

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| CONSOLIDATED RAIL CORP., | : | CIVIL ACTION |
| Plaintiff | : | |
| | : | |
| v. | : | |
| | : | |
| FOSTER WHEELER ENVIRONMENTAL | : | |
| CORP., | : | |
| Defendant | : | NO. 99-1642 |

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| FOSTER WHEELER ENVIRONMENTAL | : | CIVIL ACTION |
| CORP., | : | |
| Plaintiff | : | |
| | : | |
| v. | : | |
| | : | |
| CONSOLIDATED RAIL CORP., | : | |
| Defendant | : | NO. 99-1682 |

Newcomer, S.J. September , 2000

This consolidated action pending before the Court is between Foster Wheeler Environmental Corporation ("FWENC") and Consolidated Rail Corporation ("Conrail") for events arising out of a soil remediation project whereby FWENC was the general contractor for the project and Conrail, an interstate rail carrier, played an essential role in the planning and delivery. At issue also is a Transportation Contract entered into by the parties in 1997.

FWENC brings tort and contract claims against Conrail, while Conrail brings claims for breach of contract against FWENC for damages incurred from numerous delays and events that allegedly resulted from the parties' respective actions during the remediation project and breaches of the Transportation Contract.

In accordance with Federal Rule of Civil Procedure 52, after a three day bench trial and upon consideration of the testimony of the witnesses, admitted exhibits, and arguments of counsel, as well as the parties' post-trial submissions, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. THE PARTIES AND JURISDICTION

1. Foster Wheeler Environmental Corporation is a Texas corporation with its principal place of business located at 8 Peachtree Road, Livingston, New Jersey 07039.

2. Consolidated Rail Corporation is a corporation which operates as an interstate rail carrier subject to the jurisdiction of the U.S. Surface Transportation Board, and governed by the provisions of the Interstate Commerce Act, 49 U.S.C. § 10101 et seq.

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332.

II. GENERAL MOTOR'S SOIL REMEDIATION PROJECT

4. In 1997, General Motors ("GM") sought bids for a soil remediation project (the "Project") in Clark, New Jersey at the Former Hyatt Clark Industries Site (the "Site") which was owned by GM. The Project consisted of delivering and stockpiling approximately 325,000 cubic yards of general fill soil material to GM's Plant in Clark, as well as the removal of approximately 23,000 cubic yards of existing asphalt, concrete pavement, and aggregate base material from the Site.

5. FWENC bid on the Project, and ultimately became the general contractor for the Project.

6. Conrail owned the main rail line running east/west past the Site, as well as the Spur Track Nos. 709 and 710 which extend onto GM's property, and the "Bloodgood Branch" which runs north/south along the western edge of the Site. Conrail had discussions with GM in March 1997 about GM's use of Conrail's property and Conrail's serving as the rail subcontractor on the Project.

7. Belvidere & Delaware River Railroad is a short line that connects with class one railroads and provides local service on lower density rail lines that class one railroads have deemed as uneconomical to operate. Initially, B&D was to upgrade or build a rail siding at Baer Aggregates in preparation for the transportation of the dirt out of Baer. Once the Project began, B&D was to pick up empty cars from Conrail that were interchanged at Hudson Yard in Phillipsburg, New Jersey, take them four miles

south on the Delaware River on the railroad, place the cars at Baer for loading, and then return the trains loaded with dirt to Conrail at Hudson Yard in Phillipsburg, New Jersey.

8. The fill for the project was provided by Baer Aggregates, a quarry and mining company located along the Belvidere and Delaware River Short Line. Baer is engaged in drilling and blasting mountains, and crushing stones down in order that they be used for asphalt and other types of concrete products.

A. GM'S "BIDDER'S SPECIFICATIONS"

9. In or about May 1997, GM distributed to prospective bidders, including FWENC, a document entitled "BIDDER'S SPECIFICATIONS" ("Specifications") concerning the Project. Conrail also received a copy of the Specifications.

10. Part 1.5.2 of the "SUMMARY OF WORK" attached to the Specifications directed potential contractors to coordinate their bids with Conrail.

11. Under part 1.5.2.1 of the Summary of Work, the Specifications noted that "[w]ork performed on [Conrail's] Bloodgood Branch, formerly Lehigh Valley Railroad, right-of-way, may require a 'Permit to Enter' and railroad protective liability insurance." Part 1.5.2.1 also instructed bidders that the "Contractor shall coordinate all requests for entry onto Control right-of-way with the Railroad's Chief Engineer[,]" Mr. Fran Giacoma.

12. Part 1.5.2.2 of the Summary of Work instructed that the "Contractor shall coordinate requests for rail transportation quotations" with the following Conrail personnel: Mr. Gerry McHugh, Ms. Karen Duffy, Mr. Ray Burke.

13. Part 1.5.2.3 of the Summary of Work further stated that:

All work related to the removal, relocation and rehabilitation of Spur Tracks No. 709 and No. 710 shall be coordinated with Conrail's Chief Engineer and the Owner. The Contractor shall not enter Conrail's right-of-way without the required Permit to Enter and railroad protective liability insurance. A "Permit to Enter" or railroad protective liability insurance will not be required for track removal, relocation and rehabilitation work performed within the Owner's property lines.

14. Under Part 2.1.1 of the Summary of Work, the Specifications required that the General Fill have a maximum particle size of six inches across the greatest dimension and be free from roots and unacceptable quantities of organic matter and free from trash, debris and frozen materials and stones larger than specified.

15. Attached as Exhibits to the Specifications were two drawings prepared by URS Greiner, GM's engineers for the Project. One drawing was entitled "Stockpile Plan" and the other was entitled "Existing Site Conditions".

16. The Existing Site Conditions drawing shows Conrail's Bloodgood Branch. The Stockpile Plan drawing includes a conceptual drawing of a rail extension and the track layout at the Site. The Stockpile Plan drawing proposed an extension of

Track No. 710 running south about 1000 feet to where the fill was to be placed.

17. The conceptual drawing in the Stockpile Plan was for bid purposes and was not an approved rail design at the time the Specifications were distributed to potential bidders, including FWENC.

III. FWENC'S BID FOR THE PROJECT

A. GM'S MAY 29, 1997 PRE-BID MEETING

18. On May 29, 1997, GM hosted a pre-bid meeting at the Site for the bidders of the Project to review the Specifications and walk the Site. Ms. Kerrin Duffy, manager of customer development and coordinator of the Project, attended on behalf of Conrail. Ms. Anne Marie Staskel, an estimator, and Mr. Kevin Wood, the project manager, attended on behalf of FWENC.

19. At the pre-bid meeting GM presented the Project, explained what was expected of the bidders, and ran through the scope of the work. In addition, Duffy was introduced to the bidders. She distributed her business card and told the bidders that if they had any questions they should contact her.

20. During the Site walk, the bidders were shown the Bloodgood Branch and the Main lines, as well as the areas where the stockpile was expected to be. Staskel testified at trial that the Site was "pretty straight forward."

21. At the meeting, FWENC and the other bidders were informed that the Stockpile Plan drawing of the track extension of approximately 1000 feet was purely for bid purposes and that

it was up to the contractors to speak with Conrail to determine the actual track locations and layouts and the number of footage that was required for the rail alternative. Kevin Wood understood at the pre-bid meeting that the drawing was not an approved rail design.

B. PREPARATION OF FWENC'S ESTIMATE AND AWARD OF THE CONTRACT

22. Within a few days of the May 29, 1997 pre-bid meeting, Staskel contacted Duffy and asked to speak to the person who could give her a quote. Duffy forwarded Staskel's call to Ray Burke.

23. Staskel testified at trial that she knew that Burke's job was to quote, and that Duffy "had told [her] that [Duffy] could coordinate internally what was necessary with the proper people, but that Ray would be providing the pricing."

24. Burke testified at trial that he was responsible for negotiating the rates related to the use of the rails for the Project. Ultimately, a price of \$565 per car was negotiated and inserted into the contract. Burke based the price on a 20 week project, utilizing 50 cars per day, 5 days per week.

25. Staskel informed Burke that FWENC intended to ship the fill to the site in 50 car trains, and keep half of the cars on the Bloodgood Branch while using the 1000 foot extension of Track No. 710 to unload the other 25 cars. The two trains would then be switched out.

26. Staskel testified that she did not ask Burke to approve of the plan to use the Bloodgood Branch and a 1000 foot rail extension, but that she asked him for a price for the plan. She admitted that Burke was telling her his price would work with the proposed scenario and that she never asked Burke to approve of that plan.

27. Kevin Wood testified that prior to submitting FWENC's final lump sum bid to GM, he understood and confirmed with Burke that "[Conrail] would bring in 50 cars from the Quarry, load [them] with fill material, they would park 25 on the site, they would park 25 on the Bloodgood Branch, they would allow [FWENC] to empty the 25 cars on the site and then they would make a switch and bring the 25 full ones in and bring the 25 empties out. [FWENC] would offload them, and all 50 empties would be sent back to the quarry at night to be refilled and resent down the next day."

28. Burke testified at trial that he did not have the authority to tell Wood and Staskel whether it would be permissible to run the Project by using Track No. 710 as extended by 1000 feet in connection with the Bloodgood Branch. Consequently, he did not tell them it would be permissible to use the extension and the Bloodgood Branch; rather, he related to Wood and Staskel that the quoted rate would be good if FWENC was to use the plan.

29. At no time prior to submitting its final bid to GM did Burke approve FWENC's use of the Bloodgood Branch or building of the 1000 foot extension.

30. Wood understood that any proposed track extension had to be approved by Conrail's Engineering Department. He also understood that Burke was not in the Engineering Department.

31. Kevin Wood and Tom Wollen agreed that Fran Giacomina, as Conrail's chief engineer, was the only one who could approve of any rail extensions.

32. Staskel admitted at trial that FWENC never got any confirmation in writing from anyone that the track extension that FWENC wanted to use was workable.

33. In addition, before FWENC's submission of its final bid to GM, neither Wood, Staskel, nor anyone else at FWENC, submitted any plans or drawings to Conrail and/or Conrail's Chief Engineer for approval of FWENC's planned rail extension at the Site. At no time prior to the submission of FWENC's final bid to GM did anyone at Conrail approve of FWENC's planned rail extension and/or operating plan for the Site.

34. FWENC never contacted Conrail's Chief Engineer prior to submitting its bid to GM.

35. FWENC submitted its final bid to GM on July 18, 1997. The bid specifically referenced the fact that Wood had spoken to Burke and received commitment that Conrail would provide FWENC with the service necessary to comply with GM's scheduled completion date.

36. Under the section entitled "Assumptions and Clarifications" attached to the bid, Wood listed the assumptions and the clarifications upon which he submitted the bid. Wood did not mention any assumption that 1000 feet of track would be sufficient or that FWENC could use the Bloodgood Branch. Nor did Wood include a date by which the track installation at the Site would be completed. Wood did include an assumption of the date by which the rail siding at Baer Aggregates would be completed, and based FWENC's bid accordingly.

37. On July 23, 1997, GM notified FWENC that it was the successful bidder. On July 30, 1997 GM issued a Purchase Order to FWENC for the work related to the Project.

C. COMMUNICATIONS BETWEEN FWENC AND CONRAIL AFTER FWENC WAS AWARDED THE PROJECT

1. THE JULY 24, 1997 LANGHORNE MEETING

38. On July 24, 1997, after GM had awarded the contract to FWENC, but before the contract with GM was signed, representatives of FWENC and Conrail met at FWENC's offices in Langhorne, Pennsylvania to discuss details regarding the plans of operation for the Project. Present at the meeting were Anne Marie Staskel, Kevin Wood, and Site Manager Tom Wollen from FWENC and Ray Burke and Wendell Engeliem, Burke's supervisor, from Conrail.

39. Tom Wollen testified at trial that the FWENC representatives placed the conceptual Stockpile Plan drawing of the rail extension on a table and asked Burke and Engeliem if the

drawing represented a doable scenario. They indicated to Burke and Engelian that they wished to use the Bloodgood Branch and the 1000 foot rail extension of Track No. 710.

40. At the meeting, Burke confirmed that the per-car price he quoted previously would be good whether the track extension at Clark was 1000 feet or 1500 feet. Burke did not advise FWENC that the 1000 foot track extension at the Site would be sufficient.

41. Notes taken by Wollen at the July 24, 1997 meeting state that "prior to meeting A. Staskel had received information from R. Burke that 1,000 feet would work." The very next line clarifies, however, that there was a discussion with K. Wood that "a few feet over 1,000 is doable from a cost standpoint."

42. Wollen's notes, in conjunction with Burke's own testimony, indicate that Burke was simply approving the scenario presented in the Stockpile Plan drawing from a cost standpoint and not with regards to feasibility of the scenario.

2. THE AUGUST 4, 1997 SITE MEETING

43. On August 4, 1997, pursuant to Burke's recommendation, Wollen met at the Site with George Kuyper of Conrail's Transportation Department. Tony Glennon, a railroad contractor, and Kerrin Duffy also attended the meeting.

44. Wollen wanted to meet with all the parties that were going to be involved in the installation or construction of any structures so that they could get together, see the area, and see if they could define the constructability of the rail.

45. Similar to the July 24, 1997 meeting, Wollen showed Kuyper the Stockpile Plan drawing and asked Kuyper for his opinion about the 1000 foot rail extension.

46. In a very definitive fashion, Kuyper said the 1000 foot rail extension could not be done. Specifically, he said that there was no way that the Bloodgood Branch could be fed directly into the Site and that cars could not be shuffled from the Bloodgood Branch over to the proposed 1000 foot rail extension.

47. As of this meeting, FWENC still had not contacted or attempted to coordinate rail extension plans with Conrail's Chief Engineer, Mr. Fran Giacoma, as required by the Specifications. Giacoma did not receive any plans from FWENC until August 21, 1997, when FWENC's railroad construction subcontractor, T. Glennon Company submitted its plans for a rail extension at the Site.

D. TRACK CONSTRUCTION AT THE SITE

48. As a result of learning that the Stockpile Plan drawing scenario was not feasible, FWENC was required to construct a new rail loop at the site instead of simply adding an extension to existing Track No. 710 as they had expected.

49. FWENC's original rail design submitted to GM for approval was rejected by GM because it impacted protected wetlands areas. A subsequent design was rejected by GM because it impacted contaminated soil at GM's plant.

50. After the bid had been presented to GM, there had been several track designs that were "floating about." Among them was a 3000 foot track design, which FWENC presented to Conrail after the bid was awarded. Conrail and its engineers looked at the design and said it would work, but also that they would rather have a loop design.

51. Upon review of the design for the 3000 foot track extension, Ray Burke wrote to Tom Wollen that Conrail was willing to participate in the rail extension project in the amount of \$69,143.20. That figure was based on the following information: (1) a total of 4732 feet of track; (2) the original 3000 feet of track required; (3) the 1732 feet of excess track required due to the Conrail transportation department's requirement; (4) an installation cost of \$91,103.20; (5) scrap value of track, ties, etc. of \$60,000.00; and (6) the total costs apportioned to Conrail at 36.6 percent.

52. The new track involved substantial excavation work through existing trees and woods. While the 1000 foot extension could have been laid in two weeks, the new track took two months to construct. Without the construction of the new track, FWENC could have begun deliveries by August 24, 1997. Instead, however, the first shipments of dirt took place on or about October 2, 1997.

53. Design, approval, and construction of the new rail alignment increased FWENC's costs significantly and also delayed

FWENC at least 40 calendar days in commencing its work on the Project.

IV. THE TRANSPORTATION CONTRACT BETWEEN FWENC AND CONRAIL

A. FWENC'S CREDIT APPLICATION WITH CONRAIL

54. After FWENC was awarded the contract for the Project with GM, it began to negotiate a Transportation Contract with Conrail.

55. On or about July 25, 1997, FWENC was advised that if it wanted to pay Conrail on a credit basis for work performed, it would need to complete an application for credit with Conrail.

56. On or about July 25, 1997, Joseph Tamasitis of FWENC completed a Freight Transportation Credit Application and submitted it to Daniel Lang, Conrail's credit manager.

57. The credit application states that payments must be received within 15 days of the date of the invoice. This credit application was signed by Tamasitis.

58. Subsequent to the submission of the credit application, Conrail performed a credit check on FWENC to determine FWENC's creditworthiness.

59. Conrail determined that in order to provide credit privileges to FWENC, Conrail would require \$50,000 guaranty from FWENC's parent company. On or about August 7, 1997, Conrail demanded a \$50,000 parent guaranty from FWENC's parent company.

60. On or about August 29, 1997, FWENC delivered a written guaranty to Conrail for the purpose of establishing credit privileges with Conrail. On or about September 19, 1997, Conrail approved FWENC's credit application. At that time, Conrail informed FWENC that in order to retain the credit

accommodation, payment must be received within 15 days of the date of invoice.

B. TERMS OF THE TRANSPORTATION CONTRACT

61. On September 22, 1997, FWENC and Conrail entered into the Transportation Contract at issue in this case.

62. In the Transportation Contract, the parties agreed that shipments must move in 50 car trains. The parties also agreed in the Contract that FWENC was permitted to ship 25 car trains while track construction at the Site was in progress during October 1997.

63. Both FWENC and Conrail witnesses testified at trial that the Transportation Contract was based on shipping 50 car trains, 5 days a week.

64. The parties agreed in the Contract that "no change or modification to this Contract shall be of any force or effect unless it is incorporated in a written amendment executed by the parties."

65. The Contract further required that payment of \$565.00 per car for Conrail's services be made in accordance with Conrail's general credit policy - that is, requirement of bill payment within 15 days of the invoice.

66. The Contract required that in order for a party to claim a disability due to Act of God and/or severe weather, the party experiencing the alleged disability was required to provide notice within 10 days of the start of the alleged disability.

67. The Contract also stated that if either party failed to correct a default within 30 days after written notice to do so, the party serving such notice could unilaterally terminate the Contract.

68. Paragraph 1 of the Transportation Contract contains a choice of law provision stating that Pennsylvania law applies to this Contract.

V. DELAYS TO THE PROJECT AND ALLEGED BREACHES OF THE TRANSPORTATION CONTRACT

69. The first shipments of dirt took place on or about October 2, 1997.

70. Based on the schedule established in the Transportation Contract, and using a start date of October 2, 1997, the Project was scheduled to be completed on or about February 28, 1998.

71. The actual complete date of the Project was September 23, 1998.

A. REQUIREMENT OF 50 CAR TRAIN SHIPMENTS

72. During October 1997, the Project ran smoothly at the 25 car train rate as provided for in the Contract.

73. Although it was required by the Transportation Contract to ship in 50 car trains, FWENC was able to fill a 50 car train only once after October 1997 and before May 28, 1998.

74. Notwithstanding the fact that FWENC was required to ship 50 car trains, 5 days per week pursuant to the Transportation Contract, FWENC failed to enter into a similar

contract with its dirt supplier Baer Aggregates requiring Baer to load 50 rail cars per day.

75. Baer Aggregates could only produce enough dirt to load about 40 cars per day on a consistent basis; therefore, FWENC was unable to load and unload 50 cars per day on a consistent basis.

76. At some point during the Project, Ray Burke expressed some concerns to Kevin Wood about the fact that the Project was not moving at 50 cars a day. Specifically, Burke complained to Wood that he had priced the Project predicated on a 50 car project - on moving 50 cars a day, five days a week - and that the failure to move 50 cars was costing him additional costs.

77. Kean Burenga, owner of Belvidere & Delaware River Railroad, also complained to Ray Burke about the increased costs of the project as a result of the failure to reach 50 cars per day.

78. Belvidere suggested that there be consistent number of cars 5 days a week, rather than having high number of cars early in the week and less towards the end of the week.

79. In December 1997, Burenga agreed with Ray Burke and Wendell Engelen to move 46 or 47 car trains, rather than 50 car trains, in exchange for an extra \$10 per car settlement. Burenga confirmed this agreement in his letter to Burke dated May 27, 1998, wherein he also noted that Belvidere was losing approximately \$800 on out-of-pocket expenses on 20 car trains.

80. Burke testified that he never told anyone at FWENC that Conrail was not enforcing the 50 car mandatory requirement in the Transportation Contract.

81. By enforcement, Burke meant that Conrail would not move a train unless 50 cars were loaded, and if that meant that the trains stayed until the next day, that was how Conrail was going to do it.

82. In order to keep the Project moving, however, Conrail permitted trains with less than 50 cars to be moved.

83. Conrail never enforced the 50 car requirement until the last 10 shipments of the Project, after August 28, 1998.

84. After August 28, 1998, Conrail agreed to transport 50 car trains every other day until the job was completed. Baer was able to produce dirt to fill those 50 cars every other day.

85. After the initial period in October when the parties agreed to ship 25 car trains, Conrail permitted virtually all but the last 10 shipments to be conducted with less than 50 car trains.

B. REASONS FOR THE DELAYS DURING THE PROJECT

86. The delays in production on the part of FWENC were due to the following factors, each of which was within the sole control and responsibility of FWENC and/or its subcontractors:

(1) rocks larger than 6 inches in diameter contained in the dirt supplied by Baer, which led to delays in loading the railcars at Baer due to screening requirements implemented by FWENC at Baer;

- (2) insufficient workforce and equipment at the Baer facilities;
- (3) improper offloading and stockpiling of the dirt at the Site.

1. SCREENING BY BAER ASSOCIATES SLOWED PRODUCTION

87. Although the Specifications specifically instructed that rocks in the dirt were to be less than six inches in diameter, Louis Mitschele, owner of Baer Associates, was told by FWENC that occasional rocks greater than six inches were acceptable.

88. In addition, Mitschele was told at the beginning of the Project by FWENC that Baer would not be required to screen the dirt. Screening would have incurred a lot of additional labor on Baer's part.

89. In November 1997, GM representatives on site began to complain about the amount of rock in the dirt that was greater than six inches.

90. Beginning December 1, 1997, Baer was required by FWENC to screen the dirt before loading it into the railcars. The screening slowed the production of dirt significantly.

91. Consequently, there was a significant decrease in the number of cars that Baer was able to load. Because of the screening and the burden on production, Baer was never able to load 50 car trains consistently.

92. Mitschele testified that had the dirt been pre-screened, Baer could have loaded 50 cars per day, even on rainy days.

93. Kean Burenga testified at trial that it was not the railroad's inability, but the fact that production (dirt coming off the mountain, getting stockpiled, and loaded in the railcars) was never up to filling 250 cars a week or 50 cars a day throughout the project.

94. Burenga also testified that there was a meeting sometime in the middle of December at FWENC's offices in Langhorne, where FWENC represented that production problems would be corrected after the holidays. After the holidays, however, production did not reach 50 cars per day.

**2. WEATHER WAS NOT A FACTOR IN THE DELAYS;
RATHER INSUFFICIENT EQUIPMENT AND PERSONNEL
CAUSED DELAYS IN THE PROJECT**

95. FWENC never sent written notice to Conrail claiming any disability due to Act of God and/or severe weather. Thus FWENC never formally claimed Act of God and/or severe weather as reasons for delay or shutdown during the Project.

96. The weather experienced during the course of the Project was not severe and did not cause FWENC any disability as defined in the Transportation Contract.

97. Mitschele testified that even with the rainy winter season, if the dirt had been pre-screened and FWENC had provided additional equipment and manpower, he could have loaded 50 cars per day throughout the Transportation Contract.

98. Initially, after the screening requirement was implemented, Baer was loading about 20 cars a day with the use of just one screen. After FWENC provided a second screen,

production was slowly increased until Baer was loading 40 cars a day. Baer was comfortable with loading 40 cars a day.

99. Kevin Wood testified that at some point in time he added additional personnel because the Project could not meet the 50 car requirement.

3. FWENC'S SHUTDOWN OF THE PROJECT

100. It was FWENC's responsibility to maintain the dirt pile at the Site. Dirt had been dumped right next to the rail and was forming a mound, which was causing problems.

101. On or about February 28, 1998, FWENC shut the Project down for a period of approximately 3 weeks in order to move the dirt away from the rail and reorganize the dirt stockpile at the Site.

102. On March 19, 1998, Curt DeWolf wrote a letter to Ray Burke indicating that FWENC could continue deliveries of fill material on March 23, 1998. DeWolf also indicated that FWENC would begin with 40 cars per day with the intent to increase the car quantity to 46 per day.

103. Conrail was in agreement with DeWolf's plan to resume shipments on March 23, 1998 with 40 car deliveries per day for the first week, and an increase in production to 46 cars per day (beginning March 30, 1998) until completion of the Project.

4. CONRAIL'S DELAY IN PROVIDING RAILCARS

104. Subsequent to the 3 week shutdown, Conrail was unable to provide at least 40 railcars.

105. During FWENC's three week shutdown, Conrail dedicated railcars into service elsewhere because there was so much demand for the cars.

106. Conrail took railcars out of the FWENC Project and into two other projects: a major pig iron project coming out of New York, Newark, New Jersey, and a major slab project coming out of Philadelphia.

107. During the pig iron project, pig iron became imbedded in the dirt that remained in the railcars from the FWENC Project. When FWENC was ready to begin the Project again on March 23, 1998 after the shutdown, there was pig iron still remaining in the railcars. As a result, significant time was spent cleaning the cars. This caused a delay in the return of the cars to the Project.

108. With respect to the reassignment of cars to the scrap projects, Wendell Engelian noted in an internal Conrail email dated March 23, 1998 that "[o]bviously, in retrospect [Conrail] should have left the gondolas at Phillipsburg[,] NJ for the three week shutdown."

109. On March 26, 1998, Joseph Waldo responded to Engelian indicating that it was "not 'obvious' that the cars should have sat idle at Clark[,] NJ." In addition, Waldo found that the major cause of delay in returning the cars to FWENC was that many of them had excessive dirt and severe damage to safety devices. Waldo further stated in the email that it had "been determined that the handling of the gons by Foster-Wheeler (i.e.,

scrapping the sides of the gons by front end loaders and 3-5 inch coating of dirt on safety devices were serious mechanical issues. . . . It is 'obvious' that there are some legitimate concerns on the loading/unloading of this equipment in dirt service."

110. Engeliien wrote back in another email dated March 27, 1998 that "in 'retrospect', it was 'obvious' that the cars should not have been reassigned. Anyone can tell that. We gambled and it didn't payoff. . . . One cannot help but expect some dirt on cars hauling dirt and the decision to go for a load of scrap was made quickly, not allowing for what should have been a proper cleanup of the cars by Foster Wheeler."

111. Ray Burke wrote an email dated April 15, 1998 to Curt DeWolf that there would not be any financial liability to FWENC for cleaning the scrap steel from the cars. However, Burke indicated that "any delay in the restart of the project must be contributed to the fact that the cars were not properly cleaned and maintained by Foster Wheeler at the Clark, NJ site." Burke also mentioned in his letter that Conrail remained committed to providing 46 car trains as soon as Baer was able to load 40 cars, 5 days a week.

112. From March 23 through March 26, 1998, FWENC was able to load only 18, 27, and 20 railcars, respectively. It was not until March 27, 1998 that FWENC was able to load 40 cars again.

113. For the period beginning March 31, 2000 through May 28, 2000, FWENC was fairly consistent in maintaining 40 car loads per day.

5. CONRAIL SUSPENDS FWENC'S CREDIT

114. Throughout the course of the Project, FWENC failed to comply with the payment requirements under Conrail's Credit Policy by failing to pay within 15 days of the payment invoices.

115. Tom Wollen took care of bills for FWENC as they came across his desk. Wollen did not sit on the bills, but paid the bills pretty much when they came across his desk. For the most part, he passed them through rather quickly. Regardless, FWENC was never able to pay their freight bills within 15 days.

116. As of December 4, 1997, FWENC was delinquent in its payments to Conrail in the amount of \$227,000.

117. On or about December 4, 1997, Daniel Lang sent a letter to Kevin Wood demanding payment of all overdue invoices. The letter noted that it was imperative that FWENC's past due amount be eliminated and that FWENC's payment cycle be brought in line with the credit period of 15 days.

118. The letter also explained that failure to become current on the invoices would result in the suspension of FWENC's credit with Conrail and that in the event FWENC's credit was suspended, Conrail would require payment in advance for all future shipments.

119. The letter further advised that in the future, FWENC would not receive notice of suspension and that any

delinquency in FWENC's account would result in immediate suspension of credit.

120. Kathryn Maxie, manager of collections at Conrail, testified at trial that after the December 4, 1997 notice was sent to Wood, FWENC's payment cycles improved and it was not necessary for Conrail to enforce the credit suspension at that time.

121. Maxie also testified that she believed FWENC's payments started coming to offset the overdue amounts, but the pattern of becoming delinquent continued. After a certain period of time, the delinquency increased dramatically.

122. In March 1998, FWENC began to withhold ten percent retainage from Conrail's invoices. Maxie became aware of the retainage in late April. According to Maxie, FWENC was enforcing some type of internal discount, or reduction, in the amount that they would pay on Conrail's bills. Until that point in time, FWENC had never withheld any retainage on any payments.

123. Maxie testified that usually if a customer short paid a bill, they would give a dispute. FWENC did not raise any valid disputes; rather FWENC called its withholdings a retainage fee. The Transportation Contract did not provide for any such retainage.

124. By May 1998, Conrail's collection department was frequently contacting FWENC in an attempt to collect overdue and outstanding payments. These contacts included numerous telephone calls to FWENC in an attempt to collect the overdue amounts.

125. By May 18, 1998, FWENC's overdue balance totaled \$298,000 for those bills due beyond the 15 day credit period.

126. On May 21, 1998, Conrail contacted Tom Wollen via telephone about the overdue balance and informed him that FWENC's account was seriously delinquent and that their credit privileges were in jeopardy of being suspended. Wollen was told that FWENC could be placed on credit suspension by the end of the day.

127. On May 28, 1998, Conrail contacted Wollen again, advising him of the possibility of a credit suspension if FWENC did not clear up the unpaid balance that was reaching \$370,000.

128. Again on June 2, 1997, FWENC was informed that its credit would be suspended if it did not pay the past due amounts.

129. On the morning of June 3, 1998 Dan Lang sent a letter to FWENC indicating that FWENC's past due amount had grown to over \$382,885 and that it was unacceptable. The letter stated that if Conrail did not have a firm commitment by the end of that day from FWENC to liquidate the past due amount quickly, Conrail would have no choice but to suspend FWENC's credit accommodation with Conrail, which would then require payment in advance for future shipments.

130. On June 3, 1998, Curt DeWolf, superintendent and successor to Kevin Wood as project manager for FWENC, told Lang that Lang needed to give him some time to investigate and try to resolve the problem.

131. Conrail received no payments from FWENC on June 3, 1998.

132. In the afternoon of June 3, 1998, Dan Lang sent a second letter to FWENC advising FWENC that its credit was suspended and that all future shipments would require payment in advance. The letter stated that to restore the 15 day payment term of the Transportation Contract, all outstanding charges in the account had to be paid or disputed and the guarantee from FWENC's parent company had to be increased from \$50,000 to \$500,000.

133. Conrail did not provide cars for the shipment of fill on next day, June 4, 1998. At that time there were 12 shipments of 50 car trains remaining.

134. In a letter dated June 9, 1998, Jonathan M. Broder, Associate General Counsel for Conrail, wrote to Nada Wolff Culver, Procurement Counsel for FWENC, to outline Conrail's position as to the credit suspension and work stoppage. Broder notes in his letter that "Conrail has not terminated the contract, but, pursuant to appropriate legal and contract authority, suspended shipments pending payment. Conrail has not sought to terminate the contract under Article 12 at this time."

6. FWENC SHUTS DOWN PROJECT FOR THREE MONTHS

135. After the credit suspension, FWENC was required to pay on a C.O.D. (cash on delivery) basis for the remaining shipments.

136. Ray Burke testified that Conrail was able and willing to ship at any time and that all FWENC had to do was pay up front. However, FWENC refused to pay on a C.O.D. basis.

137. On June 26, 1998, FWENC agreed with Conrail to pay for the remaining shipments on a C.O.D. basis. In order to pay on a C.O.D. basis, money had to be wire transferred from FWENC to Conrail the previous day for the following day's train.

138. On June 29, 1998, Tom Wollen wrote a fax to Kean Burenga stating: "Presently loading and delivery of rail cars are on hold pending final approvals of COD process."

139. Notwithstanding its June 26, 1998 agreement with Conrail, FWENC did not commence C.O.D. shipments until August 28, 1998.

140. During the Project shutdown, Conrail decided to put part of the fleet of railcars into revenue service and sent the cars out to other projects. Conrail advised FWENC, on or about July 10, 1998, that it would rededicate a number of the gondola cars to other revenue producing projects if FWENC did not load any cars by July 17, 1998.

141. On July 17, 1998, FWENC wrote to Conrail stating that FWENC and GM had not reached a resolution regarding FWENC's payment on a C.O.D. basis.

142. Once the C.O.D. situation was squared away, and shipments were to resume after the credit dispute, DeWolf wrote a letter to Ray stating that FWENC wanted to restart deliveries, wanting to resume at 50 cars a day, five days a week. FWENC requested that Conrail provide the cars beginning August 28, 1998.

143. Burke responded via letter saying that Conrail would not supply 50 cars a day, five days a week. They would only supply 50 cars, three days a week Monday, Wednesday, and Friday.

144. In a note to Wendell Engelian dated August 13, 1998, Burke makes reference to Kean Burenga to confirm that there is enough dirt to maintain a 50 car train everyday for the suggested time frame. Burke points out that "[i]f Baer does not have enough dirt to maintain loading everyday, I suggest we run the train every other day. If Baer does have enough dirt on hand, we need to decide if we want to try and run the train everyday. Of course, the every day scenario would be based upon car availability."

VI. DAMAGES

145. The unpaid invoices due and owing to Conrail for services rendered and pursuant to the Transportation Contract totals \$480,985.50.

146. Although the Transportation Contract did not specify the provision of any switch crew, Conrail took into account billing FWENC an extra \$15 per car (from \$550 to \$565) for providing a switch crew dedicated to the Project. Conrail did not provide a switch crew except on rare occasions.

147. In an email dated February 12, 1998, Ray Burke wrote to Tom Wollen that the price of \$550 plus \$15 per car was based on running a 50 car train with a switch crew.

148. Burke further indicated that Conrail's costs based on a 40 car train reflected a \$37 increase per car - amounting to a cost of \$587. Burke recommended in the email that "since the contract is based upon 50 car trains that we leave the rate where it is and consider it a wash."

149. During the period between February 28, 1998 and September 23, 1998 there was a significant need for gondola cars in other revenue producing projects at Conrail.

150. Had the cars been available for other revenue service at this time period, Conrail would have used the cars in either pig iron service or slab service.

151. Slab service at that time was earning revenues of approximately \$96 per car per day. Pig iron service at that time was earning revenues of approximately \$55 per car per day.

152. Conrail dedicated the following number of gondolas to the Project:

| | |
|-----------------|--------------|
| •August 1997 | 114 gondolas |
| •September 1997 | 121 gondolas |
| •October 1997 | 111 gondolas |
| •November 1997 | 114 gondolas |
| •December 1997 | 113 gondolas |
| •January 1997 | 117 gondolas |
| •February 1997 | 117 gondolas |
| •March 1997 | 117 gondolas |
| •April 1997 | 121 gondolas |
| •May 1997 | 121 gondolas |
| •June 1997 | 116 gondolas |
| •July 1997 | 99 gondolas |
| •August 1997 | 49 gondolas |
| •September 1997 | 92 gondolas |

CONCLUSIONS OF LAW

I. FWENC'S TORT CLAIMS AGAINST CONRAIL

A. RESTATEMENT (SECOND) OF TORTS § 552

1. Restatement (Second) of Torts § 552 is entitled "Information Negligently Supplied for the Guidance of Others." In order to recover on a claim brought under Section 552, FWENC must prove the following by a preponderance of the evidence: (1) a party who, in the course of his business, profession, or employment, or in any other transaction in which that party has a pecuniary interest, (2) supplies false information, (3) for the guidance of others in their business transaction, (4) is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information if (5) the party failed to exercise reasonable care or competence in obtaining or communicating the information. Section 552 also implicitly requires the existence of "elements of duty, breach of duty and damages." See J.E. Mamiye & Sons, Inc., 813 F.2d at 615.

2. Pennsylvania has adopted this Restatement section as the elements for the tort of negligent misrepresentation. See J.E. Mamiye & Sons, Inc. v. Fidelity Bank, 813 F.2d 610, 615 (3d Cir. 1987); Rempel v. Nationwide Life Ins. Co., 370 A.2d 366 (1977).

3. FWENC brings a claim of negligent misrepresentation against Conrail, arguing that Ray Burke supplied false information to FWENC when he represented, on Conrail's behalf, that FWENC's plan of operation for the GM Project to use the Bloodgood Branch and a 1000 foot track

extension of Track No. 710 would be feasible and sufficient. In addition, FWENC contends that it justifiably relied on Burke's representations in preparing and submitting its bid to GM, and it incurred substantial extra costs when the plan was subsequently deemed unworkable.

4. FWENC, however, failed to prove by a preponderance of the evidence that Ray Burke or Conrail made any misrepresentations upon which FWENC justifiably relied when submitting its bid to GM.

5. Ray Burke never promised FWENC that their plan for the 1000 foot extension would be feasible or sufficient.

6. Ray Burke never promised that FWENC could use the Bloodgood Branch for the Project.

7. Furthermore, even if FWENC had shown that Ray Burke made representations upon which it relied, FWENC did not prove that its reliance upon those representations was justifiable and/or reasonable.

8. FWENC was instructed in Section 1.5.2.1 of the Bid Specifications that all requests for entry onto the Bloodgood Branch would have to be coordinated with Conrail's Chief Engineer, Fran Giacoma.

9. FWENC was also instructed in Section 1.5.2.2 of the Specifications that all work related to the removal, relocation and rehabilitation of Track No. 710 would have to be coordinated with Conrail's Chief Engineer.

10. This Court finds that before submitting its bid to GM, FWENC never coordinated or even discussed with Conrail's Chief Engineer, as outlined by the Specifications, its plans to use or enter Conrail's Bloodgood Branch, or extend or rehabilitate Track No. 710. FWENC also never sought approval from anyone else at Conrail concerning its use of the Bloodgood Branch or the 1000 foot track extension.

11. FWENC was also informed by the Specifications that Burke's responsibility was to coordinate rail transportation quotations. Moreover, Kerrin Duffy alerted Anne Marie Staskel that while Duffy would coordinate internally what was necessary with the proper people, Burke would be providing the pricing.

12. Kevin Wood and Tom Wollen knew that any proposed track extension had to be approved by Conrail's Engineering Department, that Burke was not in the Engineering Department, and that Fran Giacom, as Conrail's chief engineer, was the only one who could approve of any rail extensions.

13. The Court finds that in light of the instructions laid out in the Specifications as well as the understanding of Wood and Wollen, any reliance upon representations made by Ray Burke with respect to the use of the Bloodgood Branch and the 1000 foot track extension was not justifiable and/or reasonable.

14. Therefore, the Court determines that FWENC has not proven the elements of negligent misrepresentation and cannot recover on its claim brought under Restatement (Second) of Torts § 552.

B. PROMISSORY ESTOPPEL

15. FWENC alternatively seeks recovery under the doctrine of promissory estoppel, claiming that Conrail assured FWENC, for purposes of its bid, that the Project could be serviced with a 1000 foot extension of Track No. 710 and cars could be stored on the Bloodgood Branch, when in fact a full loop track had to be constructed and Conrail had mistakenly informed FWENC that the Bloodgood Branch was available for car storage.

16. A party seeking to establish a cause of action based on promissory estoppel must establish that: "(1) the promisor made a promise that he should have reasonably expected would induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise." Shoemaker v. Commonwealth Bank, 700 A.2d 1003, 1006 (Pa. Super. 1997).

17. Several federal courts applying Pennsylvania law have held that the appropriate burden of proof for a plaintiff's promissory estoppel claim is clear and convincing evidence. See, e.g., Jersey Const., Inc. v. Pennoni Assoc., Inc., CIV.A. No. 91-7331, 1993 WL 29999 (E.D.Pa. Feb. 4, 1993), aff'd, 8 F.3d 811 (3d Cir. 1993); Josephs v. Pizza Hut of America, Inc., 733 F.Supp. 222, 223-24 (W.D.Pa. 1989), aff'd, 899 F.2d 1217 (3d Cir. 1990). This Court will also adopt the clear and convincing standard of proof for the promissory estoppel claim.

18. The Court finds that FWENC has failed to prove by clear and convincing evidence that Conrail made a promise that Conrail should have reasonably expected would induce action or forbearance on the part of FWENC.

19. Conrail did not make any assurances to FWENC regarding the feasibility of FWENC's plan to use a 1000 foot track extension of Track No. 710 or store railcars on the Bloodgood Branch. At most, Ray Burke, speaking from a cost standpoint, assured FWENC that his pricing of the Project would not be affected if FWENC were to use the Bloodgood Branch and 1000 foot extension. However, Burke did not give any approval or indication that FWENC's plans were feasible or physically possible.

20. Consequently, the Court determines that FWENC did not actually take action or refrain from taking action in reliance on any of Conrail's representations.

21. Therefore, the Court finds that FWENC has not proven the elements for promissory estoppel and is not entitled to recover under said claim.

II. BREACH OF TRANSPORTATION CONTRACT

22. Pursuant to the choice of law provision in Paragraph 1 of the Transportation Contract, Pennsylvania law applies to the Contract.

23. To make out a cause of action for breach of contract in Pennsylvania, four elements must be proven: (1) the existence of a contract to which plaintiff and defendant were

parties; (2) the essential terms of the contract; (3) a breach of a duty imposed by the contract; and (4) that damages resulted from the breach. Caplan v. Fellheimer, Eichen, Braverman & Kaskey, 5 F.Supp.2d 299, 303 (E.D.Pa. 1998).

24. Conrail and FWENC are parties to the Transportation Contract executed on or about September 22, 1997.

25. The Contract contained the following essential terms:

1) All trains were to be shipped in 50-car loads five days per week.

2) The rate charged for Conrail's services per carload was \$565.

3) Conrail was to be paid pursuant to Conrail's general credit policy within 15 days of the date of the invoice.

4) If a party was experiencing a disability due to Act of God and/or severe weather, the party was to send written notice within ten days of the start of the disability.

A. FWENC'S BREACHES OF THE TRANSPORTATION CONTRACT

26. Conrail argues that FWENC breached the Transportation Contract by failing to pay Conrail's invoices for services rendered under and pursuant to the Contract.

Specifically, Conrail claims that: (1) Conrail sustained damages as a result of FWENC's breach in the amount of the unpaid invoices for work performed under and pursuant to the Transportation Contract in the amount of \$480,985.50; (2) FWENC breached the Contract by failing to load 50 railcars per day, 5

days per week as provided for in the Contract, and as a consequence of FWENC's breach, Conrail lost the opportunity to earn revenue on the gondolas dedicated to the FWENC/GM Project for the period between February 28, 1998 and September 23, 1998.

1. FWENC'S UNPAID INVOICES

27. FWENC has failed to pay Conrail \$480,985.50 for invoices covering work performed under and pursuant to the Transportation Contract. The Court finds that said money is due and owing to Conrail.

2. CONRAIL WAIVED ITS RIGHT TO ENFORCE THE 50 CAR TRAIN AND 5 SHIPMENTS A WEEK REQUIREMENTS

28. A waiver may occur when the promisor manifests an intent not to require a promisee to strictly comply with a contractual duty. Moore's Trucking Co. v. National Starch & Chemical, CIV.A. No. 93-4750, 1994 WL 741081, *3 (Sept. 27, 1994 D.N.J.).

29. Under Pennsylvania law, waiver of a contract may be shown by acts and declarations of the parties. See Portland Lumber Co. v. Kiehl, 38 A. 998 (1898). The burden is upon the one alleging the waiver, to show the sufficiency of the acts and declarations. Id.

30. "It is well settled that waiver may be established by conduct inconsistent with claiming the waived right or any action or failure to act evincing an intent not to claim the right." Evvco Leasing Corp. v. Ace Trucking Co., 828 F.2d 188, 195 (3d Cir. 1987). This is in accord with the law of other

jurisdictions. See, e.g., Nat'l Westminster Bank, U.S.A. v. Yaeger, 130 B.R. 656, 675 (S.D.N.Y. 1991), aff'd, 962 F.2d 1 (2d Cir. 1992) ("It is well-established that where a party to an agreement has actual knowledge of another party's breach and continues to perform under and accepts the benefits of the contract, such continuing performance constitutes waiver of the breach."); Lone Mountain Prod. Co. v. Natural Gas Pipeline Co. of America, 710 F.Supp. 305, 311 (D.Utah 1989) ("The applicability of waiver depends on the intent of the non-breaching party. If he has intentionally relinquished a known right, either expressly or by conduct inconsistent with an intent to enforce that right, he has waived it and may not thereafter seek judicial enforcement.") (citing Saverslak v. Davis-Cleaver Produce Co., 606 F.2d 208, 213 (7th Cir. 1979), cert. denied, 444 U.S. 1078 (1980)).

31. In addition, while silence itself is an insufficient basis for finding that a party has waived, absent an obligation to speak, "waiver may be inferred from silence or acquiescence as from other conduct or inaction." Evvco Leasing Corp., 828 F.2d at 196 (citing Midwest Maintenance & Constr. Co. v. Vela, 621 F.2d 1046, 1048 (10th Cir. 1980); Minnesota Min. & Mfg. Co. v. Kirkevold, 87 F.R.D. 324, 335 (D.Minn. 1980)).

32. When the original written contract contains an express provision that it constituted the entire contract between the parties and should not be modified except in writing, the plaintiffs have the burden of proving a subsequent change in the

agreement by clear, precise, and indubitable evidence, as in cases where fraud, accident, or mistake is alleged. Koeune, et al. v. State Bank of Schuylkill Haven, et al., 4 A.2d 234, 237 (1939).

33. Although the Transportation Contract required that shipments be made in 50 car trainloads, 5 days per week, virtually none of the shipments in fact were taken in 50 car trains until the last 9 shipments, which were made after a 3 month shutdown of the Project (June 4, 1998 through August 27, 1998).

34. The inability to ship 50 car trains was due to a production problem that was ultimately FWENC's responsibility. FWENC and its subcontractors were unable to produce 50 cars' worth of fill material 5 days a week. FWENC failed to provide the necessary equipment, personnel, and maintenance of the Project to fill 50 car trains, 5 days a week.

35. However, although Conrail had the right to enforce the 50 car train requirement set forth in the Contract, the Court finds that none of Conrail's actions prior to the 3 month shutdown (during the period of August 28, 1998 through September 23, 1998) constituted an enforcement of, or even a threat to enforce, its right to insist on shipments of 50 car trains.

36. Instead, Conrail permitted FWENC to ship less than 50 cars for nearly the duration of the entire Project. Evidence such as Ray Burke's letter of April 15, 1998 to Curt DeWolf as well as Conrail's agreement with Belvidere to ship less than 50

car trains indicate Conrail's intention to accept FWENC's shipping less than 50 cars, 5 days a week.

37. This Court concludes that the evidence is clear, precise, and indubitable that Conrail manifested through its actions an intent not to require FWENC to strictly comply with the Contract provision requiring shipments in 50 car trains, 5 days a week.

38. Conrail's conduct was clearly inconsistent with claiming its right to insist on shipments of 50 car trains, 5 days a week. Consequently, Conrail's failure, before August 28, 1998 and the 3 month shutdown, to enforce or evince an intent to claim its right to enforce the 50 car requirement constituted a waiver of said right.

39. Accordingly, Conrail is precluded from now seeking judicial enforcement and bringing a claim for breach of contract based on FWENC's failure to ship 50 cars per day, 5 days per week before August 28, 1998.

B. CONRAIL'S BREACHES OF THE TRANSPORTATION CONTRACT

40. FWENC claims that Conrail is liable for breach of the Transportation Contract because of: (1) Conrail's work stoppage delay; (2) Conrail's failure to supply sufficient rail cars between March 22, 1998 to April 4, 1998; (3) Conrail's failure to provide cars 5 days per week between August 30, 1998 and September 24, 1998; and (4) Conrail's failure to provide a switch crew.

**1. CONRAIL'S WORK STOPPAGE DELAY WAS NOT A
BREACH OF THE TRANSPORTATION CONTRACT**

41. FWENC argues that Conrail was obligated to provide FWENC with 30 days written notice of its intention to suspend service if payments were not made within 15 days of the mailing of a freight bill and thus was not justified in giving only one day's written notice that it was suspending service.

42. The Transportation Contract required 30 days notice of default, and defined failure to pay freight charges as an event of default.

43. FWENC also argues that Conrail violated 49 C.F.R. § 1300.4(a), which was incorporated into the Transportation Contract. Section 1300.4(a) of 49 C.F.R. provides:

A rail carrier may not increase any rates or change any service terms (except for charges that are equivalent to rate reductions) unless 20 days have expired after written or electronics notice has been provided

"Service terms" are defined to include "all practices that affect the rates, charges or level of service for rail transportation." The credit at issue here is a service term.

44. FWENC contends that Conrail only gave one days' notice on June 2 before suspending its credit and stopping work. The Court finds, however, that Conrail in fact notified FWENC as of December 4, 1997 that: (1) FWENC was delinquent in payments; (2) in the future FWENC would not receive notice of suspension; and (3) any future delinquency would result in immediate suspension of credit.

45. The December 4, 1997 letter constituted sufficient notice of Conrail's credit suspension, corresponding work stoppage, and default to satisfy the 30 day written notice provision set forth in the Transportation Contract and the 20 day notice provision set forth in 49 C.F.R. 1300.4(a).

a. WAIVER OF CREDIT POLICY

46. FWENC further asserts that Conrail's own payment history record showed that Conrail waived its right to strict performance of the payment terms. In addition, FWENC contends that Conrail was permitted to retract the waiver only by providing notice to FWENC of its intention to demand strict compliance in the future and by providing FWENC with a reasonable time in which to come into compliance.

47. Under Pennsylvania law, a party that has waived strict compliance with a payment term may not strictly enforce the original payment terms until it has provided notice of its intent to demand strict compliance and a reasonable time in which to comply. See Haberski v. Hill, CIV.A. No. 85-7375, 1986 WL 9726, *4 (Sept. 8, 1986 E.D.Pa.); Dempsey v. Stauffer, 312 F.2d 360, 363 (3d Cir. 1962); Riddle Co. v. Taubel, 120 A. 776, 777 (1923).

48. In light of the legal standards set forth above, the Court finds that Conrail did not waive its rights to enforce the terms of its credit policy as incorporated in the Transportation Contract. FWENC has failed to prove by clear, precise, and indubitable evidence that Conrail manifested an intent not to require FWENC to strictly comply with the credit terms.

49. In fact, the December 4, 1997 letter was the beginning of Conrail's insistence that FWENC comply with the

credit policy. The letter also asserted Conrail's interests in enforcing the credit policy in the future.

50. In addition to the December 4, 1997 letter, the evidence shows that Conrail gave sufficient notice to FWENC of its intent to demand strict compliance with the credit terms as well as a reasonable time in which to comply.

51. The Court determines that Conrail's conduct did not establish a waiver of Conrail's rights to enforce strictly the credit terms as contemplated by the Transportation Contract.

52. Accordingly, the Court finds that Conrail did not breach the Transportation Contract by stopping work on June 4, 1998; rather, Conrail had the right to stop work and enforce FWENC's strict compliance of the provision to pay the freight bills within 15 days of the invoices, as set forth in the terms of Conrail's credit policy.

2. FWENC WAIVED ITS RIGHT TO JUDICIALLY ENFORCE CONRAIL'S FAILURE TO SUPPLY SUFFICIENT RAILCARS

53. From March 23 through March 26, 1998, FWENC was unable to load 40 cars because Conrail did not provide enough cars. However, the Court finds that through its acts, FWENC waived its right to judicially enforce Conrail's failure to supply sufficient railcars.

54. Most notably, FWENC failed to raise any timely payment disputes with regards to Conrail's failure to supply sufficient railcars. Through its actions, therefore, FWENC failed to enforce, or evince an intent to claim its right to enforce, any discount from Conrail for the insufficiency of cars during the period of March 23 through March 26, 1998.

3. FWENC WAIVED ITS RIGHT TO INSIST THAT CONRAIL PROVIDE RAILCARS 5 DAYS PER WEEK

55. FWENC contends that Conrail breached the Transportation Contract by failing to provide railcars for 5 days per week between August 30, 1998 and September 24, 1998.

56. The Court finds that FWENC and Conrail effectively modified the terms of the Transportation Contract to ship 50 car trains 3 days per week. Therefore, FWENC waived its rights to have Conrail provide railcars 5 days per week.

57. Under Pennsylvania law, a written contract may be modified by subsequent agreement through words, written or oral, or by conduct of the parties. A. Valey Engineers, Inc. v. Rouse Co., CIV.A. No. 86-1597, 1989 WL 89984, *5 (E.D.Pa. Aug. 9,

1989); Cedrone v. Unity Sav. Ass'n., 609 F.Supp. 250, 254 (E.D.Pa. 1985); Dora v. Dora, 141 A.2d 587, 590-91 (Pa. 1958); Bonczek v. Pasco Equip. Co., 450 A.2d 75, 77 (Pa.Super. 1982).

58. Oral modifications constitute waiver of original contract terms. Carlos R. Leffler, Inc. v. Hutter, 696 A.2d 157, 161 n.3 (1997).

59. If there is an express provision specifically prohibiting non-written modifications, proof of an oral modification of a written contract must be by clear and convincing evidence. See First Nat. Bank of Pa. v. Lincoln Nat. Life Ins. Co., 824 F.2d 277, 280 (3d Cir.1987); Nicolella v. Palmer, 248 A.2d 20, 23 (Pa. 1968).

60. In the instant case, once FWENC decided to resume its shipments by paying on a C.O.D. basis, it requested that Conrail provide 50 cars, 5 days per week beginning August 28, 1998. Conrail in essence made a counteroffer to provide 50 cars, 3 days per week. The Court concludes that FWENC then accepted Conrail's offer by performing - that is, shipping the remaining 9 shipments on 50 car trains every other day.

61. Therefore, the Court finds that clear and convincing evidence shows that FWENC modified and waived the original contract terms and adopted the new terms - that Conrail would provide 50 railcars 3 days a week - and FWENC cannot now seek judicial enforcement of said terms.

4. THE TRANSPORTATION CONTRACT NEVER PROVIDED FOR A SWITCH CREW

62. It has long been the rule that "contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts." Northern Assurance Co. v. Grand View Building Association, 183 U.S. 308, 316 (1902).

63. Here, the Transportation Contract provided that the rate per car was \$565. The clear and unambiguous terms of the Contract did not provide for a switch crew.

64. The Court cannot, therefore, contemplate any parol evidence that suggests that the rate per car was based on the provision of a switch crew. Accordingly, the Court finds that Conrail did not breach the Transportation Contract by failing to provide a switch crew for FWENC during the Project.

An appropriate Order follows.

Clarence C. Newcomer, S.J.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|------------------------------|---|--------------|
| CONSOLIDATED RAIL CORP., | : | CIVIL ACTION |
| Plaintiff | : | |
| | : | |
| v. | : | |
| | : | |
| FOSTER WHEELER ENVIRONMENTAL | : | |
| CORP., | : | |
| Defendant | : | NO. 99-1642 |

| | | |
|------------------------------|---|--------------|
| FOSTER WHEELER ENVIRONMENTAL | : | CIVIL ACTION |
| CORP., | : | |
| Plaintiff | : | |
| | : | |
| v. | : | |
| | : | |
| CONSOLIDATED RAIL CORP., | : | |
| Defendant | : | NO. 99-1682 |

O R D E R

AND NOW, this day of September, 2000 upon consideration of the testimony of the witnesses, admitted exhibits, and arguments of counsel, as well as the parties' post-trial submissions, the Court hereby ORDERS as follows:

(1) JUDGMENT is ENTERED in favor of Plaintiff Consolidated Rail Corporation.

(2) It is DECLARED that defendant Foster Wheeler Environmental Corporation shall PAY plaintiff Conrail the unpaid invoices due and owing to Conrail for services rendered and pursuant to the Transportation Contract totaling \$480,985.50. Defendant FWENC shall also pay Conrail interest calculated at the statutory rate of 6% through the date of this Order on the monies owed from the unpaid invoices.

(3) All outstanding motions are denied as moot, this Court having rendered judgment in this action.

AND IT IS SO ORDERED.

Clarence C. Newcomer, S.J.