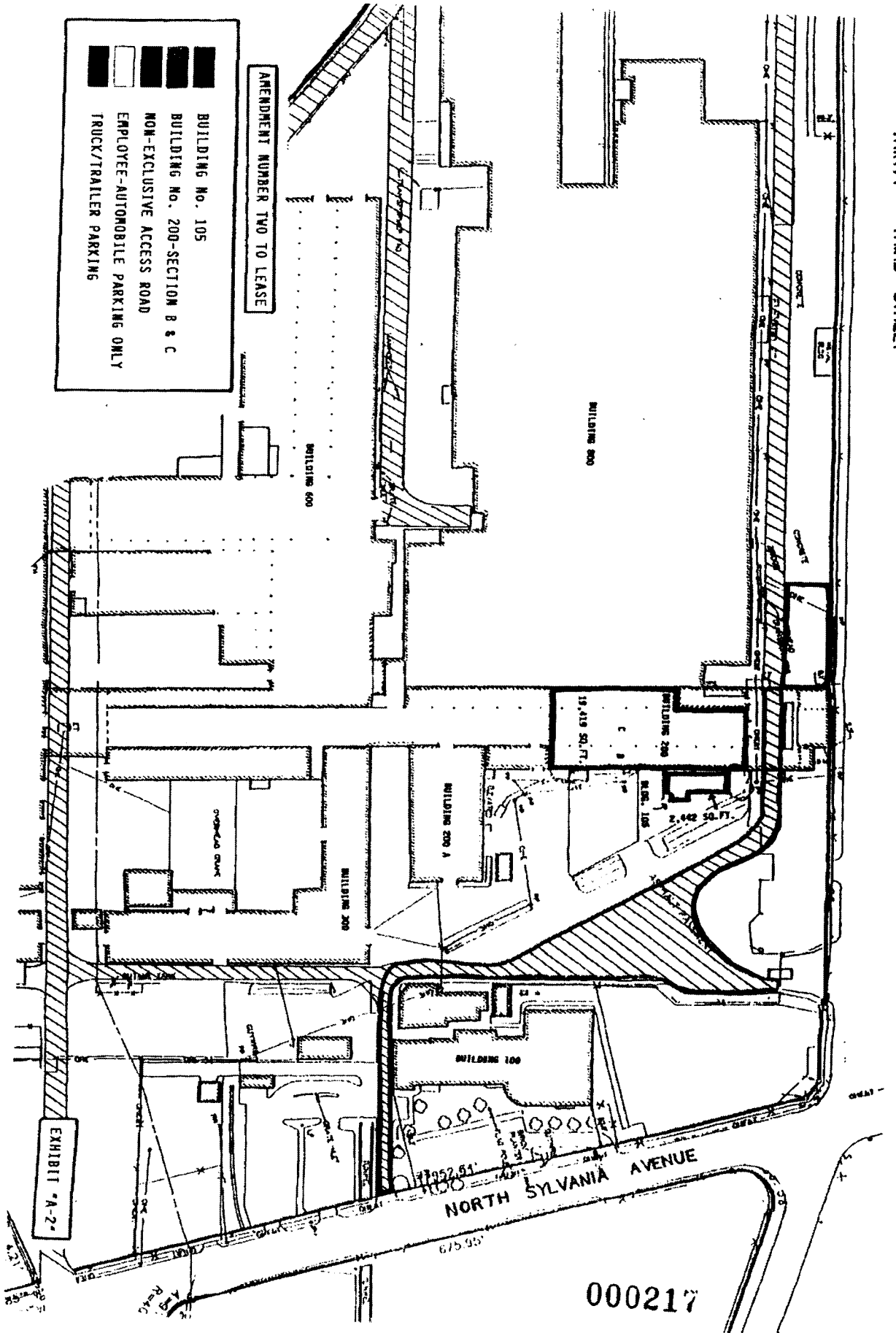
Denise McKinstry
NOTARY PUBLIC

SEAL:

My commission expires

08/07/2003.





000217

COPY

SYLVANIA INDUSTRIAL PARK, INC.

3201 N. SYLVANIA AVENUE • SUITE 100-B • FORTH WORTH, TEXAS 76111
PHONE: 817-838-8129 • 817-838-8180 • FAX: 817-838-8143

January 08, 2004

VIA HAND DELIVERY

Mr. Randy Gaston
PCI Transportation Inc.
3201 North Sylvania Avenue
Building 100 Suite A
Fort Worth, Texas 76111

Re: Lease dated March 01, 1999, Amendment Number One To Lease dated
December 01, 1999 and Amendment Number Two To Lease dated January
01, 2001

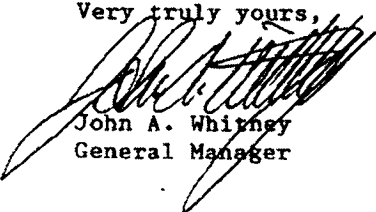
Dear Randy:

Upon reviewing my lease file, I discovered the referenced Lease and
Amendment Number Two will expire on February 29, 2004. Amendment Number One
was terminated mutually by both Landlord and Tenant.

I have not received notification of your intent to exercise your option
for the additional five year period as provided for in the above referenced
Lease.

Should you elect to exercise your option to the Extended Term beginning
March 01, 2004 and ending February 28, 2009, please execute this letter where
indicated and return to the undersigned.

Very truly yours,


John A. Whitney
General Manager

Approved: PCI TRANSPORTATION INC.

By: R. Gaston

Its: VP Sales & Mktg

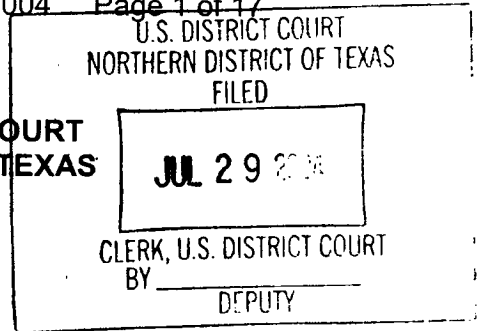
Dated: 1/14/04

000218



ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FORT THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION



PCI TRANSPORTATION, INC.,

Plaintiff,

vs.

FORT WORTH & WESTERN
RAILROAD COMPANY,

Defendant.

§
§
§
§
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§
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§

CIVIL ACTION NO
4-04CV-211-Y

**DEFENDANT FORT WORTH & WESTERN RAILROAD
COMPANY'S SECOND AMENDED ANSWER AND COUNTERCLAIM**

TO THE HONORABLE TERRY R. MEANS, U.S. DISTRICT JUDGE:

Defendant Fort Worth & Western Railroad Company ("FWWR") files its Second Amended Answer and Counterclaim in response to the Second Amended Complaint of Plaintiff PCI Transportation, Inc. ("Plaintiff" or "PCI"). In support, FWWR would respectfully show the Court as follows:

I.

ANSWER

Parties and Venue

1. FWWR admits the allegations contained in paragraph 1 of Plaintiff's Second Amended Complaint (the "Complaint").
2. FWWR admits the allegations contained in paragraph 2 of the Complaint.
3. Subject to its forthcoming Motion for Summary Judgment and without waiving any claim that an agency of the United States is the appropriate and proper venue for certain causes and contested matters herein, to the extent that there are



claims brought by Plaintiff that are properly triable in a United States District Court, FWWR would admits that the Fort Worth Division of the Northern District of Texas is the appropriate and proper venue.

Factual Background

4. FWWR admits the allegations contained in paragraph 4 of the Complaint.

5. With regard to paragraph 5 of the Complaint, FWWR admits entering into a Confidential Demurrage Agreement with PCI on or about August 23, 2001, which altered certain time lines and charges associated with the demurrage and as set forth in FWWR's Freight Tariff 8001-G. FWWR denies that the subject matter of said Agreement involved whether FWWR would take into its business premises and rail yard, any railroad cars from the Fort Worth main lines bearing cargo ordered for delivery to Fort Worth by PCI.

6. With regard to paragraph 6 of the Complaint, FWWR is without sufficient information to admit or deny the square footage of PCI's warehouse. FWWR admits the warehouse is served by railroad spur off the Union Pacific and Burlington Northern lines containing an "A" and a "B" track. FWWR admits the railroad spur can accommodate up to ten railroad cars, but denies any remaining allegations in paragraph 6 of the Complaint.

7. FWWR denies all allegations in paragraph 7 of the Complaint.

8. FWWR admits that the business relationship between PCI and FWWR proceeded satisfactorily for a number of years before problems arose involving demurrage charges. FWWR denies any remaining allegations in paragraph 8.

9. With regard to paragraph 9 of the Complaint, FWWR admits that FWWR and PCI had a disagreement concerning demurrage charges posed by FWWR. FWWR admits that demurrage is a charge by a railroad company to a customer, such as PCI, that is unable to take possession of a loaded railroad car within some agreed upon or legally imposed period of time after the car is received by the railroad company. In addition, it involves a charge for the failure of a company such as PCI to unload a car and thus being able to return it to FWWR within some agreed upon or legally imposed period of time. FWWR admits entering into a Confidential Demurrage Agreement on or about August 23, 2001. FWWR denies the subject of the Agreement was the parties' future relationship. FWWR denies Plaintiff's allegation that no monies exchanged hands between FWWR and PCI under the Agreement. While FWWR does receive revenues for switching the railroad cars from the main railroads. The Agreement, in conjunction with the tariff, sets demurrage charges to be paid directly to FWWR by PCI. FWWR admits that the Agreement provided that FWWR would provide PCI one switch per day to PCI's spur. FWWR admits that the parties' usual practice has been for FWWR to deliver to PCI oldest cars first and that such is predominantly the standard practice. FWWR denies all remaining allegations in paragraph 9 of the Complaint.

10. FWWR denies the allegations in paragraph 10 of the Complaint to the extent there is any assertion that the Agreement between FWWR and Plaintiff was not terminable upon reasonable notice by either party. With regard to the remaining allegations, FWWR lacks sufficient knowledge with which to respond at this time.

11. FWWR denies all allegations in paragraph 11 of the Complaint.

12. FWWR denies all allegations in paragraph 12 of the Complaint.

13. With regard to paragraph 13 of the Complaint, FWWR admits that the February 3, 2004, letter attached as Exhibit "A" to the Complaint is a true and correct copy of a letter sent by the FWWR. FWWR denies any remaining allegations in paragraph 13.

14. FWWR is without sufficient information to either admit or deny the allegations contained in paragraph 14 of the Complaint. Although the February 3, 2004 letter was sent via certified mail, it was returned as Mr. Gaston apparently did not ever sign for the letter.

15. With regard to paragraph 15 of the Complaint, FWWR admits that on March 1, 2004, PCI representative, Randy Gaston, met with FWWR representatives, Jim Martin and Steve George. FWWR denies any remaining allegations in paragraph 15.

16. FWWR admits the March 2, 2004 letter attached as Exhibit "B" to the Complaint is a true and correct copy of a letter sent by FWWR. FWWR admits that the e-mail attached as Exhibit "C" to the Complaint is a true and correct copy of an e-mail received by Steve George of FWWR. FWWR denies any remaining allegations in paragraph 16 of the Complaint.

17. FWWR denies all allegations contained in paragraph 17 of The Complaint.

18. FWWR denies all allegations contained in paragraph 18 of The Complaint.

19. FWWR denies all allegations contained in paragraph 19 of The Complaint.

20. With regard to paragraph 20 of the Complaint, FWWR admits that PCI filed its Original Petition in 191st District Court of Tarrant County (the "state court") on March 5, 2004, and that a Temporary Restraining Order was issued by the state court of

Tarrant county on that same date. FWWR further admits that it sent the letter attached to the Complaint as Exhibit "B" and that such letter, among other things, stated that if the then outstanding demurrage of \$2,130.00 charged to PCI was not paid by March 8, 2004, then FWWR would consider PCI in default of that Confidential Demurrage Contractual Agreement dated August 23, 2001. FWWR denies all remaining allegations in paragraph 20.

21. With regard to paragraph 21 of the complaint, FWWR admits that the Original Petition filed in the state court (as referenced by PCI) contained a verification signed by Randy Gaston, but FWWR denies all assertions and allegations contained in that Petition and subsequent Complaints filed by PCI in this Court as set forth in this Answer and prior Answers of FWWR. FWWR admits that the March 2, 2004, letter of Jim Martin contained the language as set forth in paragraph 21. FWWR denies all remaining allegations in paragraph 21 of the Complaint.

22. With regard to paragraph 22 of the Complaint, FWWR lacks sufficient information to respond to averments as to PCI's purpose in seeking an injunction in this matter. With respect to all remaining allegations in paragraph 22, FWWR denies the same.

23. With regard to paragraph 23 of the Complaint, FWWR admits that a hearing had been set in the state court on PCI's Application for Temporary Injunction on March 22, 2004, at 8:30 a.m., and that this matter was removed to this Court on March 19, 2004. FWWR would further admit that the removal of this action was within the time frames set forth in the Federal Rules of Civil Procedure and of the laws otherwise governing the United States District Courts. FWWR also admits that PCI's counsel

received notice of the removal of this matter on the same day that this case had been removed. FWWR denies all remaining allegations in paragraph 23.

24. With regard to paragraph 24 of the Complaint, FWWR admits that this Court entered its order denying the Emergency Motion to Remand on April 8, 2004. FWWR lacks sufficient knowledge to admit or deny the averments with respect to when PCI's counsel learned of the April 8, 2004, Order. FWWR admits sending the demurrage bill attached to the Complaint as Exhibit D. FWWR denies all remaining allegations in paragraph 24 of the Complaint.

25. With regard to paragraph 25 of the Complaint, FWWR admits that its counsel sent correspondence, dated April 20, 2004, stating that FWWR would charge demurrage pursuant to Tariff FWWR 8001-G. FWWR denies all remaining allegations in paragraph 25.

26. FWWR admits that the correspondence of April 20, 2004 states that the Agreement was cancelled and/or terminated due to one or more of the factors set forth in that letter, as well as other factors that may not have been included therein. FWWR admits that PCI responded to such correspondence. FWWR admits that it continues to insist the Agreement was terminated and, effective March 20, 2004, will charge demurrage pursuant to Tariff FWWR 8001-G. FWWR denies all remaining allegations in paragraph 26.

27. With respect Paragraph 27 of the Complaint, FWWR denies that Plaintiff is entitled to any injunctive relief, temporary or permanent. FWWR denies all remaining allegations in paragraph 27.

Count I. Breach of Contract/Attorney's Fees

28. FWWR admits and denies the previous allegations as stated and incorporated by reference in paragraph 28 of the Complaint.

29. FWWR denies all allegations contained in paragraph 29 of the Complaint.

30. FWWR denies all allegations contained in paragraph 30 of the Complaint.

Count II. Intentional Interference with Existing and Prospective Contractual Relations

31. FWWR incorporates by reference the responses set forth in paragraphs 1 through 30 above with the same force and effect as if fully set forth herein.

32. FWWR denies all allegations contained in paragraph 32 of the Complaint.

33. FWWR denies all allegations contained in paragraph 33 of the Complaint.

34. FWWR denies all allegations contained in paragraph 34 of the Complaint.

Count III. Request for Temporary Restraining Order and Preliminary Injunction

35. FWWR incorporates by reference the responses set forth in paragraphs 1 through 34 above with the same force and effect as if fully set forth herein.

36. FWWR denies all allegations contained in paragraph 36 of the Complaint.

Count IV. Request for Permanent Injunction

37. FWWR incorporates by reference the responses set forth in paragraphs 1 through 36 above with the same force and effect as if fully set forth herein.

38. FWWR denies all allegations contained in paragraph 38 of the Complaint.

Count V. Alternative Wrongful Termination of Contract

39. FWWR incorporates by reference the responses set forth in paragraphs 1 through 39 above with the same force and effect as if fully set forth herein.

40. FWWR denies all allegations contained in paragraph 40 of the Complaint.

41. FWWR denies all allegations contained in paragraph 41 of the Complaint.

42. FWWR denies all allegations contained in paragraph 42 of the Complaint.

43. With regard to the Prayer in the Complaint, FWWR denies that PCI is entitled to any relief whatsoever as against FWWR. All remaining allegations in the Prayer are denied by FWWR.

III.

AFFIRMATIVE DEFENSES

FWWR incorporates each and every admission, denial and averment made in paragraphs 1 through 43 above as though fully set forth herein. FWWR asserts, separately and/or alternatively, even if inconsistent, the following affirmative defenses to claims made by the Plaintiff PCI in the Complaint:

44. The Complaint fails to state a claim upon which relief can be granted.

45. FWWR asserts that Plaintiff's claims are barred by the doctrines of estoppel.

46. FWWR asserts that PCI's claims for temporary and permanent injunction are barred and/or preempted by the applicable Tariff and federal law.

47. FWWR asserts that PCI's claims for breach of contract, intentional interference with existing and prospective contractual relations, wrongful termination of contract, and any other claim plead now or in the future are all barred and/or preempted by the applicable Tariff and federal law.

48. To the extent PCI's claims are founded in whole or in part upon the Confidential Demurrage Agreement, such claims are barred or waived based upon PCI's default and breach under such Agreement.

49. To the extent PCI's claims are founded in whole or in part upon the Confidential Demurrage Agreement, such claims fail as a matter of law because such Agreement was terminable at will upon reasonable notice.

50. To the extent PCI's claims are founded in whole or in part upon the Confidential Demurrage Agreement, such claims are barred or waived based upon PCI's anticipatory repudiation of the Agreement.

IV.

GENERAL DENIAL

51. All allegations not admitted or fully denied or otherwise explained are hereby denied.

V.

COUNTERCLAIM

Parties

52. FWR is a railroad company operating under the laws of the state of Texas. Its principal office and place of business is located in Fort Worth, Tarrant County, Texas.

53. PCI is a corporation operating under the laws of the State of Texas, with a principal place of business located in Fort Worth, Tarrant County, Texas.

Jurisdiction

54. This Counterclaim presents a federal question under the Constitution and Laws of the United States of America. Therefore, jurisdiction in this Court is founded upon the provisions of 28 U.S.C. §§ 1331 (Federal Question) and 1337 (Commerce). Federal jurisdiction exists over PCI's failure to pay demurrage charges. See, e.g., *Car*

Transp. Brokerage Co., Inc. v. Darden Restaurants, Inc., 213 F.3d 474, 478 (9th Cir. 2000); *Delaware and Hudson Rwy. Co., Inc. v. Offset Paperback Mfrs., Inc.*, 126 F.3d 426, 427, 428 (2nd Cir. 1997); and *Illinois Cent. R.R. v. South Tec Dev. Warehouse*, 1999 WL 519042 *3 (N.D. Ill.).

55. In addition, FWWR's counterclaims are so related to the other claims in this action that they form part of the same case or controversy under Article III of the United States Constitution. Therefore, jurisdiction in this Court is founded upon the provisions of 28 U.S.C. §1367.

Factual Background

56. FWWR operates a railroad switching yard, commonly known as the Hodge Yard, in Fort Worth, Texas. The main rail lines of the Burlington Northern Santa Fe ("BNSF") and the Union Pacific ("UP") railroads connect to the Hodge Yard. Under various agreements and arrangement with FWWR, BNSF and UP deliver cargo-laden railcars to the Hodge Yard. FWWR receives and switches these railcars, making them available to BNSF and UP customers for unloading by such customers. After the railcars are unloaded by BNSF or UP customers, FWWR returns the empty railcars to BNSF and UP's main rail line.

57. PCI is a customer of BNSF and UP. PCI is a distributor of lumber, hardware, and building materials. In order to facilitate the unloading of its cargo from BNSF and UP railcars, PCI maintains a distribution warehouse near the Hodge Yard. This warehouse is connected to the Hodge Yard by two spur tracks. FWWR receives, switches and delivers railcars containing PCI's cargo to these spur tracks, allowing PCI

to off-load the cargo into its warehouse. BNSF and UP compensate FWWR for its switching services to PCI.

58. Additionally, pursuant to its Freight Tariff 8001-G, as well as its agreements and arrangements with BNSF and UP, FWWR is authorized to collect demurrage from end customers, including PCI. Demurrage is a monetary charge that compensates rail carriers for the expenses incurred when rail cars are detained by shippers or their customers. Additionally, it serves as a penalty for undue railcar detention and encourages the speedy return of railcars to the rail network. See, *Chrysler Corp. v. New York C.R. Co.*, 234 I.C.C. 755, 759 (1939).

59. The terms by which FWWR conducts railcar switching services for PCI and other BNSF and UP customers is governed by Freight Tariff FWWR 8001-G (the "Tariff"). The Tariff, which has received the approval of the federal Surface Transportation Board, outlines how FWWR may charge demurrage. Additionally, federal law allows demurrage rates to be changed pursuant to a confidential agreement between parties. FWWR and PCI entered into such an agreement (the "Confidential Demurrage Agreement") on or about August 23, 2001.

60. Despite FWWR's repeated demand that it do so, PCI has failed and refused to pay past due demurrage accrued pursuant to the Tariff and the computation of such charges under the Confidential Demurrage Agreement. PCI has further unequivocally indicated that it will continue to refuse to pay any and all demurrage charges accruing to FWWR in the future.

61. On April 20, 2004, FWWR sent notice to PCI that the Confidential Demurrage Agreement was automatically cancelled and/or terminated due to one or

more of the following factors: (1) PCI's unequivocal repudiation of the Agreement by profane statements as to what would be done with future demurrage bills; (2) PCI's failure to pay past due demurrage charges; and (3) PCI's breach of the confidentiality of the Agreement by setting forth its contents in public filings. Further, FWWR gave notice to PCI that, because FWWR cancelled and/or terminated the Confidential Demurrage Agreement, PCI was to be put on a cash basis and demurrage would be charged pursuant to the Tariff.

Statement of the Counterclaims

62. FWWR repeats and realleges the allegations set forth in the preceding paragraphs.

CAUSES OF ACTION

Count One:

Declaratory Relief

63. FWWR is a common rail carrier under the Interstate Commerce Act, as amended by the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101, *et seq.* FWWR, as a common rail carrier, is entitled to charge demurrage to its customers. *See*, 49 U.S.C. § 10746. FWWR charges demurrage pursuant to the Tariff and the related Confidential Demurrage Agreement.

64. By its Plaintiff's Second Amended Complaint, PCI seeks to temporarily and permanently enjoin FWWR from imposing or attempting to impose demurrage charges against PCI, despite federal law to the contrary. An actual controversy has arisen and now exists between the parties relating to the question of demurrage for which FWWR desires a declaration of rights. Accordingly, pursuant to 28 U.S.C. §

2201 and Rule 57 of the Federal Rules of Civil Procedure. FWWR requests the following declarations from this Court:

- a. At all times relevant to this litigation, the Confidential Demurrage Agreement was terminable at will and upon reasonable notice.
- b. By correspondence dated March 2, 2004, FWWR's President and Chief Operating Officer gave reasonable notice that the Confidential Demurrage Agreement would be cancelled and/or terminated upon the failure of PCI to pay the accrued demurrage by March 8, 2004.
- c. By correspondence dated April 20, 2004, FWWR's counsel gave notice that due to the intervening litigation, state court injunction, and removal to this Court on March 19, 2004, that the effective date of the cancellation and/or termination of the Agreement was March 20, 2004.
- d. Effective March 20, 2004, FWWR is entitled as a matter of law to impose and collect demurrage charges from PCI pursuant to Tariff FWWR 8001-G.
- e. All of PCI's claims, causes of action and requested relief concerning FWWR's demurrage charges, practices and rail services and procedures are completely preempted by federal law.
- f. All of PCI's claims, causes of action and requested relief concerning FWWR's demurrage charges, practices and rail services and procedures fall within the exclusive jurisdiction of the Surface Transportation Board.

Count Two:

Breach of Confidential Demurrage Agreement

65. PCI's failure to pay demurrage incurred pursuant to the Tariff and related Confidential Demurrage Agreement constitutes a breach of contract by PCI. PCI's breach proximately caused damages to FWWR.

Count Three:

Breach of the Tariff

66. PCI's failure to pay demurrage incurred pursuant to the Tariff after the termination of the Confidential Demurrage Agreement constitutes a breach of PCI's obligations pursuant to the tariff and other applicable law.

Count Four:

Anticipatory Repudiation of the Confidential Demurrage Agreement

67. Furthermore, PCI, by and through its representative, Randy Gaston, has unequivocally stated to FWWR it would not pay any demurrage charges accruing to FWWR in the future. Such statement, as well as PCI's related actions and omissions, constitutes an anticipatory repudiation and breach of the Confidential Demurrage Agreement and the obligations of PCI pursuant to the tariff and federal law that proximately caused damages to FWWR.

Count Five:

Attorney's Fees

68. FWWR has presented PCI with a demand to pay the overdue demurrage charges pursuant to the Confidential Demurrage Agreement and Tariff. Pursuant to §38.001, *et seq.*, of the Texas Civil Practice and Remedies Code, FWWR requests that the Court award its attorneys' fees incurred to prosecute this action. Further, FWWR requests an award of its attorneys' fees and costs pursuant to the Declaratory Judgments Act, 28 U.S.C. 2202.

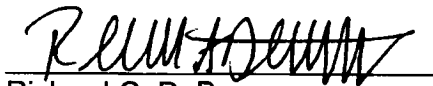
WHEREFORE, PREMISES CONSIDERED, Defendant FWWR requests that upon final trial of this case PCI take nothing by its action. Furthermore, FWWR requests that upon final trial, FWWR have Judgment against PCI as follows:

1. A Judgment declaring that:
 - a. At all times relevant to this litigation, the Confidential Demurrage Agreement was terminable at will and upon reasonable notice.
 - b. By correspondence dated March 2, 2004, FWWR's President and Chief Operating Officer gave reasonable notice that the Confidential Demurrage Agreement would be cancelled and/or terminated upon the failure of PCI to pay the accrued demurrage by March 8, 2004.
 - c. By correspondence dated April 20, 2004, FWWR's counsel gave notice that due to the intervening litigation, state court injunction, and removal to this Court on March 19, 2004, that the effective date of the cancellation and/or termination of the Agreement was March 20, 2004.
 - d. Effective March 20, 2004, FWWR is entitled as a matter of law to impose and collect demurrage charges from PCI pursuant to Tariff FWWR 8001-G.
 - e. All of PCI's claims, causes of action and requested relief concerning FWWR's demurrage charges, practices and rail services and procedures are completely preempted by federal law.
 - f. All of PCI's claims, causes of action and requested relief concerning FWWR's demurrage charges, practices and rail services and procedures fall within the exclusive jurisdiction of the Surface Transportation Board.
2. A Judgment awarding damages for PCI's breach and/or anticipatory repudiation of the Confidential Demurrage Agreement.
3. A Judgment declaring the amount of demurrage owed under the Tariff following PCI's breach.

4. A Judgment awarding attorneys' fees.
5. A Judgment awarding prejudgment and post-judgment interest as allowed by law.
6. A Judgment awarding costs of suit.
7. A Judgment awarding such other and further relief, both general and special, at law and in equity, to which FWWR may be justly entitled.

Dated 1st of July, 2004.

Respectfully submitted,



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**Attorneys for Defendant/Counter-Plaintiff
The Fort Worth & Western Railroad Company**

CERTIFICATE OF SERVICE

I hereby certify that in accordance with Rule 5 of the Federal Rules of Civil Procedure and Rule 21 of Texas Rules of Civil Procedure, a true and correct copy of the foregoing Defendant Fort Worth and Western Railroad Company's First Amended Answer and Counterclaim was forwarded via facsimile and regular mail to the following counsel of record this 1st day of July, 2004:

H. Allen Pennington, Jr.
Pennington, Hill & Baker, LLP
777 Taylor Street, Suite 890
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Russell Devenport