THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY, PETITIONERS, v. UNITED STATES OF AMERICA, ET AL., RESPONDENTS. SHELL OIL COMPANY, PETITIONER, v. UNITED STATES OF AMERICA, ET AL., RESPONDENTS.

Nos. 07-1601 & 07-1607

SUPREME COURT OF THE UNITED STATES

2007 U.S. Briefs 1601; 2008 U.S. S. Ct. Briefs LEXIS 952

November 17, 2008

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Joint Appendix

COUNSEL: [**1] Kathleen M. Sullivan, Counsel of Record, Crystal Nix-Hines, William B. Adams, Jeffrey C. Berman, Quinn Emanuel Urquhart, Oliver & Hedges, LLP, 51 Madison Avenue, 22d Floor, New York, NY 10010, (212) 849-7000, kathleensullivan@quinnemanuel.com.

Counsel for Petitioner Shell Oil Co.

Maureen E. Mahoney, Counsel of Record, J. Scott Ballenger, Jeffrey A. Pojanowski, Derek D. Smith, Latham & Watkins LLP, 555 11th Street, NW, Suite 1000, Washington, DC 20004, (202) 637-2200, maureen.mahoney@lw.com.

Counsel for Petitioners The Burlington Northern and Santa Fe Railway Co. and Union Pacific Railroad Co.

Charles G. Cole, Bennett Evan Cooper, Steptoe & Johnson LLP, 1330 Connecticut Ave., NW, Washington, DC 20036, (202) 429-3000.

Roger Nober, Orest B. Dachniwsky, BNSF Railway Co., 2650 Lou Menk Drive, Fort Worth, TX 76131, (817) 352-6020.

Counsel for Petitioner The Burlington Northern and Santa Fe Railway Co.

Cisselon Nichols Hurd, Shell Oil Company, One Shell Plaza, 910 Louisiana Street, Houston, TX 77002, (713)

241-0979.

Michael Johnson, Lewis Brisbois, Bisgaard & Smith, LLP, One Sansome Street, 14th Floor, San Francisco, CA 94104, (415) 362-2580.

Counsel [**2] for Petitioner Shell Oil Co.

J. Michael Hemmer, Robert C. Bylsma, David P. Young, Union Pacific Railroad Company, 1400 Douglas Street, Room 1580, Omaha, NE 68179, (402) 271-5000.

Counsel for Petitioner, Union Pacific Railroad Co.

Gregory G. Garre, Counsel of Record, Solicitor General, Department of Justice, Washington, DC 20530-0001, (202) 514-2217.

Counsel for Respondent, United States.

Ann Ruston, Counsel of Record, Deputy Attorney General, Office of the Attorney General, 300 South Spring Street, Los Angeles, CA 90013, (213) 897-2608, Ann.Rushton@doj.ca.gov.

Counsel for Respondent, Dept. Toxic Substances Control, State of California. [*i]

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TITLE: PETITION FOR CERTIORARI FILED JUNE 23, 2008, CERTIORARI GRANTED OCTOBER 1, 2008

[EDITOR'S NOTE: PART 1 OF 2. THIS DOCUMENT HAS BEEN SPLIT IN MULTIPLE PARTS ON LEXIS TO ACCOMMODATE ITS LARGE SIZE. EACH PART CONTAINS THE SAME LEXIS CITE.]

JOINT APPENDIX

[*JA1] **RELEVANT DOCKET ENTRIES**

U.S. Court of Appeals for the Ninth Circuit

Case No. 03-17125

Date Filed	#	Docket Text
		* * *
02/17/2004	9	Filed certificate of record on appeal
		* * *
11/23/2004	24	Filed USA's first brief on cross-appeal,

		and excerpts of records in 4 vols.
11/23/2004	25	Filed DTSC, California's first brief on cross-appeal
		* * *
02/17/2005	31	Filed Burlington Northern and Union Pacific Transp's second brief on cross-appeal and excerpts of record in 2 vols
		* * *
02/17/2005	33	Filed Burlington Northern and Union Pacific Transp motion to take judicial notice of EPA order
		* * *
03/18/2005	42	Filed Shell Oil Company's second brief on cross-appeal and suppl excerpts of record in 2 vols
		* * *
04/21/2005	43	Filed USA's third brief on cross-appeal and suppl excerpts of record in 1 vol
04/21/2005	45	Filed DTSC, California's third brief on cross-appeal and copies of record
		* * *
07/11/2005	68	Filed Shell Oil Company's reply

		brief
		* * *
08/04/2005	71	Filed certified record on appeal
		* * *
09/07/2005	75	Filed appellee Burlington Northern and Union Pacific Transp's 38 pages brief
		* * *
09/12/2005	77	Argued and submitted to Betty B. Fletcher, John R. Gibson, Marsha S. Berzon
		* * *
03/16/2007	87	Filed opinion: affirmed in part, reversed in part. Filed and entered judgment.
		* * *
05/07/2007	99	Filed Appellee Shell Oil Company petition for panel rehearing and petition for rehearing en banc
05/07/2007	101	Filed Appellee Burlington Northern, Appellee Union Pacific Transp petition for panel rehearing and petition for rehearing en banc
		* * *

07/30/2007	109	Filed DTSC, California's response to petition opposing petitions for en banc rehearing
07/30/2007	111	Filed Appellant USA's response to petition opposing petitions for en banc rehearing
09/04/2007	113	Filed order and amended opinion

* * *

03/25/2008	125	Filed order and amended opinion. Denying Petitions for rehearing and en banc rehearing; (Judge Bea dissents from order denying petition for rehearing en banc)

* * *

04/03/2008	128	Filed order. The unopposed motions to stay the mandate filed by Shell and by the Railroads are granted.

* * *

[**9]

[*JA4] **U.S. Court of Appeals for the Ninth Circuit**

Case No. 03-17153

Date Filed	#	Docket Text

* * *

02/17/2004	9	Filed certificate of record on appeal

* * *

11/23/2004	19	Filed USA's first brief on cross-appeal, and 5 excerpts of record in 4 vols.
11/23/2004	20	Filed DTSC, California's first brief on cross-appeal

* * *

02/17/2005	24	Filed Burlington Northern and Union Pacific Transp's second brief on cross-appeal and excerpts of record in 2 vols

* * *

02/17/2005	26	Filed Burlington Northern and Union Pacific Transp motion to take judicial notice of EPA order

* * *

03/18/2005	33	Filed Shell Oil Company's second brief on cross-appeal and suppl excerpts of record in 2 vols

* * *

04/21/2005	34	Filed USA's third brief on cross-appeal and suppl excerpts of record in 1 vol

* * *

04/21/2005	36	Filed DTSC; California third brief on cross-appeal and copies of record

* * *

07/11/2005	54	Filed Shell Oil Company's reply brief

* * *

09/07/2005	59	Filed appellee Burlington Northern and Union Pacific Transp's brief

* * *

09/12/2005	61	Argued and submitted to Betty B. Fletcher, John R. Gibson, Marsha S. Berzon

* * *

03/16/2007	71	Filed opinion: affirmed in part, reversed in part. Filed and entered judgment. [03-17125, 03-17153, 03-17169]

* * *

05/07/2007	78	Filed Appellee Shell Oil Company petition for panel rehearing and petition for rehearing en banc
05/07/2007	79	Filed Appellee Burlington Northern, Appellee Union Pacific Transp petition for panel rehearing and petition for rehearing en banc

* * *

07/30/2007	86	Filed Appellant DTSC, California's response to petition opposing petitions for en banc rehearing
07/30/2007	87	Filed Appellant USA's response to petition opposing petitions for en banc rehearing
09/04/2007	88	Filed order and amended opinion

* * *

03/25/2008	94	Filed order and amended opinion. denying petitions for rehearing and en banc rehearing

* * *

04/03/2008	97	Filed order. The unopposed motions to stay the mandate filed by Shell and by the Railroads are granted.

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[**10]

[*JA7] **U.S. Court of Appeals for the Ninth Circuit**

Case No. 03-17169

Date Filed	#	Docket Text

* * *

02/17/2004	7	Filed certificate of record on appeal

* * *

11/23/2004	17	Filed USA's first brief on cross-appeal

		and excerpts of record in 4 vols
11/23/2004	18	Filed DTSC, California's first brief on cross-appeal
		* * *
02/17/2005	22	Filed Burlington Northern and Union Pacific Transp's second brief on cross-appeal and excerpts of record in 2 vols
		* * *
02/17/2005	24	Filed Burlington Northern and Union Pacific Transp motion to take judicial notice of EPA order
		* * *
03/18/2005	31	Filed Shell Oil Company's second brief on cross-appeal and suppl excerpts of record in 2 vols
		* * *
04/21/2005	32	Filed USA's third brief on cross-appeal and suppl excerpts of record in 1 vol
04/21/2005	34	Filed DTSC, California's third brief on cross-appeal and copies of record
		* * *
07/11/2005	52	Filed Shell Oil Company's reply

		brief
		* * *
09/07/2005	57	Filed appellee Burlington Northern and Union Pacific Transp's brief
		* * *
09/12/2005	59	Argued and submitted to Betty B. Fletcher, John R. Gibson, Marsha S. Berzon
		* * *
03/16/2007	69	Filed opinion: affirmed in part, reversed in part; filed and entered judgment.
		* * *
05/07/2007	76	Filed Appellee Shell Oil Company petition for panel rehearing and petition for rehearing en banc
05/07/2007	77	Filed Appellee Burlington Northern, Appellee Union Pacific Transp petition for panel rehearing and petition for rehearing en banc
		* * *
07/30/2007	84	Filed Appellant DTSC, California's response to petition opposing petitions for en banc rehearing

07/30/2007	85	Filed Appellant USA's response to petition opposing petitions for en banc rehearing
09/04/2007	86	Filed order and amended opinion

* * *

03/25/2008	92	Filed order and amended opinion. Denying Petitions for rehearing and en banc rehearing (Judge Bea Dissents from Order denying Petition for rehearing en banc)

* * *

04/03/2008	95	Filed order. The unopposed motions to stay the mandate filed by Shell and by the Railroads are granted.

* * *

[**11]

[*JA10] **RELEVANT DOCKET ENTRIES**

U.S. District Court for the Eastern District of California

Case No. 1:92-cv-05068-OWW-DLB

Date Filed	#	Docket Text

* * *

12/09/1992	20	First amended complaint filed

* * *

03/05/1993	31	Answer to 1st amended complaint and counterclaim by defendants Fred R Bryant, Ed A Brown,

		John H Brown, Brown & Bryant, Brown & Bryant Inc, Vernon A Wilson against plaintiffs Southern Pacific, Atchison Topeka
		* * *
05/24/1995	513	Motion for partial summary judgment on the issue of joint and several liability at Arvin by Plaintiff's Atchinson Topeka and Southern Pacific
05/24/1995	514	Memorandum of points and authorities by plaintiff Atchison Topeka and Southern Pacific in support of motion for partial summary judgment on the issue of joint and several liability at the Arvin Site
		* * *
05/24/1995	523	Declaration of Thomas W Kalinowski in support of motions for partial summary judgment
		* * *
07/17/1995	575	Counter-motions for summary adjudication of claims, and for partial summary judgment re: Railroad's liability at Arvin by deft, cntdft, cntclmt etc Brown & Bryant, J Brown, E. Brown, V. Wilson and M.J. Dupas
		* * *

07/17/1995	578	Memorandum of points and authorities by counter-defendant Brown & Bryant Inc., et al in support of counter-motion for summary adjudication of claims and for partial summary judgment re: Railroad's liability at Arvin

* * *

09/11/1995	685	Supplemental declaration of Dr Thomas W. Kalinowski in reply to Brown & Bryant's joint opposition to railroad's motion for partial summary judgment re: non-liability and joint and several liability at Arvin

* * *

11/15/1995	713	Memorandum opinion by Judge Oliver W. Wanger granting in part and denying in part cross-motions for summary judgment on the issue of joint and several liability at Arvin by Plaintiff's Atchinson Topeka and Southern Pacific

* * *

01/09/1997	846	Order by Judge Wanger reassigning cases and relating case(s) 1:92-cv-5068 with member cases 1:96-cv-5879, 1:96-cv-6226, 1:96-cv-6228

* * *

06/16/1998	933	Motion for summary judgment filed by Pltf USA
06/16/1998	934	Memorandum of points and authorities in support of motion for summary judgment against The Atchison Topeka and Santa Fe Railway Co and the Southern Pacific Transportation Co

* * *

07/06/1998	965	Memorandum by plaintiff in 1:92-cv-05068 in opposition to motion for summary judgment

* * *

07/12/1998	969	Memorandum of points and authorities by Dept Toxic Substance in 1:92-cv-05068 in support of motion for summary judgment against the Atchison, Topeka and Santa Fe Railway Company and the Southern Pacific Transportation Company
07/17/1998	970	Amended notice of motion and motion (terminating original motion 933) for summary judgment by Dept Toxic Substance in 1:92-cv-05068

* * *

08/12/1998	985	Motion for partial summary judgment by Dept Toxic Substance against the Atchison, Topeka & Santa Fe Railway Co and Southern Pacific Transportation; memorandum of points and authorities
		* * *
09/01/1998	990	Memorandum in opposition to United States and Department of Toxic Substance's motions for summary judgment by Union Pacific Railrd in 1:92-cv-05068
		* * *
09/01/1998	993	Cross-motion for partial summary judgment by Union Pacific Railrd in 1:92-cv-05068; memorandum in support
		* * *
09/01/1998	999	Declaration of Daniel B Stephens in support of Railroads' cross-motion for summary adjudication
09/01/1998	1000	Declaration of Dr. Thomas W Kalinowski in support of Railroads' cross-motion for summary adjudication
		* * *
09/15/1998	1007	Joint reply by pltfs USA and Dept of Toxic Sub in support of

		motions for summary judgment against the railroads and in opposition to cross-motion for partial summary judgment by Union Pacific Railrd in 1:92-cv-05068
		* * *
09/15/1998	1009	Declaration of John Walton in support of USA's motion for summary judgment
09/15/1998	1010	Declaration of Gary Chirlin in support of USA's motion for summary judgment
		* * *
09/16/1998	1018	Deposition of George Mack taken on the following date(s) 3/12/98
		* * *
09/16/1998	1026	Deposition of John Howard Brown taken on the following date(s) 6/15/98
		* * *
09/21/1998	1031	Reply memorandum by Union Pacific Railrd in 1:92-cv-05068 in support of cross motion for partial summary judgment
		* * *
09/21/1998	1035	Declaration of Daniel B Stephens

* * *

11/05/1998	1050	Notice of motion and motion for summary judgment by third-party defendant Shell Oil Company
11/05/1998	1051	Memorandum of points and authorities by third-party defendant Shell Oil Company in support of motion for summary judgment

* * *

11/05/1998	1053	Declaration of John A Connor in support of Shell Oil Company's motion for summary judgment

* * *

12/04/1998	1085	Response by plaintiffs Atchison Topeka and Southern Pacific in 1:92-cv-05068 in opposition to motion for summary judgment by third-party defendant Shell Oil Company
12/04/1998	1086	Response by plaintiffs Atchison Topeka and Southern Pacific in 1:92-cv-05068 to Shell's statement of undisputed facts in support of motion for summary judgment

* * *

12/08/1998	1090	Notice of motion and cross-motion for partial summary judgment

		against Shell Oil Company by Dept of Toxic Sub in 1:92-cv-05068
		* * *
12/08/1998	1092	Memorandum of points and authorities by Dept of Toxic Sub in 1:92-cv-05068 in support of cross-motion for partial summary judgment against Shell Oil Co
12/08/1998	1092	Memorandum by Dept of Toxic Sub in 1:92-cv-05068 in opposition to Shell Oil Company's motion for summary judgment
		* * *
12/08/1998	1096	Notice of motion and motion for summary judgment against Shell Oil Company by Dept of Toxic Sub in 1:92-cv-05068
		* * *
12/23/1998	1100	Deposition of Patrick J Reeves taken on the following date(s) 12/18/97 with exhibits
12/23/1998	1101	Deposition of Robert Swain taken on the following date(s) 3/17/98
		* * *
12/23/1998	1107	Deposition of David Rea taken on the following date(s) 5/2/98
12/23/1998	1108	Deposition of David Rea taken on

		the following date(s) 7/11/98, volume II
		* * *
12/23/1998	1113	Deposition of Richard Woolley taken on the following date(s) 5/27/98
		* * *
12/28/1998	1123	Reply by Shell Oil Company to the Railroads' and Governments' opposition to motion for summary judgment by third-party defendant Shell Oil Company
		* * *
12/29/1998	1130	Reply by defendant Shell Oil Company to response to motion for summary judgment by third-party defendant Shell Oil Company
		* * *
12/29/1998	1133	Response by Shell Oil Company motion for summary judgment against Shell Oil Company by Dept of Toxic Sub in 1:92-cv-05068
		* * *
12/29/1998	1138	Response by Shell Oil to the governments and railroads cross motions for summary judgment and reply to the governments and

		railroads oppositions to Shell Oil Company Oil Company by Dept of Toxic Sub in 1:92-cv-05068
		* * *
01/06/1999	1140	Transcript of 10/26/98 hearing on USA's motion for summary judgment as to ATSF; DOT's motion for partial summary judgment as to ATSF
01/06/1999	1141	Reply in support of cross-motion for summary judgment against Shell Oil Company
		* * *
01/29/1999	1144	Findings and recommendations by Magistrate Judge Dennis L. Beck recommending that Railroads motions be granted; that the Brown & Bryant counterclaim be dismissed with prejudice; that Brown & Bryant parties Answer be stricken; that default judgment be entered against Brown & Bryant parties as to all remaining claims of Railroads against them in this matter
		* * *
02/19/1999	1146	Pretrial statement by USA
		* * *

02/22/1999	1148	Supplement to purported pretrial statement from cross-defendant Shell Oil Company in 1:92-cv-05068

* * *

03/02/1999	1151	Pre-trial order approved

* * *

03/16/1999	1175	Trial brief submitted by counter-defendant Southern Pacific in 1:92-cv-05068

* * *

03/19/1999	1183	Memorandum and Order: by Judge Oliver W. Wanger re cross motions for summary judgment by third-party defendant Shell Oil Company [1050-1] denied with regard to the Arvin Site

* * *

03/19/1999	1187	Trial brief submitted by third-party defendant Shell Oil Company
03/19/1999	1188	Trial brief submitted by Dept Toxic Substance

* * *

03/19/1999	1195	Memorandum and Order: by Judge Oliver W. Wanger motions by the governments for summary judgment as to liability of the

		railroads for releases from the Brown and Bryant parcel are denied; the motions by the governments for summary judgment as to response costs from the railroads for releases on the Brown and Bryant property are denied; the railroad's motion for summary judgment that they are not liable for response costs for releases from Brown and Bryant property is denied
		* * *
03/22/1999	1198	Trial brief submitted by Dept Toxic Substance
		* * *
03/25/1999	1200	Supplemental trial brief submitted by Dept Toxic Substance re statement of claim for past response costs
		* * *
04/06/199	1209	Stipluation and order by Judge Wanger re Department of Toxic Substances Control's claim for past response costs
		* * *
04/19/1999	1223	Order by Judge Wanger re cross-motions for summary judgment against Shell Oil Company by Dept of Toxic Sub, motion for

		summary judgment by third-party defendant Shell Oil Company and motion for summary judgment filed by Pltf USA all denied on issue of arranger and operator liability with regard to Arvin site
		* * *
04/23/1999	1228	Motion for judgment on partial findings by third-party dft Shell Oil Company; and memo of points and authorities
		* * *
04/30/1999	1236	Joint response by USA and Dept of Toxic Substances Control to motion for judgment on partial findings by third-party dft Shell Oil Company
04/30/1999	1237	Joinder by Shell Oil Co in the railroads motion to strike the opinion testimony of government witness John Walton
		* * *
05/18/1999	1257	Transcript of 3/30/99 hearing on court trial, day 1
05/18/1999	1258	Transcript of 3/30/99 hearing on court trial, day 1 testimony of Lonnie Merryman
05/18/1999	1259	Transcript of 3/31/99 hearing on

		court trial, day 2
05/18/1999	1260	Transcript of 5/18/99 hearing on court trial, day 3
05/18/1999	1261	Transcript of 5/18/99 hearing on court trial, day 4
05/18/1999	1262	Transcript of 5/18/99 hearing on court trial, day 5
05/18/1999	1263	Transcript of 4/7/99 hearing on court trial, day 6
05/18/1999	1264	Transcript of 5/18/99 hearing on court trial, day 7
05/18/1999	1265	Transcript of 5/18/99 hearing on court trial, day 8
05/18/1999	1266	Transcript of 4/13/99 hearing on court trial, day 9
05/18/1999	1267	Transcript of 4/14/99 hearing on court trial, day 10
05/18/1999	1268	Transcript of 4/15/99 hearing on court trial, day 11
05/18/1999	1269	Transcript of 4/16/99 hearing on court trial, day 12
05/18/1999	1270	Transcript of 4/20/99 hearing on court trial, day 13
05/18/1999	1271	Transcript of 4/21/99 hearing on court trial, day 14

05/18/1999	1272	Transcript of 5/18/99 hearing on court trial, day 15
05/18/1999	1273	Transcript of 4/23/99 hearing on court trial, day 16
05/18/1999	1274	Transcript of 4/27/99 hearing on court trial, day 17
05/18/1999	1275	Transcript of 4/28/99 hearing on court trial, day 18
05/18/1999	1276	Transcript of 5/18/99 hearing on court trial, day 19
05/18/1999	1277	Transcript of 4/30/99 hearing on court trial, day 20
05/18/1999	1278	Transcript of 5/4/99 hearing on court trial, day 21
05/18/1999	1279	Transcript of 5/18/99 hearing on court trial, day 22
05/18/1999	1280	Transcript of 5/6/99 hearing on court trial, day 23
05/18/1999	1281	Transcript of 5/7/99 hearing on court trial, day 24
05/18/1999	1282	Transcript of 5/12/99 hearing on court trial, day 25
05/18/1999	1283	Transcript of 5/13/99 hearing on court trial, day 26
05/18/1999	1284	Transcript of 5/14/99 hearing on court trial, day 27

* * *

05/19/1999	1287	Deposition of William Perkins taken on the following date(s) 5/26/98

* * *

07/14/1999	1311	Proposed findings of fact Re: Department of Toxic substances control's claim for response costs by claimant Dept Toxic Substance in 1:92-cv-05068

* * *

07/19/1999	1314	Railroads' proposed Conclusions of law
07/19/1999	1315	Railroads' proposed findings of fact

* * *

07/19/1999	1317	Proposed findings of fact by Shell Oil Company
07/19/1999	1318	Proposed conclusions of law by Shell Oil Company
07/19/1999	1319	Govt's proposed findings of fact and conclusions of law
08/20/1999	1320	Response by pltfs Atchison Topeka Southern Pacific to Shell's Proposed findings of fact and conclusions of law

08/10/1999	1321	Response by pltfs Atchison Topeka Southern Pacific to Govt's proposed findings of fact and conclusion of law

* * *

08/17/1999	1323	Response by claimant Dept Toxic Substance plaintiff USA to Govt's Shell's proposed findings of facts and conclusions of law
08/17/1999	1324	Response by claimant Dept Toxic Substance, plaintiff USA to Railroad's findings of fact and conclusion of law
08/18/1999	1325	Response by third-party defendant Shell Oil Company to Govt's proposed conclusions of law
08/18/199	1326	Response by third-party defendant Shell Oil Company to Govt's proposed findings of facts
08/18/1999	1327	Response by third-party defendant Shell Oil Company to Railroads' proposed findings of fact

* * *

10/05/1999	1330	Transcript of 9/28/99 hearing on oral argument

* * *

05/24/2002	1354	Findings of fact and conclusions of law by Judge Oliver W. Wanger; judgment shall be entered in the amount of $ 702,871.51 plus interest against Atchison Topeka & Santa Fe Railway and the Southern Pacific Transportation Company and in the amount of $ 468,581.01 plus interest against Shell Oil Company; Declaratory judgment shall be entered in favor of pltfs and against the Railroads and Shell Oil for future response costs at the Site in the percentages of 9% and 6% according to proof; the federal government attorneys shall propose a form of judgment and lodge with the court within five days of the service of these findings

* * *

06/26/2002		Lodged Judgment on decision by the court by plaintiff
07/09/2002		Lodged proposed order re pltfs claims for interest, attorneys fees, and costs of suit and re: DTSC's response costs by Railroads'

* * *

07/09/2002		Lodged judgment on decision by the Court by Shell

* * *

07/10/2002		Lodged judgment on decision by the court

* * *

07/17/2002	1375	Master exhibit list

* * *

08/22/2002	1377	Order by Judge Oliver W. Wanger ordering the modification of the findings of fact and conclusions of law to enter judgment for DTSC

* * *

09/12/2002	1381	Motion to amend the court's findings of fact and conclusions of law by Plaintiff Dept Toxic Substance
09/12/2002	1382	Memorandum of points and authorities by Dept Toxic Substance in support of motion to amend the court's findings of fact and conclusions of law

* * *

10/25/2002	1388	Railroads' notice of motion and motion to amend the Court's findings of fact and conclusions of law
10/25/2002	1389	Railroads' memorandum of points

		and authorities in support of motion to amend the Court's findings of fact and conclusions of law
		* * *
10/28/2002	1390	Notice of motion and motion to add and amend findings of fact and conclusions of law by third-party defendant Shell
10/28/2002	1391	Memorandum of points and authorities by third-party defendant Shell in support of motion to add and amend findings of fact and conclusions of law
		* * *
11/27/2002	1394	Opposition of defendant and cross-defendant Shell Oil Company to the Govt's motion to amend the court's findings of and conclusions of law
11/27/2002	1395	Partial opposition of Shell to the Railroads' motion to amend
12/02/2002	1396	Railroads' opposition to Government's motion to amend
12/02/2002	1397	Railroads' memorandum in opposition to Shell's motion to add and amend findings of fact and conclusions of law
12/02/2002	1398	Railroads' memorandum of law in

		opposition to Shell's motion to add and amend findings of fact and conclusions of law
12/09/2002	1399	Shell's reply to response to motion to add and amend findings of fact and conclusions of law
12/09/2002	1400	Response by plaintiff Southern Pacific in 1:92-cv-05068 to partial opposition of Shell Oil to Railroad's motion to add and amend findings of fact and conclusions of law
12/09/2002	1401	Railroad's reply by plaintiff Southern Pacific in 1:92-cv-05068 to the govt's opposition to Railroad's motion to amend the court's findings of fact and conclusion of law
12/09/2002	1402	Reply memorandum of law in support of the govt's motion to amend the court's findings of fact and conclusions of law

* * *

02/11/2003	1410	Supplemental brief of cross-dft Shell Oil Company re motions to amend findings and conclusions

* * *

02/19/2003	1412	Reply by pltfs Atchison Topeka and Southern Pacific in 1:92-cv-05068 regarding Shell Oil Co's

		supplemental brief re motions to amend findings and conclusions
05/28/2003	1413	Memorandum opinion and order by Judge Oliver W. Wanger re findings of fact, motion to add and amend findings of fact and conclusions of law by third-party defendant Shell Oil Co, motion to amend by dft Railroad granted, motion to amend the court's findings of fact and conclusions of law by Plaintiff Dept Toxic Substance denied
		* * *
06/13/2003	1417	Errata re order on dfts' separate motions to amend the court's findings of fact and conclusions of law
		* * *
07/15/2003	1419	Amended findings of fact and conclusions of law by Judge Oliver W. Wanger
		* * *
09/10/2003	1428	Judgment on decision
		* * *
10/31/2003	1435	Notice of appeal by claimant Dept Toxic Substance
		* * *

11/06/2003	1439	Notice of appeal by plaintiff USA

* * *

11/12/2003	1441	Notice of cross-appeal by dft/cross-appellant Shell

* * *

02/12/2004	1472	Transcript of 1/27/03 hearing on motion to amend findings of fact
02/12/2004	1473	Transcript of 2/3/03 hearing on motion to amend findings of fact

* * *

[**12]

[*JA32] **U.S. District Court for the Eastern District of California**

Case No. 1:96-cv-06226-OWW-DLB

Date Filed	#	Docket Text

* * *

11/07/1996	1	Complaint
11/14/1996	3	Notice by plaintiff Dept Toxic Substance of related case(s) CV F 96 6228; CV F 96 5068
12/09/1996	4	First amended complaint

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03/20/1997	14	Answer by defendant Southern Pacific to first amended complaint
03/20/1997	15	Crossclaim by defendant

		Southern Pacific against defendant Shell Oil Company
03/26/1997	16	Answer by defendant Brown and Brynt Inc to first amended complaint
03/26/1997	17	Amended answer to first amended complaint by defendant Brown and Brynt Inc

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04/16/1997	21	Notice by cross-claimant Southern Pacific in 1:96-cv-06226 of related case(s) 1:96cv6228; 1:92cv5068

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07/31/1997	31	Answer by defendant Shell Oil Company
07/31/1997	32	Answer to cross-complaint by cross-defendant Shell Oil Company

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[*JA34] **U.S. District Court for the Eastern District of California**

Case No. 1:96-cv-06228-OWW-DLB [**13]

Date Filed	#	Docket Text

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11/07/1996	1	Complaint

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03/20/1997	7	Cross-claim by defendant Southern Pacific against defendant Shell Oil Company
03/20/1997	8	Answer by defendant Southern Pacific

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03/26/1997	10	Amended answer to complaint by defendant Southern Pacific

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04/16/1997	13	Notice by deft Southern Pacific in 1:96-cv-06228 of related case(s) CV-F-96-6226-OWW-DLB, CV-F-92-5068-OWW-DLB

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07/31/1997	24	Answer to complaint by Defendant Shell Oil Company
07/31/1997	25	Answer to cross-complaint by cross-defendant Shell Oil Company

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[*JA35] UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al., Plaintiffs, vs. BROWN & BRYANT, INC., et al., Defendants.

THE DEPARTMENT OF TOXIC SUBSTANCES CONTROL, Plaintiff, vs. THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al., Defendants.

NO. CV-F-92-5068 OWW/DLB

(CONSOLIDATED ARVIN CASES)

NO. CV-F-96-5879 OWW

(CONSOLIDATED SHAFTER CASES)

[*JA36] UNITED STATES OF AMERICA, Plaintiff, vs. THE ATCHISON, [**14] TOPEKA & SANTA FE RAILWAY COMPANY, et al., Defendants.

DEPOSITION OF PATRICK J. REEVES, P.E.

THURSDAY, DECEMBER 18, 1997

9:10 A.M.

* * *

[16]

* * *

Q Well, let me ask you. Was there a typical pattern to your doing this work for Shell at these particular sites?

A Yes.

Q What was that typical pattern?

A Each of the people who supplied bulk, just the bulk storage were given a three-ringed binder or a manual.

And in that manual, it had all of the procedures and more or less criteria for storing their chemical.

This document was prepared by Shell. And in most [*JA37] cases, we were basically kind of a watchdog for Shell that those people when we would go to these places, this Brown & Bryant, for instance, we would want to know where is that manual, first thing. We would ask who has read it. If they were familiar with it, and if they had any questions.

We would then go out to wherever their storage tank or tanks were. And we would inspect them for the type of material, in other words, whether it was steel or aluminum or fiberglass, whatever kind of material that they were using to store it.

We would be sure that it had the right kinds **[17]** of valves. And [**15] if the storage had a containment facility large enough so that if in a catastrophic event rupture of the storage vessel, that it would be able to be contained within this area.

And we would tell them that it had to be concrete. It had to be impervious material. Asphalt was not approved. But it couldn't be plastic, and it had to be something that could weather.

And we would explain and give them ideas as to what kind of materials could be used. I mean even concrete block needed to be treated because it would go through concrete block.

So that is the kind of thing we did with them. We also looked to see that they had the right kind of breathing apparatus for safety, the right kind of rubber, I don't even remember if rubber gloves, but it was a certain kind of material to protect themselves if they are ever handling this material.

We would also share with them various things we found from other plants where people didn't take the precautions and the kinds of damage that were done to a number of individuals.

[*JA38] So it was an awareness that we were trying to instill with each of the places we went. We were always, I don't want to use the word chaperoned by the local sales [**16] **[18]** representative, and in this case, his name was

David Rea, R-e-a, for this area.

And that way, the sales representative would also be trained to know that he was supposed to have read the manual, also, and that he could learn from me the kinds of valving that they needed to have, the kinds of safety equipment, the eyewash facilities, those kinds of things.

And if we saw anything that didn't comply with the Shell manual, we would write them up in a report and say these are the things that you need to do.

And then it was up to the local sales representative to kind of check on them.

Q Now, did you do this same basic pattern, this typical pattern with the two Brown & Bryant sites?

A. Yes.

Q And do you remember visiting those two sites?

A Yes.

Q Do you remember how many sites you went to with David Rea?

A More than two.

Q More than Shafter and Arvin you are saying?

A Yes.

Q Do you remember going with him to any other sites?

* * *

[52]

* * *

[*JA39] A. If there was a hose or a coupling that was located in the yard that they then attached to a truck that was going to come or go, yes, we looked at everything that was associated with that facility. [**17]

Q. Did part of what you look at also include how the D-D was cleaned out of tanks?

A. No.

Q. Did you look at what happened to D-D--well, let's get to it when we go down the checklist.

What kind of body protection were the Brown & Bryant workers supposed to use when they were transferring D-D in and out of the bulk handling, the bulk storage facility at Brown & Bryant?

A. They had their option in terms of whether they wanted to wear a full slicker suit, an apron or special resistant coveralls.

They all were supposed to have gloves and then they were supposed to have something that would cover their, you know, where a spill might occur.

Q So the front part of their body?

A Yeah.

Q And do you have any specific memory about what **[53]** you were told was the Brown & Bryant?

A No.

Q Apparel?

Is that "no"?

A "No." Excuse me.

Q So then turning the page to 071468, these were questions about safety equipment that was available in the case of some kind of spill; is that right?

A Yes.

Q Then turning the page to the next page, what [*JA40] information went into the tankage section right at the top of the form?

A Well, if we would note if there was one or two tanks. There [**18] was seldom more thin two tanks. The diameter, the length or the height.

In some cases they were laying. Sometimes they were standing straight up. It varies with the location.

The approximate number of gallons. So we would calculate all of that by measurement as to how. Sometimes they had stamps on them. Sometimes they didn't.

Q And was that just to have the description or did you understand it to have some other purpose for collecting that information?

A Well, no. There is a purpose because we **[54]** would, further on we would talk about the containment. So we had to calculate the volume for containment.

Q The next section is labeled "Construction."

And what information was important there from the perspective of this inspection?

A Well, we were looking to see if the tank was, the suitable material according to their manual. If it was a polyolefin, a PVC, a rubber tank, a steel tank, whatever it was, we would note that.

And if we could determine what the thickness of it or the rating of it, we would do that.

A lot of times we couldn't, but we would make notes that that might want to be clarified at a later time. But it wasn't part of our scope of work, because you can [**19] see from our fees we were only given a very small allocation.

Q Then the next entry is "Location," and there is a schematic there. How did you use that?

[*JA41] A Well, this schematic is so small. We would use it. We would, that is why we needed an additional sheet to show the location, the property lines or walls or things like that. We really didn't use this to speak of.

Q Then the next heading is "Foundation." And what information did you collect for that that had relevance to this inspection? **[55]**

A Well, we just note if it was on a concrete foundation or if it was on asphalt or if it was horizontal tank and it had concrete piers, we would note the dimensions and the sizes of those piers.

Q And how was it supposed to be? What was the foundation supposed to be?

A Well, it was supposed to be an impervious material so that if it leaked it wasn't going to get into the underground. I don't remember what the, this particular site was.

Q Would gravel or small rock bed have been an appropriate foundation?

A No.

Q When you say "no" and that is because it needed to be impervious?

A Correct.

Q And then there is a section called. "Access."

What was the purpose of that? [**20]

A Oh, just to note for the record if they had a--if there were any components on the tank that you couldn't--that needed to be maintained or serviced, if there was a fixed stairway up to it or if they used a ladder to put against it or if, some of the tanks were very low to the ground and you could do everything without having to climb onto the tank. **[56]**

[*JA42] Others had a lot of important things that were going in and out of the roof, for instance, that was way up high. Then you needed the handrail and stuff. Again, this was more or less for safety purposes.

Q Then the next entry is "Spill Containment Provisions."

It has:

"Diking-Height, Dimensions, Tanks with Common Dike."

If they didn't have a dike, you would put an "N" in the brackets?

A Yes.

Q Or in the parentheticals.

Then next it says:

"Controlled run-off to:"

What was that about?

A If these tanks would actually flow into something, we would indicate where they would flow.

Q So if there was no dike or containment, secondary containment, then you would use this "Controlled run-off to:" section to explain where--

A Where it was going.

Q --where it would go?

A Yeah, where it would go.

Q And [**21] then the next entry or the next line says: **[57]**

"Sewers, ditches and streams protected?"

What did that mean?

A If there was, for instance, a sewer manhole in the yard in some of these cases where they didn't have containment, at that moment in time, if water, I mean water, D-D could actually get to any of these facilities, [*JA43] then that is not protected.

Q The next entry is "Moisture Control" on Page 071470.

What was the importance of the information that was collected there?

A To be honest with you, I don't recall. But I know that the fumigant, I believe it broke down with time if it didn't have some kind of moisture control device.

So if they didn't have one, we would write them up that they needed to get one. But there were two types. One was, and most of them did have the inert gas device where they would periodically recharge it much like an air conditioning system with freon or something along those lines.

Q And then the next entry is "Emergency relief." What was the information that was important there or why was it important is really my question.

A I don't recall.

Q The next entry says: **[58]**

"Pressure/vacuum relief (breathing.)"

What did [**22] that mean?

A There are times in the day, especially when it gets real hot, real cold and the material can expand and shrink and consolidate.

So that if you had a major temperature change, the moist--it would in fact consolidate and you might have a little bit of a vacuum or, vacuum occur in the tank so as to keep the tanks from going out and in. They allow this, an air device that would allow air to either come into the tank or relieve the tank.

Q And then there is, the next entry is "Level indication". What was that about?

[*JA44] A Well, they, we want to know how much fluid is in the tank so they don't overtop it when they are filling it or let it go totally empty.

So there is, we indicate what kind of a--and we don't really want them to open up a lid and do as in a gas station where you run this rod in there, because if you pull it out, you are going to get it on your hands and it's going to drip. So we wanted them to have internal measurement devices to know what the level of the fluid is in the tank.

Q Were there certain devices that were even of the kind you are describing that were not approved because **[59]** they would tend to leak, for instance?

A I don't [**23] recall. We usually had site gauges. And if we saw that they were not protected, we would mention that; in other words, a glass site gauge that was out on the edge of the tank that anybody could walk along and break it, we would bring that to their attention.

But I don't remember actually having that to be a problem. We particularly liked the ones where you actually, they are closed off. I can't think of the brand name, but you would open something up and it would come and it would tell you what the level is. And then you shut it off and the fluid drains back into the tank.

Q Then there is an entry called "Grounding."

Was that to reduce static electricity and the chance of a spark?

A Yes.

Q And then "Markings," what were the markings supposed to be?

A All of the tanks were supposed to have the product labeled so that anybody delivering or picking [*JA45] up would know exactly what it is.

And also if a fire chief was coming on to the site, he would know what is in it. So we would be sure that those placards were on the tank.

The next page starts with: **[60]**

"Tank filling/emptying Connections (Top or Bottom.)"

What information was important to be put in there [**24] and why?

A We were looking, well, they wanted to know if it was off the top or the bottom, again, for the possibility of overtopping.

And also if the valves, if anybody could come along and, you know, if it wasn't a secured, I mean most of these had, you know, big fences around them.

But in some cases where we went to, they were not very well--they weren't very secure. So we want to make sure that they always have a lock so that only the employees would be able to open and close these things and get, have access to them.

Q Then the last entry on that page, well, the next entry says:

"Valves and Packing on Tanks."

What was important to collect there and why?

A. Well, we wanted to be sure that--there are many materials within these that would be corroded by D-D. I mean they are perfectly good for other agricultural chemicals, but D-D was very corrosive to certain types of things. So we verified that that was the right kind of packing material. **[61]**

And the other thing that we were worried about that they didn't have any kind of dripping or leaking. So we would go exercise where we could see there to [*JA46] see that there wasn't any dripping going on. There had to [**25] be a positive seal.

Q You said you would go exercise. Is that what you said?

A Yeah, see if we could, if they looked to be in operating order. If they weren't hooked up to anything, we couldn't do it. But we always at least, wherever it was, if you had a quick connect or quick disconnect, take it apart and look at it to be sure that it was the right material.

Q Then the next page, 071472, says:

"Transfer Equipment:"

And the first entry after that is:

"Piping, Materials, Joints, Screwed, Welded, Flanged."

What information were you collecting there and why was it important to your inspection?

A We just wanted a record of how the--usually it is talking about any pipe that leaves the tank and comes to a little pump.

There is a few quick cases where the tanks were elevated so they didn't even have to have a pump. I **[62]** mean they could just gravity flow into a truck.

But we were looking to find out, I mean you could--they were all legal to have either screwed, welded or flanged, but we just had a record of--I don't know why they wanted it, but I didn't take it there was any particular importance, other than they have a record of how it was done.

Q When you were [**26] looking at the D-D tank at these facilities where you were conducting these inspections, were you inspecting the plumbing so to speak that got the D-D into the tank as well as the [*JA47] plumbing that got the D-D out of the tank?

A Correct, yes, we did.

Q The next entry is:

"Sealants/gasket materials:"

What did you need know there and why?

A Just to be sure that they didn't have devices--that they were of the approved material, primarily again for these quick connects. You can connect something and as soon as water--no--D-D flows through it, it's going to be leaking. We wanted to make sure that they knew. We were trying to make these as leakfree as possible.

Q And then there are:

"Hoses, Materials, Used for:" **[63]**

What information was important for your inspection?

A Well, we--

Q And why?

A We just noted the kind of hose materials, diameters and lengths, make sure they didn't have all kinds of excess links around.

Once the D-D flows through it, if you have all this stuff, 100 feet of hose or something, that you know there is actually material, it doesn't drain out of there.

So that we were just making sure they didn't have a lot of that stuff laying around, [**27] because somebody would pick it up later and, you know, how it will dribble out on the ground.

Q And what was the procedure that was recommended by Shell to be followed in that circumstance?

MR. EARLE: Objection, assumes facts not in [*JA48] evidence.

THE WITNESS: I don't know.

Q BY MR. LASATER: You can go ahead.

A I don't know.

Q From your review of the manual and communication with Shell personnel, what did you understand was Shell's position in that regard?

A I don't remember. **[64]**

Q Now it says:

"Electrical bonds established."

What is that about?

A I don't remember.

Q And it says:

"Valves easily accessible."

What was that about?

Is that just a physical thing that you could get to them to shut them off?

A Yes.

Q The next line is:

"Valves & packings used in transfer system."

Was this simply to record the information or was there certain kinds of valves and packings that were not suitable for use with D-D?

A Yes, there were certain ones that were not suitable. And we would check to be sure that they were okay.

Q Now, if they weren't suitable in this example, but it probably applies to some of the others, but in some example you found something that [**28] wasn't suitable, there are spaces provided for what you found, how would you note that it wasn't suitable?

A Usually in the transmittal in the end, you [*JA49] know, when we delivered the final report. **[65]**

Q And "Packing materials," what does that refer to? Is that like valve packing?

A Yes.

Q Now, "Meters--descriptions," what were the meters?

A Well, it was usually an in-line device that spun as the fluid flowed through it so that you knew how many gallons

was being loaded.

Q And then there is a "Filters--description" entry. And what was that about?

A If they had a filter on the transfer equipment or not, we would note what kind it was, same with the strainer. They kind of go hand in hand.

Q Was there supposed to be a filter or a strainer?

A There didn't have to be, but most of the places as I did recall did have either one or the other.

Q In the next page starts with "Hose connections," and then, quote, "Dry," close quote, disconnects--description."

And then the next one is "Quick connects--description." What were you looking for here?

A Just to determine that they actually had them.

Q Would you describe the difference between a dry disconnect and a quick-- [**29] **[66]**

A Connect.

Q --and a quick connect?

A I don't recall, but I believe that the dry disconnect is, you had, there would be no fluid in the line. A valve was somewhere--I don't recall.

Q Do you remember that there were other kinds of connects or disconnects that were in use but which [*JA50] were not what Shell wanted to be used?

MR. EARLE: The question is vague and ambiguous and has no reference as to time or place. Are we talking about in general or Shafter or Arvin or--

MR. LASATER: I am talking about in this period of time that he was doing these inspections.

THE WITNESS: I don't recall.

Q BY MR. LASATER: The next entry is:

"Pumps, Loading bulk storage, Unloading bulk storage," and so on.

What information was important to collect for this form and why?

A Well, we just noted all of the information about the pump equipment that was being used for this process.

I don't think that we ever really found a problem with the pump. I mean we just want to make sure that it wasn't corroding and it worked for the purpose. **[67]**

Q And then to the last page of this exhibit, it says, "Truck/Tank Car Station," and then "Hard-stand."

What did that mean? [**30]

A What they wanted, what they were looking for is that a truck, where they were putting this material or conveying it to a truck that it had an impervious surface, that it wasn't just being done like you say on the gravel, that in fact they were supposed to be when a truck was alongside the tank or as close to the tank as it could get while it was being

transferred, that there actually was a hard stand material which to them means like concrete.

Q Did it need to be impervious or was it some [*JA51] term that was less than impervious by saying "hard-stand"?

A We interpreted it to be impervious.

Q And then the next entries or the last entries say, "Barricades and warning signs."

What was that about?

A I don't recall the importance of that.

Q Then it says:

"Grounding/bonding cable and clamp."

Was that to reduce static electricity?

A Yes.

Q And then the next is "Spill containment."

That is something that is actually dealt with earlier, isn't it? **[68]**

A Yes, it is, but I think that this spill, containment pertains to the truck area as opposed to the bulk storage area.

So we wanted it--I mean sometimes the trucks could drive into the area, you know, down into where [**31] there was big bulk storage facility. And they would come into a ramp and then be loaded and unloaded and then drive back out. So the truck and the tank storage was all protected.

But in other cases, this is probably one of them, but I can't remember. You know, the tank is sitting throughout and probably not with any containment. And the truck area might be somewhat over here or in a case even if you did have a tank that had containment, but just a paved area side by side that was outside of that diked area, they would say, hey, that needs to be protected also, because the truck can spring a leak, too.

MR. EARLE: Move to strike the witness' answer [*JA52] after "but in other cases, this is probably one of them, but I can't remember" as speculative, lacking foundation.

Q BY MR. LASATER: Are you doing any work for Shell Oil Company or any of its affiliated companies today?

A Not that I am aware of.

* * *

[103]

Q. Do you recall whether or not you reviewed the entire manual.

A. Yeah, actually I did.

Q. That was your assignment?

A. That was my assignment, before I made a budget up because I knew I was going to have to do it over and over and over. And I didn't want [**32] to lose a ton of money.

Q. Was it your understanding that the tank that you were inspecting was to be at the facility was used for the Shell D-D?

In other words, was it your understanding one way or another whether or not the tanks that you were inspecting were used for Shell D-D and other products or was it just Shell D-D?

A. No, only Shell D-D. In other words, I would go to a site and they may have a dozen tanks in the yard, I don't want to look at any other tank other than where they keep D-D. That was my only assignment.

Q. But it was your understanding, though, that the tanks you were inspecting were used to store Shell D-D?

A. Exclusively, yes.

[*JA53] Q. And Mr. Earle asked you about whether or not the Shell manual had as its purpose safety; correct? Do you remember that? **[104]**

A. Yes.

Q. You said yes. Did it also have a component of environmental protection as far as you can recollect?

A. I believe it was, but only as the existing environmental codes that were referenced in the back.

Q. But you didn't prepare the manual?

A. No.

Q. And you didn't have any discussions as far as you can recollect with the person who did prepare the manual?

A. I did not. [**33]

Q. So you don't really know what the purpose was of the author of the manual?

A. No.

Q. You jut knew what the manual said and that the company had to comply with it?

A. Right. They said we want you to fill out this checklist and, you know, look for the checklist compliance with our manual.

* * *

[*JA54] IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al., Plaintiffs, -vs- BROWN & BRYANT, INC., et al., Defendants. AND RELATED ACTIONS

No. CV-F-92-5068 OWW/DLB

(CONSOLIDATED ARVIN CASES)

No. CV-F-96-5879 OWW

(Consolidated Shafter Cases)

THE DEPOSITION OF GEORGE MACK
before the undersigned Certified Shorthand Reporter, taken on behalf of the Plaintiffs, at the Ramada Inn, Ft. Smith, Arkansas, on MARCH 12, 1998, pursuant to Notice and The Federal Rules of Civil Procedure.

* * *

[56]

* * *

Q. Now, just to be clear for the record, from the west side--by the west side I'm referring to the area on Exhibit 687 which is to the west of grid H, vertical grid line H, west of that to where the fence line is indicated, is that what you understood me to mean by [*JA55] west side?

A. That's [**34] right.

Q. Okay. Did you ever see any chemical spilled over there on the west side while you worked there?

A. Not on the west side. I would say near the 32 **[57]** tank, the Beebee 32 tank, liquid fertilizer tank, which is the biggest tank in the yard; the southwest, if you want to call it.

* * *

[59]

* * *

Q. Now, back to the west side. You mentioned the UN-32 tank, which is not on the west side, and a leak from it. Were there any leaks, spills, chemical releases over on the west side that you can remember?

A. If I remember right, some of that 32 had veered off in behind the welding shop and had not quite made it in behind the office there on the west side

Q. Is it fair to say that the west side was used for the purposes that you've already testified to; and that other than that, those uses, it wasn't used in ways that would produce spills or leaks?

A. No. No.

Q. That just is not what happened over there; is that right? **[60]**

A. No. Huh-uh.

Q. And you're saying no, meaning that that's correct?

A. That's correct. As far as I know, the almost four years that I was there, no, there wasn't any tanks, holding tanks of any kind, that I know of, that was over [**35] [*JA56] there in that area that had ruptured or lines had broke or anything of that nature.

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[*JA57] UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al., vs. BROWN &BRYANT, INC., et al.,

NO. CV-F-92-5068 OWW/DLB

(CONSOLIDATED ARVIN CASES)

NO. CV-F-96-5879 OWW

(CONSOLIDATED SHAFTER CASES)

DEPOSITION OF ROBERT W. SWAIN
March 17, 1998 Houston, Texas

* * *

[104]

series of inspections found that not one of the customers visited had a totally satisfactory spill containment system." So by that, you're saying that the Brown & Bryant Arvin facility did not have a totally satisfactory spill containment system for the bulk D-D storage. Is that correct?

MR. HELDT: Objection to the form of that question.

A I don't think that's what it says. It says they didn't have an adequate or totally satisfactory spill containment system.

Q Okay. Would you then explain to me what that meant?

A Every one of the agricultural chemicals, products, fertilizers, insecticides, pesticides, [*JA58] everything that they were handling in a liquid form could be inadvertently spilled or discharged [**36] onto the ground and could be flushed into, you know--off the property, if not contained. In that respect, they were not totally satisfactory. Not by my standards but by the California standards; by the EPA standards. I'm not sure that EPA was in existence then. Anyway, California certainly had some pretty stringent

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[118]

* * *

A I don't really recall the situation at the time. I do know that they were given the D-D safety manual. My guess is that probably, without exception, most of these people did not read and retain and practice all of the suggestions that are in the D-D safety manual and the other codes and regulations that were referred to in the manual. People just don't read all of that stuff. They just go ahead and get the business done. It's not that it wasn't available to them. It's just that they didn't practice it.

Q Okay.

A Most of the people that we visited, it was a pretty competitive business. Most of these people were real entrepreneurs when they came to putting together a facility to provide the products and services that they sold. They didn't always follow the rules. They did the best they could in the cheapest way possible, and those conditions [**37] didn't always meet the standards **[119]** and regulations required. And that's a general statement. I'm not saying that this was true with Brown & Bryant at Arvin, but this is generally true with all the facilities I investigated.

[*JA59] * * *

[128]

* * *

Q Here on Page S003269, it says, in part, "When D-D spillage has been collected as above, proceed to decontaminate contaminated equipment and surfaces as follows," colon.

A Uh-huh.

Q "Wash down affected areas with a detergent solution and rinse with water," period. "Absorb waste water as above or drain it to a sump for future collection and disposal," period, end of quote. Was that your understanding, at least in part--And the paragraph goes on. Did you have that understanding as to that was the way contaminated equipment was to be decontaminated?

A You're referring to equipment?

Q Equipment and surfaces.

A As a part of equipment, it's probably the only way you can really do that surfaces. There's other ways in which that can be handled, such as putting containment facilities, a dike or whatever, around a tank, if that's the area in which they are concerned about spillage, having--loading the facilities [**38] or transfer facilities, I should say, set on a pad with a sewer system or a sump that will run it to a basin and then get **[129]** pumped into their holding pond to keep it from running off of the premises. A lot of these facilities, as we noted in the inspection report, is--again, reviewing it, I noticed that the tank was sitting on gravel. A lot of the other facilities that were inspected were sitting on gravel and all this would do is if there was a spill, would allow the D-D to percolate [*JA60] into the ground. Washing it with detergent wouldn't have helped a bit. So I don't think that in my review of the facilities with Jack Brown, that we said anything about cleaning or following any of these procedures other than the fact that he should follow the D-D safety manuals.

Q Was it your understanding that Brown & Bryant had a sump where D-D rinseate could be collected?

A I don't recall that, but my guess was that they did not, but it was something that they were planning on providing as regard to that footnote on the inspection report, the typed inspection report.

Q Was it your understanding at this time in 1979 that waste waters containing D-D were regularly generated [**39] by distributors like Brown & Bryant as a normal course of their operations? **[130]**

A Waste waters containing D-D--Repeat the question, please.

MR. LASATER: Actually, I don't think I can. Will you read it back?

If it doesn't make sense, I'll redo it.

(The record was read by the reporter.)

A I don't recall that. But in the first place, one wouldn't mix water with D-D if there was a way of avoiding it. It's possible that there would be a D-D spill and rain could come around or somebody was washing down the facilities and there happened to be some residual D-D from transferring product from the storage tank into a transport vehicle where there might have been some spillage. That water, with a little D-D that might be in it at Brown & Bryant from, again, reviewing the inspection report 'cause I don't [*JA61] remember the specifics, probably would have run off the property at the time that I made the visit because I don't recall that they had a collection facility there at the time. Again, I can only surmise that from our discussion following my inspection and the review with Jack Brown, that this is something that he was going to have to put in as required by the Water [**40] **[131]** Quality Board.

Q Now, you indicated that washing down with water would not be--I don't know that that's what you indicated. You indicated that you wouldn't typically put water with D-D if you could avoid it.

A If I--That's correct.

Q Okay.

A I would absorb it using kitty litter or calcium chloride or--There's a lot of things that you can use to absorb hydrocarbons and then pick them up and then you don't have to worry about the contamination so much or at least you're going to grossly indilute it. Just mixing it with water just makes it that much more difficult to handle and dispose of.

Q We've had testimony in this case that Brown & Bryant's procedures were such that they had a two-thousand or a twenty-five-hundred-gallon-tank truck that they would use to transport D-D to the fields to put into a nurse tank. And that at times, they wanted to handle or transport a different liquid in that truck, and they would wash out that truck and put it into a sump that they had on site so that they then could put the **[132]** other fertilizer or chemical or whatever in there.

A Yeah.

Q Were you ever aware that Brown & Bryant had a procedure like that?

[*JA62] A [**41] No.

Q Were you ever aware that that was a kind of procedure that other agricultural chemical facilities that you visited over your career utilized?

A There were all sorts of facilities out there in order to collect spills and what-have-you. By and large, most of the facilities that I visited had no adequate protection with the handling of spills. Most of them just let them percolate in the ground. And that was one of our concerns in this business because most of these were just bare-bones operations and they allowed this to happen. Most of them were in rural areas and after all, it's D-D. What do you do with the product, anyway? You inject it into the soil. That's the commercial use of it. It's to kill nematodes, so why not let it spill on the ground and kill the damn nematodes?

Q Would be very sure there were no nematodes on **[133]** that site.

A Well, I've heard of people using D-D as a weed killer. Well, let's face it. It's, basically, like diesel oil, anyway, and people used to go along the road and spray diesel oil on there and kill all the weeds. And that was a good way of getting rid of their contaminated D-D. It wasn't recommended by Shell, but then a lot of things [**42] that we recommended weren't followed.

Q You were talking about spills and how, in fact, it was your experience that spills were handled. When you were talking about spills, were you including in there that concept that I referred to of washing out one tank truck in order to put a different product in there?

A No. My concern in looking at that facility, primarily, again, in referring back to the inspection report which was--I don't know. Where'd it go?

[*JA63] MR. HELDT: Over here, 1030.

THE WITNESS: Yeah, 1030.

A Most of it was to contain spills that occurred either in the transfer of product or the major concern with what

happened to the product in the storage container. Some of the things that they **[134]** were doing with their storage container, as you will see by reading the report, that were very potentially hazardous. They had nothing more than a hose going up from the top to the bottom of the tank and if anything happened to that hose, either because it became old and brittle or it was accidentally pulled off of the bottom connection, it would have evacuated the whole tank. The problem there is that that spill--gross spill of D-D, for instance, there was just [**43] no way to contain it. It would run off the property and contaminate everything on down.

Q Right.

A That certainly was a concern to us and a concern to them. They needed to do something about it. So we made recommendations as to what they could do and there were many options to that, to put in a different type of level device so that they can determine what the volume was. You certainly don't want them to overfill the tank. The other one was, well, the--what if they did, then what do you do about it? Well, we suggested that they put a berm around the tank to contain it so if there was a spill, it would only affect the ground immediately around the tank and wouldn't

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[186]

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[*JA64] Q Do you recollect what was done with respect to catching spills, if any, that were part of the transfer process both in and/or out?

A There's usually very little spill that can occur, but they always do happen. There's a few drips that are lost or whatever. One way of doing it is when the transport vehicle--it can be a railcar, it can be a tanker truck or whatever. **[187]** --comes in and he connects his hose from his storage tank to a pump, which then pumps it into the [**44] customer's storage tank. Again, liquid won't flow uphill, so you need a pump in the operations. In making this transfer, then, 'cause, usually, a valve on the end of his hose that connects to the valve on your tank, you open up both of them, but there's still a little space in there where product can get trapped. And when you break the connection so that you can move the umbilical cord from the truck and get him going on his way, there's probably a little drop in there. Frequently, it's collected in a little bucket or pan and disposed of, if it's done properly. Most often, though, back in those days, just let it dump on the ground.

* * *

[*JA65] UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA AT FRESNO

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al. Plaintiffs, vs. BROWN & BRYANT, INC., et al., Defendants. AND RELATED ACTIONS

Case No. CV F-92-5068

DEPOSITION OF DAVID REA GLENDALE, CALIFORNIA

SATURDAY, MAY 2, 1998

* * *

[208]

* * *

Q. Do you remember that part of the bulk facilities improvement program was a requirement that there be dry disconnect valves for transfer valves?

A. I do.

Q. And what was your understanding as to what those [**45] dry--what was entailed in the dry disconnect [*JA66] valve? **[209]**

MR. EARLE: The question is ambiguous as phrased.

MR. LASATER: Let me restate the question.

Q. What was your understanding about the requirement for dry disconnect valves?

MR. EARLE: The question is overbroad, calls for a narrative, and it's ambiguous.

If you can tell.

THE WITNESS: He gets the narration version then.

Dry disconnect valves were used to minimize spill or release of product upon hoses being disconnected.

I can't tell you how many grams of product that meant that would be in tolerance. I can't remember that.

I just know I remember that, through the State of California, the regulators were demanding dry disconnect fittings for filling helicopters and fixed wing aircraft to discharging all kinds of products.

BY MR. LASATER:

Q. Do you remember that the bulk **[210]** facilities improvement programs requirement for dry disconnect valves referred to the disconnect of the hose that went from the tanker truck which delivered the D-D to the customer site from the customers' tank?

A. I do.

Q. Do you remember that the dry disconnect requirement also applied to disconnects when the [**46] customer was taking or had taken D-D out of the bulk tank and -- well, when they were disconnecting from having taken out from the D-D tank?

[*JA67] A. Yes, it was.

* * *

[*JA68] UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al., Plaintiffs, vs. BROWN & BRYANT, INC., et al., Defendants.

CV-F-92-5068 OWW/DLB

DEPOSITION OF WILLIAM PERKINS

BE IT REMEMBERED THAT the deposition of WILLIAM PERKINS was taken on behalf of the Plaintiffs before Jann Nichols, a Notary Public, on Tuesday, May 26, 1998 beginning at the hour of 10:30 a.m. at the Jackson County

Airport Authority Building, 3650 Biddle Road, Suite 13, Conference Room C, Medford, Oregon, 97504.

* * *

[12]

* * *

Q. Now, what else was washed into this sump that you've referred to? **[13]**

A. Well, everything that they ever drained out of [*JA69] any tank went into it. They didn't spare anything. Nemagun, DD, whatever, it all went in there.

Q. You mentioned Nemagun. What was your involvement with Nemagun?

A. Well, I injected quite a bit of it in the fields for cotton and things like that. It was mainly used on cotton to kill [**47] nematode.

Q. And what was the container that the Nemagun come in?

A. If I remember correctly it came in five-gallon containers made out of metal and it was a clear liquid and weighed about three or four times what water would way. Extremely heavy.

Q. And did any of that get washed into the sump?

A. Well, I imagine it did when they washed out the lines that carried it from the pumps to the injectors when we put it in the ground. Now, the containers when they were emptied before they had the landfill out there near Arvin we took them out there and just threw them out and burned them.

Q. Threw them out where?

A. At the dump grounds. Would be west of Arvin about four miles on Way Patch Highway.

Q. And these lines, were these the lines on the **[14]** tractors that you were driving?

A. Right, they came from the, you know--they dripped it into these little injector tubes. They had things that went down into the ground, that it was injected into the ground under pressure, a slight amount of pressure, didn't need much because the stuff was so heavy. Then when we got back there was still some in the lines, so we just flushed it out and it went into the hole, the sump hole.

[*JA70] [**48] Q. When you say got back, do you mean get back to the Brown & Bryant Arvin yard?

A. Right, from the farm or wherever we was using the stuff.

Q. When you were driving tractors while working for Brown & Bryant, were those Brown & Bryant tractors?

A. They were leased. Who they leased them from, I don't know. All of their trucks and everything were leased. They had all Dodge trucks and they were all leased. Now, we had Ford tractors, Ford 6000s that we used, and we had some Ford 500s. I believe that was a smaller tractor that we used for putting fertilizer and pesticides and stuff like that out.

Q. So after the tractor was used at the farmer's field, you'd bring it back to the Arvin yard, the Brown & Bryant yard? **[15]**

A. That's correct.

Q. Do you ever remember DD being--do you remember any DD in the Brown & Bryant yard that was in 55-gallon drums?

MR. EARLE: Can I have the reporter read that back?

MR. LASATER: Let me restate it.

Q. (By Mr. Lasater): When you worked at Brown & Bryant did you ever see DD on site in containers, smaller than 55 gallons? Fifty-five gallons or smaller?

A. Well, I saw some stuff like that in 55-gallon drums but I never--I don't recall ever seeing [**49] anything in any container any smaller than that. They had so much stuff there that--gosh, this has been years. I just can't remember all of the amount of junk they had there.

[*JA71] Q. Was some DD present at the Arvin site in 55-gallon drums--

A. I'm just not--

Q or do you remember?

A. I'm just not sure. I can't really remember how they brought that stuff in there. It's just they had so much in that warehouse that it was unbelievable. **[16]** Now, I've never hauled any of it in drums, so I'm not sure.

Q. Okay. How about a product called Telone. Did you ever have anything to do with a product with that name?

A. Well, if I knew what it was used for. Like I say, my memory of those times is--

Q. Okay.

A. I was p.o.'d most of the time that I worked there anyway because I had to handle that crap.

Q. Oh, I see.

A. How do you spell that?

Q. Some people called it Telone, T-e-l- --

A. -- - o-n-e?

Q. Yes, Telone.

A. Well, it sounds familiar. It was probably in 5-gallon cans, wasn't it?

Q. I don't know, and it was a product that was similar to DD is my understanding.

A. Well, that must be what--that's what we used on the tractors for injection on cotton and things like [**50] that.

Q. Let me ask you, looking at this grid map again which is Exhibit 687 and you see the area to the west of the warehouse, to the west of the vertical line **[17]** [*JA72] "H"--

A. It says "covered storage"?

Q. Right. The area to the west of that, up and to the rail lines there, do you see where I'm indicating?

A. Yes, I do. That's an H on the grid.

Q. H on the grid. West of that H.

A. It would be H6.

Q. Right. Now, was any of that property out there used? It was--it's also shown on this overhead photo which is Exhibit 242.

A. That's the area to the west?

Q. Right, it's the area to the right of the large building in that photo.

A. Yes.

Q. Did--while you were there was Brown & Bryant did it use that area at all?

A. No.

* * *

[19]

* * *

Q. Was there equipment stored to the west? **[20]**

A. No, not when I worked there there wasn't.

Q. So the west of the warehouse and this maintenance building, that was not used?

A. Not when I was there, no.

* * *

[*JA73] IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Plaintiff, -vs- HERCULES, INCORPORATED, et al., Defendants. [**51]

No. CV-F-96-5879 OWW/DLB

DEPOSITION OF RICHARD S. WOOLLEY
Glendale, California May 27, 1998

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[135]

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Q. In the typed-in portion in the lower half of this form, where it says 5000 gallons, D-D, **[136]** and then there is a letter, and then it says soil fumigant, do you see that?

A. Yes.

Q. And right below it it says less evaporation allowance. Do you see that?

A. Uh-huh.

Q. Do you remember what the evaporation [*JA74] allowance was?

A. I don't. There was one because it's a volatile material.

Q. And there was an evaporation allowance at the time that you were district manager?

A. As far as I recollect.

Q. What was your understanding of how that allowance operated?

A. I can't tell you the particulars. But being a volatile product, it was--it seemed to be a necessary adjustment for the customers.

* * *

[*JA75] IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

HON. OLIVER W. WANGER

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al., Plaintiffs, vs. BROWN & BRYANT, INC., et al., Defendants. AND RELATED CROSS-CLAIMS AND THIRD PARTY ACTIONS

NO. CV-F-92-5068 OWW

USA's Motion for Summary Judgment [**52] as to ATSF; DOT's Motion for Partial Judgment as to ATSF
Fresno, California Monday, October 26, 1998

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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[87]

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THE COURT: Let's look at divisibility cases that were just cited.

MR. MacAYEAL: Okay.

THE COURT: And let us assume, because this is [*JA76] my assumption just by looking at the evidence in gross. This less than 10 percent, probably less than 5 percent of anything **[88]** that has been released on the leased property compared to what has been released on Brown & Bryant's property, owned property, through the years that would contribute to the groundwater problem or the threatened groundwater problem, and so if we are looking at the Restatement, you do not assign at this stage as a matter of law 100 percent joint liability to the railroad.

Mr. MacAYEAL: So we are assuming that only 10 percent came from the railroad parcel.

THE COURT: I think based on what Mr. Brown testified to and knowing what their operations were compared to,

in other words, nobody has tried to give us, like gross estimates of how many millions of gallons were stored in containers or stacked in drums or what was spilled [**53] and what wasn't spilled, that kind of stuff, but we know on the other property that you have got, basically, a fabricating site where you are mixing, you are crushing, you are basically taking the ingredients of the agricultural commodities, I should say chemicals, and are putting them into package and a form for transportation, some are in bulk, and that obviously is going to be unquantified, but there is a lot more there on property for which Brown--I should say for which the railroads under CERCLA don't have liability compared to what is going on on their property that they have contracted to permit Brown & Bryant to conduct its activities.

* * *

[*JA77] IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

HON. OLIVER W. WANGER

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al., Plaintiffs, vs. BROWN & BRYANT, INC., et al., Defendants. AND RELATED CROSS-CLAIMS AND THIRD PARTY ACTIONS

NO. CV-F-92-5068 OWW

Court Trial, Day 1

Testimony of Lonnie Merryman

Fresno, California Tuesday, March 30, 1999

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

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[8]

MR. MacAYEAL: I will call the witness, your Honor. Your Honor, the government [**54] calls Lonnie [*JA78] Merryman.

LONNIE MERRYMAN, called as a witness on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

THE CLERK: Please state your name and spell your last name for the record.

THE WITNESS: Lonnie Dean Merryman. My last name is M-E-R-R-Y-M-A-N.

THE CLERK: Thank you. You may take the witness stand.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. MacAYEAL:

Q. Mr. Merryman, were you ever employed at Brown & Bryant in Arvin?

A. Yes, sir.

Q. When did you start there, roughly?

A. It was either '72 or '73, and I worked until '81.

Q. Were you out there in the yard in Arvin?

A. I worked a little bit in the yard. Mostly I was field service.

Q. Field service?

A. Yes.

Q. Tell us briefly what you do and what field service **[9]** involved.

A. Field service was as a serviceman, we would--salesmen would go out and sell the material and then we had a full service operation. We would go out and mount the tractor, put the equipment on to apply, or whatever, to apply whatever it was they were putting on.

Q. Fumigant or whatever?

[*JA79] A. Fumigants, insecticides, pesticides, whatever.

Q. Are you familiar with [**55] the term of a bobtail?

A. Yes.

Q. What is that?

A. Bobtail were the trucks we handled to handle the fertilizer, the fumigant, to haul it from the plant to the field.

Q. Was there a tanker called a nurse tank?

A. Yes, sir. That's what the bobtail carried it in when the salesmen or tanker drivers would take the nurse tank to the field. They would fill the material in it and then we would nurse out of it to either tractor tanks on tractors or pull rigs.

Q. What was the capacity of the nurse tank generally?

A. Field service, it would hold--we had two sizes. One was 2,000 gallons; one was 25 or 26--I'm sorry, 2,000 gallons and 25- or 2600 gallons.

Q. That tank would be stationed out at the farmer's field? **[10]**

A. Yes.

Q. Material from that would go into another tank?

A. Yes, sir.

Q. And then to get the material out to that nurse tank, you would use the bobtail?

A. Yes, sir.

Q. What was typically the size of the bobtail in terms of gallons?

A. I believe it would hold 1800 to 2,000. I'm not sure.

THE COURT: There was a tank on the bobtail?

THE WITNESS: It was a 2,000 or 1800 gallon tank [*JA80] mounted on a two-ton truck.

BY MR. MacAYEAL:

Q. Was it a tank [**56] or truck?

A. Yes.

THE COURT: When you say the nurse tank was stationed in the fields, did you move it into the field?

THE WITNESS: Either the serviceman would move it or the tanker driver when he took out the material. Sometimes the servicemen would spot him in the field and call the order in.

THE COURT: Otherwise, where was it kept?

THE WITNESS: Inside the yard at Brown & Bryant.

BY MR. MacAYEAL:

Q. Now, you personally were taking these tanks out there, correct, you were a serviceman? **[11]**

A. Yes, sir.

Q. And later on, you became the manager?

A. I became the service manager the last year, two years I was there.

Q. Okay. And when did you leave Brown & Bryant?

A. '81.

Q. Did you have occasion to go visit Brown & Bryant after you left their employment?

A. Yes, sir. The company I went to work for, Kisco Sales, K-I-S-C-O Sales, Incorporated, we sell spray and fertilize equipment, and they were one of my customers after I went to work for them.

Q. You would go back to Arvin plant and try and sell the products that Kisco sold?

A. Yes, sir.

[*JA81] Q. To Brown & Bryant?

A. Yes, sir.

Q. Now, could you tell the Court--are you familiar with the term "D-D rig"? [**57]

A. Yes, sir.

Q. Could you tell the Court what that is?

A. A D-D rig, I presume he's talking about the pull rigs?

Q. Yes, sir.

A. That was a unit that had two wheels on it with a tongue. It had anywhere from 14 to 16 shanks on the back and then it **[12]** had about a 500-gallon tank that we put the material in. They would pull this apparatus through the field behind the tractor and that would inject the D-D into the ground for fumigation. They call it solid fumigation.

Q. The D-D rig had tines that dug into the ground like a fork?

A. Yes, tines, shanks.

Q. Those had hoses that allowed the fumigant to be sprayed?

A. Yes, sir.

Q. Now, did these D-D rigs--you have familiarity, correct?

A. Yes.

Q. You took them out in the field?

A. Yes.

Q. Did these D-D rigs have any filters on them?

A. Yes, sir.

Q. And what was the reason for the filters?

A. To keep any sediment or trash out of the orifices, to keep them from being plugged up. [*JA82] Sometimes the D-D, or whatever material it was, would have settlements of rust or pieces of hose that came apart. The big filter would catch everything coming out of the tank going to the pump. We had a smaller three-quarter inch [**58] filter that came out of the pump going back to a manifold. That manifold would feed however many shanks we had on the back. Each one of those tubes would have a small in-line orifice body with an orifice and a small strainer in it. **[13]**

Q. Let me go through that again. Now, when the D-D goes out in the field, would there be dust generated when it was being dragged around?

A. Yes, sir.

Q. That was a concern as far as that material getting inside the tank?

A. Right.

Q. When--was there a filter on the bottom of the D-D pull rig?

A. Yes, sir.

Q. What was that for, as far as you understood?

A. That was to keep the dust or sediments from the big tank getting through the pumps and plugging the orifice.

Q. That would keep the sediment from going out of the D-D tank into whatever was transferring into the D-D pull rig?

A. Yes, sir.

Q. And then you had another filter on top of the D-D tank?

A. Not on top of the tank. The tank was open. We would fill directly into it and then it would be strained coming out of the D-D tank.

Q. Was there some type of filter before it got to [*JA83] the tines?

A. Yes, coming out of the pump there was a small three-quarter filter there [**59] also.

Q. You had a pump on the D-D rig that got the D-D into the tines? **[14]**

A. Yes, sir.

Q. There was a filter on that pump?

A. Yes, sir.

Q. Down at the bottom of the tines were there filters as well?

A. Yes, sir, and every shank had its own filter.

Q. Okay. Now, before you took the D-D rig out to the field, did you have to make sure it was clean?

A. Right.

Q. And, in other words, if the filter were all clogged up, it would be--would it be difficult to fill the tank?

A. It would be difficult to take material out of the tank.

THE COURT: Did each shank or tine disperse material?

THE WITNESS: Yes, sir.

THE COURT: Thank you.

You may continue.

BY MR. MacAYEAL:

Q. Mr. Merryman, were the D-D rigs typically washed out?

A. Not usually. If it got real bad, full of a lot of sediment or something, we would wash them out. Usually when we finished an application of the job during our busy season, we would move it from one location to another and we just credit what material [*JA84] was in the tank and charge to the other farmer.

Q. How would you know how much was in there?

A. They had plastic sight gauges or tubes on the end of the tank, hoses, and they were [**60] marked and calibrated in gallons and **[15]** you could check it that way.

Q. If the tank were half full, the sight gauge would read half full?

A. Yes, sir.

Q. And you applied D-D year-round, though, correct?

A. Yes, sir.

Q. And if there was residual material in the D-D rig out at the field that you were not transferring to another job, what would happen with that rig at that point?

A. If there was a small amount, like less than a hundred gallons or so, the servicemen would hook on for it, tow it back into the yard and park it in the lot.

Q. And that would be staged somewhere in the plant?

A. Yes, sir.

Q. Where was that?

A. In the early years, it was on the north end of the warehouse. In the later years, it was on the northwest and the west end of the warehouse.

Q. This is to the west of the warehouse?

A. Yes, sir.

Q. And that was after the fence got taken down in 1975?

A. Whatever year it was, yes, sir.

Q. And so did you have occasion to check out the [*JA85] D-D rigs before you took it out on the job?

A. Yes, sir. It was easier to check them in the field, to **[16]** clean the filters and do everything there, but we did check them there.

Q. What happened [**61] from time to time when you checked the filter on the bottom of the tank, if anything?

A. In regards to?

Q. Was there any spillage?

A. Yes, sir.

Q. Were there any special nurse tanks that were devoted to D-D?

A. Yes, sir.

Q. How were they different from the other nurse tanks?

A. They had a different type of hose on it to handle the material, they were smaller hose. Other than that, it was the same.

Q. And were these tanks--the D-D tanks were not rinsed for the most part, the pull rigs, rather?

A. The pull rigs were not rinsed.

Q. How about the D-D nurse tanks, were they rinsed from time to time?

A. Whenever they were brought into the yard, if it was going right back out to another D-D job, they would hook onto it and take it back. If it was going to be in the yard for a while, they would clean it up and park it in the lot.

Q. Was there ever occasions you were aware of where not all of them got rinsed out for whatever reason? **[17]**

A. Yes, sir.

[*JA86] Q. Too many of them lined up?

A. Yes, sir.

Q. And were those staged over on the western side of the plant, west of the warehouse?

A. Usually when the servicemen brought it in, they would park it on the west [**62] side. It was easier to unhook.

Q. Was this a situation where you have to check the filters? Do these have filters?

A. Yes, sir.

Q. Was it important to check these filters on the tank as well?

A. If you were going to turn it right around and take it into the field and you decided to use another application, we would clean it there.

Q. There was a filter on the bottom of the tank that you would open up?

A. Yes, sir.

Q. You did it yourself?

A. I have done it myself.

Q. Was there any type of spills you experienced?

A. Yes, sir.

THE COURT: Where was the--you say that each time the rigs were brought in, the nurse tanks, they were checked, the filters were checked. Was that at the Brown & Bryant site **[18]** or in the field?

THE WITNESS: That was done inside the Brown & Bryant site when we brought them back in.

THE COURT: Even though you wouldn't rinse them, the filters would be checked every time the tank came in?

THE WITNESS: Right. Because you would have [*JA87] sediment in it. It was easier to do it there than out in the field.

BY MR. MacAYEAL:

Q. If you had a clogged-up filter, would there be problems from having a clogged-up filter?

A. Right. Sometimes [**63] you couldn't get any material out of the tank or it would plug up the rest of the rig, so it was easier to take it apart, clean it there where we had hose and different ways of cleaning it or replacing it.

Q. Okay. Now, were any of the Bobtails--let me ask you this.

Do you recall a tank, a big bulk tank that was dedicated to the product D-D?

A. Yes, sir.

Q. All right. Now, do you recall a--was there a windstorm or some type of a storm--

THE COURT: Can we do this? How big was the tank for D-D only?

THE WITNESS: I'm not sure how many gallons it held. It would hold like two loads or three truckloads, which were **[19]** usually--

THE COURT: A thousand gallons, estimate?

THE WITNESS: No. When they delivered the D-D, I think it was probably--I'm speculating, but I think it was probably 4,000 gallons or so. So, in that area.

THE COURT: In your tenure from 72-73 until '81, was there always a D-D bulk tank?

THE WITNESS: No, sir.

THE COURT: So how long was there a D-D bulk tank?

[*JA88] THE WITNESS: Up until when we had the dust storm, it was either '77 or '78, I'm not sure what year it was, but that tank was destroyed.

THE COURT: And your earlier testimony that concerned [**64] nurse tanks, pull rigs and Bobtails, we are talking about that equipment being used only for D-D?

THE WITNESS: We had a special number of trailers that we used for just D-D. The Bobtails would be used for all materials.

THE COURT: Other materials as well. And how many units were devoted to D-D only?

THE WITNESS: On the nurse trailers?

THE COURT: Yes.

THE WITNESS: I can't remember the exact number. There was probably ten or so.

THE COURT: And D-D was used, to your understanding, **[20]** as a soil fumigant?

THE WITNESS: Yes, sir.

THE COURT: You may continue.

BY MR. MacAYEAL:

Q. Now, after that--you recall that the D-D tank was damaged in that windstorm?

A. Yes, sir.

Q. That was '77 or '78?

A. Whenever the dust storm was.

Q. Did the plant take, where--was there a place that you were aware of where they stored the D-D since they didn't have that tank? Where did they put it?

A. We had some large truck and trailers, a set of doubles, they call them. They were stainless steel tanks. Each tank would hold anywhere from 2300 to [*JA89] 2500 gallons. They were old converted milk trailers and we would use those. We used it--after we lost the big tank, we used it for [**65] temporary storage, and they would put those and use it during our busy season.

Q. When you load up the bobtail, it would be loaded up from that double tank, milk tank, is that what you call it, a milk tank?

A. Yes, sir.

Q. It was a stainless steel milk?

A. They were all stainless steel milk trailers that were converted. **[21]**

Q. There were two of them?

A. We had two sets, yes.

Q. And were those stored over on the western side of the warehouse?

A. They would be all over the yard. They would be on the west side, yes.

Q. Those would be used, then, to download into the bobtail?

A. Yes, sir.

Q. And, also, as far as you know, any deliveries coming in would be pumped into that tank?

A. As far as I remember, yes.

Q. Now, let's go back to you were at the plant before the parcel to the west of the warehouse was used?

A. Yes, sir.

Q. And there was a fence running up along the railroad track?

A. Yes, sir.

Q. To the west side of the warehouse?

A. Yes.

[*JA90] Q. And do you recall whether or not that fence was taken down at some point?

A. Yes, sir.

Q. Do you remember the precise year?

A. I couldn't tell you the exact year, no.

Q. Now, after that fence was taken [**66] down, was there anything done to that property out to the west of the warehouse as far **[22]** as grading or anything like that?

A. The first thing we did was remove the railroad spur that was ran alongside the warehouse. After we took the railroad spur out, then it was leveled. We had a drag that we drug around, leveled it out.

Q. Did you oil it?

A. Yes, sir.

Q. All right. Was it a common practice to oil that plant?

A. Yes, sir.

Q. What type of oil was it?

A. It's just regular road oil. They would have a truck come out and they would spray it on the ground.

Q. Did it have any type of hard material on it, like asphalt, or was it--

A. No, it was just like road oil.

Q. Okay. And you recall seeing that surface, correct?

A. That's correct.

Q. Throughout the year, would there be vehicles moved on that surface and other material stored out there?

A. Yes, sir.

Q. Now, did you ever recall any types of flaws or [*JA91] cracks in that surface?

A. Yes, sir.

Q. What did that look like to you?

A. After they would oil it, we would let it sit for a week or **[23]** two until it pretty well dried or soaked in and then we would move equipment back over and store it there. [**67] They would move it with a forklift or one-ton truck and turning the wheels back and forth would always break out new dirt.

Q. You recall seeing that?

A. Yes, sir.

Q. When you did the oiling, would you do one side of the warehouse first and the other side of the warehouse?

A. Yes, sir.

Q. When that happened, what would you do with the material that was, say, on the side that you wanted to oil, what would you do with the things that were stored out there?

A. We would move everything to the other side.

Q. Now, do you recall whether or not that oiled surface on the west side of the warehouse, did that run all the way up--let me back up.

Was there a concrete apron to the west of the warehouse?

A. Yes.

Q. Now, do you recall whether or not the oiled surface ran all the way up and touched that surface?

A. No, you couldn't get the truck all the way up there. They didn't spray all the way to it.

Q. And do you recollect whether or not the site was graded in any particular way as far as rainwater [*JA92] runoff? **[24]**

A. Everything was sloped to run to the southeast corner of the yard.

Q. There was a pond down there?

A. Yes, sir.

Q. And let me--

MR. MacAYEAL: Your [**68] Honor, may I hand the witness a document?

THE COURT: Yes, you may.

BY MR. MacAYEAL:

Q. I hope this shows up, but could you mark the letter "A" in the area that you had referred to as the pond.

A. (Witness complies.)

MR. MacAYEAL: Your Honor, I have marked a photograph as G-100, and may I show it to the witness and have him identify it, please?

THE COURT: Yes, you may. You can show it to him physically or put it on the Elmo.

BY MR. MacAYEAL:

Q. I have put G-100 on the Elmo so it's visible on the computer screens. Lonnie, can you see that?

A. Yes, sir.

Q. Now, I put an "A" down--first of all, what is that photograph?

A. I'm sorry?

Q. What does this photograph depict? **[25]**

A. It is the Arvin facility.

Q. Okay. Now, I put an "A" down on an area of that photograph. Can you tell me what was located at that particular location?

A. That was just a large sump area.

[*JA93] Q. That was where the facility, the plant drained down there?

A. Most all the--everything drained to that corner, yeah.

Q. Did you ever see water puddled up down there?

A. Yes, sir.

Q. Now, do you recall that there was a sump over on the eastern side of the plant?

A. I'm sorry, a [**69] sump on the eastern?

Q. Was there a big sump?

A. There was a large sump where that A area is.

Q. Some people called that a sump, but others called it a pond?

A. We called it a sump.

Q. Okay. Was there another sump that was connected with a rinsing location?

A. Yes, sir.

Q. Okay. And let me get you to identify where that is, please. I'm handing the witness Exhibit G-100. Could you write the letter "B," the general area where the rinsate sump was?

A. (Witness complies.) **[26]**

Q. Just for the record, on Exhibit G-100, you put a "B" down on the photograph, correct? Do you see that?

A. Yes, sir.

Q. What was in that location?

A. Originally, it was one large sump.

Q. Uh-huh.

A. And it had two wash racks, one to the north and one to the west.

Q. Now, in later years, was there an additional [*JA94] sump placed to the south of that?

A. Yes, sir.

Q. And was that--can you put a time period on that? Was it in the 80's?

A. No. It was actually in the 70's. It's when we lined that sump in the back.

Q. Late 70's?

A. Yes, sir.

Q. All right. Now, prior to that time, was--let me back up.

Was there a time when the sump or the pond that is marked Exhibit A, was there a [**70] time that that was lined?

A. It was lined in the late 70's. Before then it wasn't.

Q. Okay. Now, in connection with that lining and the placement of the new--of the smaller sump in--let me get you to mark where that smaller sump is placed.

A. Be like the letter "C" or something? **[27]**

Q. Yes, C.

A. Okay. (Witness complies.)

Q. Thank you. Let the record show that you have put a letter "C" down on the photograph, correct?

A. Yes.

Q. That was where that smaller sump was put in?

A. Yes.

Q. Do you recall what that was for, that smaller sump?

A. At the time when we lined sump number A, we also--on number B, we put two small concrete sumps in there. That small concrete sump would drain to underground. We had a pipe that would drain to C to [*JA95] catch all the sediment and then C would drain into A.

Q. C would capture the sediment?

A. Yes, sir.

Q. Did you install the pipes that connected B, C and A?

A. Yes.

Q. Do you remember when that was? Was that late 70's, early 80's?

A. It was in the late 70's when we lined that pump. I couldn't tell you what year.

Q. Prior to that was there any connection between sump B and the pond A?

A. Not that I'm aware of.

Q. Are [**71] you familiar with the product called Nemagon? **[28]**

A. Yes, sir.

Q. And when you were out there at the plant, was that something that was taken out to the growers' fields?

A. Yes, sir.

Q. And how did that come into the Arvin plant?

A. They would bring it in in 30-gallon drums and 5-gallon drums.

Q. Now, the 30-gallon drums, was there anything done to the 30-gallon drum before it went out to the field?

A. Sometimes, yes.

Q. Was it mixed with water?

A. Yes, sir.

Q. And how would that happen?

A. We would get one of the Bobtails. We would put water in it to an amount of mix that they needed, [*JA96] we would weigh it, and we would back up and we would get a forklift, raise the drums up, open the lid and dump the drum into the top of the bobtail and mix it.

Q. And then you would transport it to the field?

A. Yes, sir.

Q. And apply it?

A. Yes, sir.

Q. What happened with that? After you emptied the drum, where would that drum be placed, if anyplace?

A. Before we got the property to the west side of the shop, it **[29]** was stored at the south end. I would have to show you.

Q. Let me have you mark, please, with a "D" where that area was that you just referenced. [**72]

THE COURT: Which of the drums were the ones that were used to mix 30- or the 5-gallon?

THE WITNESS: They were mostly 30-gallon drums.

THE COURT: Thank you.

BY MR. MacAYEAL:

Q. Now, on Exhibit G-100, you see on the screen where you have put down a "D"?

A. Yes, sir.

Q. What was that area before you went out onto the west of the warehouse, what was that?

A. That's where we stored all the drums, the 5-gallon cans.

Q. Let me back up. The 5-gallon, did you remember 5-gallon cans of Nemagon?

A. Yes, sir.

Q. How were those applied to the field?

[*JA97] A. They were mostly done with what they called a "dripolator." It was a device that you would open--on the drums there were two sizes, on the 5-gallon there would be like a two-inch and three-quarter inch. You would take the three-quarter inch plug out, you would screw this brass dripolator in. It would have anywhere from two to four outlets, sometimes even more, and then you would hang that upside down on the back of the tractor **[30]** and it would drip out to the shanks.

Q. What happened with the can after it was emptied, if anything?

A. We would bring it back in the yard and store them where that "D" is.

Q. Okay. [**73] Now, was there--from after you started using the property to the west of the warehouse?

A. Yes, sir.

Q. Was there a--did you have occasion to store drums out on that western area?

A. Yes, sir.

Q. Then did you store the Nemagon, the 30-gallon Nemagon drums?

A. Yes, sir.

Q. And these were the ones that had been emptied?

A. I'm sorry?

Q. These are the ones that had been emptied?

A. Yes, sir.

Q. Was there ever an occasion that that area where you marked as D got filled up with rainwater?

A. Yes, sir.

Q. And so what would happen? What would happen to the drums, if anything, that was stored [*JA98] there?

A. Anything at that time would be stored over on the west side. **[31]**

Q. Now, what about Weed Killer D, do you remember that product?

A. Yes, sir.

Q. How would that product be applied out in the fields?

A. They would usually put it on with a spray rig, either the farmer's spray rig or else through tractor tanks, and then sprayed out with a hose.

Q. And was that a 30-gallon container?

A. I believe those were 55 gallons.

Q. All right. And--and so those were emptied out on the farmer's field, correct?

A. Right, it was either that way or, in some cases, it was [**74] brought out in bulk.

Q. But with respect to the 55-gallon drums, what would happen to the drums, if anything, after they were emptied?

A. We would bring them back in the yard.

Q. Where would you place them?

A. There again, in the early days, it would be down where D is. Later, it was on the west side.

Q. After the fence got taken down and you started using the west side?

A. Yes, sir.

Q. Now, do you recall you testified earlier about a concrete apron to the west of the warehouse?

A. Yes, sir. **[32]**

Q. All right. What was that used for?

A. Storage.

[*JA99] Q. Of what?

A. We would store mostly Weed Killer D and drums out there and 5-gallon cans out there.

Q. And did you also store that particular material inside the warehouse?

A. No.

Q. And why on--did you store some material in the warehouse?

A. Yes, sir.

Q. Was there any distinction between the two products to determine where one would be stored and where the other one would be stored?

A. The Weed Killer D was--if we ever had a problem with a leak or something, it was real messy. It made a mess. It was easier to keep it outside.

Q. Did you ever have occasion to see any leakage from any of those cans? [**75]

A. Yes, sir.

Q. What was done, if you recall, after the leak occurred?

A. Depending on what type of leak it was, the can would be picked up, redrummed into another container and cleaned up.

Q. Did you have a hose out there?

A. Yes, sir.

Q. Did you wash off the pad? **[33]**

A. Yes, sir.

Q. All right. Now, what I was trying to get at, was there some product that was stored in the warehouse, correct?

A. Yes, sir.

Q. Why the distinction? Was there a price--were [*JA100] you concerned about theft of some product?

A. Yes, sir.

Q. Could you explain that?

A. The Weed Killer D was a product that nobody hardly ever would steal. It's low cost. Where Nemagon, Fumazone, Round-Up, all that was expensive.

Q. You would store that and the other products you just mentioned inside the warehouse?

A. Yes, sir.

Q. But the dinoseb was outside on the apron?

A. Yes, sir.

Q. Now, do you recall the--did Brown & Bryant have company barbeques from time to time?

A. Yes, sir.

Q. Did you ever have any inside the warehouse?

A. Yes, sir.

Q. Were any steps made to clean out that warehouse before the barbeque?

A. Yes, sir.

Q. What was done? **[34]**

A. We would go in a week before [**76] the barbeque, we would empty the warehouse out, take all the material out. It would be swept and then hosed out.

Q. And would it be hosed out in the direction of the west?

A. It would go out all three doors or four doors.

Q. There was a set of doors to the west--

A. Yes, sir.

Q. --of the warehouse building?

A. Yes, sir.

[*JA101] Q. Now, you were out in the yard quite a bit, weren't you?

A. Yes, sir.

Q. All right. And a lot of what happened out there is the transfer of liquid material; is that correct?

A. Yes.

MR. LASATER: Objection, vague, your Honor, and leading.

THE COURT: All right. The objection is sustained.

BY MR. MacAYEAL:

Q. Did you ever have occasion to see any transfer of liquid material from one container to another?

A. Yes, sir.

Q. Can you tell us what that was?

A. It was all types. It was--it was trucks unloading material into storage tanks, it was Bobtails loading out of storage tanks, it was rebottling materials into drums, a lot of **[35]** different materials.

Q. Now, did you ever have occasion to see any leakage from that?

A. Yes, sir.

Q. Was that a rare event?

A. No, sir.

Q. Was it common?

A. Yes, sir.

Q. Was it common enough [**77] that you didn't particularly pay any attention to it?

A. Yes, sir.

Q. Now, did you ever have occasion to witness any tanker trucks downloading material into the D-D tank?

[*JA102] A. I have seen some in there. I seen all kinds of trucks unloading trucks.

Q. All right. Did you ever have occasion to see any materials transferred from a tanker truck where a bucket would be placed underneath the connection?

A. Yes, sir.

Q. All right. And did you ever have occasion to see--do you remember whether or not that was done in connection with the D-D tank?

A. That was all materials.

Q. And did you ever have occasion to see any spills with that type of activity? **[36]**

A. That was a common practice, yes, sir.

THE COURT: When you talked about leakage being common, on the transfer of materials from trucks to storage, from tanks out of storage and bottles to drums, where did the leakage go?

THE WITNESS: You mean like on the ground?

THE COURT: Yes, where did it go?

THE WITNESS: Yes, it would be on the ground.

THE COURT: All right. And when you talk about spills from all materials, including the D-D tank, where did the spills go?

THE WITNESS: When they were unloading, sir? [**78]

THE COURT: You were asked about buckets being under the connection.

THE WITNESS: Yes. When they were pumping off, we had a 5-gallon bucket we kept out there. When they got through unloading and unhooked their hoses, they would drain their hoses into that bucket and that bucket would be

dumped back into the tank they were putting it in or into another storage tank.

[*JA103] THE COURT: Thank you.

THE WITNESS: You are welcome.

THE COURT: And the spills that you referenced, what were those?

THE WITNESS: Just about anything we had in the yard. **[37]** I have seen spills of one type or another, sir. It was quite a daily--

THE COURT: And where were those spills? In other words, what was the receiving point of the spill?

THE WITNESS: I'm sorry, I don't understand.

THE COURT: The material, assumedly, is spilling from a drum, a bottle, a tank, a bobtail and it spilled somewhere. Where did the spill go?

THE WITNESS: It would go usually on the ground. If the bobtail was loading something in the yard anywhere or we were cleaning something out in the yard, wherever that was, it would spill.

THE COURT: Thank you.

THE WITNESS: You are welcome.

BY MR. MacAYEAL:

Q. Now, after [**79] you left Brown & Bryant, you went to work for Kisco?

A. Yes, sir.

Q. And do you recall, did you ever have occasion to sell equipment to Brown & Bryant?

A. Yes, sir.

Q. Was there ever--do you recall one way or another whether you ever sold a pump to Brown & Bryant in connection with the D-D tank?

A. We sold them pumps and seals, yes. **[38]**

Q. And do you remember a particular pump that was placed on that D-D tank around 1981 or '82?

[*JA104] A. I remember them buying a pump from us for a D-D tank. I couldn't tell you what year it was.

Q. All right. Now, the area to the south, I'm talking about in reference to the western side of the warehouse, okay, to the south of that parcel.

A. Yes, sir.

Q. Did you ever see any flooding or ponding down in that area?

A. I would have to show you on the map.

Q. Let me hand you Exhibit G-100. Why don't you draw, if you can, the general area where you would see ponding

in that southern part--

A. That would cover the whole south end of the map.

Q. Okay. Why don't we do it this way. After a rain, would it pond up down by the sump that you marked as A?

A. Yes, sir.

Q. All right. And would that be a different--would the water extend [**80] to different areas depending upon the rain event?

A. Yes, sir.

Q. Do you have in your mind, though, sort of a typical area that it would cover?

MR. LASATER: Objection, vague.

THE COURT: Do you understand the question?

THE WITNESS: I'm sorry? **[39]**

THE COURT: Do you understand the question?

THE WITNESS: Yes, sir.

THE COURT: Overruled.

THE WITNESS: It would. I'm trying to see how I can explain it. Let me see. On this map there is a large [*JA105] tank just above--

BY MR. MacAYEAL:

Q. Let me put it back on the screen. Could you direct me, you are talking about this tank here?

A. Yes, sir.

Q. All right. Why don't we mark that--is that called the UN-32 tank?

A. That was a UN-32 tank.

Q. Why don't you put an "E" right in the middle of that.

A. (Witness complies.)

Q. Let the record show that I've handed the witness Exhibit G-100. And you have put an "E" down on that picture, correct?

A. Yes.

Q. What does that represent?

A. That was our UN-32 tank, and a flood would come all the way up. If you look at the white line right next to it, there is like a white line that runs all the way down towards C.

Q. Uh-huh.

A. The water would extend all the way up, even [**81] up to where--just below B where the white anhydrous ammonia tank was, just **[40]** south of it about 50 feet. That would all be under water.

Q. Let me mark the anhydrous ammonia tank, if you would, please, with an "F."

A. (Witness complies.)

Q. Let the record show that I have handed the witness Exhibit G-100. I have put an "F" down on that photograph.

A. Yes.

[*JA106] Q. What does that "F" represent?

A. That was the anhydrous ammonia tank.

Q. And you were talking about where you had seen water ponding?

A. The water would run all the way up to just about 50 feet from that tank just wide enough you could drive a bobtail through without being in the water.

Q. When you say "that tank," which tank are you referring to?

A. I'm sorry. The one that's marked number F.

Q. Would the water be north of that or south of that?

A. Be south of that.

Q. You say it was wide enough for what?

A. Wide enough where you can drive a bobtail before it got into the water. Almost to the tank.

Q. Okay. You talking about the depth?

A. Yes.

Q. And how high was that bobtail tank from the ground surface?

A. The bottom of the bobtail? I could only speculate. I **[41]** couldn't even [**82] guess.

Q. All right. Was it higher than your knees?

A. To the bottom of the truck, I would say yes.

Q. Now, was there a railroad spur running up along the warehouse?

A. Originally there was, yes.

Q. All right. During the time that that railroad spur was there, was there any type of drainage device from the west side to the east side underneath that?

A. No, there was nothing on the west side, just [*JA107] dirt.

Q. In other words, was water--did water on the west side of the warehouse, was that channeled down to the pond?

A. Everything would go down to the pond, yes.

MR. MacAYEAL: All right. No further questions, your Honor.

Excuse me, your Honor. I would like to move Exhibit G-100 into evidence.

THE COURT: Any objection?

MR. LASATER: No, your Honor.

THE COURT: G-100 is received in evidence.

(Plaintiffs' Exhibit G-100 was received.)

THE COURT: Mr. Lasater, you may proceed.

MR. LASATER: Thank you, your Honor.

Mr. Merryman, I still don't think you can see that.

THE WITNESS: Not directly. **[42]**

MR. LASATER: Maybe we can work on this at the break, your Honor. At this point, if I can just have the witness be able to see it and your Honor.

MR. MacAYEAL: Your [**83] Honor, may I sit over here?

THE COURT: You certainly may.

MR. LASATER: I think we can, at the break, work out an easel system in the jury box.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. LASATER:

Q. Mr. Merryman, how are you today? Ike Lasater. I said hello to you again.

A. Fine.

Q. I have put up here on this easel an [*JA108] enlargement of what has been previously marked as Exhibit 689, that was the deposition exhibit and also the number that the railroad used to designate the exhibit.

So, your Honor, you have that available to you in a binder?

MS. BECKER: Excuse me, I believe it's 687.

MR. LASATER: 687, excuse me, I misspoke. We have a series of binders for the Court.

THE CLERK: They haven't been opened yet.

MR. LASATER: We will get them for you.

THE COURT: Fine. I can work off the large diagram **[43]** now.

MR. LASATER: So the government counsel will also have that as 687 in the binder.

MR. MacAYEAL: We have a copy of it?

MR. LASATER: Yes.

BY MR. LASATER:

Q. So with all of those logistics--

MR. MacAYEAL: Is this it? It doesn't have marking on it.

MR. LASATER: I'm not so sure on the Elmo with all those lines if it don't drive me to distraction. [**84]

BY MR. LASATER:

Q. Mr. Merryman, my question to you is whether this exhibit, 687, appears to you to be a reasonable drawing or aerial view map of what you have been calling the Brown & Bryant property and the west side?

A. Yes, sir.

Q. I'm going to use this grid map to identify some of the things that you have testified about here and at [*JA109] deposition. First, if I might, the fence that you were talking about was a fence that ran approximately on the line, the fence that was removed, ran on a line, that is the H grid line, is that approximately correct?

A. Yes, sir.

Q. And so that fence, it ran actually from the northwest **[44]** corner of the warehouse on grid line H between grid 4 and 5?

A. I can't see the numbers from here, but--

THE COURT: The numbers are on the vertical axis and 1 is on the top going down to 31 at the bottom, which I understand to be the south.

THE WITNESS: Where it's marked right there "fence," that is where the line ran.

BY MR. LASATER:

Q. Okay. This drawing actually shows the fence as being a little bit out to the west from the warehouse. Is that actually the way you remember it?

A. Yes, sir.

Q. Okay. So that you could get--let [**85] me ask it to you this way. Was there a--this is different from the way I understood it, so let me rephrase it.

THE COURT: 12-G-4 and a half to 23-20, that's the fence?

BY MR. LASATER:

Q. Was it along the G grid line?

A. It was in that area, yes.

Q. Was there actually space to walk between the fence and the warehouse?

A. There was a set of railroad tracks that ran through there, so there was enough area to walk between there.

[*JA110] Q. And so the fence, as you remember it, was on the west side **[45]** of those railroad tracks that were--that ran north and south alongside the warehouse?

A. The way I remember it was, yes.

Q. Okay. And then at some point in time, Brown & Bryant leased this property to the west that you call to the west?

A. Yes, sir.

Q. And when that--and how did you find out about that?

A. When they told us to take the fence down and they put the other fence up along the railroad tracks.

Q. That was your supervisor, Mr. Turley?

A. Yes, sir.

Q. And then you and a crew went in there and you ran a drag over this property; is that right?

A. Yes, sir.

Q. And the property there is the western side of the warehouse?

A. Yes, sir.

Q. And you understood [**86] that to be railroad property?

A. Yes, sir.

Q. And would you describe the drag to the Court.

A. It was pulled behind a pickup or behind the tractor. It was like a piece of pipe with some chain on it, and there would be like a series of pipe and they would pull this across the ground and it would smooth it out and eliminate whatever weeds and rocks and stuff were there. **[46]**

Q. Did you ever have a grader in there or actually move soil to try to change the drainage at that time?

[*JA111] A. We had one of the farmers to the east of us, we borrowed his tractor with a scraper on the back and we scraped it.

Q. When you scraped it, what did you do?

A. Mostly--and then scraped where everything would drain back towards the back of the yard.

Q. And were there actually railroad rails in place next to the warehouse?

A. Yes, sir.

Q. And you took those out?

A. Yes, sir.

Q. Now, prior to these--this shift, and I believe you testified, but let me confirm, you are not certain what year that was?

A. I couldn't be exact, no.

Q. Was it your understanding at the time from your supervisors at Brown & Bryant that that took place right after the leasing of that property from the [**87] railroad?

A. Yes, sir.

Q. Now, before that lease took place and the activities you've just described took place, the activities of the Brown & Bryant Arvin operation took place on what you've described as the Brown & Bryant property; is that right?

A. Yes, sir. **[47]**

Q. And that property is shown on Exhibit 689 (sic) as the property that runs along grid line 1 starting at about G or H and runs to the east a little bit past X; is that right?

MR. MacAYEAL: Objection as to foundation, your Honor. This witness doesn't know the property lines. We have other witnesses who will say what the [*JA112] property line is. I just asked him where west and east are from the warehouse.

THE COURT: I will let the foundation be established. I think you said "689" and my understanding it is 687.

MR. LASATER: First of all, that is correct. It is 687, your Honor.

THE COURT: You can lay the foundation.

BY MR. LASATER:

Q. Let me ask it this way to you, Mr. Merryman. You described the west side fence before Brown & Bryant leased the property from the railroad. Was there a fence in place along the north part of the property that you understood was the Brown & Bryant property?

A. Yes, [**88] sir.

Q. And did that run along grid line 1 from approximately G or H all the way to a little past X?

A. On that map, yes, that's where the fence ran.

Q. And then the east side fence ran where it's shown here almost along the X grid line a little bit to the east of the X grid line? **[48]**

A. That's where the fence was, yes.

Q. And then the fence before the lease, as shown at about G or H and 20, is a curved line that runs from there to the lower right-hand portion of this Exhibit 687; is that right?

A. Yes, sir.

Q. Okay. That's what you called the yard before the lease of the railroad property on the west side of the warehouse; is that right?

MR. MacAYEAL: Objection as to "that." I don't know what he means by "that."

[*JA113] THE COURT: Sustained.

BY MR. LASATER:

Q. The portion that you've described as being within those four fence lines, the southern, the eastern, the northern and the western, before the lease of the railroad property to the west of the warehouse, was that the area that you called the yard?

A. Yes, sir.

Q. And was that the area where Brown & Bryant conducted its activities before it leased property from the railroads?

A. Yes, sir.

Q. And [**89] the activities that took place in that area were the activities, among others, included rinsing out of these bobtailed trucks when they came back in after having delivered D-D to the fields? **[49]**

A. Yes, sir.

Q. And it included, upon occasion, rinsing out nurse tanks that had been used to store D-D?

A. Yes, sir.

Q. And it also was used for the rinsing out of the tanks in which the diluted Nemagon had been transported to and stored at the farmer's field?

A. Yes, sir.

Q. And the rinsing that you just referred to of D-D and Nemagon, that rinsing took place into the sump, which you've identified on the government's exhibit as, I believe, C. That's Government's Exhibit G-100 at B? I'm now handing you G-100.

A. Right, where B is.

Q. And at B on Government's G-100, there were two wash pads, one oriented north and south on the west side of that sump and one that was oriented east [*JA114] and west on the north side?

A. Yes, sir.

Q. And those were organized to where you could drive a truck or a tank up onto a concrete pad; is that right?

A. Yes, sir.

Q. And there was a drainage hole in the pad?

A. Yes, sir.

Q. And that drainage went into the sump; is that right? [**90]

A. Yes, sir. **[50]**

Q. And that sump, up until 1979 or '80, was unlined?

A. Yes, sir.

Q. Meaning it just had an earthen bottom?

A. Yes.

Q. And approximately how deep was it?

THE COURT: You talking about the sump at B?

MR. LASATER: Yes, your Honor.

THE COURT: And the rinse pads were on the north and--

MR. LASATER: The west.

THE COURT: The west sides of the sump.

THE WITNESS: That's right, sir. As for the depth, I have no idea. It was deep.

BY MR. LASATER:

Q. And can you recall ever a time while it was unlined that there was not liquid in it?

A. No, sir.

Q. So it always had liquid?

A. Yes, sir.

[*JA115] Q. Can you give us the dimensions of this unlined sump that's been referred to as B on Government's G-100?

A. I couldn't be exact, but it was probably--it was a pretty good-sized sump. It was probably 35 by 35 foot.

Q. You say it was deep. Can you give us a range? It was deeper than a foot? **[51]**

A. It was deeper than 10 foot, I know.

Q. Prior to leasing the railroad property, was this the only area where Brown & Bryant rinsed out its equipment?

A. That's where we tried to do all of it, yes.

THE COURT: May I ask, what is the estimated time [**91] for the examination of Mr. Merryman?

MR. LASATER: Your Honor, I think given how it's going now, I have at least 45 more minutes.

THE COURT: All right. Then will Shell have some questions?

MR. EARLE: We have some questions, your Honor, yes.

THE COURT: It appears to me that we couldn't reasonably keep going. And I don't want to unduly detain you, Mr. Merryman, but we are going to take the noon recess now. We will resume at 1:30, and then it sounds like about an hour or so more.

THE WITNESS: That's fine.

THE COURT: We will stand in recess.

(The lunch recess was taken.)

AFTERNOON SESSION

1:30 p.m.

THE COURT: We are going back on the record in [*JA116] United States versus Atchison, Topeka.

Mr. Lasater, you may resume your cross-examination.

MR. LASATER: Thank you, your Honor.

Initially, your Honor, I have here a binder that has some of the exhibits. Making sure of who is on first.

I also have provided for the witness what your Honor has just unfolded there, which is a smaller version of the enlargement of Exhibit 687. And then also underneath this, I will come to it in a minute, are Exhibits 1023, 1024, 1025 and 1027.

THE COURT: You want this exhibit [**92] in evidence?

MR. LASATER: Your Honor.

THE COURT: 687, is there any objection?

MR. MacAYEAL: There is an objection to the extent that there is some editorial comment on the document and it depicts the site as it was long after the witness had any dealings with it. I think he asked the witness generally does it look like the plant, and I think the witness said yes, but I just want to make it clear that the witness cannot lay a foundation for all these editorial comments about direct --

THE COURT: We will wait for the foundation.

BY MR. LASATER: [53]

Q. Mr. Merryman, looking at Exhibit 687, there in the center is an area that's entitled "dry sealed pumps with inspection door," and it points to a blackened area that's between grid lines 16 -- excuse me, between grid lines 17 and 18 and O and P. Do you see that?

A. Yes, sir.

Q. Okay. Now, that was -- is that what it looked like when that area was an unlined sump?

A. That's the same location, yes.

[*JA117] Q. It's the same location. The wash pad to the west is shown here as being from grid 18 up to midway between 17 and 18 and it is along grid line N; is that correct?

A. Yes, sir.

Q. And that [**93] was the wash pad that was there the whole time you worked for Brown & Bryant?

A. Yes, sir.

Q. And there is another wash pad that's to the north of that blackened area that I identified when you first began in this afternoon session, and that is between grid lines O and R and along grid line 16?

A. Yes, sir.

Q. And those were the two concrete wash pads that you testified this morning were where the equipment was pulled up to, they would be washed out, whatever was drained would be drained onto those pads, and from those pads there was a **[54]** connection into the unlined sump; is that right?

A. Yes, sir.

Q. And then sometime about the time that the pond in the southeast corner of the Brown & Bryant property was lined, at about that time, this sump was -- the unlined earthen sump was replaced with two concrete below-ground containers; is that right?

A. Yes, sir.

Q. And they were open at the top?

A. Yes, sir.

Q. And approximately what were their dimensions?

A. I would be speculating, but I would say they are probably 8 foot by 12 foot long and the depth was probably 8 foot.

[*JA118] Q. And were those -- there were two concrete boxes set side by side in the same [**94] place where the unlined earthen sump had been; is that right?

A. Yes, sir.

Q. And after those were put in up until the time you left Brown & Bryant's employment, did Brown & Bryant continue to use that sump with those concrete boxes as the washout area?

A. Yes, up till probably four months before I left, and we stopped using them altogether.

Q. And where was washout done at that time?

A. They would still try to use that same area, but we weren't able to wash the trucks. We used to do our cleanup on the **[55]** trucks and they weren't able to wash there, just the trailers.

Q. And by "the trailers," you mean the tank trailers?

A. Yes, sir.

Q. And by "trailers," are you also including the bobtail trucks that had the big tanks on them that were used to carry product to the farmer's field?

A. Right.

Q. So the operation of rinsing out the inside of the tanks continued up until the time you left Brown & Bryant's employment?

A. Yes, sir.

Q. And it happened at this area where it was first an unlined sump and then they put those two concrete boxes in?

A. Yes, sir.

Q. And the unlined earthen sump, you gave us the dimensions of that before lunch, and you said that it was at [**95] least 10 feet deep. I neglected to ask you then, I [*JA119] ask you now, how much liquid would be in that unlined earthen sump typically?

A. It would be pretty full certain times of the year. It would be up to the very top. Other times, it would be down about 5 foot, 6 foot.

Q. Six foot from the surface?

A. Yes, sir.

THE COURT: And we are talking about the sump in the area of grids line 16, O through R, not the double -- what's **[56]** referred to as the double lined pond in the lower southeast corner of the property?

MR. LASATER: That's what I'm referring to, your Honor, but I will confirm it with the witness.

BY MR. LASATER:

Q. When I have been talking about the unlined sump that was then replaced with the two concrete boxes, were you referring to this darkened area on Exhibit 687, which is between grid lines 17 and 18 and between 0 and P?

A. Yes, sir.

Q. Now, we got off onto this about the sump when I was asking you what took place on the Brown & Bryant property before Brown & Bryant leased the property to the west of the warehouse.

MR. MacAYEAL: Judge, I would make an objection to the continued reference to the "Brown & Bryant property," because this witness [**96] does not necessarily have a foundation to know where the property line was.

THE COURT: Well, let's do this.

MR. MacAYEAL: If they want to identify it by fence, I have no objection, but there has been no foundation --

[*JA120] THE COURT: Let's determine this. Mr. Merryman, do you know of your own knowledge from the time you were on the property and as of the time you were on the property, if we take the area that is contained within **[57]** the grids on Exhibit 687, starting on the west with A and going to X on the east, and on the north going from 1 to 31 on the south, recognizing that there is that curve, do you know who owned that property during the period of time you were there?

THE WITNESS: I don't know who owned it, no. I know Brown & Bryant used that facility.

THE COURT: All right. And so we have talked about the fence coming down generally along on the vertical axis grid G. Did you understand that Brown & Bryant at some portion of time while you were there was using all the property within this grid after the fence came down?

THE WITNESS: Yes, sir.

THE COURT: All right. So let's just refer to this for now as the Arvin site, and that way nobody will have to [**97]

be concerned about ownership until we get that into evidence.

BY MR. LASATER:

Q. Mr. Merryman, if I might develop a terminology with you. You identified area within the fence before the time Brown & Bryant leased to the west of the warehouse, and that was where Brown & Bryant conducted its operations; is that right?

A. Yes, sir.

Q. I'm going to refer to that as the Brown & Bryant yard.

A. Yes, sir.

Q. Okay. And then when I'm referring to the [*JA121] property that was leased after you began to work for Brown & Bryant, that was **[58]** leased to the west of the warehouse, I will refer to that as the area west of the warehouse. Are we on the same page?

A. Yes, sir.

MR. MacAYEAL: Judge, I just want to make an objection for the record, because that's going to be extremely confusing when we actually do get a witness to say what the property line is. But if Mr. Lasater wants to define it in terms -- however he wants. I'm using different -- I'm using those same terms to mean different things, just so the record is clear.

THE COURT: I candidly would like it, if we could, for us to all agree on terms to designate these various areas of the property. Does anybody object [**98] to referring to the property within the western fence as the Brown & Bryant yard?

MR. MacAYEAL: I do, your Honor, because my understanding is the property line runs along -- the warehouse is on the property line, is what Jack Brown will testify to.

So--and, actually, that's where the railroad line was. Obviously, the railroad would own that, because there was a railroad line on it. So to call that area where there was a railroad line the "Brown & Bryant property," that is misleading. That area where that railroad track was was railroad property, and we can get a witness in who will lay the foundation for the property line. But I just think it's misleading when I have been saying west of the warehouse, I **[59]** mean if you can stand to the west of that warehouse, that's what I mean by that. So now Mr. Lasater is moving it over a couple of feet and I think it's confusing for the record.

[*JA122] THE COURT: All right. Well, then, let's do this. Let's, if we can, refer to the property. Would you agree to grid line H as the western boundary?

MR. MacAYEAL: That is the property line as we have heard, as the testimony, I understand it.

THE COURT: Let's refer to the property [**99] from grid line H to the east as the Brown & Bryant--I don't care if you call it "yard." You can call it anything you want. And for now, we will refer to the property to the west of that, going over to grid A, either as leased property or railroad property, whichever the parties prefer.

MR. MacAYEAL: Thank you, your Honor.

MR. LASATER: Thank you, your Honor.

BY MR. LASATER:

Q. Okay. I got to remember where I was. I'm trying to identify with some things that took place on the Brown & Bryant property or the Brown & Bryant yard before the property was leased from the railroad, the leased property came into use. You've identified activities that took place at the sump, which was first unlined and then lined. Now, also prior to leasing the property, there was a bulk D-D tank in the Brown & Bryant **[60]** yard; is that correct?

A. Yes, sir.

Q. And is that shown on this grid map or is this a later version of what was there?

A. That's a later version.

Q. Okay. Would you give us the grid coordinates of approximately where the bulk D-D tank was prior to when it was crushed in the windstorm?

A. Between 11 and 12 and P and Q.

Q. And this --

[*JA123] A. I'm sorry, that's [**100] between 12 and 13. I'm sorry.

Q. Between 12 and 13 and P and Q; is that correct?

A. Yes, sir, just east of where that C is.

Q. So there is a tank that is shown right along grid line P between 12 and 13 that has a C in it, which, according to the legend, says "lime sulfur"?

A. I'm sorry. I guess I'm talking about G, the one right there.

Q. So G on the legend, it says "mixer," but what -- regardless -- I'm just identifying what is on the picture.

A. Yes.

Q. What I'm asking you is are you saying that the --

A. Probably to be exact, it was halfway between B and C on that same grid line, they were all in line.

Q. The bulk D-D tank, prior to the time it was destroyed in **[61]** the windstorm, was between -- was on grid line P between 12 and 11?

A. Yes, sir.

Q. Now, I've referred to a windstorm. Would you describe what happened to the D-D tank in the windstorm?

A. It was totally destroyed. It was buckled in half.

Q. Approximately when was that?

A. I can't remember. It was '77 or '78, one of those two years.

Q. And do you remember there being any D-D released from that tank as a result of the windstorm?

A. I don't remember if there was any material in the tank at that [**101] time.

[*JA124] Q. Now, that tank held two or three tanker truckloads of D-D; is that right?

A. Yes, sir.

Q. And D-D was delivered into this Brown & Bryant yard at Arvin by these tractor-trailer rigs that were tank trucks; is that right?

A. Yes, sir.

Q. And as far as you know, D-D was never delivered by rail car; is that right?

A. Not to my knowledge, it never was.

Q. Now, these tractor-trailer rigs pulling a tank of D-D would pull into the yard and unload at the D-D bulk tank before the **[62]** windstorm?

A. Yes, sir.

Q. And those would contain approximately 5,000 gallons, or do you have another number in mind?

A. I couldn't tell you exactly. Somewhere between four and five.

Q. And the D-D bulk tank, as it existed before the windstorm, would hold at least more than 10,000 gallons?

A. Yes, sir.

Q. And it was during the delivery from these tractor-trailer rigs pulling a tank of D-D, it was during these deliveries that you personally saw D-D coming out of the hose coupling; is that correct?

A. Yes, sir.

Q. And there was a 5-gallon bucket that was used to try to collect those, but nonetheless, you saw D-D go onto the ground; is that right?

A. Yes, sir.

Q. And [**102] you saw at instances when that would [*JA125] happen--you would see at least two gallons on the instances where you saw a fair amount come out?

MR. EARLE: Objection, your Honor. The witness is being led.

THE COURT: Sustained.

BY MR. LASATER: **[63]**

Q. How much did you see come out--did you ever see material come out of the couplings of these tractor-trailer rigs that were delivering the D-D to the bulk tank?

A. I have seen material come out, yes.

Q. Can you give us an estimate of the quantity?

A. It would be hard to say exact. I have seen sometimes just a few cupfuls, other times they would fill a 5-gallon bucket, no problem.

Q. And that would go on the ground?

A. Sometimes it would, yes.

Q. Now, in addition to before the lease of the railroad property--let me go at it this way.

There was also on the Brown & Bryant yard, there was an area where you stored--"you," meaning Brown & Bryant employees--stored empty cans of pesticides and herbicides; is that right?

A. Yes, sir.

Q. And those empty cans included 5-gallon cans that had formerly contained Nemagon; is that right?

A. There were some, yes.

Q. And that storage area also contained empty cans that formerly [**103] contained Brown & Bryant's Weed Killer D?

A. Yes, sir.

Q. Do you know that Weed Killer D contained a [*JA126] product called dinoseb? **[64]**

A. I didn't know what the chemical name was, but it was something like that, yes.

Q. And that can storage area, at some point did it become--was a concrete pad laid down for it?

A. Yes, sir.

Q. Is that shown on Exhibit 687?

A. Yes, sir.

Q. Is it the area in the south part of the yard near the UN-32 tank that has an arrow to it with a legend that says "concrete can enclosure"?

A. Yes, sir.

Q. Before that concrete pad was put down, had the cans been stored in that same area?

A. Yes, sir.

Q. The empty cans?

A. Yes, sir.

Q. Now, when those empty cans were stored in that area, were they periodically, meaning every couple--every two to three months, did a crew of Brown & Bryant employees go out there and crush those cans?

A. Yes, sir.

Q. And did they use a hydraulic ram, like a log splitter, that would squeeze them down?

A. Yes, sir.

Q. And did you ever see any of the residual contents of those **[65]** cans go onto the ground?

A. Yes, sir.

Q. And approximately what size area would be affected, the ground area would [**104] be affected by the residues from these cans?

[*JA127] A. It would be larger than the area marked "concrete can enclosure." It would be about double that size.

Q. And so after they--after the can enclosure was created and the concrete pad that created it, did Brown & Bryant continue to crush cans in that area?

A. No, sir.

Q. Approximately when was that can enclosure created?

A. It had to be '79 or '80. I couldn't tell you exactly when.

Q. After Brown & Bryant leased the property west of the warehouse and began using it, did the wash rack and sump activities continue to go on in the Brown & Bryant yard where you've testified to them?

A. Yes, sir.

Q. Now, after you left Brown & Bryant's employment and as a result of your coming back because of your work with Kisco?

A. Kisco, yes.

Q. You learned that Brown & Bryant moved their rinse operations to the northern part of the yard; is that right?

A. Yes, sir.

Q. And is that area shown on here as the contained rinse system on Exhibit 687? **[66]**

A. Yes, sir.

Q. Did--after the leasing of the property to the west of the warehouse, did Brown & Bryant ever set up any kind of wash rack or sump on that property?

A. No, sir. [**105]

Q. Now, the--did Brown & Bryant ever set up a [*JA128] can crushing area on the property leased to the west of the warehouse?

A. No, sir.

Q. Did Brown & Bryant ever move any of its permanent bulk storage tanks onto the property that had been leased to the west of the warehouse?

A. No permanent bulk storage tanks were used.

Q. Now, after the lease, Brown & Bryant did what you've indicated of oiling and dragging or dragging and oiling, and then as a result of having that lease and taking down the fence, circulation could go all the way around the warehouse, driving circulation could go all the way around; is that correct?

A. Yes, sir.

Q. And there was storage of movable tanks along the north and the west fence line; is that right?

A. Yes, sir.

Q. And there were some pallets stored out there with--for a short period of time with some empty cans on it; is that right?

A. At different times of the year, sir. **[67]**

Q. And that was mainly during the wet time of the year, because it would get so wet down in the southern part of the Brown & Bryant yard that you would move those empty cans onto the west fence line; is that right?

A. It would be drums that would be stored [**106] out there, yes.

Q. Now, before--going back to before the lease, did you ever see any Brown & Bryant employees using the leased, the railroad property? Now, this is before Brown & Bryant had a right to use it, did you ever see Brown & Bryant employees running a spray rig out [*JA129] there?

A. Not to my knowledge, no.

Q. Did you ever see Brown & Bryant out in that area running a spray rig or any piece of equipment, draining it out as they were driving around in order to clear out the tank or the spray rig?

A. No, sir.

Q. Now, Mr. Merryman, with regard to the area that was leased by the Brown & Bryant from the railroads, the area to the west of the warehouse, you've said that that area was oiled. Was it also your view that at some point it was blacktopped?

A. I never seen it blacktopped, no.

Q. Do you remember in your deposition in this case I asked you some questions and you were also asked some questions by Mr. MacAyeal?

A. Yes, sir. **[68]**

Q. And you were under oath at that time?

A. Yes, sir.

Q. And that deposition was in December of 1997; is that right?

A. Yes, sir.

Q. And at that time you gave as accurate of answers as you could at the time?

A. Yes, sir. [**107]

MR. LASATER: Your Honor, and counsel, I would like to refer you to the December 17, 1997 deposition, and I will get it for your Honor. It's been lodged.

THE CLERK: I will have to get them.

MR. LASATER: Is it outside of the room?

THE CLERK: Yes.

MR. LASATER: I will go to something else.

[*JA130] BY MR. LASATER:

Q. Mr. Merryman, I want to go back to the sump, what I have been calling the sump, but it's the area where it has the two wash pads and had an unlined sump and then concrete boxes in there. Did you call that the wash rack?

A. Yes, sir.

Q. So how often was that wash rack used during the busy season for Brown & Bryant?

A. Probably every hour it was open. There was always trailers lined up on it.

Q. So you have testified to something called bobtail trucks **[69]** that had tanks on them?

A. Yes, sir.

Q. Those were the trucks that went up to the Brown & Bryant bulk tank and unloaded the D-D into the bobtail truck, to the tank on the bobtail truck, and then those were--those trucks were driven out to the farmer's field by a Brown & Bryant employee; is that right?

A. Yes, sir.

Q. And then at the farmer's field, those tank trucks that you call bobtail trucks [**108] were offloaded into the nurse tanks that were the four-wheeled mobile tanks that Brown & Bryant would move from one farmer's field to another; is that right?

A. Yes, sir.

Q. Now, when those bobtail trucks would come back into the yard after a delivery of D-D to a nurse tank at a farmer's field, what typically happened to that bobtail truck?

A. If there was a truck, we had a lot of D-D or that particular item would be hauled, he would [*JA131] probably come back in, he would pull on the scales, get a light weight, pull around, load up again, pull back on the scales and then go back out.

Q. And if that truck came in and was then needed to transport a chemical other than D-D, what would happen when that truck came back into the yard?

A. He would pull back on the scales, he would get a light **[70]** weight and then go to the wash rack and wash out and then--

Q. Would you describe to us washing out one of those bobtail truck tanks into the wash rack sump?

A. They would pull into the rack. The driver would open a valve inside the truck, it was usually a three-inch or two-inch valve, he would climb up on top of the truck with a hose and rinse the truck out.

Q. When he climbed [**109] up on top of the truck, was there a hatch he could open up?

A. Yes, sir.

Q. And then there was a water line, a flexible water line or hose that he would use to spray inside the tank?

A. Yes, sir.

Q. And how big was that water hose?

A. There was two. There was a three-quarter inch hose and an inch-and-a-half hose.

Q. And the valve at the bottom of the truck was open at the time that the Brown & Bryant employee was washing out the interior of the tank; is that right?

A. Yes, sir.

Q. And then that combination of D-D that was left in the--well, let me ask you. Was there ever any D-D left inside of these bobtail truck tanks when they came back into the yard?

[*JA132] A. You could never pump them completely dry. They would probably have five to ten gallons, sometimes 20 gallons left in **[71]** a truck.

Q. And so this operation that you have described of washing out one of these bobtail tank trucks, that resulted in that residual D-D coming out of the tank with the water on to the wash pad?

A. Yes, sir.

Q. And then what would happen to it?

A. If the driver was able to pull right out on top of the wash rack, it would drain into the sump; if not, run out onto--the drainage [**110] off the other way into the yard.

Q. Onto the surface next to the concrete wash pad?

A. Yes, sir.

Q. Approximately how often would one of these bobtail trucks with a residual of D-D in them get washed out?

A. It would depend on how many loads we had to haul that day. If we had a lot of D-D going out, it would continue reloading and going. If that particular truck had to change over to a different fertilizer, different chemical, it would rinse out.

They would probably run, during a busy day, those trucks would probably haul 20 to 30 loads, so it depends on how it fell in the schedule.

Q. Would you say it was a daily activity to rinse out a bobtail truck tank that had contained D-D?

A. During the busy season, yes.

Q. And sometimes during the busy season, might you wash out **[72]** one of those tanks as much as 20 times?

MR. EARLE: Question calls for speculation.

[*JA133] MR. LASATER: I will rephrase, your Honor.

THE COURT: The objection is sustained.

BY MR. LASATER:

Q. During the busy season, did these bobtail trucks with the tanks on them that were running the D-D, did they get washed out with residual D-D--let me phrase it another way.

How often, if you can [**111] give us a range, were these bobtailed trucks with the tanks on them washed out after they had had D-D in them?

A. We had three tanker trucks usually running at a time. Each one would probably hold--haul probably ten loads a day per truck. Sometimes more, sometimes less. During the course of a day, I would say each truck probably got washed out at least two or three times.

Q. And that's two or three times washing out residual D-D?

A. That would be whatever they were hauling.

Q. Can you give us an estimate of how often residual D-D would be washed out of these tanks?

A. At least once a day they would clean them at the end of every day.

Q. So is it fair to say at least once a day at the end of the day and sometimes more often than that in a day?

A. Yes, sir. **[73]**

Q. Now, the nurse tanks that you referred to, I forget what size they were. Were they about 1600 to 2600 gallons?

A. They were 2,000, 2600.

Q. And when they were brought back into the yard after having contained D-D, were they washed [*JA134] out?

A. Yes, sir.

Q. And was that the standard Brown & Bryant policy?

A. Yes, sir.

Q. And they were washed out in this same rinse rack or--

A. Wash area.

Q. [**112] The wash area; is that right?

A. Yes, sir, it is.

Q. And then sometimes those nurse tanks, after having been washed out, would be parked on the leased property after the leasing took place; is that right?

A. Yes, sir.

Q. And they were also parked on the yard, even after the leased property had been leased?

A. Yes, sir.

Q. Now, there were no water fittings, no hose fittings along the west, the very west fence line of the leased property; is that right?

A. Yes, sir.

Q. And you don't remember anything ever being washed out along that westernmost fence line? **[74]**

A. Not against the fence line, no.

Q. Another piece of equipment that was stored on the leased property were water run tanks; is that correct?

A. Yes, sir.

Q. Would you describe to the Court what a water run tank was?

A. It could be a combination of different tanks, anywhere from 200 gallon horizontal tank made out of [*JA135] steel up to 500 gallon horizontal tanks made out of steel. We had some 1,000 gallon poly upright tanks, and we also had some 1600 gallon polypropylene upright tanks.

Q. Now, on occasion, after Brown & Bryant leased the property to the west of the warehouse, there were 30-gallon [**113] drums of Brown & Bryant's BB Weed Killer D that was stored over there, is that right?

A. I don't remember if there were 30 gallons, I think there were 55 gallons.

Q. And those were empty cans; is that right? Empty drums?

A. Yes, sir.

Q. And you never saw any of the--let me back up and ask you.

Brown & Bryant's Weed Killer D had a characteristic color when it went out on the ground; is that right?

A. Yes, sir.

Q. Would you describe that to us?

A. It was a real dark yellow-orange color.

Q. And in the area that these empty drums of Brown & Bryant's **[75]** Weed Killer D that had formerly contained Weed Killer D, you never saw that characteristic color around those drums; is that right?

A. I never saw it, you said?

Q. That's my question.

A. No, I did see small leaks and so forth at different times.

Q. Did you see that on the leased property?

A. Yes, sir.

Q. Okay. Where were these empty drums stored? [*JA136] Were they stored between C and D and 13 and 15?

A. For a while they were in that area, and then further south, like 18 and 19 and E and F.

Q. Now, did you ever see any of the characteristic color of dinoseb when these empty drums were stored in the area C [**114] and D and 13 and 15?

A. I can't remember positively, but they always--there was always small leaks. I believe one time we did have one large spill out there in that area. I don't know if it was exactly in that coordinate, that particular area.

MR. LASATER: Your Honor, I see that we have not yet gotten the deposition transcript.

THE CLERK: You will need to provide the Court with a copy. That's only like a third of what we have in the clerk's office.

MR. LASATER: If you will indulge me for just a **[76]** moment, your Honor, I think we have extra copies.

THE COURT: Yes, I will.

MR. LASATER: Your Honor, I will provide you with this copy.

THE COURT: Thank you.

MR. LASATER: I would like to direct Court and counsel to page 143, line 22, to page 144, line 8 of Mr. Merryman's December 17, 1997 deposition.

MR. MacAYEAL: Your Honor, this is a prior consistent statement. What statement is it supposedly inconsistent to? Is this on the blacktopping issue?

MR. LASATER: No. It's with regard to dinoseb.

MR. MacAYEAL: You are offering a prior inconsistent statement?

MR. LASATER: Yes.

[*JA137] MR. MacAYEAL: Which--

MR. LASATER: 143, line 22 through 144, line 8.

MR. MacAYEAL: [**115] I object. This is not inconsistent. The witness said that he did not remember the particular coordinate, but he did remember seeing it in general. This question relates to the particular coordinate.

THE COURT: The deposition can be used to either impeach or refresh recollection. This question, at line 22 asks him if he saw Weed Killer D in the area between C and D and 13 and 15, and the witness answered that he didn't see the **[77]** color, he saw it wet over there a few times when the railroad spurs were being torn out.

Now, it does refer to a particular--a specific area of the property. And is the objection that the witness has not made specific where he saw Weed Killer D?

MR. MacAYEAL: I may have misheard his testimony, but I thought he said, one, they were 55-gallon drums, so that is inconsistent. But I thought he said that he didn't remember the specific coordinate, but he did remember in general, so I'm not sure it impeaches, but.

MR. LASATER: Your Honor, in order to facilitate this, I would just as soon go over this with the witness again.

THE COURT: All right.

BY MR. LASATER:

Q. Mr. Merryman, let me tell you what I'm driving at here. You've, as I understand [**116] it, correct me if I'm wrong, you've testified that, in the court today, that these empty containers of Brown & Bryant Weed Killer D, after the property was leased from the [*JA138] railroads, were staged along the fence line from time to time?

A. Yes, sir.

Q. And initially they were staged between C and D and 13 and 15 along that fence line?

A. In that area, yes.

Q. In that area. And then you said at a later time, they **[78]** moved south along the fence line?

A. Yes, sir.

Q. At the time that they were staged, or stored, between C and D and 13 and 15, did you ever see the characteristic color of dinoseb around those containers?

A. I think I said in my deposition the ground was wet in that area. It would soak up fast. When it would soak up on the dirt and oil, it would turn black, but there were white areas. Usually I would say it was just west of the maintenance shop, so it would be about in that area, yes.

Q. My question to you is whether you saw the characteristic color of Weed Killer D around those containers in that area that we have just identified on Exhibit 687.

A. Not on the ground, no, sir.

Q. Now, you said you saw some wet area near these pallets between [**117] C and D and 13 and 15 and it was--isn't it correct to say that it was just wet and there was really no color definition to it?

A. Right, it was just dark dirt.

Q. And in light of it just being wet, it could have been water, for instance?

A. Yes, sir.

Q. Now, Mr. Merryman, if I can go back to this blacktopping point. You've referred to it in your [*JA139] testimony today here as having oiled the area, and I'm asking you whether, in fact, **[79]** that area to the west of the warehouse was ever blacktopped?

A. I don't remember it being blacktopped. It was--they laid down a layer of oil and sand mix. I don't know if you would classify that blacktop or not.

Q. And when was that laid down?

A. When we first put the drainage in and put the grade to it where it would drain to the rear towards the sump.

Q. And was this sand-road oil mix ever laid down after that first time?

A. Not that I remember, no.

Q. Now, every year after the sand and road oil mix was laid down on the leased property, there was an additional application of oil, of road oil; is that right?

A. It was either a year or a year and a half apart. They tried to do it once a year.

Q. And you would leave that [**118] area of the leased property that had been covered with this road oil, you left that for up to a week in order for it to dry?

A. Sometimes longer, just depends how fast it soaked in the ground.

Q. What time of year was this spraying done?

A. Usually when the yard was empty during our busy season. We had less trailers to move around.

Q. So what time of the year was the busy season?

A. It was during the summer. **[80]**

Q. So it was during the hottest part of the year?

A. Yes, sir.

Q. Now, when the filters were taken off of one of these bobtail trucks that had a tank on it, were they [*JA140] the ones that had the filter or was it the nurse tank that had the filter?

A. Nurse tank.

Q. Did the bobtail tank trucks have filters on them that were checked?

A. No, sir.

Q. So the nurse tanks were these 2,000 to 2600 gallon tanks that were on four wheels; is that right?

A. Yes, sir.

Q. And they had a tow bar that you could pull behind a truck?

A. Yes, sir.

Q. And state highway regulations required that they be towed empty; is that right?

A. Yes, sir.

Q. And was that--did Brown & Bryant comply with that law of towing those empty?

A. Most of the time.

Q. That's a big [**119] hole, but we won't go into it. Then the nurse tanks would come back in and, as you've testified, if they had D-D in them, it was Brown & Bryant's regular policy that they get rinsed out at the wash rack; is that right?

A. Yes, sir, unless they were going right back out on a job. **[81]**

Q. And then those nurse tanks, if they weren't going to go right back out, after they were washed, they were parked at various places on the yard or on the leased property, either one; is that right?

A. Yes, sir.

Q. And the process of checking that filter sometimes let some of that residual water, and if there [*JA141] was any D-D in the water, come out; is that right?

A. Yes, sir.

Q. But that was no more than a gallon or so that would come out of checking that filter, is that right?

A. It would be less than that, yes.

Q. So less than a gallon?

A. Yes, sir.

Q. And that was a water--can you describe whether it was D-D or water that came out when the filter was checked?

A. It depends if the trailer had been washed or not. If it had been washed, the strainer had already been removed and it would be mostly water. If it was like sometimes when servicemen would bring it in, they would [**120] drain--take the strainer cap off, drain the bowl, which usually held a pint or a quart, take the strain out, wash it out, stick it back in, sometimes before it was washed out, sometimes afterwards.

Q. And where was that done?

A. If they could get on the wash rack, it was done at the wash **[82]** rack. If not, it would be around that area, sometimes west of the building. It just depends where they were.

Q. Can you remember an instance when a--the taking the strainer, the filter off of a nurse tank took place on the west side of the warehouse?

A. Yes, sir.

Q. Okay. On how many occasions that you know of?

A. I couldn't be exact. A lot.

Q. Now, D-D is--what happens to D-D or what happens to the person when D-D gets on their hands?

[*JA142] A. It will blister and burn it.

Q. And when people would be taking the filters off and if they got D-D on them or got the liquid that was in the nurse tank, what would happen to them?

A. They would have to go wash their hands. They wore gloves, though.

Q. So it was something that the person who was checking the filter--well, one, did you always have to check the filter?

A. The servicemen did, because we had to use them in the field [**121] and we wanted them clean before we left the yard. It's easier to clean them in the yard than out in the fields.

Q. Given this effect on the skin that D-D had, this was something that the servicemen would prefer to do around the wash rack where they had the right equipment to do it with; is that right? **[83]**

A. Yes, sir.

Q. Now, the D-D pull rigs, those are different from nurse tanks; is that right?

A. Yes, sir.

Q. Would you describe a D-D pull rig?

A. It had a--usually a 500-gallon or 600-gallon tank mounted on a two-wheel trailer. Just the trailer actually had a draw bar on the back that could be raised and lowered. On those draw bars, they would run anywhere from 12 to 16 shanks, or tines. "Shanks" is what we called them. They would have a pump mounted on it. It was ground-operated that

would pump the material.

Q. If I might show you the exhibits which I have already placed in front of you here, these are some aerial photos.

[*JA143] MR. MacAYEAL: Which exhibit is that, please?

MR. LASATER: 1024, 1025, 1026, and 1027. And the Court should also have those same exhibits in the same notebook as contained Exhibit 687.

THE COURT: Yes.

BY MR. LASATER:

Q. If [**122] you would, turn to Exhibit 1025. First off, that is an aerial view of the Brown & Bryant yard and leased property; is that right.

A. Yes, sir.

Q. It's taken from an airplane that's to the northeast of the **[84]** site; is that right?

A. Yes, sir.

Q. And this photo was taken after Brown & Bryant had leased the property west of the warehouse?

A. Yes, sir.

Q. And you can tell that because there is no fence line along the west side of the warehouse; is that right?

A. Yes, sir.

Q. And you can see the area on that photo which is also shown on Exhibit 687 as the main gate between M and N?

A. Yes, sir.

Q. And that was what the legend on 687 indicates, that was the main gate to the Brown & Bryant site?

A. Yes, sir.

Q. During the whole time you worked there?

A. Yes, sir.

Q. So--

THE COURT: Let me interrupt. If we are looking from the northeast, let me orient this grid map, because--

[*JA144] MR. LASATER: Your Honor, we are looking from up here down at the site.

THE COURT: Yes, and I'm just trying to--all right.

MR. LASATER: I believe the witness can help us orient the Court and counsel.

THE COURT: Yes. You know, I am--unless I am **[85]** mistaken, this seems [**123] to be much more from the east than from the north.

MR. LASATER: From the east-northeast, yes, your Honor.

THE COURT: It's strongly bearing east, because we almost have the northern boundary of the property on the vertical axis here.

MR. LASATER: Yes.

THE COURT: All right.

BY MR. LASATER:

Q. If we use, Mr. Merryman, Exhibit 687 as a reference point, this photo is taken somewhere to the upper right of this exhibit; is that right?

A. Yes, sir.

Q. And it's taken to the east and a little bit north of the northeast corner of the site?

A. Yes, sir.

Q. And it's looking back southwest?

A. Yes, sir.

Q. And in the left hand--well, in Exhibit 1025, in the middle on the left-hand margin, is what later was the double lined pond or sump; is that right?

A. That would be--yes.

Q. And so on Exhibit 1025, that same feature is shown as a square area and it's labeled the "double [*JA145] lined pond" and it's **[86]** in the southeast corner of the site?

A. Yes, sir.

Q. Okay. Looking at the main gate on Exhibit 1025, someone driving in would come in off of that road, which runs almost parallel to the top of this photo; is that right?

A. Yes, sir.

Q. And that was Derby Road? [**124]

A. Yes, sir.

Q. And so a person would turn off of Derby Road and drive along the north fence line of the leased property and then some of the Brown & Bryant yard and then turn right into the main gate?

A. Yes, sir.

Q. And then as shown in this photo, 1025, to the right of where a person turning into the main gate would look, are--is some equipment stored there along the north fence line; is that correct?

A. Yes, sir.

Q. And if we start at the main gate in Exhibit 1025, the main gate just to the west of the main gate, that first piece

of equipment is a D-D pull rig; is that right?

A. Yes, sir.

Q. And then there are a couple of more D-D pull rigs in that photo?

A. There is three more. **[87]**

Q. And that area north of the warehouse was where the D-D pull rigs were typically parked when they were at the Brown & Bryant site; is that right?

A. For long periods of time, yes.

[*JA146] THE COURT: Let me just ask out of curiosity. Is that a bobtail as you come in the entrance there, just on the east side there in front of what are called the--well, it's actually--I can't see it on this. It's--there is a car in front of the warehouse, east of the warehouse and then there [**125] is a truck that looks like it's red or orange. Is that a bobtail?

THE WITNESS: Yes, sir, the one with the tanker on the back.

THE COURT: Okay.

BY MR. LASATER:

Q. And that bobtail truck that the Court has just asked you about is just to the west of what's identified on Exhibit 687 as the "contained rinse system"; is that right?

A. Yes, sir.

Q. And that was put in after you left Brown & Bryant's employ?

A. Yes, sir.

Q. But you saw it because you went back there?

A. Yes, sir.

Q. And there were two pads for that contained rinse system?

A. Yes, sir.

Q. Now, the large tank, the largest tank in this picture is **[88]** the UN-32 tank; is that right?

A. Yes, sir.

Q. And the largest building in this picture is what we have been referring to as the warehouse?

A. Yes, sir.

Q. And south of the warehouse, as shown in 1025, is a maintenance building; is that right?

[*JA147] A. Yes, sir.

THE COURT: Do you want this exhibit in evidence?

MR. LASATER: Yes, your Honor, I would move to have this admitted.

THE COURT: Any objection?

MR. MacAYEAL: No objection.

THE COURT: Exhibit 1025 is received in evidence.

(Defendants' Exhibit 1025 was received.)

BY MR. LASATER: [**126]

Q. Now, 1025 was also a picture that was taken after the big pond in the southeast corner had been double lined; is that right?

A. Yes, sir.

Q. And it was after the concrete boxes had been put into the place of the unlined wash-out sump; is that right?

A. Yes, sir.

Q. And the wash rack is shown in this photo; is that right?

A. Yes, sir. **[89]**

Q. It's the open shedded area that is just north of the anhydrous ammonia tank?

A. That's one of them, yes, sir.

THE COURT: Looks to me like a covered area. I don't see any sheds. I see what looks like maybe it's a shed there, but those look just like aluminum roofing.

MR. LASATER: Is what your Honor is referring to, was it open on all four sides and it had a roof?

THE COURT: Yes, exactly.

THE WITNESS: Yes, sir.

[*JA148] BY MR. LASATER:

Q. And that, Mr. Merryman, was a covered area that was--that covered the north wash pad?

A. Yes, sir.

Q. And the west wash pad by the sump did not have a cover on it?

A. That's right.

Q. Okay. The area that's north of the warehouse that's shown both on Exhibit 1025 and 687, was there ever any kind of sump in that area as far as you knew?

A. Not to my knowledge.

Q. So there was [**127] no low place where water collected?

A. No.

Q. Now, on the west side of the warehouse, and here I'm talking just the warehouse, on the property that was leased, **[90]** but due west of the warehouse, when it rained, did water collect here?

A. There was one low spot out there. And I want to rephrase my statement. On the north side there was a low area that a little water might set there, but it might be an inch deep.

Q. Getting back to the low place on the leased property, that was down to the southern end of that leased property; is that right?

A. Yes, sir.

Q. So can you tell us, the grid line, 12 or 13, how far north did that low place extend when water was in it?

A. I would say it would be 14, would be about the highest. 13, 14, right in that area.

Q. So that was the most north of that that that [*JA149] puddle would grow?

A. Right.

Q. And that puddle would extend south to where it says "the gate" on Exhibit 687?

A. It would go down to about 18, grid 18.

Q. It did not get as far as the gate?

A. Usually not, no.

Q. That puddle would go how far to the east? Would it go to G or would it go any past?

A. Yes.

Q. To the east? **[91]**

A. It would depend on [**128] how much rain we had. Usually it stayed right in F and G area right there.

Q. So it was a pretty narrow puddle?

A. Yes, sir.

Q. So it was between F and G and 18 and 13; is that right?

A. Right. As the further north it went, it would go sometimes a little wider over to E and it would kind of follow the fence line and kind of taper down.

Q. But there was no low spot or collection area for water north of 13, grid line 13 that was west on the leased property; is that right?

A. No, everything would funnel to the south end.

Q. Now, if I might turn your attention to Exhibit 392, which I'm about to hand you, do you recognize--

And your Honor, do you have the exhibit?

THE COURT: Yes, I do.

BY MR. LASATER:

Q. Do you recognize what's shown in Exhibit 392 as showing both the Brown & Bryant yard and the [*JA150] leased property?

A. Yes, sir.

Q. And this photo was taken at a time after you were employed by Brown & Bryant; is that right?

A. Right, it was after that.

Q. Can you recognize or can you date this photograph any more than just to say it was after you left the Brown & Bryant **[92]** employment?

A. No, sir. It had to be quite a while after I left, because I see [**129] some--it looks like they have some recycling water containers in the back, so it had to be towards the end of Brown & Bryant.

Q. And do you see a water puddle on the leased property?

A. I see some dark areas. I don't know if that's a water puddle or not.

Q. Is that dark area on the south part of the leased property, is that in the same area where you earlier described was where water collected after a rain?

A. Yes, sir. It's quite a bit larger what I described.

Q. The photo describes it as larger?

A. Yes, sir.

Q. Now, also in the area to the--shown in this photo, Exhibit 392, which is to the east of UN--the UN-32 tank, and to the west of the double lined pond, do you see a water puddle there?

A. I see a dark area, yes, sir.

Q. Was that dark area an area where water collected after a rain?

A. Yes, sir.

[*JA151] Q. And the Brown & Bryant yard directly north of that area drained into that southern portion; is that right?

A. Yes, sir. **[93]**

Q. And that particularly was the case after the pond was double lined because a berm went up that kept the water from going directly into the pond; is that right?

MR. MacAYEAL: Objection as to foundation.

THE COURT: If he [**130] knows.

Do you know?

THE WITNESS: It couldn't get into the pond because there was a berm around it, so it would settle in there.

THE COURT: When you were there, was there a berm?

THE WITNESS: Yes, sir.

THE COURT: All right.

MR. LASATER: Let me clarify that.

BY MR. LASATER:

Q. When the double lined pond was put in, that was approximately 1980; is that right?

A. In that area, maybe a little before.

Q. And up until that time, the water from the Brown & Bryant yard washed into the pond and it--there wasn't anything that limited it from going into the pond, it was encouraged to go into the pond?

A. It actually collected in that same area the water is right now. There was a small berm around it, but it had a 12-inch pipe buried in the ground, so all the water from that low area would go into the pond.

Q. And then after the double lining, there was this [*JA152] sump that **[94]** was put in that you testified to this morning and that pumped water into the double lined pond?

A. It didn't pump into it, it would run from there into it.

THE COURT: Can we agree on which area we are talking about? Are we talking about the area that is easternmost directly south of the [**131] double lined pond or is it the area that is west of the double lined pond and appears to be south of whatever it is, to the south of the anhydrous ammonia tank? It's blue. I don't know what it is. It doesn't appear on the diagram, 687.

That looks like a dark area that might be water. It would be roughly, looks like it's almost contiguous to the west boundary of the double lined pond and it is some distance east of the UN-32 thank. That's an area that looks like it's dark that could be water.

And then there is the second area that is directly south of the southeast corner of the property of the double lined pond. Which one are we talking about?

MR. LASATER: I'm talking about the area that is bounded by a triangle of the UN-32 tank, the anhydrous ammonia tank and the double lined pond.

THE COURT: All right. I'm with you. Let's take the afternoon recess at this time. We will stand in recess until 3:10.

(Recess) **[95]**

THE COURT: Back on the record in United States versus Atchison, Topeka.

You may continue, Mr. Lasater.

MR. LASATER: Thank you, your Honor.

BY MR. LASATER:

Q. Now, in Exhibit 392, north of the north fence [*JA153] line to the Brown & Bryant yard and [**132] the leased property, there is a building with a light-colored roof and it looks like some pavement around it. Do you see what I'm talking about?

A. Yes, sir.

Q. That's in the upper right-hand portion of this Exhibit 392. Was that area at some point blacktopped?

A. The area just north of the main gate there?

Q. Yes.

A. Yes, sir.

Q. And when did that take place?

A. When they built that facility right there, it was Kernridge Growers, I believe the name of it was. When they built that, they blacktopped that area.

Q. And they blacktopped it as it's shown in this photo, 392?

A. Yes.

Q. And do you know when that took place?

THE COURT: I'm lost. On my 392, you can't see the north fence line. Excuse me. I didn't have the exhibit unfolded, all right. **[96]**

THE WITNESS: I know it had to be I think it was '81, '82, somewhere in that area.

BY MR. LASATER:

Q. And before that blacktopping took place, what was the ground surface there north of the site?

A. It was just a dirt field.

THE COURT: So this is blacktop as of this photo?

MR. LASATER: That's my understanding, your Honor.

BY MR. LASATER:

Q. Did you see the equipment come in there to [*JA154] blacktop it? [**133]

A. I didn't see it come in. But it was a blacktopped surface.

Q. And so at the time that this photo was taken, sometime after you left Brown & Bryant's employ, it's showing the blacktopping as you remember it there when it was first put in?

A. Yes, sir.

MR. LASATER: And, your Honor, this is also a joint exhibit that I would move into evidence.

THE COURT: Joint exhibits are in evidence.

MR. LASATER: Okay. Thank you.

BY MR. LASATER:

Q. Now, if we shift back to the bulk D-D tank, prior to the sand storm, or prior to the windstorm that crushed it, what was it set on top of?

A. Just gravel base. It set on a gravel pad.

Q. And as far as you know, that gravel was set over soil? **[97]**

A. As far as I know.

Q. Shifting to the Nemagon that was handled on the Brown & Bryant site, after the Brown & Bryant bobtail tank truck had taken the diluted Nemagon, diluted with water to the farmer's field and that tank truck came back, it was rinsed out at the wash rack area; is that right?

A. Yes, sir.

Q. And that diluted Nemagon was made from Nemagon that had been delivered to the Brown & Bryant site in 30-gallon containers; is that true?

A. 30 gallons or 5 gallons.

Q. And when [**134] it was--when the 30-gallon [*JA155] containers were used to make this diluted Nemagon, it was hoisted up on a forklift, placed over the bobtail truck tank and drained into the top of the tank?

A. Yes, sir.

Q. And that tank had already had water put in it?

A. Yes, sir.

Q. And then that tank truck went off, the 30-gallon containers of Nemagon were kept at the Brown & Bryant yard; is that right?

A. Yes, sir.

Q. And those were rinsed out at the wash rack?

A. Not usually, no.

MR. LASATER: If I could direct Court and counsel to Mr. Merryman's deposition, page 128, line 11, through 22. And **[98]** I have a copy for the Court.

THE COURT: I have the lodged deposition now, the original.

MR. LASATER: Very well. Absent an objection, I will read these lines.

THE COURT: You may proceed.

> MR. LASATER: "Question: Then what happened to the 30-gallon drums after they had--their contents had been put into one of these water tank trucks?

"Answer: It depends on where at that time they had the drum storage. For a while, it was by the 32 tank and then for a while, it was over along the west side of the yard."

MR. MacAYEAL: Just for the record, that's "west end of the [**135] yard."

MR. LASATER: "West end of the yard."

"They would just leave it on the pallet, take it over [*JA156] there and then store it until they got ready to rinse them out. And they bring them over to the wash rack. They would rinse them out and then take them back and then leave them stored."

BY MR. LASATER:

Q. Do you remember me asking you that question and you giving that answer at your deposition?

A. Yes, sir. **[99]**

Q. Now, did you ever see an instance when any of the contents of an empty Nemagon can would leak onto the ground?

A. Yes, sir.

MR. LASATER: If, again, I may read, your Honor, or I direct counsel and the Court to page 129, lines 7 through 18.

MR. MacAYEAL: I think there was maybe a time period issue, but maybe the witness--I will clear it up on cross, so I have no objection.

THE COURT: You may proceed.

MR. LASATER: Question by myself: "The 30 gallon drums, did you ever, after they were emptied of Nemagon, did you ever see them leak any of their contents onto the ground?

"Answer: No.

"Question: Did you ever hear of that ever happening?"

Objection by Mr. MacAyeal.

MR. MacAYEAL: "Mr. McKae."

MR. LASATER: Excuse [**136] me, Mr. McKae.

"I object. It calls for hearsay"--

THE COURT: Don't read the objection. Skip to the answer, unless somebody is reasserting them.

[*JA157] MR. LASATER: "Answer: I never heard of the drums, the 30-gallon drums leaking."

BY MR. LASATER: **[100]**

Q. Mr. Merryman, did I ask you those two questions and did you give those two answers at your deposition?

A. Yes, sir.

THE COURT: You don't have to ask him that question. The testimony speaks for itself.

MR. LASATER: Very well, your Honor.

THE COURT: Unless you are trying to test his memory, but if it's offered for impeachment, all you have to do is read the question and the answer.

MR. LASATER: Very well, your Honor.

BY MR. LASATER:

Q. Now, harkening back to your testimony earlier today when you were talking about the can crushing that took place near the can crushing area, both--well, the can crushing area before there was a concrete pad put there, now, did the residue of those cans at times get to be two to three inches deep and as much as six feet or so across?

A. Yes, sir.

Q. Now, the BB Weed Killer D came onto Arvin site, the Brown & Bryant site both in cans and in bulk; is [**137] that right?

A. Yes, sir.

Q. And at least on one occasion, you saw Weed Killer D spill out of the bulk holding tank located on the Brown & Bryant yard; is that right?

A. Yes, sir. **[101]**

Q. And that was at approximately P and Q and 14 [*JA158] and 15 of the grids, which are shown on Exhibit 687?

A. Yes, sir.

Q. And the BB Weed Killer D that came in in 30-gallon barrels, you never saw any of that residue from those barrels leak out onto the ground at the Arvin site; is that correct?

A. No, sir.

THE COURT: No, is that correct, or yes, is it correct?

THE WITNESS: No. I have seen some of them leak.

THE COURT: You have seen it leak, all right.

MR. LASATER: Your Honor, if I could direct yourself and counsel to Mr. Merryman's deposition, page 139, line 19 through 140, line 14.

MR. MacAYEAL: I object. That's not inconsistent.

THE COURT: It actually amplifies his answer. I will permit the reading.

MR. MacAYEAL: Okay.

MR. LASATER: Your Honor, in particular, I would read from on page 140, line 8 through 14, is the directly

contradictory portion. The portion before that he designated to make it clear that we were referring to the 30 gallon D-D barrels.

THE COURT: Yes, [**138] you may.

MR. LASATER: Starting on--at page 139, line 19. **[102]** "Question: Now, what happened to the 30-gallon BB Weed Killer D containers?

"Answer: The ones we took to the field, I don't remember ever bringing any back myself. We did have some empty ones in the yard that other servicemen had brought back and they were stored in two areas or at different times, the different [*JA159] years they were stored there in two different places.

"Question: Were they rinsed in the--at the wash pads?

"Answer: I never seen them rinse any of them. I don't know if they were done in the field or if they did them in the yard. I never opened one up and looked inside. I never saw anyone rinse them.

"Question: Did you ever see any of the residue in those 30-gallon barrels spill out onto the ground at the Arvin yard?

"Answer: I never seen them spill. I seen spots around them where it was wet. I don't know if it was from that particular drum or something else, but."

MR. MacAYEAL: I would ask that he continue--

MR. LASATER: I would be happy to continue, your Honor, after the colloquy of counsel if Mr. MacAyeal wants me to be more complete.

THE COURT: I [**139] think he wants you to start at line 15. **[103]**

MR. LASATER: Okay.

"Did those wet spots have the characteristic color?

"Answer: Over there it was mostly dirt and it was just wet dirt and."

I would propose to then start reading again at page 141, line 16.

THE COURT: That's correct.

MR. LASATER: "Question: Now, you are saying that there was a wet spot around those barrels that"--

THE COURT: "Around some barrels."

[*JA160] MR. LASATER: "Around some barrels that you were talking about?

"Answer: One time when I came into the yard, I went to drop a trailer and I drove back around and I had a habit of parking on the west side of the yard. It was less traffic over there. It was easier to walk in the shop. And I happened to notice there was a wet spot around where the drums at that particular time were being stored on the west side of the yard next to the fence. And I happened to notice a wet spot. Like I say, I don't know what caused that spot. I don't ask, I just happened to see it.

"Question: And what--and that "wet" spot, what did it look like--what did it look to you like?

"Answer: There was all dirt that was underneath [**140] the **[104]** pallets over there and it was just wet and there was no really color definition to it, just wet.

"Question: And approximately what year was this?

"Answer: It was before the dust storm, probably around '79, in the same year. We stored drums over there, I think, a couple of years and it was '78, '79, somewhere in there.

"Question: Now, you were saying on the west side. Can you tell us, using the grid map, where you saw this west spot?"

Should have been wet spot.

"Answer: In the area between C and D and 13 and 15, somewhere right in that area.

"Question: And other than this one occasion of seeing that wet spot around BB Weed Killer D drums, did you see any other wet spots around those kinds of drums?

"Answer: Not around the drums per se, unless it [*JA161] had been raining or something like that, it would be wet."

BY MR. LASATER:

Q. Mr. Merryman, turning to the D-D pull rigs, I believe you indicated in the course of your testimony that sometimes there was leakage from the sight gauges?

A. Yes, sir. **[105]**

Q. Is it also accurate to say that you're unable to estimate the quantity that you ever saw leak from one [**141] of these sight gauges?

A. I have no idea how many gallons.

Q. When was the concrete apron that was built to the west of the warehouse and right next to the warehouse, when was that put in place?

A. It had to be right after you took out the railroad spur, but I don't know what year that was.

Q. When there was a rain actually going on, there was a thunder storm or rain actually coming down, did you work in the--did you, the Brown & Bryant employees, work in the Brown & Bryant yard?

A. Yes, sir.

Q. So you just kept on working right through the rain?

A. Right. We worked in the maintenance department and the shop working on pumps or different items.

Q. Would you go out into the yard or would you wait until the rain had stopped?

A. Usually when the rain stopped, unless there was an emergency of some type.

Q. Now, the procedures that you have outlined with regard to the wash rack and that area of washing, [*JA162] do you have any way of knowing how long those procedures had been in place prior to your employment? **[106]**

A. No, sir.

Q. Now, how did you come to leave Brown & Bryant's employment?

A. I went on vacation and came back unemployed.

Q. What's your understanding [**142] of why that happened?

A. I got a letter stating from Jack Brown that I was no longer employed.

Q. And what did you hear was the reason behind that termination?

A. I never got a definite reason. I heard a lot of rumors.

MR. LASATER: No further questions, your Honor.

THE COURT: Mr. Earle, do you wish to cross-examine?

MR. EARLE: Yes, I do, your Honor.

CROSS-EXAMINATION

BY MR. EARLE:

Q. Does the witness have Government's 100 up there?

A. I don't know what that is.

Q. That was the photograph marked by the government at the beginning that you wrote on?

A. I don't see it.

THE CLERK: You took it, Mr. MacAyeal, when you took it off the Elmo.

THE COURT: The number was Government's Exhibit 100. It's not in those binders. It was a [*JA163] separate sheet.

MR. EARLE: That's all right. I will attempt to work off what has been marked as 387. **[107]**

BY MR. EARLE:

Q. Mr. Merryman, my name is David Earle, and I represent Shell and we met at your deposition and we met earlier today out at the hall.

I would like to ask you, first of all, sir, isn't it true that you saw more spills of D-D resulting from activities at Brown & Bryant employees loading Brown & Bryant [**143] equipment than from tanker trucks unloading D-D at the site?

A. Yes, sir.

Q. I would like to direct your attention to the evaporation pond, which is marked on Exhibit 687 as the double lined pond. Prior to the time that that pond was double lined, was it bermed?

A. It had a berm around it, yes.

Q. Did it have a berm around it as long as you were employed at Brown & Bryant?

A. Yes, sir.

Q. Can you tell me approximately how high that berm was?

A. It wasn't very tall. It was probably just a couple of feet.

Q. And now I would direct your attention to the sump, which you identified as the wash rack, which is right in this area here and it's identified on this grid map as sump number 1. At the time that you worked for Brown & Bryant, was that sump bermed? **[108]**

A. No, sir.

Q. What kept people from falling in that sump?

[*JA164] A. It had a fence around it, a chain link fence around it.

Q. Is it correct that following the destruction of the dedicated D-D tank at Brown & Bryant during the windstorm that you testified about earlier that there was no bulk storage of D-D at Arvin, at least until sometime after you left that site?

A. Not a stationary tank, no. They did [**144] have milk trailers that they would line up and put D-D in.

Q. Was it your testimony earlier that the majority of that--that D-D following that windstorm was sent to Shafter for storage?

A. The majority of it, yes.

Q. Can you tell me what was the primary D-D application season?

A. It was during the summer. I couldn't tell you exactly what months. It was during the hot part of the year.

Q. Okay. Were there other parts of the year that D-D was applied?

A. Yes, sir.

Q. What times of the year were those?

A. Before planning getting cotton ground ready. They would use it before carrot ground.

Q. When would that be?

A. Probably in February, back in that area. Sometimes earlier **[109]** than that. Sometimes later than that.

Q. Can you apply it in the rain?

A. We never did, no.

Q. Can you describe for me, I know that you have testified that most of your duties took you out of the [*JA165]

Arvin yard for field applications, but what were your duties in the Arvin yard?

A. The last couple of years I was there, I was a service manager. I made sure all the servicemen were lined out, had equipment they needed to get them going.

Q. There was never a Shell representative that [**145] ever directed you in the performance of your duties as a service manager at the Arvin yard, was there?

A. No, sir.

Q. Did you ever see any Shell employees assisting the unloading of tanker trucks containing D-D at the Arvin site?

A. Shell employees?

Q. Yes.

A. No, sir.

Q. Did you ever see any Shell representative?

MR. MacAYEAL: I would object on foundation grounds, Judge, to the extent one can tell who a particular person works for.

THE COURT: It obviously assumes that you know that a person is a representative of Shell. You can start by telling **[110]** us if, while you were on the site, working or doing anything else in the period you were there, you ever saw anybody who was identified to you as a Shell employee.

THE WITNESS: Just once in a while, I was in the office, a salesman would come by, but I never seen anybody out unloading.

BY MR. EARLE:

Q. Now, it was Brown & Bryant's policy to regularly wash out the bobtail tank trucks, the nurse tanks and the pull rigs, wasn't it?

[*JA166] A. The pull rigs were hardly never washed out unless they had a problem or they had some sediment or something inside the tank they couldn't get out. The rest of them were [**146] washed out regularly.

Q. Did you ever know of any employee or representative of Shell Oil Company directing the manner in which that washing out should take place?

A. No, sir.

Q. You never--or were you ever aware of any Shell employee or representative ever assisting or directing in the washing of bobtail trucks, pull rigs or nurse tanks?

A. No, sir.

Q. Your principal job function with Brown & Bryant was the application of D-D in the farmers' fields, was it not?

A. That was one of the jobs, yes. **[111]**

Q. And incumbent or included within that job was getting that equipment to the farmer's field; isn't that right?

A. Yes, sir.

Q. Any representative of Shell Oil Company ever direct you or assist you in getting the nurse tanks or the other apparatus that you used to farm his field?

A. No, sir.

Q. Any Shell employee or representative ever assist you or direct you in the application of material to a farmer's field?

A. No, sir.

Q. You testified earlier today about washing out Nemagon cans at the wash rack. Any Shell employee or representative ever assist or direct you in that activity, sir?

[*JA167] A. No, sir.

Q. Any Shell representative or employee ever assist [**147] you in the crushing of the cans that you testified in crushing down there by the UN-32 tank?

A. No, sir.

Q. Did you ever see any Shell representative or Shell employee assisting or directing any Brown & Bryant employee in the performance of any duties at the Arvin site?

A. No, sir.

MR. EARLE: No further questions, your Honor.

THE COURT: Any redirect?

REDIRECT EXAMINATION **[112]**

BY MR. MacAYEAL:

Q. While you were working at the Arvin yard, did the entire plant area drain down to that pond?

A. Yes, sir.

Q. And was that the purpose of that pond, to hold rainwater runoff?

A. That area was, yes.

Q. Now, you testified earlier about sight gauges, you remember that?

A. Yes, sir.

Q. Could you explain what a sight gauge is?

A. It's a clear piece of poly tubing that would run the length of the tank. It would tell us how much material was in the tank.

Q. And what types of--were those on pull rigs?

A. Pull rigs, nurse tanks and bulk storage tanks.

Q. Now, did you ever actually see one break?

A. I never seen them break. I seen broken ones.

Q. And did you see those out on the leased parcel [*JA168] on the west side?

A. I have seen them in all places of the yard [**148] and the field.

Q. And would there be a particular time when that would happen?

A. Usually in the evenings, probably, because if somebody seen them leaking, they would stop and fix them, but it could happen **[113]** at any time.

Q. But you remember them happening at night from time to time?

A. I remember some happening at night.

Q. Now, what is the--what is your best recollection whether the Nemagon cans were rinsed out? Do you recall that they were stored over there on the west parcel?

A. Yes, sir.

Q. What is the explanation of that about whether they were rinsed or not?

A. I don't remember them ever being rinsed. I'm sure they probably were, but I don't know for sure.

Q. Give us your best recollection.

A. I just know when they fill the rig up, we take them and store them over there.

Q. As far as the dinoseb, you saw the yellow material from time to time around the plant?

A. Yes, sir.

Q. And you understood that to be connected with the BB weed--the Weed Killer D?

A. Yes, sir.

Q. Now, how often in a given month--how many times, if you can estimate, would employees be checking the filters?

[*JA169] A. It's hard to say.

Q. What's your best estimate? More than [**149] 20?

A. Yes, sir. **[114]**

Q. All right. And these rigs were stored over on the west side?

A. All over the yard.

Q. And you used D-D year-round?

A. At times we did, yes. Mostly in the summer.

MR. MacAYEAL: Thank you.

THE COURT: Anything further, Mr. Lasater?

MR. LASATER: No, your Honor.

THE COURT: Mr. Earle, anything further for Mr. Merryman?

MR. EARLE: Nothing further, your Honor.

* * *

[*JA170] IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

HON. OLIVER W. WANGER

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al., Plaintiffs, vs. BROWN & BRYANT, INC., et al., Defendants. AND RELATED CROSS-CLAIMS AND THIRD PARTY ACTIONS

NO. CV-F-92-5068 OWW

Court Trial, Day 1
Fresno, California Tuesday, March 30, 1999

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

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[*JA171] JOHN WALTON, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

THE CLERK: Please state your name and spell your last name for the record.

THE WITNESS: My name is John Walton, W-A-L-T-O-N.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. MacAYEAL:

Q. Can you please explain [**150] to the Court what you do.

A. I'm a professor at the University of Texas at El Paso.

Q. What department?

A. Department of Civil Engineering. Also associated with the Environmental Science and Engineering Ph.D.

program.

Q. Do you have any particular specialty?

A. Fate and transport contamination damage.

Q. And what disciplines relate to that particular field?

A. Well, it's a multi-disciplinarian field. It has to do with biology, chemistry, geology, hydrology, engineering.

Q. What about mathematical quantitation?

A. And also part of it, but I do a lot of numerical modeling.

* * *

[16]

* * *

[*JA172] BY MR. MacAYEAL:

Q. Dr. Walton, let's--can we--why don't we start with dinoseb. What was your--you studied the properties of **[17]** dinoseb?

A. Yes.

Q. And what properties were relevant to your analysis?

A. Some of the major properties are--the two major properties, first of all, has very low vapor pressure, so it will not volatilize or vaporize to any significant extent. So if it spills, it tends to stay put.

Second of all, its solubility of water. And one of the questions is if it transports down to groundwater, and so one must know how it behaves [**151] with water. It has a mild solubility of water, about 52 milligrams per liter.

THE COURT: Slow down.

THE WITNESS: Fifty-two milligrams per liter.

THE COURT: Moderate solubility.

THE WITNESS: I call it "mild," but these terms depend on context, of course.

BY MR. MacAYEAL:

Q. And why were those factors relevant?

A. Those factors are relevant because when you look at a spill, whether it's on the leased or main parcel, but a spill of dinoseb, you want to know or estimate what would happen with it. And so for something like dinoseb that doesn't have a significant vapor pressure, it will tend to remain in place where it's spilled until it's transported by some other means. In this case, it could either be water or it could be blown by **[18]** the wind, perhaps.

Q. Now, as part of your analysis, did you look at focused infiltration?

[*JA173] A. Yes, I did. Because of my experience in hydrogeology and also my research experience, I understand that a lot of contaminant migration has to do with preferential pathways and focused infiltration.

Q. Can you explain to the Court what you mean by "focused infiltration."

A. What I mean is we're located in a fairly dry environment; [**152] however, what happens, particularly in an industrial site like this, is water tends to be concentrated. That is, for example, you might have the roof of the warehouse, and so all the water that rains on the roof of the warehouse comes down.

In this case, on one half of the warehouse would come down and either come right off the edge or go into the downspouts and then directly back down on the surface. And so if you were looking and standing, for example, at the edge of the warehouse, then it would seem like quite a bit of rain came down right there because all the rain from the whole roof is concentrated on that point.

And what could happen at a site like this is that you have, say, a precipitation event, or what happens in industrial water use, such as hosing out the building, and **[19]** that water can go out on the parking lot and then it tends to run downhill. And it runs downhill until it gets to places where it can infiltrate, and in a lot of places it can infiltrate. I call it "focused," because you take water from a broad area and concentrate it down to where it seeps in.

The most obvious spot at this site is down at the waste pond. The entire site was created to go [**153] down to the waste pond. And so if you have a big storm, the water comes down, it picks up, for example, first of all, with dinoseb. It can pick up and dissolve the dinoseb [*JA174] or it could entrain the dinoseb. Just like if you wash your driveway with a hose, it can take and wash the dust off. It doesn't have to dissolve, it can wash the dust off. The dust can be entrained in the water.

So it can be entrained in the water and then washed down to, for example, the waste pond. So the waste pond is one point--that's one example of focused infiltration.

Q. What's another example?

A. Another example would be we heard Mr. Merryman testify that when they oiled the surface, the oil didn't go all the way up to the edge of the building, because they couldn't spray all the way up to the edge of the building. And it didn't go all the way up to the edge of the path, it stuck out on the leased parcel. And so right there you have a place that's not oiled. **[20]**

And so you have bare soil that's not oiled. You have water that can come down off the eaves right there, so you have a source of water. You have potentially a source of spills, because you have dinoseb stored out on the [**154] pad out there, and so you could have a spill of dinoseb.

You have a rain. From a small rain, turns into a lot when you count how much comes from the eave of the top of the roof all the way down, and it can be infiltrated right there at the gap between, say, the concrete pad and the oiled surface.

There's a lot of examples in a site like this. It would change in time. And people that work there would not necessarily be aware of it.

Another example would be a pothole. You could have a pothole. Mr. Merryman testified you oiled the surface, you drive these heavy rigs over it that's not [*JA175] properly impacted as you would do to do it properly, so you could get potholes.

It could rain. If those were low spots, the water could run down into the low spots, and if the hole has been put into the surface by, say, a heavy vehicle, then you have infiltration right there. So this is what I mean by "focused

infiltration."

* * *

[26]

* * *

Q. Did you study the rainfall as part of your analysis?

A. Yes, I did.

Q. How did you get that data?

A. I got the data from the Weather Service. I think it was the Desert Research Institute that has it. And I originally got it off the [**155] Internet, and they had some graphs that were very useful. And then I wanted to do some more detailed calculations and I got some more detailed data from them.

Q. Did you do any analysis of the frequency of rain events?

MR. LASATER: Your Honor, I object at this point. This testimony is testimony that was generated after the expert report and, therefore, contrary to the pretrial order.

MR. MacAYEAL: Judge, this was the subject of the deposition.

THE COURT: Was the rain data relied on disclosed at the deposition?

MR. MacAYEAL: The last session. It was--**[27]** Mr. Lasater interrogated the witness on the very topic.

[*JA176] MR. LASATER: If this is what I think it is, your Honor, if it's consistent with what has previously been presented, it was presented to me at the first session of the deposition.

THE WITNESS: There were two parts. One was given to him in the first deposition, and then he asked me some questions in the first deposition and I realized how I could answer them, so I came back in the second deposition and gave him some more information.

THE COURT: All right. It would appear that the information has been disclosed. It is frequent that an expert or any other--whether [**156] it be a hydrologist, chemist or other, may be questioned in such a way that additional subjects or data are required.

Any competent lawyer would have asked the question of any expert, "Have you done everything you wanted to do, needed to do, was told to do, and is there anything you think you should do?" And in that process, often the expert determines that there is additional work necessary.

And, of course, the closing question always has to be asked, "Have you completed all your work? Is there anything else you're going to do?" And if the expert indicates that there is more, or further inquiry, then the protection for the party is to leave the deposition open and **[28]** to get the data and then to deal with it so it can be provided, both as a subject of cross-examination, inquiry and analysis, and to the inquiring party's experts. It sounds to me like this was done here, and, therefore, I'm going to overrule the objection.

You may answer.

BY MR. MacAYEAL:

Q. What was the question that Mr. Lasater asked [*JA177] you at the deposition that you tried to answer for him?

A. Well, initially I had gone to the Weather Service and obtained some data on the probability [**157] of precipitation. Because the scenario pathway I'm describing is you have a history of--of poor housekeeping and spills that I can only describe as coming at random, because I don't have any other data.

And so when I looked at the DCP, the question is, will rainfall precipitation come before it has time to evaporate. Because if you just let it sit there for a definite period, it will evaporate. And so that was the question.

And Mr. Lasater asked me in great detail about this hypothetical one gallon, about what would happen to it. And that night I had a brainstorm in terms of how I could describe it quantitatively and give him an answer, and that's what I developed at a later time. **[29]**

So originally I had some data depending on the season, the year, the probability of precipitation following the spilling in a certain period of time. But what you can do is put that kind of data together with the binomial distribution statistics and look at the question if you had multiple spills, what's the probability that one or more of them would be followed by precipitation within a certain period of time after that spill.

Q. What's binomial?

A. The binomial is just a distribution that [**158] was--statistical distribution. It describes probabilities.

For example, if I were to have a dice right here and if I were to roll that dice, what's the probability that I would--if I rolled it ten times, that I wouldn't never get a 6. And the binomial would answer that for me, [*JA178] the probability I would never get a 6 if I rolled it a certain number of times.

Q. That's a mathematical computation?

A. That's a mathematical computation. Very common, well understood.

Q. How did you apply that to this question?

A. The way I applied it to this question is I didn't know when the spills were occurring, so I assumed the spills were random in time. And, based on that, I calculated the probability that you get a precipitation event within a **[30]** certain number of days after any point in time.

So what's the probability if you have a random point in time within 24 hours? You get precipitation. What's the probability within two days? You get precipitation. What's the probability of a week? You get precipitation. And not only precipitation, but the amount is important, because we're talking about precipitation that's large enough to lead to a runoff event.

And so the textbook [**159] number for enough precipitation to lead to a runoff event from a parking lot type area is about a millimeter of precipitation. So I actually calculated the probability that you get a millimeter or more precipitation within a certain time period after it was spilled.

Q. What were the results of your analysis?

A. The results of my analyses were--it's in one of these reports here, but I came up with a table that gave those probabilities. And I'm not sure just where it is in this pile of stuff. I'll have to look through it. But within here there's this table of probabilities that I came up with.

[*JA179] So, first, there's a table, but, then, ultimately, the table leads to more specific calculation. The original table just says what's the probability for one spill getting caught by a rain. And if it's, like, within a day, the probability

is about 7 percent, and within a week, **[31]** precipitation is about 20 percent. Now, I'd have to look up the precise numbers, but it's approximately that.

But then you can put it together with the binomial and say, What's the probability if I have, say, 20 random spills that one or more of them was followed by a precipitation? And you can [**160] generalize that to one, two, three, four, all the way up to fifty applied it. So I have this chart right here--do you want me to show it on the Elmo?

Q. Could you explain that chart, please.

A. Yeah. I'll try to speak up.

THE COURT: Does it have an exhibit number?

THE WITNESS: This was given to Mr. Lasater at my last deposition, so I think it must have a number.

THE COURT: How about for trial?

MR. MacAYEAL: Let's mark it--

THE COURT: Have the defendants seen this chart?

MS. BECKER: Could you give us just a second, please.

MR. MacAYEAL: Is this something that was provided at the deposition?

THE WITNESS: Yeah, this is a bigger version, is all. It's the same.

MS. BECKER: Can you tell us the exhibit number from the exhibit list that I'm working on? **[32]**

MR. MacAYEAL: I will just use it as a [*JA180] demonstrative exhibit.

Just use it to explain your analysis.

THE COURT: Let me ask one question here, Doctor. The underlying data that you used, which was the precipitation data, how many years did you use for your model?

THE WITNESS: I think I said in here. It's like, I think, 30 some years, if I remember right. I'd have to go back and check the exact, but something [**161] like 30 years or more. And it's from Bakersfield, by the way.

THE COURT: That would cover this site?

THE WITNESS: That would cover this site. It was the closest site they had to Arvin that I could find, and that was Bakersfield, and so it was the most relevant data that I could get.

THE COURT: And then how was the precipitation quantified? Was it quantified by volume, by quantity, by frequency, by duration, or what other characteristics?

THE WITNESS: This particular data was daily data by the National Weather Service, and they have standardized methods for collecting precipitation data, and it was depth of precipitation. And so the data I had was depth of precipitation. Like today, they had so many fractions of an inch of precipitation.

And then what I did was wrote a little computer **[33]** algorithm, and it would sort through the data and it would look and say is the precipitation--would go through each day and say, Was there precipitation within 24 hours? Was it greater than the amount of one millimeter? Was it great enough to cause a runoff event?

THE COURT: And the one millimeter, is that a [*JA181] depth calculation?

THE WITNESS: That's a depth calculation. That's [**162] the depth that the Weather Service would report in the newspaper. Quarter of an inch of precipitation, it's a depth.

THE COURT: And so, in your expert opinion, one millimeter of precipitation is sufficient to do what? To penetrate at an infusion site or to carry the contaminant that's being studied in solution or transport it?

THE WITNESS: One millimeter is the value I looked up in the hydraulics text in a reference to generate runoff from a parking lot. That's the point in time, if you have one millimeter precipitation on a typical parking lot, you go out there and you would see that it starts to run off the surface.

And so at that point in time you have enough where it starts to run off on the surface.

And then when it starts--so when it can run off the surface, now you are really integrating the volume of precipitation over a larger area. That is, once it starts to run off, you're taking precipitation from a large area, it **[34]** starts to collect and flow down, so you start to see flow.

THE COURT: And your assumption was that it was hitting an area that would be comparable to a parking lot in terms of its imperviousness?

THE WITNESS: That is the basic assumption, and [**163] it's certainly an approximate number.

THE COURT: But this site is mostly at that time, when you're studying it, unimproved, it is--it's, essentially, dirt?

THE WITNESS: No. It's oiled surface that has a [*JA182] relative low permeability, and so I had to make a decision--I mean, ideally, what you'd like to do is go out there and measure this for the site as it existed.

THE COURT: The spill points?

THE WITNESS: Not only the spill points, but the site as a whole, when you start getting runoff. So I decided the closest approximation I could do was a parking lot, but it's just an approximation.

THE COURT: And hearing this last witness, you were in the courtroom, he talks about an area that is oiled, but I don't understand that to be the entire site. In other words, the road oil, if you will--and I don't know if it's even sufficient to call it a cap, whatever it was--was applied, and that was a portion of the property but not all of the property. And so your analysis is you took the site as being **[35]** equivalent to that?

THE WITNESS: Right. This calculation gives the analysis as though it were behaving as a parking lot. And I agree with you completely, that it's really [**164] an open question, how you describe it, and I felt that was the best I could do it. But if we--

THE COURT: All right. I'm following you.

THE WITNESS: If we came up with a different number of how much it took, that would be very easy to recalculate, and these numbers would change somewhat.

MR. HELDT: Your Honor, for the record, we would object and strike the testimony, because there is an improper foundation here. And it is clearly shown that this area is not a parking lot, and so the foundation basis for the testimony is inappropriate and should be stricken.

[*JA183] THE COURT: Well, it goes to its weight and not its admissibility. I assume on cross-examination these things will be shown. The objection is overruled.

You may continue.

MR. MacAYEAL: Just for the record, your Honor, I will note that the railroad has in their trial brief called it a parking lot, but we'll leave that aside.

THE WITNESS: But that was merely an assumption. It would be very easy to calculate this with some other number.

And what this shows right here is this is the number **[36]** of random spills. So the spills seem to occur at random, and this is the probability that you get that one or more [**165] of these random spills sees precipitation greater than one millimeter, which I'm saying that is greater that can cause runoff.

And as you correctly point out, it depends on the nature of the surface. And what you find is that if you just have a single spill right here, you have the probability off the tables, which is right here. I found my tables, as a matter of fact, if you want to see it.

But when you look at the probability of one or more spill, that if you get a high number of spills, that--and, also, I left the number of days open, and we should talk about that, because it's an open question.

How fast does DCP evaporate? It depends on how big the spill is. Is it in the shade? Is it in the winter? Is it in the summer? A lot of questions like that.

And, furthermore, it doesn't just evaporate the spill, it evolves over time, so I don't really know how long it's going to stay around. So what I'll do is calculate a range for you. So if you disagree with me, you can choose, and, likewise, I can calculate a range--rather [*JA184] than the parking lot assumption, we can calculate a greater amount of precipitation to lead a runoff, if you want. And what it says, though, is that [**166] if you wait seven days after, that even after ten spills, the probability is **[37]** almost one, at least one of them will be caught. And if you just look at a one-day lag period, that if you get more than about 50 spills, the probability quickly asymptotes to one.

And in any of these, even if I recalculate and require greater amounts of rainfall to produce runoff, if you get a large number of spills, the probability of at least one of them will be captured by rain and transported down to the waste pond or other focused infiltration site is effectively one.

BY MR. MacAYEAL:

Q. Which means what?

A. Which means that the probability that the leased parcel, if this many number of random spills occurred at the leased parcel, that the probability of the leased parcel contributed to the observed contamination goes to one as the number of spills goes up.

Q. When you say the probability is one, what do you mean by that?

A. The probability is--well, when you calculate it here, what it does is it will calculate 99.9999 whatever certainty that at least one or more of them went down there.

Q. Close to a hundred percent?

A. It goes--asymptotes to a hundred percent. For mathematicians, [**167] it doesn't reach it until it goes into infinity out there, but it goes to what, common sense, you **[38]** would call a hundred percent.

[*JA185] And so, again, I didn't--it was ambiguous how long it would stay until it evaporated, so I calculated a range to show you. And I'd be very happy to go back, and if someone has a different--what's called--what you're talking

about the parking lot is called an initial interception--

THE COURT: Let me understand, because I just heard you say something that I'm not sure we can derive from this study. Did you just say that this probability analysis leads to the conclusion of the likelihood that a spill entered the groundwater?

THE WITNESS: What this really says is this is the probability that one or more spills would be captured by the surface runoff and transported the surface runoff. Down the groundwater is an additional step. But this says what's the probability spill will be picked up by the surface water and moved with the surface water to a low spot which is likely to infiltrate.

BY MR. MacAYEAL:

Q. Could you explain the groundwater part of it?

MR. LASATER: Objection, vague.

BY MR. MacAYEAL:

Q. Could you explain [**168] your analysis of how it gets to the groundwater, if--

THE COURT: Let's just stay on the first point **[39]** before we go to the next question.

So this study is one that shows us the probability based on the frequency of random spills, the frequency and volume of a rain that that combination is sufficient to--I'm just going to use the word "move"--the contaminant over the surface?

THE WITNESS: That's basically correct, yes.

THE COURT: So now you want to go from here to [*JA186] the groundwater?

BY MR. MacAYEAL:

Q. Well, I guess the key thing is, does it relate to the evaporation? In other words, is the water relevant to the evaporation? And explain how that relates.

A. Well, I think what we need to do is move to the situation of--this just looks at can enough water to transport it come before it evaporates. It says that if you have a large number of spills, that it's probable at least one will be picked up by a rainfall.

Q. This is the probability it will be dissolved in water?

A. That it will be picked up and dissolved in water.

Q. And that relates as to whether it will evaporate or not?

A. And that relates as to whether it will evaporate. Now, once it's picked [**169] up by the water, the question is transport pathway after that. We haven't really discussed that yet, so **[40]** I guess that's the next direction you want to go.

THE COURT: I think he was asking you about evaporation, so wait for the lawyer's question.

THE WITNESS: Okay.

BY MR. MacAYEAL:

Q. So this analysis you did, does it relate to whether or not a particular spill will evaporate? Is there--what's the chance of water hitting it so that it will dissolve in the water?

A. Right. This is the chance that it will be--precipitation event will come and pick it up prior to the time it would evaporate. That's really all it said. The judge summarized it very well.

[*JA187] Q. And then is the focused infiltration relevant to the infiltration in the groundwater?

A. Yes. The focused infiltration is the major pathway that I believe that the contaminants of concern got to groundwater, is that they were moved by surface water to points of focused infiltration where they could infiltrate with the groundwater and move with the surface water, infiltrate the surface water, then move eventually with the water down to the groundwater. And--

Q. Let me ask you here. Does this analysis [**170] about the evaporation that you did, probability analysis, is that applied to the dinoseb? **[41]**

A. No, it does not apply to the dinoseb. The dinoseb does not have a significant vapor pressure.

Q. Dinoseb doesn't evaporate?

A. Dinoseb doesn't evaporate, so dinoseb just stays put until something moves it. And so dinoseb, if you spill it, will just basically stay put until a precipitation event comes and transports it. And so the probability of dinoseb will be impacted by this precipitation runoff event is one. It doesn't evaporation.

THE COURT: This is D-D we're talking about?

THE WITNESS: This is D-D we're talking about, exactly right. This is D-D we're talking about here. Dinoseb doesn't evaporate, so you could wait for a hundred days or wait for a year. And so then the probability is one right away, so this is for DCP and D-D.

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[*JA188] IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

HON. OLIVER W. WANGER

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al., Plaintiffs, vs. BROWN & BRYANT, INC., et al., Defendants. AND RELATED CROSS-CLAIMS AND THIRD PARTY ACTIONS

NO. CV-F-92-5068 OWW

Court Trial, Day 2
Fresno, California Wednesday, March 31, 1999
[**171]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

[Direct Examination of John Walton continued]

* * *

[74]

Q. How did this enter into your analysis?

[*JA189] A. The way it entered into my analysis is I first look at the physical-chemical properties of the compound and how they would move and I determine that if you had no water movement, that the dinoseb would not tend to move to the groundwater table. And that in order for DCP or D-D to move to the groundwater table without any movement of water, you would have to have a fairly large spill, fairly large spill. Because if you have a fairly large spill, then the D-D or DCP would move as a liquid, organic liquid on its own down, but that takes a fairly large spill.

However, the DCP is very soluble in water, and so if **[75]** you have regular movement of water, then the DCP would dissolve in the water and move with the water towards the water table. And so it would move towards the water table.

And so my analysis was that the pathway that would take small spills of DCP or other spills of dinoseb to the water table would be to migrate with the water, because it's--for the organic liquid to go on its own, it takes a great [**172] big spill.

So that's the situation I looked at and I looked, do you have this infiltration of water, do you have water at the site, and we talked about that yesterday, and there is enough water at the site to supply this infiltration scenario. One of the most obvious places at the site is the waste pond. And every expert who has worked on this case has said that the waste pond is a major source or location of communication with groundwater. The contaminants get in the waste pond and they move down into the groundwater. That has not been a point of contention. Railroad experts have said that, Shell experts say that. I say that as well. That was not a point of contention and so I didn't look [*JA190] at it in any more detail, but that's the other scenario.

THE COURT: At what level for the points of reference is the water table under this property?

THE WITNESS: It's not a completely simple answer. There is what's called the A zone groundwater that's about 60 **[76]** or 70 feet below the ground surface, and that's what we called the perched water level. That is, you get water there because there's a clay layer, stops the water from going down and there's air beneath that and [**173] perched zone below that until you get down to lower ground.

THE COURT: Where is the lower groundwater, at what depth?

THE WITNESS: The lower groundwater is couple hundred feet down, I believe. Most of the data you are seeing in this case will be for what's called the A zone, which is this perched water that's about 60 or 70 feet deep. That's what we are pretty much focused on.

THE COURT: And I assume for the plume that we are talking about, that that is diagrammatically represented somewhere.

MR. MacAYEAL: Yes. Different people have tried to draw that plume and different experts will address that.

THE WITNESS: Exactly correct. Is that most of the expert reports have a bunch of pictures that depict that plume.

BY MR. MacAYEAL:

Q. Now, as far as your analysis is concerned, you looked at the infiltration of water and how that affects this equilibrium and you examined what would happen if there were contaminants in that water solution in the subsurface?

[*JA191] A. I looked at what would happen with contaminants and based **[77]** on the properties of the contaminants, they will behave differently during this infiltration. One infiltration is at the waste pond.

Another [**174] case of these focused infiltration spots, where the water puddled down where there is someplace, there is a flaw in the surface and it infiltrates lower and you have a series of rain events that put water into this spot over time. And so you now have system where the water there is migrating down to the groundwater table.

And if you look at the properties of the compounds, if you look at dinoseb, it has a moderate solubility, so what you would expect is that if you have a small spill of dinoseb, that perhaps all of it would be dissolved and move downward with the water. Larger spills of dinoseb, some portion of the spill would be dissolved in the water and move down into the subsurface, and if you came back later on, years later, and you expect to see if there were dinoseb spills, that there was a fair signature of dinoseb at the surface that wasn't all gone and in the shallow subsurface, that is, the water would take it down, but some residual or trace amounts would remain behind.

The DCP behaves differently. It has different properties. It's very soluble in water and so it tends to all readily dissolve, unless you have a very large spill, and--but at the same time it has a high [**175] vapor pressure and a high Henry's law constant.

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[259]

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[*JA192] ROBERT MANDEL, called as a witness on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

THE CLERK: Please state your name and spell your last name.

THE WITNESS: Robert Mandel, M-A-N-D-E-L.

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[*JA193] IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

HON. OLIVER W. WANGER

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al., Plaintiffs, vs. BROWN & BRYANT, INC., et al., Defendants. AND RELATED CROSS-CLAIMS AND THIRD PARTY ACTIONS

NO. CV-F-92-5068 OWW

Court Trial, Day 3
Fresno, California Wednesday, April 1, 1999

REPORTER'S TRANSCRIPT OF PROCEEDINGS

[Direct Examination of Robert Mandel continued]

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[339]

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[*JA194] THE COURT: Cross-examination?

MR. LASATER: Yes, your Honor.

CROSS-EXAMINATION

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[359]

* * *

BY MR. LASATER:

Q. Now, staying on this topic of the leased property. Now, **[360]** when I'm referring to the term "leased property," do you understand me to be talking about the area to the west of the warehouse up until the west fence line?

A. Yes, [**176] I do.

Q. That area was set up as the clean area for the TAT mobilization; is that correct?

A. Yes, it was.

Q. So within the TAT report itself, there's a map that shows the area west the warehouse, and north is designated as "clean area"; is that right?

A. It's a relative term. "Clean" meaning cleaner than other areas.

Q. And it was clean enough to designate on the map and to utilize for people to go there and park their cars and be in civilian clothes and to walk around and be safe; is that correct?

A. That is correct.

Q. There was a determination in making it the clean area that it was not a hazard to human health or the environment in general; is that correct?

A. I don't know if I would characterize it as--I mean, the entire site was a hazardous waste site. In [*JA195] terms of employee health and safety, we try to find the safest place for them to park cars and to maybe change clothes and things like that. It doesn't mean that it's a safe place.

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[389]

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DON WOODY, called as a witness on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

THE CLERK: Please state your name and spell your last name for the record.

THE WITNESS: [**177] Don Richard Woody, W-O-O-D-Y.

THE COURT: Ms. Johnson, you may proceed.

MS. JOHNSON: Thank you, your Honor.

DIRECT EXAMINATION

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[411]

Q. Okay. And let me ask you, before you took any samples, did you visually inspect the property?

A. Yes.

Q. You physically walked around? Did you see any visual signs of contamination?

A. Yes, I did.

Q. What did you see?

A. I saw various piles of green, yellowish-green powder which later turned out to be dinoseb. We saw some oil stain--or some staining, perhaps is a better word. And lots of signs of just spillage and bad [*JA196] housekeeping.

Q. Okay. Did you see any of this, what you have learned later to be dinoseb on the railroad property?

A. Yes.

Q. And that was before you began any of your surface investigation?

A. That's correct.

Q. During the surface investigation, did you also take surface water samples?

A. Yes.

* * *

[449]

* * *

Q. Now, the property west of the warehouse as shown on Exhibit 687, the so-called leased property, that area, particularly in the northern part, was initially designated as the safe zone; is that right?

A. I believe that's correct.

Q. Or actually I've misspoke. It was [**178] designated the clean area; is that right?

A. Yes.

Q. Well, let me, so that we'll both be on the same page, let me show you Exhibit 1034. And I'm directing your attention to figure 22, which is EPA 201820.

A. I have it.

Q. That's entitled the "Site Safety Map"; is that right?

A. Yes.

Q. And the clean area is designated there with the hatched lines; is that right?

A. Yes.

[*JA197] Q. Did you prepare this map?

A. It was prepared by our site safety people.

Q. And you incorporated it within this report?

A. Yes.

Q. You're the author of this report, 1034?

A. I'm the one who orchestrated putting it together. There were several authors, but, yes, I put it all together and they **[450]** laid it out to make sure that it came out in the state that you see it now.

Q. In the text on the prior page to this site safety map, under the section 15.0 where it says "Prefield Activities," do you see that?

A. Yes.

Q. In the third sentence in that paragraph just below that heading it says, "The northwest area." Let me stop there. The northwest area was the area that's indicated as the "clean area" on figure 22; is that right?

A. That's what it says, yes.

Q. "The northwest area [**179] on the site was designated as the clean area to be used for parking and accepting deliveries."

Was that an accurate statement?

A. Yes.

Q. And when you say "accepting deliveries," that was deliveries of what?

A. Various equipment and documents that would come via Fed Ex. It wasn't like large delivery trucks or anything like that.

Q. And these people would come in the main gate and park in the clean area and then where would they go?

A. There was a doorway south of the--I'm trying [*JA198] to see what that says, "covered area parking." There was a single--a normal door where people could walk through just south of that covered area.

* * *

[*JA199] IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

HON. OLIVER W. WANGER

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al., Plaintiffs, vs. BROWN & BRYANT, INC., et al., Defendants. AND RELATED CROSS-CLAIMS AND THIRD PARTY ACTIONS

NO. CV-F-92-5068 OWW

Court Trial, Day 5
Fresno, California Tuesday, April 6, 1999

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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[753]

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JOHN BROWN, called as a witness on behalf of the Plaintiffs, having [*JA200] been first duly sworn, [**180] testified as follows:

THE CLERK: Would you please state your name and spell your last name.

THE WITNESS: My name is John H. Brown, B-R-O-W-N.

THE CLERK: Thank you. You may take the stand.

THE COURT: You may proceed, Mr. MacAyeal.

MR. MacAYEAL: Thank you, your Honor.

DIRECT EXAMINATION

* * *

[764]

Let me just get the witness to identify this.

I hand you Exhibit 1070. I'll direct you to the second page. Are you familiar with that document? Have you seen documents like that before?

A. Yes, I have, yes.

Q. Does that look like a Shell marketing agreement that you had--that Brown & Bryant had with Shell?

A. Yes, it does.

Q. I direct your attention to the second paragraph which states, "Shell's objective in making this agreement with you is to maximize penetration of Shell's pesticides in the area of your primary marketing responsibility." Do you see that?

A. Yes.

Q. What did you do to make that happen, to help Shell penetrate into the area of marketing?

A. Well, we represented them as a distributor for their products and had all the equipment and everything necessary to apply their products and to [*JA201] sell their products in the Kern County.

Q. Now, I direct [**181] your attention to paragraph three about Brown & Bryant's responsibilities which required you to "Maintain adequate inventories of Shell pesticides in order to provide prompt shipments to customers throughout

your primary area of responsibility." Do you see that?

A. Yes. **[765]**

Q. Now, what did you do, if anything, to meet that obligation, that is, to maintain inventories?

A. Well, to maintain D-D inventory, we had to buy bulk tank, keep it in good order so that we could store D-D for--in adequate amounts to be supplied to the farmers. We had a warehouse, and we maintained Shell products both at Arvin and in Shafter for--so that we could sell it in Kern County.

Q. Now, paragraph four makes reference to--it says, "Bring in your key pesticide personnel for a Shell instructed one-day meeting when mutually beneficial. The purpose of these meetings will be to review with your personnel the technical aspects of Shell pesticides as well as pertinent marketing information." Do you see that?

A. Yes.

Q. Did anything like that happen in your relationship with Shell, technical meetings?

A. Oh, yes, we had those meetings quite often.

Q. Tell us--

A. Sometimes they would be--when [**182] I first went to work for Brown & Bryant, we would have them in the evenings, maybe--probably for Shell, we would maybe have two a year of what we call real technical meetings where we get something on nematocides or [*JA202] nematodes or something like that. Later on we would maybe have something about spraying of cotton, either lygus, worms, things like that. Then we would have luncheon

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[777]

* * *

Q. And you had this pond down at the southeast corner of the facility?

A. That's correct.

Q. Now, that pond was not lined at that time, was it?

A. It was unlined at that time.

Q. Was there any type of a berm around it or not?

A. There might have been a small berm around it, but it collected all the rainwater, too, so the water had to run into it.

Q. What was the purpose of that pond? **[778]**

A. The pond was really just to collect rainwater.

Q. And that was from the entire plant?

A. Yes.

Q. Now, as of 1978, you had moved over onto the railroad parcel, correct?

A. Oh, sure.

Q. Just one thing. You were out at the Arvin facility before you moved over onto the railroad property, correct?

A. Yes, I was.

Q. And you also were involved in the purchase of [**183] the--what later became the Brown & Bryant parcel from the Derbys?

[*JA203] A. Yes, I was.

Q. Did you have occasion to become familiar with where the property line was between the Brown & Bryant parcel and the railroad parcel?

A. Do I know where it was?

Q. Yes.

A. Yes, I do.

Q. Could you just tell us generally in connection with the warehouse, how did the warehouse--where did the warehouse sit in reference to the property line?

A. The warehouse was on the property line because there wasn't a fence on the west side of the warehouse. The fence went to the north end of the warehouse and started again on the south end. **[779]**

Q. Now, you had--there was a railroad spur that ran up along to the warehouse, correct?

A. Yes, there was a--on the west side there was a railroad spur that went clear up into the main warehouse at one time.

Q. Now, did you have an agreement to allow that to occur with the railroads--prior to your lease in 1975, was there another agreement that--

A. There was some kind of an agreement about the railroad spur, but it belonged to them. We built it, I think, but it belonged to them.

Q. The railroad spur was on their property?

A. Yes.

Q. The railroad's [**184] property?

A. Yes.

Q. Now, do you recall, though, leasing the railroad property, the west of the warehouse, correct?

A. Yes.

[*JA204] Q. What was the reason you needed that property, if any?

A. We were growing quite a bit and we had run out of space. We needed more room, that's why we rented.

Q. Now, the railroad parcel, did it drain into the pond, too?

A. Yes, it did.

Q. Did you take any steps to assist that process?

A. Yes. We graded the railroad property to run to the south and then cut across underneath the tracks. We even put a pipe **[780]** underneath the tracks to channel the water over to the Brown & Bryant property and down to the main pond, the drainage pond.

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[783]

* * *

Q. Now, do you recall, however, in 1979 that there were--you had a contact with representatives from Shell?

A. You're going to have to be a little more specific.

Q. Do you recall whether there was an inspection of your plant by Shell in the summer of 1979?

A. Yes--

MR. EARLE: Objection, lack of foundation. Which facility?

MR. MacAYEAL: Arvin facility.

THE COURT: Sustained.

BY MR. MacAYEAL:

[*JA205] Q. In 1979, you were at the Arvin facility, correct? [**185]

A. Yes.

Q. Do you recall an individual by the name of Bob Swain?

A. Yes, just barely. They inspected both facilities at the time. Shell came out with some, in my opinion, dramatic new ways of handling D-D, D-D storage, and things like that at this time.

Q. What do you recollect--what context did you have with Shell on these subjects?

A. Well, we had a meeting with Shell. It was--it wasn't **[784]** just me, it was the company, our company meeting, and it might have been other companies. I don't think there was. Anyway, they delineated a lot of new things that they wanted done as far as the handling of D-D was concerned.

Q. What type of things were they?

A. Well, they wanted the D-D tank used with what they call like a closed system where you couldn't vent to the outside. They wanted the D-D tank to be put into an impervious enclosure so that it set inside of a dike, but impervious on our concrete deck where it--it was impervious to the ground but it was also diked to hold any spills.

They wanted our field equipment to be put into what they call a closed system where--it's kind of like when you fill

your gas tank today in a service station, you put fluid in and air comes [**186] out, but it--the air goes right back to the tank that the gas came out of, and that's what we call a closed system.

* * *

[*JA206] **[792]**

* * *

Q. Was there a location where--tell us--describe the procedure under which product was delivered in the bulk tank, the Shell D-D, that is.

A. Well, Shell D-D would come in a commercial carrier, which is a tanker truck. And they--although the tanker trucks were supposed to be stainless steel, sometimes they would be aluminum, which was not really what they were supposed to be, but they would come in a double--set of doubles, two trailers.

And they would come into our warehouse and we would hook up to them sometimes with a two-inch or maybe a three-inch hose, hook up to the trailers and turn on the pump and pump the D-D into our tank. If the trucker supplied his own pump, then he would come in and just hook up to our tank and turn on his pump and pump the D-D into our tank.

Now, if the trucker pumped D-D into our tank, when he hit the bottom of the tank of his trailer, there would be no--he would be pumping air, and on the discharge side of his pump, he wouldn't have any pressure to push that hose full of liquid out. So when [**187] he stopped and uncoupled, he had a hose, whatever size that hose was, either two or three inches, whatever length it was, ten, you know, five to ten feet, that would be for the **[793]** liquid.

And that liquid had to go someplace, so normally they would have a bucket and they would pour it into the bucket and pour it back into his truck, or sometimes we had a tank sitting there and he would pour it into a tank that we had there to catch what we call "dregs."

[*JA207] Q. Let me show you what has been--what is in evidence as Exhibit 1123. I ask you first, again, if this Exhibit 1123 appears to be the type of document you received from time to time from Shell?

A. Yes, it is.

Q. Now, I direct your attention to a--this is a document entitled an "Outline of General Guidelines for D-D Soil Fumigant Bulk Installations." And I direct your attention to Bates page S003568, and it's Exhibit 1123. It's--purports to be a 1981 manual, and there is a category entitled "Miscellaneous Information." I will just read it.

> First item says, number 1, "Commercial carriers usually deliver through a three-inch cam-lock female fitting. If your pump has sufficient capacity, you can use it [**188] to off-load the carrier and, in so doing, the carrier's hose will be drained. If the carrier's pump is used, the hose between the pump and your tank will remain full and must be drained back into the truck or other suitable container." **[794]**

Do you see that?

A. Yes, I do.

Q. Is that what you are talking about?

A. Yes, that's exactly what I'm talking about.

Q. Now, did you ever have occasion to see any spills in connection with this downloading process where a bucket was used?

A. Almost every time.

Q. Now, when the D-D tank was all corroded and no longer good, did you have to replace it?

A. Yes, we did.

Q. And that happened from time to time, correct?

A. That happened from time to time.

[*JA208] Q. Now, when you were in the process of replacing that D-D tank, did you have to take measures to find some other location to store the material?

A. Yes.

Q. What measures?

A. If the tank leaked for any reason, which it did from time to time, it leaks not only just because it was worn out, it would develop a leak at the pump or you might develop a leak at a valve or anything, you would have to pump the tank out into trailers.

Sometimes we would use 2,000 gallon [**189] trailers or 2500 gallon trailers or even milk trailers, pump it into trailers **[795]** and hold the D-D temporarily while the repairs were made, even if it was--meant a new tank, you know.

Q. These trailers were portable?

A. Yes.

Q. And would you store them in various locations around the plant?

A. Yes, we would store them, you know, anyplace in the plant where we could, where we had room.

Q. Do you recall whether they were ever stored over on the western side of the warehouse?

A. Yes, I can remember being stored over there.

Q. Now, let me turn your attention to Exhibit 1075, which is in evidence.

THE COURT: When you say every time there was a loading or pumping there were spills, what are we talking about in terms of quantity?

THE WITNESS: Well, could be anywheres from, oh, maybe a half a cup to two quarts, maybe even a gallon, sir.

THE COURT: Thank you.

[*JA209] BY MR. MacAYEAL:

Q. I'm directing your attention to Exhibit 1075, which is a multi-page exhibit. It's in evidence. And I'm directing your attention to page 30, to the handwritten number page 30, and there is a--an item 6, which I will read to you. I just want you to look at it briefly. **[796]** [**190]

A. Okay.

Q. You see that?

A. Uh-huh.

Q. I'm going to read it and then I will ask you about it. All right. This is--quote--this is from a Shell document. It's from a folder that appears to be Shell bulk herbicides, and up at the top it says, item number 6, "Shrinkage."

MR. EARLE: What page?

MR. MacAYEAL: Page 30, which is a handwritten page, which is from Exhibit 1075.

> Item 6, "Shrinkage. Single and multiple destination deliveries by common carrier will be allowed a .5 percent on a weight basis for shrinkage that may occur at time of unloading. The shrinkage allowance will be deducted off the billing invoice."

BY MR. MacAYEAL:

Q. Do you see that?

A. Yes, sir.

Q. Now, was there in the industry a general practice of these so-called shrinkage allowances?

A. Yes, there was on bulk liquid items. Fertilizers had shrinkage allowances. D-D obviously did. And I know in fertilizer it was very common.

Q. All right.

[*JA210] MR. EARLE: Move to strike the reference and the **[797]** testimony as inflammatory and prejudicial on the grounds that this particular document is beyond the date that Shell exited the D-D market. Shell exited that market in approximately [**191] 1983-1984. This is a 1986 bargaining agreement. It, therefore, has no relevance to this case or this product or these deliveries.

MR. MacAYEAL: The document is in evidence, your Honor. I'm just asking the witness a general question.

MR. EARLE: The document doesn't relate to any time period during which D-D was delivered.

THE COURT: All right. Let us take it one step at a time. First of all, if the document is in evidence, is its relevance that it is a prototype?

MR. MacAYEAL: Yes, your Honor, I was just asking him to explain his understanding of that concept as it existed in the industry generally, and I'll lay a foundation for the time period.

MR. EARLE: Your Honor, we have documents from the time period. He doesn't need to utilize this prototype.

THE COURT: Well, I'm only dealing with the exhibit from the standpoint that it's in evidence. And so if there was an objection to it, assumedly that would have been asserted. Apparently it was not. And so if the item is in evidence, it can be referred to, unless you are making a motion to withdraw it from evidence. **[798]**

MR. EARLE: I will make that motion, your Honor. I did not realize, when the document was originally propounded, [**192] that it was a 1986 agreement that postdates this case.

[*JA211] MR. MacAYEAL: Judge, we relied on their representations that they had no objection. We probably would have designated other deposition testimony.

MR. EARLE: Your Honor, there is no doubt, your Honor, but it is a Shell document, which is why--and it's genuine, but it has no relevance.

THE COURT: Well, I'm going to permit it to remain in evidence on the representation of Mr. MacAyeal that it is a prototype of the type that was in use, and then the witness has stated that he recognizes the practice of shrinkage, and so that's where we are at this point.

So I recognize that it's an '86 document and that Shell stopped its D-D operations--although I don't think I have heard that evidence yet, but that's going to be, that's the offer of proof--in '83-84.

* * *

[800]

Q. Now, getting back to the Regional Water Quality Control Board, you remember them, they were doing the inspection? Did you have a cage out at the plant near the UN-32 tank where you stored cans?

A. I'm sorry?

Q. Do you remember having an enclosure of some kind for can storage?

A. Oh, yes, okay.

Q. What were these--were these cans that had [**193] been used, opened?

A. Yes. These were empty cans.

Q. And some of them you stored in an enclosure?

A. Yes, yes.

[*JA212] Q. What was the reason for--

A. Well, we stored some of them, cans, in a wire chain link enclosure, and kept it locked up because some of those cans had contained highly toxic pesticides and we didn't want anybody to get near those cans until they could be crushed and properly disposed of.

Other cans that we didn't consider, you know, so dangerous, so to speak, we would keep in a--over in another area. Mostly they were kept on the west side of the plant up against the fence.

Q. What type of cans were those that you kept over there on the west side? **[801]**

A. Oh, they would be like herbicide cans and things like that that we didn't consider so highly toxic.

Q. Dinoseb?

A. Dinoseb cans, yes.

Q. What about Nemagon?

A. Probably Nemagon cans too.

Q. Now, do you recall having discussions with the Regional Water Quality Control Board about putting a liner in that caged area?

A. They wanted--wherever we stored pesticide cans, no matter whether we considered them highly toxic or not, they wanted our pesticide--can storage area set with an impervious [**194] deck, so we would pour a concrete deck or some other type of impervious material, and they wanted it all fenced so that cans of any kind could not be easily gotten to.

Q. Did you have room to accommodate all the cans, though?

A. Well, no, we didn't. We had to enlarge the area and--

[*JA213] Q. Now, did they also come to ask you to--what was your proposal to the Regional Water Quality Control Board about how you would handle the sump and the pond?

A. Well, we--when the Regional Water--they asked us for a proposal, so first we started out, we were thinking about just lining the sumps, which were right next to the wash racks in the middle of the yard. We were going to put those in concrete, and then try to cut down the amount of water that we

* * *

[821]

* * *

BY MR. MacAYEAL:

Q. Mr. Brown, I'm going to hand you, again, Exhibit 1123, which is in evidence, and just to refresh your memory, this is a December 1981 set of guidelines on D-D. Do you see that? Have you looked at that earlier?

A. Yeah.

Q. Okay.

A. I see it.

Q. All right. Now, I'm going to direct your attention to Bates page S003566. It's Exhibit 1123. Now, let me just show you this page before I [**195] begin. There is an entry about a gauging device, do you see that?

A. Yeah.

Q. See that?

A. Yes.

Q. Now, there is an entry number 4. The first [*JA214] entry, rather, says it's a reference to gauging devices, and there is four items, and the first one is for a non-sparking calibrated stick. Second one is for a gauge tape. Third is for a bubble or float gauge.

And I direct your attention to the fourth, which is referred to as a "sight tube, (a poor but acceptable alternate)." And then there is (a) that says, "Tube material must not be attacked by tank contents or the natural **[822]** environment (sunlight)." Do you see that?

A. Yes.

Q. Now, is it your recollection that the--the various rigs that you had, the D-D rigs in particular, had sight gauges?

A. Yes.

Q. And what do you recollect those were? Can you describe what material they were made out of?

A. Sight gauges were made out of Corlon tubing, a type of plastic.

Q. And do you recollect whether there was any particular problem with those sight gauges breaking?

A. Corlon tubing was a--is a plastic, and it's fairly stiff, it's not too flexible. It would withstand D-D and D-D could not melt it, like it did most [**196] plastics. However, it was not very tolerant to sunlight, and it would get hard and brittle after a period of time, and sometimes even a hard wind would crack it. And then if there was anything in the tank, the way a sight gauge works is you have a hole at the bottom for the liquid to come up and give you a liquid level and you have a hole at the top to let the air out. So that any air gets in the tube as it fills up, the tube fills up. Well, if the tank was half full and the tube broke at the bottom part of the tank, the tank would run out very slowly, [*JA215] but it would run out.

Q. Do you have any recollection of having to replace those sight gauges from time to time? **[823]**

A. Yes, you had to definitely replace them from time to time, and sometimes we weren't quick enough to do it and they would break and we would lose material.

Q. Would you ever come back to the plant in the daytime and see the results of a spill from the prior night?

A. Oh, yes. Yes, I have. Sometimes on a very large tank.

Q. Now, did you have those sight gauges on the D-D pull rigs?

A. Yes, we had them on the D-D nurse tanks, pull rigs, yes.

Q. And were those tanks ever stored over on the [**197] west side of the warehouse?

A. Yes, they were.

Q. I'm going to direct your attention to Exhibit 1216. We have a lot of exhibits that are like this. I will hand it to the witness. I hand you Exhibit 1216. Have you ever seen a document like that before or a group of documents like that?

A. Yes, I seen this--documents just like this before.

Q. What are those?

A. That's a purchase order issued by Brown & Bryant for--this one here specifically is for D-D soil fumigant to Shell Chemical.

Q. All right. Now, I direct your attention to the last page of the exhibit, page 6, six-page exhibit. Do you see that?

[*JA216] A. Yes, I do.

Q. And is there a reference to a--an evaporation allowance?

A. Yes, there is. **[824]**

Q. Can you tell us what it says?

A. Looks like it's just $ 122.54. Would be 1 percent, I guess, huh?

* * *

[829]

* * *

You could get rid of these cans by triple-rinsing them and taking them to a county dump or later you could take them to a Class I dump, but at that time we didn't want to triple-mix them and mix that with our rinsate, so we were crushing the cans.

In order to store these cans for up to a year while we were waiting to get a whole [**198] dump truckload, we applied for a TSD so we would be legal in storing them for a year.

Q. Did you store these cans over on the railroad property?

A. Yes.

Q. All right. Now, when the Department of Health Services came over and inspected your plant--let me back up. The Regional Water Quality Board wanted you to make some improvements, they wanted you to line the sump and pond?

A. We had already done that, though.

Q. Now, do you recall whether or not you moved your rinsing facility from the area where the sump was to another location, the contained rinse area? That's [*JA217] what I'm talking about.

A. Well, I think--this was after the Department of Health Services, we were under investigation, and then under the Department of Health Services order for--to do a study and everything. Then we built a contained rinse area on the--it would be on the north side of the plant, the north side of the tank farm there.

* * *

[*JA218] IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

HON. OLIVER W. WANGER

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al., Plaintiffs, vs. BROWN & BRYANT, INC., et al., Defendants. AND RELATED CROSS-CLAIMS AND THIRD PARTY [**199] ACTIONS

NO. CV-F-92-5068 OWW

Court Trial, Day 6
Fresno, California Wednesday, April 7, 1999

REPORTER'S TRANSCRIPT OF PROCEEDINGS

[Cross-Examination of John Brown continued]

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[846]

CROSS-EXAMINATION (Resumed)

* * *

[*JA219] **[854]**

BY MR. LASATER:

Q. Now, what is your earliest memory of when this unlined sump was used as a washout area for the Arvin operations, the unlined wash rack sump?

A. My earliest recollection was sometime in '64.

* * *

[923]

* * *

Q. Now, if I can direct your attention to Exhibit 391.

A. Yes, I have it.

Q. Is this also an aerial photo of the Brown & Bryant Arvin facility?

A. Yes, it is.

Q. And is there a numeral 4 and a circle over the UN-32 tank?

A. Yes.

Q. And right on the crease there is a tank that appears to be inside a concrete containment. Do you see what I'm referring to there?

A. Yes.

Q. It's just to the left of the tank that has the numeral 5 circled on top of it, do you see that?

A. Not on mine, it doesn't have 5. It has a 3, I think, that's in the containment area.

Q. 3 is in the containment area and 5 is just to the right of the one that has the 3 on it; is that right? [**200]

A. Yes, it is.

Q. And the tank that has the number 3 on it, what was that tank? **[924]**

[*JA220] A. Well, that was either a D-D or a Telone tank, I'm almost positive. After D-D went out, we sold Telone for a while.

Q. Is that the containment and the tank that was put in place as a result of the Shell Bulk Facilities Improvement Program?

A. Yes, it is.

Q. And was Brown & Bryant reimbursed by Shell as a part of that program for putting in that tank and containment system?

A. Yes, they were. They received payments for it, I don't know if complete. That, I'm not aware of.

Q. You're saying that Shell reimbursed Brown & Bryant to some extent, you're just not personally aware to what extent?

A. That's right.

Q. And if you'll look at the area on this photo that has the numbers 11 and 12 circled in handwriting, do you see those?

A. Yes, I do.

Q. Are those the two pads for the contained rinse system?

A. Yes, they are.

Q. And the pad number 12 was a flat concrete pad that you could drive a truck or a trailer onto going east or west; is that right?

A. Yes. It was not really flat, though, it was kind of angled down, it had a little low spot in it.

Q. And it had a bar [**201] trench with a graded top over it?

A. That's right.

Q. And that's what you called the sump? **[925]**

[*JA221] A. Yeah, small sump.

Q. The small sump for that facility?

A. That's right.

Q. And the northern one, number 12, was used as a pesticide rinse area; is that right?

A. As I remember, that was the pesticide side of the rinse system, yeah.

Q. And that went into that black open top tank that's between 11 and 12; is that right?

A. Yes, I think so.

Q. And there were spray nozzles inside of that to promote evaporation of the contents of that tank?

A. Yeah, there was a spray nozzle in there, yes, to try to evaporate any water that was in that.

Q. And then pad number 11 was constructed similarly to that of number 12, meaning it was sloped to a bar, concrete bar trench at one end; is that right?

A. Yes.

Q. And 11 was used for rinsing the fertilizer tanks and equipment; is that right?

A. As I remember it, that's right.

Q. And that's the main warehouse directly to the west of that contained rinse area; is that correct?

A. Yes.

Q. And I have one other question. See here along the north **[926]** fence line where there's a number 18 in a circle with an arrow [**202] pointing to a piece of equipment there.

A. I've got two arrows on mine.

Q. Okay. Is the equipment along that north fence line just to the west of the main gate, are those D-D pull rigs?

[*JA222] A. It's hard to say. I think they are, but they could be ammonia pull rigs too, but they look like D-D pull rigs.

Q. Was that the location where D-D pull rigs were typically parked?

A. Yes, we parked, yeah, D-D pull rigs there.

* * *

[932]

* * *

Q. Now, is it accurate to say that you have no personal **[933]** knowledge of D-D spills on leased--on the railroad leased property, personal knowledge?

A. That's accurate.

Q. Is it also accurate to say that you never saw fresh puddles of chemicals on the leased property that appeared to you to have come out of tanks or trailers?

A. Fresh puddle?

Q. Fresh puddles.

A. Yes.

Q. Is it accurate to say that you never actually saw releases from sight gauges on the leased property?

A. I can't remember any that I saw.

Q. And you have no actual personal knowledge of releases of EDB-containing products on the leased property?

A. EDB, no.

Q. Nor do you have personal knowledge of the release of products containing DBCP on the [**203] leased property?

A. No, I have no knowledge.

Q. And nor do you have any actual personal [*JA223] knowledge of the releases of puddles that contained 1,2-DCP, 1,3-DCP or 1,2,3-TCP on railroad leased property?

A. That's D-D?

Q. Yes.

A. No, I don't have any actual, no.

* * *

[980]

* * *

Q. Okay. Do you recall whether Shell Oil Company or any of its representatives ever suggested that Brown & Bryant employees should take control of the unloading of common carrier tanks of D-D in order to ensure that there were no spills in connection with that process?

A. Not really. I think Al was involved in that far more than I was.

Q. I'm going to direct your attention to Exhibit 1123.

A. Twenty--

Q. Three. I'm going to ask you to look at page S003568. There is a title "Miscellaneous Information."

THE COURT: Counsel, what was the exhibit?

MR. EARLE: 1123, your Honor.

THE COURT: Thank you.

BY MR. EARLE:

Q. Do you ever recall being advised that "Commercial carriers **[981]** usually deliver D-D through a three-inch cam-lock female fitting. If your pump has sufficient capacity, you can use it to off-load the carrier and, in so doing, the carrier's hose will be [*JA224] [**204] drained"?

MR. LASATER: Advised by whom?

BY MR. EARLE:

Q. By Shell Oil Company or any representative of Shell Oil Company.

A. No, I don't ever recall being advised. I knew that from unloading them myself.

THE COURT: How was the unloading?

THE WITNESS: I unloaded them myself sometimes, sir, years ago.

THE COURT: How did you do this to avoid spilling?

THE WITNESS: I did it with our pump. But they had a three-inch cam-lock fitting on them and we had a three-inch hose.

THE COURT: And the pump obviously pressurizes the liquid coming out of the tank that's delivering, so what do you do to stop the hose from leaking when you disconnect?

THE WITNESS: That was always the problem, your Honor. That was always the problem. I would like to know.

They did eventually develop what they call--and it might have been around for a long time, they had a dripless coupling. Had a ball bearing like a hydraulic coupling or an **[982]** air coupling, but to get one in stainless steel and vikon steel for D-D was prohibited for a long, long time.

BY MR. EARLE:

Q. Again, Mr. Brown, directing your attention to Exhibit 1123, wasn't the point of the first sentence in paragraph 1 that if you [**205] put the pump on the tank side as opposed to the truck side, that it will drain the hose [*JA225] in connection with the pumping before it runs out of product?

MR. MacAYEAL: Objection, your Honor. Asking the witness what the meaning of this document is, and he didn't write it, what the intent of the writer is.

MR. EARLE: I will rephrase the question.

THE COURT: Well, we are on H-1 on page 5?

MR. EARLE: That's correct, your Honor.

THE COURT: Did you understand this question, Mr. Brown?

THE WITNESS: Yes, I understand it, your Honor.

THE COURT: Does it have any applicability to your operation?

THE WITNESS: Yes. You never get it all, that's all I can say. You never get it all.

BY MR. EARLE:

Q. Are you familiar with a term, sir, called "walking the hose"?

A. Pardon? **[983]**

Q. Walking the hose?

A. Yeah, I have seen it done. Done it.

Q. Why don't you describe for me what it means to walk the hose?

A. Well, you take the hose and disconnect it from the nurse tank, or the cargo tank, the common carrier. And then you are running the pump, and as you run the pump, you walk the hose down and try to drain every bit of it into the pump and to get all that in the tank. [**206] But when you walk the hose down, then you have to be able to shut it off and then shut off your pump, keep the pump pumping all the time for the pressure, and this is possible, and you can get most of it, but you'll never get [*JA226] it all. That's why they had buckets.

Q. And using a bucket it's possible to get it all, isn't it, sir?

A. Pretty much so, but I have seen them walk the bucket, too, and then the bucket fell over, so. (Witness shrugs)

Q. Did you ever consider putting a pad in the area of the tank delivery system, a concrete pad?

A. No, I don't remember even considering that.

Q. It would have been possible to put a mini dike containment system in the area where D-D was delivered, would

it not?

A. Yes.

Q. It would have been possible to correctly walk the hose and collect what little bit was left in a bucket and carry that to **[984]** an appropriate place to dispose of it or save it for an application, wouldn't it?

A. Yes.

Q. So spills were not inherent in the process of delivering D-D, were they?

MR. MacAYEAL: Objection, your Honor. There is two different practices. There is when the pump is on the truck pushing it through the hose and then there is the [**207] alternative, when the pump is at the tank sucking it dry. Which practice is he talking about?

MR. EARLE: I will rephrase the question.

THE COURT: Sustained.

BY MR. EARLE:

Q. Mr. Brown, I thought we had just talked about both practices, whether the pump was on the tank--excuse me, the pump was on the tank side or whether the pump was on the trailer car side, and I thought we had determined that under both of those scenarios [*JA227] there were methods available to deliver the product and not spill; isn't that true?

A. What do you call a "spill"?

Q. Release it to the ground where it can go to the groundwater.

A. I don't think that any way you get it you could get away without spilling, you know, at least a half a quart.

Q. I thought you just told me five minutes ago that you would **[985]** have prevented it from hitting the dirt if you put in a little concrete containment system in the area where it was delivered.

A. We didn't have one.

Q. But that wasn't because Shell Oil Company told you not to build one, was it?

MR. LASATER: Objection, argumentative.

THE COURT: Overruled.

THE WITNESS: No. Shell never told me not to build it.

BY MR. EARLE:

Q. Spills [**208] are not inherent in the process. My point is, sir, weren't there steps you could have taken, if you chose, so that you never had to spill a drop of it on the bare ground?

MR. LASATER: Objection, your Honor, to the word "inherent" as being vague, both in the sense of is it foreseeable that, in fact, humans operating the system will do it.

THE COURT: Did you consider putting in a containment system?

THE WITNESS: No, sir.

THE COURT: And what was the reason for that?

[*JA228] THE WITNESS: It never appeared to be that big of a problem.

THE COURT: Thank you.

BY MR. EARLE: **[986]**

Q. Do you recall an employee by the name of Charles Dickey, a Brown & Bryant employee?

A. Yes. Yes, I do.

Q. You say that with a bit of humor.

A. Well, he was a very funny guy.

Q. Took a shower in D-D, I understand it?

A. Pardon?

Q. Took a shower in D-D, I understand it?

A. I don't remember him--I remember another employee that did it.

Q. His duties to deliver fertilizers and fumigants kept him in the yard quite a bit, didn't they?

A. Yes.

Q. Now, you testified yesterday that D-D was spilled every time it was delivered; do you recall that testimony?

A. Yes.

Q. Were you out there [**209] every time it was delivered?

A. No.

Q. How do you know that?

A. I--just from my own experience and seeing it done so many times that I think every time you brought in a bulk load, you were going to spill some of anything, fertilizer or anything.

Q. Charles Dickey testified that he never saw a common carrier spill D-D on the ground while it was unloading. Can you explain his testimony in light of [*JA229] yours? **[987]**

MR. MacAYEAL: Objection. Assumes a fact that's not in evidence as to what his testimony is. The man hasn't testified.

THE COURT: All right. The technical objection is sustained.

If you assumed that Mr. Dickey said he had never seen a spill, would that be consistent or inconsistent? What would be your understanding of that?

THE WITNESS: (Witness laughs) If Mr. Dickey didn't see a bathtub spilled, then he wouldn't call it a spill. That's

my answer. That's the way he was.

BY MR. EARLE:

Q. When is the first time that you recall seeing a common carrier deliver D-D and spill any measurable quantity at Arvin?

MR. MacAYEAL: Objection as to "measurable." It's vague.

THE COURT: All right. Why don't you just consider the question, do you remember the [**210] first time you saw a common carrier deliver D-D and you saw some of it get on the ground? We won't specify how much. Some of the D-D?

THE WITNESS: Probably sometime in '68, '69.

BY MR. EARLE:

Q. And at that time you were the plant manager at Arvin?

A. Yes.

Q. How much was D-D going for in 1968, 1969? **[988]**

A. I don't remember. I do remember selling it for $ 1.10. $ 1.15 a gallon.

[*JA230] Q. At $ 1.10, $ 1.15 a gallon, if somebody spilled a gallon, that's a $ 1.10, $ 1.15 on the ground?

A. Yes.

Q. Did you ever take any action back that when you saw it?

MR. MacAYEAL: Assumes a fact not in evidence.

THE COURT: I think he's being asked to assume that in the question, and you may answer it with that assumption.

In other words, if you were seeing that kind of quantity spilled, were you warning the employees, taking any kind of steps to deal with that?

THE WITNESS: We did. A hundred thousand gallons, you get maybe 4,000 gallons to a truckload. You got 25 loads a year, $ 25 a year, you don't worry about it too much.

BY MR. EARLE:

Q. You didn't worry about it too much, that's a Brown & Bryant decision, correct?

A. That's a Brown & Bryant decision.

Q. You [**211] acknowledge that had you worried about it--had Brown & Bryant worried about it, there are steps that Brown & Bryant could have taken to ensure that nothing spilled; isn't that right?

A. I guess so. I don't know.

Q. Thank you. Do you ever recall receiving an evaporation **[989]** allowance for D-D from Shell Oil Company?

A. No, I do not recall that.

Q. Do you recall anyone from Shell Oil Company providing Brown & Bryant with advice regarding appropriate couplings or valves to use on equipment delivering D-D?

[*JA231] A. Not specifically, no.

Q. Do you recall Shell Oil Company suggesting the use of dripless couplers?

A. I don't remember that specifically.

Q. Do you ever recall a Shell employee or representative inspecting the wash site sump that we've identified in the center of the Arvin property?

A. No, I do not recall that.

Q. Do you ever recall a Shell representative or employee inspecting the evaporation pond, the southern portion of the property?

MR. LASATER: Objection, vague as to inspection--"inspecting."

THE WITNESS: I don't remember that.

THE COURT: Overruled. You may answer.

THE WITNESS: I don't remember that.

* * *

[999]

* * *

A. Yes. [**212]

Q. And there was also discussions about a closed system?

A. Yes.

Q. And there was discussions about valves and packing on tanks?

A. Yes.

Q. All right. Now, how did you--what was your belief as to whether--were they asking you to do this or were they telling you to do this? What was your impression?

A. My impression was that they were telling me [*JA232] to do it, that they were telling Brown & Bryant that they had to do these things in order to continue to be distributors for D-D.

Q. Now, did these matters that they wanted you to do, did they involve some expense?

A. Yes, they did.

Q. Is that something you were happy to incur at that time?

A. No, not really.

Q. So you didn't--it wasn't necessarily something you were eager to do, all these various improvements; is that correct?

A. No, I was not eager to do them.

Q. But Shell told you to do them; is that right?

A. Shell told us to do them.

Q. Now, had your relationship with Shell changed such that had they told you to do these matters in the past, it would have **[1000]** been different?

MR. EARLE: I'm going to object. That question is vague, calls for speculation.

THE COURT: Sustained. Rephrase.

BY MR. [**213] MacAYEAL:

Q. Now, are you familiar with the relationship you had with Shell, correct?

A. Yes.

Q. As of the time that you were having these discussions in 1979, had it changed--had the relationship changed prior--as it was prior to that time?

A. I don't think so, no.

Q. All right. So based on that relationship, if they had told you to make these improvements in earlier [*JA233] years, you would have done them at that time as well; is that right?

A. Yes, I think so, sure. I would have had to.

* * *

[1004]

* * *

Q. Now, Mr. Lasater asked you if you had ever witnessed any releases, and I think he asked you if you had seen any recent **[1005]** releases or new releases, or something of that effect.

Did you ever see any evidence of spills or releases out at the plant?

A. Well, you could take a walk over in that area and see spots on the ground where things had leaked or, you know, spilled.

Q. Were you ever aware of any practices with respect to D-D rigs as far as checking filters?

A. Well, if an order came in that you needed a D-D rig, then somebody would tell the serviceman, "We are going to take a D-D rig out to Joe Smith's farm. Go get it ready." And part [**214] of getting that ready was to clean out the filters and everything. When you cleaned out the filters, usually they had material in them and the material would go on the ground.

Q. Did you see that happen?

A. A quart, maybe, or less.

Q. Did you see that happen?

A. Oh, yeah, I have seen that happen. I don't remember specifically on the railroad property, but I have seen it happen.

Q. But in other words, were those rigs parked [*JA234] over on the railroad side?

A. Yes.

Q. Okay. So when you say you remember it, you remember it generally?

A. Generally, yes. **[1006]**

Q. But not any specific area?

A. Not any specific place.

Q. Now, do you recall whether or not Shell ever gave you any technical advice about the mobility of the D-D constituents in the groundwater? They ever give you any advice about that or technical advice?

A. I don't remember that, no.

* * *

[1011]

* * *

Q. I want to look at one thing for a moment. Did you have any understanding--let me phrase it another way.

Did you ever see the D-D being unloaded from the tanker truck into the Brown & Bryant bulk storage tank by the driver of the tanker truck?

A. Boy, I don't remember.

Q. Do you know [**215] whether that happened?

A. Oh, I'm sure it did.

Q. Was that--is it your understanding that that was a common occurrence?

MR. EARLE: Move to strike. Lack of foundation.

THE COURT: Well, do you have any knowledge?

THE WITNESS: No, sir, I really don't.

THE COURT: Sustained.

BY MR. LASATER:

[*JA235] Q. Mr. Brown, you were the plant manager out there and your office was 20 or 30 yards away from the bulk D-D tank; is that right?

A. Yes, it was on the other side, though. I couldn't see it **[1012]** from my office.

Q. You would move around the facility?

A. Oh, sure.

Q. You would see the tanker truck delivering D-D?

A. Yeah.

Q. It was coming 25 or more times a year on average; is that right?

A. Yeah.

Q. And you would have the opportunity to see whether it was, in fact, a Brown & Bryant employee that was doing the unloading or whether it was a--the truck driver that was doing the unloading, is that reasonable?

A. Well, not every time.

Q. Not every time, but--

A. I have seen it, yes.

Q. And so you did see the truck drivers unloading these from time to time?

A. Yes.

* * *

[*JA236] IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA HON. OLIVER [**216] W. WANGER

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al., Plaintiffs, vs. BROWN & BRYANT, INC., et al., Defendants. AND RELATED CROSS-CLAIMS AND THIRD PARTY ACTIONS

NO. CV-F-92-5068 OWW

Court Trial, Day 9
Fresno, California Tuesday, April 13, 1999

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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[1488]

GARY CHIRLIN, called as a witness on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

THE CLERK: Please state your name and spell your last name for the record.

THE WITNESS: Gary Richard Chirlin, C-H-I-R-L-I-N.

[*JA237] DIRECT EXAMINATION

BY MR. MacAYEAL:

Q. Dr. Chirlin, where are you employed?

A. At Chirlin & Associates, Incorporated, in Rockville, Maryland.

Q. What do you do there?

A. I'm a groundwater hydrologist and everything else, president and chief bottle washer and so on.

Q. And would you please summarize your educational background after high school for us.

A. I attended the Massachusetts Institute of Technology from '68 to February of '72 and obtained a degree, a Bachelor's degree in Earth and Planetary Sciences II.

Q. What was that all about?

A. Earth and Planetary Sciences Department [**217] was, at that time, administering the majors which were developed independently, and I developed a water pollution degree at a time when not many people were doing that.

* * *

[1521]

Q. And you've analyzed that as well, have you not?

A. I have. I have also added some hydraulic information, primarily in terms of emphasis of color rather than new colors.

Q. You added the colors?

A. Well, someone related to me did.

Q. And tell us what is the relevance of the subsurface, the nature of the subsurface to your analysis?

[*JA238] A. Well, certainly the first and most important feature of any groundwater system is the medium through which the groundwater flows, and that is a geologic medium. It's hardly ever the case that we have a sand box of uniform materials through which water flows in a straight line without any diversions or preferential paths of flow.

So it's necessary in this case and in many cases to understand what types of impediments to flow may exist in the subsurface, what the dimensions or scales might typically be of those impediments, what diversions of flow might occur as a result. And in this particular case, it has become an issue in terms of the pattern [**218] of soil contamination in the vadose zone.

Q. What role does the different permeabilities of the soils have for groundwater flow and contaminant transport?

A. It's really as you would expect. When the materials are coarser, such as sands or sands and gravels, the flow is attracted to those areas because less energy is expended getting from point A to point B if you go through a very **[1522]** permeable zone. On the other hand, if there is a silt or a clay, a fine material in the way, it will tend not to go through that. Most of the flow will tend to divert around that if there is an avenue for such a diversion.

So we can't characterize at the scale of a, say, a core, five-inch or two-inch diameter core, we can't characterize

what the true distribution of sands and silts and clays might be, but we certainly can get a feeling from looking at multiple cores whether the system is irregular or regular. And as you have heard over again, this is an inhomogeneous or heterogeneous setting.

[*JA239] Q. Do the different types of soils have any impact on how contaminants bind to those particular soils?

A. Yes, yes. Some soils have a greater affinity for contaminants than others. [**219] So, in particular, I think at this site, I think you would tend to find contamination in the clays to a greater extent than in the sands.

Q. Do they have a greater tendency to absorb the contaminant?

A. Right, it's a sorption process.

Q. Is then based on the differences in the types of soils, what type of pattern do you expect on the groundwater flow?

A. Well, are you speaking of the vadose zone now?

Q. Yes.

A. The unsaturated zone. I would expect the flow from the surface would tend to take a circuitous route moving through **[1523]** the zones of preferential flow where slightly coarser materials exist.

Q. And these areas of higher groundwater flow, do they have any greater tendency to dissolve any contaminants that may remain in those particular areas from heightened groundwater flow?

A. Well, if there is still some contamination in a sandier material, it will be more available to flow than, say, the same contamination in a clay material, because the amount of water to get by is greater and the absorptive strength is less.

Q. Based on your experience, then, do you typically find a pattern of soil contamination that is, so to speak, straight down a column for volatile [**220] organic compounds?

MR. LASATER: Objection. Lack of foundation as to what is typical or that he knows.

[*JA240] MR. MacAYEAL: Let me lay a foundation.

THE COURT: Objection is sustained.

BY MR. MacAYEAL:

Q. Have you ever had any experience dealing with investigations of volatile organic contaminants?

A. Yes.

Q. At other sites?

A. Yes.

Q. And you have studied them?

A. Yes. Most of the sites I have dealt with have been on **[1524]** volatile organics.

Q. Have you seen any pattern emerge as far as the distribution of contaminants in the subsurface?

MR. LASATER: Same objection. Lack of foundation as to--well, first of all, it's vague as to what he means by "pattern" and then lack of foundation.

THE COURT: I have just understood the doctor to say that he has studied the distribution of volatile organic contaminants at sites under investigation and now he's asked whether he has observed, and I assume it's in those observations that he's referred to, any pattern regarding the distribution of--it's true the word "contaminants" rather than "volatile organic contaminants" was used.

And, therefore, we will ask if you intended to refer to any contaminants or volatile organic? [**221]

BY MR. MacAYEAL:

Q. I meant volatiles. Could you limit your answer to volatile, volatile organic compounds?

A. Yes.

Q. Have you seen any particular pattern as far as distribution?

[*JA241] A. Other than the pattern I just referred to where a contamination tends to be found in the finer materials rather than to a greater extent than coarser materials, it's very site specific. If areas where there is a large source, for **[1525]** instance, you would tend to find a more continuous pattern of contamination which doesn't represent migration straight down from the surface to each one of those vertical sampling points, but quite likely represents contamination that began at different locations on the surface and happened to wend its way down from one location to another to those vertical sampling points in your straight line down. And as sources get smaller and as contamination concentrations get less, the patterns become a lot more irregular, and that happens for a lot of reasons, some having to do with passing above and below the detection limit so what looks like a missing piece of contamination is just contamination at a level below the detection limit of your analytical [**222] limit or it could happen because the materials really aren't there.

Q. Now, with respect to the location of particular sampling points, have you had occasion to analyze the location of any Kennedy/Jenks sampling points, particularly at 16-A and CA-16 and CA-19?

A. Yes.

Q. For the record, this image is G-106.15.

What was the issue, as you understood it, with respect to the sampling points?

A. My understanding is the defendants--the defendants' contractor, Kennedy/Jenks, placed some shallow borings, two shallow borings in what they intended to be close proximity to

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[*JA242] IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA HON. OLIVER W. WANGER

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al., Plaintiffs, vs. BROWN & BRYANT, INC., et al., Defendants. AND RELATED CROSS-CLAIMS AND THIRD PARTY ACTIONS

NO. CV-F-92-5068 OWW

Court Trial, Day 11
Fresno, California Thursday, April 15, 1999

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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[1831]

* * *

GARY LEARY, called as a witness on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

THE CLERK: Please state your name and spell your last name. [**223]

[*JA243] MR. MacAYEAL: Judge, Mr. Leary had a hip **[1832]** replacement. He may need to stand up from time to time.

THE COURT: If you need to take a recess, tell us.

THE WITNESS: As long as I stretch it out.

THE CLERK: Please state your name for the record and spell your last name.

THE WITNESS: Gary Joe Leary, L-E-A-R-Y.

THE CLERK: Thank you.

DIRECT EXAMINATION

* * *

[1838]

Q. Did you ever have occasion to see a trucker filling up the D-D tank?

A. I saw a number of trucks at different times unloading in that area. I mean you could always kind of smell the material, so you didn't know if it was coming from that truck or, you know, one someplace else.

Q. Well, do you recall--are you familiar with the smell of D-D?

A. Yes.

Q. Do you recall that from having been out at the Arvin plant?

A. Yes, it was many years ago, but you never forget that smell.

Q. And you had occasion to observe the types of trucks that were making the D-D deliveries?

A. Yes.

Q. Were they the same type of trucks that you were using for your fertilizer?

A. Yes.

[*JA244] Q. Now, could you describe--I want to take you back--do you recall a time period when the so-called "quick [**224] connect cam-lock" came into existence?

A. Yes, in the late 70's.

Q. And I'm trying to direct your attention to before that time.

A. Yes. **[1839]**

Q. Could you describe for us the procedure for filling up a tank during this time before the quick connect?

THE COURT: Which tank?

MR. EARLE:: Objection, the question is vague.

THE COURT: Yes, fill up the tank on his truck or the tank at the site?

MR. MacAYEAL: At the Brown & Bryant facility in Arvin.

MR. EARLE:: I would then object on the grounds of relevance, because there is no foundation shown that the unloading of fertilizer into an above-ground storage tank is the same procedure followed to unload pesticide into an above-ground storage tank.

MR. MacAYEAL: Judge, if I can try and establish that foundation, I will attempt to show how he did it for the fertilizer and to establish that it was the same.

THE COURT: You may.

MR. MacAYEAL: All right.

BY MR. MacAYEAL:

Q. Directing your attention to the process of filling up a tank at the Brown & Bryant facility, and I'm talking about fertilizer, correct?

A. Yes.

Q. Could you please describe how that process [*JA245] was accomplished. **[1840]**

A. The trucks [**225] had a pump mounted on them, and it was normally operated by a PTO unit, "power takeoff." It would be plumbed into the tank or plumbed to where you could hook a hose to the tank, the truck tank which would accept the material. You hooked another hose from the pump to the discharge point, or the tank that you were unloading into. Those, in the early days, were threaded fittings. The tank that you were pumping into normally had a male threaded fitting. The hoses had female threaded fittings and in the end of those threaded fittings was a gasket.

Q. Would you describe what a gasket is?

A. A gasket is a rubber material that fits inside the fitting, the threaded fitting that is supposed to stop leaks.

Q. Okay. And how did it work?

THE COURT: And before you ask that question, to which tank was the hose attached? To the truck tank or to the receiving tank?

THE WITNESS: It was attached to the receiving tank and it came from the pump on the truck.

THE COURT: All right. And so was the hose detachable at both ends or was it permanently affixed to one or the

other of these tanks?

THE WITNESS: Attached at both ends.

THE COURT: And who was the, if you will, the owner of the hose? **[1841]** [**226]

THE WITNESS: Normally the trucking company.

THE COURT: Thank you.

You may proceed.

BY MR. MacAYEAL:

Q. Now, so you would attach the hose at the [*JA246] pump?

A. That's correct.

Q. And then attach it at the tank that you are trying to fill up?

A. Right.

MR. EARLE:: Again, your Honor, an objection on relevance. I think we are talking about a fertilizer.

THE COURT: Well, I can't tell yet and so I'm going to permit his attempt to lay the foundation and I will make a decision.

MR. EARLE:: I would like to voir dire this witness and ask him if he's ever delivered D-D.

THE COURT: As I understand it, the foundation that is being offered by the government is that the witness observed the offloading of D-D at Brown & Bryant Arvin with sufficient power of observation and precision to be able to describe it. That would be a potentially suitable foundation. I can't know that until I hear it.

And so I'm not going to let him speculate, but why don't you wait until we have attempted through Mr. MacAyeal for the foundation to be laid. Then I will let you voir dire. **[1842]**

MR. MacAYEAL: And just for the--to make sure it's all okay with the Court, I'm going to have him [**227] describe how it was done with the fertilizer tank and then if it was the same with D-D.

THE COURT: Yes.

BY MR. MacAYEAL:

Q. Were there gaskets at both ends of the hose?

A. Yes.

Q. And, again, the gasket is--what is it, it was a rubber seal?

[*JA247] A. Yes, it was a rubber seal. Look at a garden hose and the little rubber gasket that goes in the female end of the garden hose that screws up against the faucet to stop the water leak. Same type of arrangement.

Q. All right. So you would connect the hose at both ends?

A. That's correct.

Q. And then turn on--what happened next?

A. Then you would turn on the pump, engage the PTO unit on the truck, and open the valve that controlled the material coming out of the truck tank and allow it to flow to the pump and be pumped off.

Q. Now, did you ever observe any leaks in this process?

A. It was not uncommon to have leaks at the gaskets, and at the packing, in the power or in the pumps themselves, and you would have to tighten this up from time to time to stop it from **[1843]** leaking, and I want to say probably every load you would have a drip or two that you had to tighten up and then you had to change the packing in [**228] these pumps quite often.

Q. Did you carry any gaskets with you in your truck?

A. Yes.

Q. What was the reason for that?

A. Because the gaskets would wear out pretty rapidly.

Q. Did you ever have occasion to use a bucket?

A. Put a bucket under each one of the fittings.

Q. What was the reason?

A. To normally catch the drips.

[*JA248] Q. All right.

A. And when you would finish the unloading process, you would disconnect the hoses and there was always a little residual material left in the hose and you would drain it back into the bucket.

Q. Describe how that happened.

A. Well, normally you would disconnect at the truck head and lay the hose--

If I may?

THE COURT: Yes, you may.

THE WITNESS: If you have a hose and it's kind of flexible and it lays down on the ground, you would hang it on the edge of the bucket and then start back at the far end of the hose and lift it up and allow the material to drain down **[1844]** and towards the bucket. And it's as you got closer to the bucket, you were here, the bucket sometimes gets unstable and is on rough ground and it would tip over.

BY MR. MacAYEAL:

Q. Would the contents spill?

A. And it would spill, or if you had [**229] too much material in the hose for what was in the bucket and you would run it over.

Q. The bucket would overflow?

A. Yes.

Q. Now, was there a tank at Brown & Bryant that had a pump on it, on the tank?

A. Yes, the UN-32 tank had a large pump on it. And you really liked to unload there because it would unload you very much quicker than your own pump and it would suck the lines pretty clean.

Q. In that situation, was there less likelihood of a spill?

[*JA249] A. Yes, because you could break--it didn't have to go through the pump and you could break it loose at the tank, close the valves, break the fitting loose and it would allow a little air to come in it and then you could lift the hose up and work it towards the pump and it would suck it out.

Q. Now, in the occasion when you were using the bucket, though, was there ever a time when you would take the hose and throw it on the ground?

A. Normally, when you finished unloading and if you tried to **[1845]** get everything you could into the bucket, you would toss it on the ground. All of the tanks had hose tubes on them, the tanker trucks had hose tubes on them, and you would lift up one end of the hose, place it into [**230] the hose tube and feed it into the hose tube, which was a carrying tube for the hose.

Q. And would any spills occur in connection with that?

A. A little residue would probably drip out of the hose from time to time.

MR. EARLE:: Your Honor, I would like to make an objection and ask the witness to pause a moment before answering questions. It's obvious that he's got quite a rapport going here with Mr. MacAyeal, but I don't have an opportunity to object, and two questions ago I wanted to raise an objection the question was leading and I now move to strike that testimony because, in fact, it was leading.

THE COURT: All right. If you would, please, Mr. Leary, count a thousand one before you answer after the question is asked. That will give anybody a chance, if they want to object.

THE WITNESS: All right.

[*JA250] THE COURT: I will grant the motion to strike the answer and I believe that referred to what was done when the hose was being reinserted in the hose tube for storage, so that was the answer I have stricken.

BY MR. MacAYEAL: **[1846]**

Q. Mr. Leary, you testified about the bucket, correct?

A. Yes.

Q. Were there ever any other instances where leaks occurred [**231] in the process of filling up a tank?

A. From time to time, like I said before, the pumps leak. The packing on the pumps. The gaskets in the hoses. If you tipped over a bucket, you would spill what material was in it or if you put too much material out of your hose, had too much in the hose and dumped it into the bucket, it would overflow.

Q. What about putting the hose up in the hose tube?

A. When you would toss the hose down on the ground, the hose tube was built on to the side of the tanker truck. You would pick up one end of it and feed it into the hose tube and continue to feed it in until it was completely inside the hose tube. As it hangs down on one end, any material or residue that's left in the hose would drip down and drip out on the ground.

Q. Do you remember seeing that?

A. Yes.

Q. Now, you said you had occasion to see it. Do you remember the distinctive smell of D-D?

A. Yes.

Q. And you had occasion to observe that the D-D--by the way, let me back up. Did you fill up a lot of the tanks in the tank farm area of Brown & Bryant [*JA251] with fertilizer? **[1847]**

A. Yes.

Q. And did you have some familiarity with what the tanks, what the various tanks were [**232] used for?

A. Yes.

Q. Okay. And you recall the D-D tank?

A. Yes.

Q. And you recall--do you recall the distinctive smell of D-D?

A. Yes.

Q. Now, do you remember ever having observed any tanker trucks filling up the D-D tank?

A. Yes.

Q. Okay. Did they use a procedure similar to the one that you used?

MR. EARLE: Objection. The question is vague and ambiguous with respect to the word "similar."

THE COURT: All right. If you would, tell us your best estimate on how often you observed the filling on site of the D-D tank.

THE WITNESS: Two or three times.

THE COURT: All right. And can you describe what you observed with respect to filling the D-D tank on those occasions?

THE WITNESS: The equipment was similar or exactly like I used on my equipment and the procedure would have been **[1848]** exactly the same. The--they had a pump on the truck. They pumped from the truck through the pump through a delivery hose into the tank. There were buckets that sat there for drips. When they finished--I mean not seeing it or exactly knowing what they did, I would estimate that there--

[*JA252] THE COURT: Don't estimate if you didn't see it.

THE WITNESS: Okay.

BY MR. MacAYEAL: [**233]

Q. You were in the trucking business during this time period?

A. Yes.

Q. You had familiarity with the types of trucks that were used?

A. Yes.

Q. And you were familiar with the type of--you saw these D-D delivery trucks?

A. Right.

Q. You were familiar with them?

A. Yes.

Q. They were basically the same type of equipment you used?

A. That's correct.

Q. And do you recall seeing buckets for those D-D deliveries?

A. Yes.

MR. EARLE: Question is leading.

THE COURT: He's already so testified.

* * *

[1862]

* * *

CROSS-EXAMINATION

BY MR. EARLE:

Q. Mr. Leary, we have met before at your deposition in Bakersfield; do you recall that?

A. Yes.

[*JA253] Q. You began your testimony this afternoon by talking about a--an employment pursuant to which you drove an oil truck and oiled the Brown & Bryant yard, and I think I heard you say--I think I heard you contrast putting that oil down on the yard, which was a penetrating oil, with an asphalt surface, was that correct? Did I hear correct?

A. No. No. It was a mixture of fuel oil and gas oil and they called it "dust binder" and that was all that was put on. There was never any asphalt, to my knowledge, added to the [**234] Brown & Bryant facility.

Q. Okay. When you put this oil on the Brown & Bryant yard--

A. Right.

Q. --did it create a surface that in any way resembled asphalt?

A. No.

Q. Did it create a surface that was in any way nonporous **[1863]** because of the oil on it?

A. No.

Q. Did you ever see rainwater on that surface after it had been oiled?

A. Not after it had been oiled.

Q. Okay. But I guess, based on your testimony, you would not have expected rainwater to run off on that surface like it would run off on asphalt?

A. Well, that was the reason it was put on, so it would run off.

Q. Would it run off to the extent that it would run off of asphalt?

A. Probably not as much as it would run off of asphalt, but it would definitely run, and the way the yard was graded, it was graded to run anyway.

[*JA254] * * *

[1872]

* * *

Q. Okay. So you testified earlier that you didn't know that Brown & Bryant had a pump as early as 1976 on the D-D tank, so I suspect that you didn't know back when you were delivering fertilizer to Brown & Bryant whether or not any buckets they had in the area of the tank farm were for the D-D tank or some other tank; isn't that right?

A. That's [**235] correct.

Q. As you sit here today, you do not have a specific recollection of observing a D-D delivery to the Brown & Bryant Arvin above-ground storage tank which utilized a bucket, do you?

A. Everything that was hauled to Brown & Bryant between the years of 1974 and probably 1980 that was not--that Brown & Bryant ordered or Brown & Bryant paid the freight on, Mitchell West hauled, so anything--any other trucks that ever came into that facility were being shipped by someone else.

I don't--I mean as far as the buckets are concerned, there may have been a bucket, there may not have **[1873]** been, but there were buckets all over the facility to stop drips.

Q. But you don't recall that being the method employed by anybody delivering D-D to that facility, do you?

A. That a bucket was used?

Q. Yes.

A. Well, when Rainbow--there were Rainbow trucks and there were other trucks in there. "Matlack" [*JA255] I believe was another name. Whenever they unloaded, they used buckets just like everyone else.

Q. Mr. Leary, you testified earlier today that the placement of the offloading pump next to the tank facility, the

above-ground storage tank facility, facilitated getting the product [**236] into the tank without spilling it because it allowed you to get the product out of the hose; do you recall that testimony?

A. That's correct.

Q. Now, if you utilized a--the pump at the above-ground storage tank, would it be necessary to utilize the bucket?

A. Yes.

Q. Okay. And why would it be necessary in that situation to utilize the bucket?

A. Because nine times out of ten, the gaskets are going to leak.

Q. Why are the gaskets going to leak, Mr. Leary? **[1874]**

A. Because the material they are hauling is a very corrosive material and it eats gaskets up.

Q. On what frequency basis?

A. You know, that's hard to say.

Q. Did you carry extra gaskets?

A. Certainly.

Q. Did you inspect the gaskets before you hooked them up?

A. Not normally.

Q. Why not?

A. Well, you just, if you had used them once before and they weren't leaking, you hooked up and you started the unit. If you leaked, they shut it down [*JA256] and changed the gasket.

Q. That was your standard operating procedures?

A. That was most of the standards in the industry.

Q. That's not the question I asked you, Mr. Leary. I asked you if it was your standard operating procedure.

A. Yes.

Q. The fertilizers [**237] you were hauling were considered toxic, were they not?

A. Your definition of "toxic"?

Q. Were they subject to special regulations in the hauling?

A. No.

Q. They were not?

A. No.

Q. The two occasions that you hauled pesticides, were those **[1875]** pesticides subject to special regulations?

A. Yes, they were.

Q. And who promulgated those regulations?

A. They were placarded at the loading facilities.

Q. Do you know whose regulations they were?

A. The Department of Transportation.

Q. Do you recall the substance of those regulations?

A. Not verbatim.

Q. Can you tell me in general what they were?

A. No. I mean, not right offhand.

Q. Isn't it true, sir, that some of those regulations dealt with the safe unloading of those products?

A. Well, any product you hauled deals with safe [*JA257] unloading of it, whether it be a package of toilet paper.

Q. And the fact of the matter is, as an independent carrier, sir, you were supposed to exercise your best ability not to spill product in the unloading process; isn't that right?

A. That's correct.

Q. Now, you testified about this oiled surface at Brown & Bryant.

A. Yes.

Q. Was that oiled surface there as long as you [**238] were familiar with the Brown & Bryant facility?

A. Yes.

Q. How about in the area of the tanks? **[1876]**

A. Describe "area of the tanks."

Q. The area--

A. Between the tanks?

Q. Between the tanks.

A. No.

Q. What was between the tanks?

A. Gravel.

Q. And for what period of time?

A. Forever, that I can remember.

Q. Okay. You talked about the UN-32 tank and you talked about what a dream it was to unload into that tank because the pump was right there at the side of the tank.

A. Right.

Q. I take it you still used a bucket when you unloaded at the UN-32 tank?

A. That's right.

Q. When you unhooked your hose after unloading the pump at the side of the above-ground storage tank, [*JA258] how much product spilled into that bucket?

A. Oh, there would be a couple of drips and then you break the hose loose a little bit and build up a vacuum and it would suck it right into the pump.

Q. So in other words, a couple of drips?

A. Yes.

Q. And "drip," you are talking about less than an ounce? **[1877]**

A. You know, a half an ounce, an ounce.

Q. Okay. And tell me, sir, was it possible, even without the pump at the above-ground storage tank, utilizing the pump and the [**239] power takeoff on your truck, it was possible to walk that hose and not spill product, wasn't it?

A. Possible, but not probable.

Q. Did you ever ask anybody else to help you to hold the bucket?

A. No.

Q. Why not?

A. Because everybody else had their own jobs to do. They were busy. We were hired to haul the material, and that was it.

Q. And one of your jobs was to haul it and not spill it; is that correct?

A. That's correct.

Q. Did you ever think about suggesting that any of the distributors that you delivered to put in a concrete pad with a little lip on it so that anything that spilled wouldn't go to the ground?

A. No.

Q. Brown & Bryant never did that, did they?

A. Not that I'm aware of.

[*JA259] Q. If they did that, they wouldn't have spilled anything in their unloading process, would they?

A. Not that I'm aware of. **[1878]**

Q. When is the last time you talked to Jack Brown?

A. Probably a year ago.

Q. You didn't see him last week?

A. No.

MR. EARLE:: If I could, I would like to consult with my co-counsel for a moment.

THE COURT: Yes, you may.

(Discussion off the record.)

MR. EARLE:: No further questions, your Honor.

THE COURT: Anything further, Mr. MacAyeal? [**240]

MR. MacAYEAL: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. MacAYEAL:

Q. Mr. Leary, when you were delivering the product, were you trying to get the job done quickly?

A. Yes.

Q. Did you have other loads to go pick up?

A. Yes.

Q. So was it a situation where time was money?

A. That's correct.

MR. EARLE:: Objection, leading.

THE COURT: The objection is sustained.

BY MR. MacAYEAL:

Q. When you delivered at Brown & Bryant, did Brown & Bryant tell you how to do it? **[1879]**

A. They pointed the tank out and said, "There it is, go unload."

[*JA260] Q. And the--were you working for the person-- the company that was trying to get the product delivered?

A. Right.

MR. EARLE:: Objection, question is leading.

THE COURT: Sustained by.

BY MR. MacAYEAL:

Q. Who were you working for?

A. I personally was working for Mitchell West Trucking. Mitchell West was contracted--or not contracted, but they were ordered out by whoever was shipping the material.

Q. Now, was it your practice, if you received instructions from that company that was arranging for the delivery, to follow those instructions?

A. No.

Q. Well, did they give you--would you receive instructions? [**241]

A. They would tell you that, you know, deliver the material here, and that was basically it. When you arrived at a site, you would ask, you know, "Where is the tank," and they would point out the tank and you would go hook up to it and unload.

Q. That was for the fertilizer?

A. That's correct.

* * *

[1886]

* * *

RECROSS-EXAMINATION

BY MR. EARLE::

Q. Isn't it true, Mr. Leary, that if a trucker [*JA261] carefully walks the hose after the delivery, whether the pump utilizes at the above-ground storage tank or at the truck tank, the hose is carefully walked and the bucket is watched, you can unload a liquid product into the above-ground storage tank without spilling a drop of it? **[1887]**

A. Probably.

Q. And isn't it true that if the owner of the facility put in a concrete pad in the delivery area with a lip on it that even if a bucket were tipped over, you could prevent any product from reaching a place where it could go to ground?

A. If you had impermeable surface, certainly.

Q. And isn't it true that through the use of dripless couplers you can further reduce the amount of any spill that you are going to have to collect in a bucket?

A. Dripless couplers? [**242]

Q. Yes.

A. I'm not familiar with that terminology.

Q. Are you familiar with dry disconnect couplers?

A. Oh, I'm sorry, yes.

Q. And isn't it true through the use of dry disconnect couplers that you can reduce the amount that's going to fall into the bucket to literally drops?

A. I would suspect so, yes.

Q. And again, as a truck--as an independent trucker, it was your duty to utilize whatever methods you could employ to make sure you didn't spill anything; isn't that right?

A. That's correct.

* * *

[*JA262] IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA HON. OLIVER W. WANGER

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al., Plaintiffs, vs. BROWN & BRYANT, INC., et al., Defendants. AND RELATED CROSS-CLAIMS AND THIRD PARTY ACTIONS

NO. CV-F-92-5068 OWW

Court Trial, Day 14
Fresno, California Wednesday, April 21, 1999

REPORTER'S TRANSCRIPT OF PROCEEDINGS

* * *

[2169]

* * *

WILLIAM HAVERLAND, called as a witness on behalf of the Defendant Shell, having been first duly sworn, testified as follows:

THE CLERK: Please state your name and spell your last name for the record.

[*JA263] THE WITNESS: William H. Haverland, [**243] H-A-V-E-R-L-A-N-D.

THE COURT: You may proceed. **[2170]**

DIRECT EXAMINATION

* * *

[2207]

* * *

BY MR. HELDT:

Q. The transportation was done by common carrier; is that right?

A. That's correct.

Q. Once the common carrier arrived at a distributor facility, what were the typical arrangements then for the unloading of the product?

MR. MacAYEAL: I guess here we--at a minimum, we need to have a time frame on it, because he only was the D-D sales manager in 1980. But I guess--

THE COURT: From '80 to '81.

MR. MacAYEAL: '80 to '81.

THE COURT: And he was in the field as well. I don't know whether he was in Indiana and northern Kentucky, I don't know whether that was a bulk sales type of distribution area or **[2208]** not.

Mr. Lasater has arisen.

MR. HELDT: Your Honor, I think perhaps it's worth mentioning at this point in time that Superfund is a very peculiar animal. It's one in which there's no statute of limitations, and so it's always a struggle for all of the parties to bring specific personal knowledge to an incident which occurred way back in 1976, which makes it almost unique in cases. Mr. MacAyeal--

[*JA264] THE COURT: Well, we have somewhat [**244] of a trail, because we know that there's a bulk storage facility, we know that a common carrier is being used, we have some invoices which give us the kind of trail that would be foundationally sufficient to explain what was happening. Here, however, what is done at the distributor's facility, particularly if it's by the distributor, I wouldn't especially expect the national product manager to know. I mean, if he does, he can say so.

THE WITNESS: I know the wording was that we deliver FOB customer's facility, not FOB customer's tank, and there's a difference there.

THE COURT: What is that difference?

THE WITNESS: The difference is we have stewardship of that product across the road to the time it reaches the customer's facility. They take stewardship upon the common carrier arriving at their facility and it's theirs at that **[2209]** point and then they move it into the tank.

THE COURT: So when you say--you can make your objection and then I'll ask one more question.

MR. MacAYEAL: I just move to strike because he's stating an opinion, a legal conclusion, it sounds like.

THE COURT: Well, actually, I think that he was very cautious in using the word "stewardship." That isn't [**245] so much of a legal opinion. He hasn't mentioned title at all.

What he is, I think, expressing is a matter of intent, and the seller can state its intent. Whether or not that's the legal fact is a different question. But, in other words, the seller can say, "We deliver to a common carrier with the instruction and our invoice [*JA265] provides that this is FOB shipping point or it's FOB destination. And when we say FOB destination, we mean when it leaves the highway and it turns into your driveway, it's your product." Stewardship doesn't necessarily say legal title, but what it does say is, "You handle it now."

Is that--

THE WITNESS: That's correct.

THE COURT: --what Shell intended?

THE WITNESS: Yes.

BY MR. HELDT:

Q. To try to shed some more light on this particular issue, was there a particular custom and practice concerning documents **[2210]** that would be exchanged between the distributor and Shell that would be typical from transaction to transaction in which the distributor would order D-D and the manufacturer, in this instance Shell, would confirm the order and then documents for shipping produced and then invoices?

A. Yeah, there was--

MR. MacAYEAL: Excuse [**246] me, Judge. If we can just get him to say, "I've seen these documents before and I have a base to say what's typical" rather than just launching into the conclusion.

THE COURT: All right. Can you state whether or not you had seen the documents that are used in the distribution chain before?

THE WITNESS: Yes, I have.

THE COURT: All right. Then you may answer this question.

THE WITNESS: Yeah, there was a procedure that was to be followed where the customer placed an order [*JA266] at the order center. The order center would issue an acknowledgment of that order and a release to the San Pedro terminal that there was going to be a shipment of bulk D-D to the customer.

The common carrier would be ordered, would go in, pick up the product. They would weigh in to get the tare weight of the truck, that's the way bulk commodities are moved, they would fill it up, they would weigh on the way back out, **[2211]** and they deduct the tare weight from the gross weight and that gives the net weight of the product, and that's what is shipped and shown on the bill of lading. And the bill of lading is used for the issuance of the invoice based on the weight of that bill of lading.

MR. [**247] HELDT: I'd like to direct your attention to Exhibit 1199. That would be under Tab B, Bill.

I think there are no objections to this being received into evidence.

THE COURT: You probably need to move them in if they're not joint exhibits as you're going, Mr. Heldt.

MR. HELDT: 1199 is in evidence.

BY MR. HELDT:

Q. First of all, page 1 of Exhibit 1199, is this typical of a purchase order that would be utilized in order to order D-D in bulk?

A. Yeah. Every customer would probably have their own version of their purchase order, but that would be typical, yes.

Q. This particular invoice, Plaintiff's Exhibit 1199, has a column called "Quantity" and then it has a notation "1" space "T/L." Do you see that?

A. Yes.

Q. What did that mean in the industry, typically?

[*JA267] A. Truckload.

Q. One truckload. Would that have a standard quantity in the **[2212]** industry?

A. It would have an approximate quantity. You would typically load the trucks to 5,000 gallons.

Q. Five thousand gallons.

I'd like to direct your attention to the second page as I have it. I'm not positive that in all of the exhibit books this will be the second page, but it has the microfilm number 2902 [**248] on the margin.

This has a Shell peckton. First of all, what's a peckton?

A. It's a Shell logo.

Q. What is this particular form?

A. It's an order acknowledgment showing that Brown & Bryant ordered from San Pedro to be shipped to them a truckload of D-D.

Q. What is the purpose of the order acknowledgment?

A. It releases the product from the--it gives-- authorizes the terminal to release the product to the carrier.

Q. Does it quote a price?

A. Yes.

Q. This particular invoice is somewhat difficult to read, does it appear to be $ 2.07 a gallon?

A. Yes.

Q. I note that it says freight is prepaid, what does that typically mean? **[2213]**

A. That means that Shell paid the common carrier for the freight to take it from San Pedro to Arvin.

* * *

[*JA268] **[2228]**

Q. On the next page, which is microfilm number 1164, we have that same form, which is the order acknowledgment; is that right?

A. That's correct.

Q. This form appears to be slightly different as far as the line items on the form than Exhibit 1199. What are those differences that we can pick up from the middle of the document?

A. Well, the difference is, for one, the price is different and, number two, [**249] is there's a less fall fumigation promotional allowance of 3 cents per gallon.

Q. What does this mean, then, as the total price of the D-D Soil Fumigant considering the price of $ 2.58 a gallon and then the promotional allowance of 3 cents a gallon?

A. The net price the customer would pay would be $ 2.58.

Q. Are promotional allowances something that you were generally familiar with in the context of your employment in the agricultural chemical Shell business?

A. Yes. They were typical in not only the D-D product line, but other products within our line. Essentially, what it is is once you establish--once we established our list price, we wanted to maintain the integrity of that list price. If for some reason we had to meet some kind of a competitive offering from another supplier, we typically would do it in the form of a promotional allowance, temporary allowance, something like **[2229]** that.

Q. And--

A. Much the same as a car dealer that maintains [*JA269] their sticker price on the window and the manufacturer gives a thousand dollar rebate.

Q. And this would be an example of that kind of promotional allowance?

A. That's correct.

Q. On the third page, which has [**250] the microfilm number 1163, this again is the--shows down at the bottom the quantity of freight out; is that right?

A. That's correct.

Q. In this instance, it's more than 5,000 gallons; is that right?

A. Yes.

Q. In fact, it's 5,054 gallons.

A. That's correct.

Q. On the next page, this is a largely unintelligible truck ticket similar to the Gray Truck ticket?

A. Yes.

Q. And the carrier in this instance was Allen Transportation Company, I guess?

A. Yes.

Q. Looking at the last page of this document, this is the invoice front that we had--that is similar to the invoice **[2230]** front on the Exhibit 1199?

A. Yes.

Q. And it contains, then, an invoice for an amount of 5,054 gallons. Does that indicate to you, then, that the entire amount that left the San Pedro terminal was invoiced to--

A. Yes, it was.

Q. --Brown & Bryant? In other words, they paid for everything that left the terminal?

A. They were invoiced and paid for 5,054 gallons.

[*JA270] Q. They received, however, a cash discount which would lower the price per gallon price?

A. Not a cash discount, a promotional discount. A cash discount is typically when you pay your bill within a specified period of time [**251] you can get a cash discount. This is a promotional discount.

Q. That, then, is an example of a promotional allowance. And I'd like to direct your attention next to Exhibit 1271. Again, in 1271--

MR. LASATER: Can you hold on for a second. I have to change notebooks.

BY MR. HELDT:

Q. 1271, first page we have an order for a trailer load again?

A. That's correct.

Q. This was in 1980, it appears.

The second page, the order acknowledgment, it **[2231]** shows--I can't read the price, but it shows a comp allowance. What is a comp allowance as opposed to a professional allowance?

A. That's abbreviation for "competitive allowance."

Q. And what does that mean?

A. Again, that's something--price, meeting some competitive offer that they received from another supplier.

Q. We have a truck ticket, or a weigh ticket, I suppose, from GATX.

Then we have the ticket which shows the quantities shipped again, that's the document number 1185, and it shows quantity of less than 5,000 gallons that was actually put into the tanker at San Pedro; is that right?

A. That's correct.

[*JA271] Q. The quantity being 4894 gallons?

A. Yeah.

And it may be worth mentioning in these type of [**252] bulk shipments, product is not metered in the truck. If it were metered in the truck, you could put in 5,000 gallons, but it's all done by weight. There is no metering of this material.

Q. We have a third common carrier here, it appears L & L Tank Lines; is that right?

A. Yes.

Q. And then we have the invoice. We just established that 4894 got shipped. The quantity that was actually invoiced **[2232]** corresponds to that exactly, 4894.

A. That's correct.

Q. And it shows then a reduction--it's a little clearer now. $ 2.58 a gallon was reduced to 5 cents a gallon in order to get a total bill of 1,230--excuse me.

A. $ 12,381.82.

Q. Right.

Now, then, if we can go to Exhibit 1217 to look at a different type of allowance. Exhibit 1217, an order from Brown & Bryant, July 11, 1978. Again, it's for one trailer load; is that right?

A. That's correct.

Q. On this next page, which has microfilm number 3360, it shows a price, I believe, of $ 2.40 a gallon; is that right?

A. That's what it looks like to me, yes.

[*JA272] Q. And then we have a separate line item, which is called "Less evaporation allowance," and that's stated in kind of mixed terms there. It has a dollar sign [**253] and it has a "0.01," but then it has a percent rather than gallon; is that right?

A. Yes.

Q. What was this evaporation allowance?

A. Evaporation allowance is, again, something to just reduce the price from the list while maintaining the integrity of the list price rather than dropping it by two and a half cents a gallon. **[2233]**

Q. Would competitors from time to time offer things such as a evaporation allowance?

A. Yeah, you would--the industry was typical to offer different types of allowances, call them different things, but, essentially, it was to adjust the price, try to get a competitive edge or meet a competitor, one of the two.

Q. Then the next page, again, is a truck ticket again. Skip that page. And the next page, this appears to be Allen Transportation again, and go to microfilm number 3359. That shows us the quantity leaving San Pedro terminal again; is that right?

A. That's correct, 4,954 gallons.

Q. 4,954. And if we go to the next page, which has the microfilm number on it, which is 3361, how many gallons then were invoiced to Brown & Bryant?

A. 4,95--and I think that's a 4.

Q. It appears to me also to be 4,954.

Assuming that is what that says, that corresponds, [**254] then, with the 4,954 that left the GATX terminal; is that right?

A. That's correct.

[*JA273] Q. In other words, even with this evaporation allowance on the invoice, Brown & Bryant paid for everything that left the GATX terminal; is that right?

A. That's correct.

* * *

[*JA274] IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA HON. OLIVER W. WANGER

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al., Plaintiffs, vs. BROWN & BRYANT, INC., et al., Defendants. AND RELATED CROSS-CLAIMS AND THIRD PARTY ACTIONS

NO. CV-F-92-5068 OWW

Court Trial, Day 18
Fresno, California Wednesday, April 28, 1999

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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[2860]

* * *

JOHN CONNOR, called as a witness on behalf of the Defendant Shell, having been first duly sworn, testified as follows:

THE CLERK: Please state your name and spell your last name.

[*JA275] THE WITNESS: My name is John Connor. Last name is spelled C-O-N-N-O-R.

THE CLERK: Thank you.

DIRECT EXAMINATION

* * *

[*JA276] IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA HON. OLIVER W. WANGER

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et [**255] al., Plaintiffs, vs. BROWN & BRYANT, INC., et al., Defendants. AND RELATED CROSS-CLAIMS AND THIRD PARTY ACTIONS

NO. CV-F-92-5068 OWW

Court Trial, Day 19
Fresno, California Thursday, April 29, 1999

REPORTER'S TRANSCRIPT OF PROCEEDINGS

[Direct Examination of John Connor continued]

* * *

[2982]

* * *

Q. Is there any source of focused infiltration that you noticed from the topography of the tank area?

A. The testimony and the available record indicate that we do not have pavement at the tanks.

[*JA277] Q. What about some big roof that would be directing all the rain right there onto the spot where the unloading occurs?

A. There is no indication of any such of a source of runoff in that area either, and this is just oiled soil. It's a very imperfect surface by its own right. It's more flaws than not flaws. It's oiled dirt. **[2983]**

The--at this point, I would like to comment on the .04 inch rainfall.

Q. Okay. Go ahead. What do you think about the validity of using that .04 inch rainfall as the standard for a runoff event and what is more appropriate?

A. The .04 inch rainfall number was derived from the TR-55 method of runoff analysis that [**256] is published by the U.S. Soil Conservation Survey. It is, frankly, the most common method for estimating surface runoff, and in Dr. Walton's document, he indicates that he did use this. TR-55 is variably called the SCS method, sometimes called the curve number method.

In Dr. Walton's report, he characterized the surface soil as a paved parking lot with roofs and driveways paved, meaning concrete or asphalt, and he used the highest curve number that's in the SCS method, he used a 98. These numbers only range from areas from numbers around 40 up to a hundred theoretically, and the highest number on the curve is 98. The higher the number, the less initial rainfall required to initiate runoff.

Dr. Walton ran this calculation and came up with a millimeter of rainfall. If you actually look at the type of soil we have in the vicinity of the tanks, which is dirt, you know, on this list, there is dirt, there it is, dirt, including right-of-way, you know, such as somebody driving on it, and I took the dirt number, which is 82, [*JA278] and I applied--I made it **[2984]** higher.

I said, well, let's say this is a commercial business, 98, average it, use 87, the answer is .3 inches, [**257] .3 inches of rainfall required to cause runoff at the Arvin site, not a millimeter. Think about it. Even--

Q. Well, let's stick with equal units of measure. .3 inches versus .04 inches?

A. Yes.

Q. Go ahead.

A. That's a ratio of, what, eight times, and I also, rather than looking at binomial distributions or theoretical calculations, I pulled all the rainfall data for the Arvin site and pulled, for the last decade of the D-D tank operation, all the rainfall data. This is based on the Bakersfield weather station by the NOA Service. And if we look at that and say in that entire time, ten years, for a decade, how often do you get a rainfall over .3 inches? Well, it gets 70 times in ten years, 70 days where there could be a rainfall event.

Q. To put that in perspective, how many days in a decade, 3,600?

A. In that particular decade there is 3,652 because we have two leap years.

Q. 3,652 days?

A. Yes.

Q. There were 70 days in which you had-- **[2985]**

A. A rainfall event over .3 inches.

Q. That's what percentage?

A. It's under 2 percent. It's very small. This is a desert, remember. So how many times were there rainfall events that even caused runoff at the Arvin site? . [**258] 2 percent of the time. So if you go out there on day one and you are saying, "Well, gee, I sure need [*JA279] some rainfall to cause a runoff," chances are one or two days out of a hundred days you will actually see some rainfall movement. That's very different from saying that rainfall gets somewhere, okay?

Q. Okay. One other point I wanted to ask you about. We are not delivering D-D every day. Didn't we--we talked about 25 times a year in a busy year, 15 times in a slow year. Did you do any analysis to spread out the fact that you are only talking about 25 to 15 days a year in which there is the opportunity for it to coincide with a rainfall event? Did you do some analysis?

A. Yes.

Q. What was the results of that analysis?

A. That analysis indicates that on days--well, that there were rainfall events--and these are actual days, right, when there is a rainfall event above .3 inches. I'm looking at the rainfall record for the last decade, that would be 1973 through 1983, the last decade of D-D activity at the property.

You look at that analysis and we superimpose on that **[2986]** historical profile D-D deliveries. My understanding from the Shell information is that the [**259] rate of sales over that period of time would correspond to about 15 deliveries from '73 to '78 and 25 deliveries a year thereafter until 1983. If we superimpose that record, and if we assume just an even distribution of these deliveries over that time, that the number of days that coincide with an actual rainfall event are only one, or it rains from zero to a maximum of five days, if you--depending on how you shift that delivery record.

So--and most of the days it's--the record very typically would come out with one day. One day out of 3,652 up to a maximum of five days, given, I don't know [*JA280] exactly the days of delivery, would you have rain the same day that you had D-D delivered.

Q. All right. One day in a decade is the probability, then, analysis that we are going through. This may be a statement of the obvious, but it's a legal standard. That would be less likely than not; is that right?

A. Yes. That's a long time to wait for something to happen.

Q. Okay. But now we have had--we don't know, maybe we have had a thimbleful spilled on that day, maybe we have had a gallon spilled on that day. Assuming we have one spill a decade on a day of a runoff event, what are the [**260] obstacles then that would mitigate the runoff to prevent it from getting to the sump and the pond which we have talked about being our **[2987]** bull's-eye that are the cause for contamination?

A. Well, there are a number of abstractions that would impede transport of that spill during a rain event. First, it's the volatilization of the spill. Dr. Deeley talked extensively about the volatile characteristics of the D-D product. We all recall that it is a soil fumigant. It's not called a soil leachant, it's called a soil fumigant because it vaporizes in the soil, so when you spill D-D, it tends to evaporate.

D-D's vapor pressure for 1,2-DCP is about half that of benzene. And benzene is one of the constituents we are most concerned about in gasoline, so let's think about that yourself. You go out in your driveway tonight. Pour out a gallon of gasoline, will it be there the next day? No, it won't.

Q. Will it be there in an hour?

A. There might be some left in an hour, but [*JA281] normally it's gone. Now, D-D might--it might volatilize a little bit faster--it might volatilize a little bit slower than gasoline because it's made up of a lot of 1,2-DCP and gasoline doesn't have [**261] a lot of benzene in it. But think about that, would it be there the next day? No way. Would it be there in a couple of hours, it might be a stain, but, you know, that stuff probably is gone in an hour. And the analyses, if you model this, it's pretty much the answer that you do get.

So the first impedance is the volatilization of the **[2988]** spill itself. Secondly, is it will, you know, initially contact that soil or that oil, and it's--there it is. It's on the dirt. Now, it rains on that soil. It has to get into that--now the stuff has to get off the soil and into the rainwater. That's partitioning, right? That's partitioning, and that's a very inefficient process.

You ever try to wash something off your driveway, you know it's not--doesn't work so well. Say you had something spilled out there and it rains on it. Still there. You got to work pretty hard. You get some gasoline or D-D on your pants, put them in the washing machine, put it so it cycles one time, man, they are still going to smell pretty bad. The stuff doesn't come off very easily. It's a very inefficient process.

Put D-D in a jar of water, equal parts, just pour it in there. Does it dissolve? No. Make some [**262] chocolate milk. Put some Hershey's Syrup in a glass of milk, don't stir it. Does it dissolve? No, your kid would be a little bit upset if that's how you made his chocolate milk, with the good stuff at the bottom. It takes energy to dissolve. It dissolves very slowly, very slowly. So the second impedance is the partitioning process. These are relatively inefficient. So the rainwater will pick up very little.

[*JA282] Then the rainwater has to get all the way down to that pond. From the D-D tanks, if we look at the 1994 topographic surveys, it's something over 300 feet from that **[2989]** tank down to that pond. If we go as the crow flies, it's something over 200 feet down there. It's 230 feet or something like that. Let's assume that it was graded back in whenever, that it went straight, you know, there was a grade that went to the pond. Well now it has to get there. That spill, some large percentage of it volatilized, mostly. I think if you run the calculations, you will get 90 to 95 percent volatilization in that first day. Then some of it has to get in the rainwater, terribly inefficient process.

And now that rainwater has to get to that pond and it's got a pretty tough [**263] trip to make. It's got to exceed the initial abstraction so it causes runoff on each little block as it goes down there. Some of it gets caught in the soil. Some of it gets caught in footprints, some of it gets caught in a truck rut.

Earlier, we looked at the topographic survey, and it's pretty lumpy out there. So all of those things would impede significantly the progress of any droplet of water from my D-D spill plot, if I assume that it did indeed happen, from ever getting down into that pond, and that is a long trip for a drop of water, quite frankly.

Q. And along that trip I presume that it's still raining and so it's diluting that drop, right?

A. Yes.

Q. And along that trip, the ground is still--you have to **[2990]** cross ground, that would cause it to infiltrate there as opposed to getting to the pond; is that right?

A. You will have some what's called storage under--the SCS method refers to storage. Now, [*JA283] storage, the actual storage capacity of that soil is five times larger than what's referred to as the initial abstraction.

How much rain does it take to cause runoff to happen? And I have said earlier, if you look at the actual surface soil at that [**264] site, it's .3 inches. How much storage capacity in the soil is there? Well, it's five times larger than that. It's 1.5 inches, so that's quite a gauntlet to run to get all the way down there. There is a lot of opportunity for that droplet to get lost, a five times opportunity for that droplet to get lost on the way there.

Q. More likely than not?

A. Oh, infinitely more likely than not that it can't get there.

Q. All right. So let's assume, then, that we have this site, these conditions and site history, but this site is only the bulk storage tanks. It doesn't have the dinoseb spill area, it doesn't have dinoseb slung all over the site, it doesn't have a sump and it doesn't have a pond. Would there be any need whatsoever for any remediation or investigation of this site, in your opinion?

A. No. If we were able to snap our fingers and make the sump **[2991]** and the pond disappear, we would have a clean site.

Q. Then what can we conclude about the contribution of the bulk facilities to the need for remediation or investigation at this site?

A. The bulk facilities and the activities associated with the bulk facilities, based on all the data in the record, my review of all the [**265] analyses conducted by [*JA284] other professionals on this project, did not make any contribution to remediation costs at this site.

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