

Deposition of: Walter Marshall

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Bedrock Corporation v. Slate Quarry, L.P. (Case No. CV-98-046383 S)

Appearances of Examining Counsel:

For Plaintiff Bedrock:

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EXAMINATION OF MARSHALL BY LAWRENCE:

4:8 – 4:10. Swearing in of Witness. Walter Marshall, being duly sworn, testified as follows:

4:17 – 6:15. Background. Marshall works for the Rubble Mill, part of Bedrock, Inc. at 123 Bedrock Road in Jacksonville, Florida. He started working for Rubble Mill in 1986 when Bedrock Corporation bought the mill. Marshall graduated with a double major in prelaw and accounting. Both are Bachelor of Science degrees that he obtained from Florida State University in 1974. He attended grade school in Miami through the fifth grade and then continued his education in Melbourne, Florida. He graduated from high school in 1970.

6:16 – 9:14. Employment History. Marshall went to work for Wilma Corporation in September 1974 upon his graduation from FSU. It was a wire and cable manufacturing facility in Carrolton, Georgia. Marshall started out as a corporate staff accountant. After about 14 months, he was promoted to special projects accountant for the division controller of the wire and cable group. As the special projects accountant, Marshall's job was to implement uniform reporting in the new facilities and training new controllers on company policy. A year later, he was promoted to the utility plant controller. This was for the utility cable plant. The company had five plants in Carrolton and the largest were the building wire plant and the utility plant. He remained in the position of utility plant controller until he left there in 1979. He left for a better opportunity and went to work for Sherwood Forest Industries in Savannah, Georgia at their Port Marion Mill. The mill was a one-machine linerboard mill. He joined them as their manager of financial analysis. It was the equivalent of a cost accounting manager. Sherwood was later bought by Bedrock in 1983.

9:15 – 10:2. History of Mill. In 1986, the mill had been idle for over a year by its previous owners Jacksonville Macaroni. They shut it down in bankruptcy, and Bedrock bought the assets from the old company. On November 1, 1986, the new ownership started restaffing and maintenance operations. The No. 1 machine started running February 1987 and the No. 2 machine started running March 1987.

10:3 – 10:19. Employment History. When the company was starting up again, Marshall was the controller. He oversees 20-22 people in his department and has responsibility for the overall financial operations, some IT, some purchasing, and some storeroom.

10:20 – 13:16. Team Related to Service Agreement. Marshall was part of the three-man team that went through the negotiations of the contract that ultimately resulted in the April 29, 1991 services agreement. The other two were Warren Hoover, the general manager and Marshall's boss, and Kurt Allens, the vice president of environmental affairs out of Atlanta. Marshall's job was to do all the number crunching to determine what they would look like if the deal went through. All three worked for Bedrock Corporation. Hoover and Allens primarily negotiated the terms. They all made notes during the meetings, but formal minutes were not taken. Marshall thinks he still has his notes. Steve Jeffers and Lewis Newman of Rubble Macaroni signed the document. Jeffers was the senior general counsel and vice president of Bedrock Corporation in Chicago, the corporate headquarters. The service agreement was marked starting S 202.

13.17 – 15:20. Services Agreement. Marshall participated in the structure behind Section 4.5. ABC brought them a draft of a contract, and Bedrock made revisions based on the initial draft. Each set of revisions was taken to the attorneys. Section 4.5 was a point of high interest between the parties. The capacity payment provision was also heavily negotiated. Marshall was involved with both provisions due to the economic feasibility of the agreement between the two parties. The ultimate language used was acceptable to both sides.

15:21 – 18:11. Negotiators. The other gentlemen who negotiated the agreement, Hoover and Allens, have since retired. Allens retired from Bedrock, Inc. after the merger and lives north of Atlanta. Hoover retired from Snowflake Mill and lives near Snowflake, Arizona. Marshall has not spoken to either of them related to this lawsuit, nor has he spoken to anyone else regarding the negotiations of the service agreement with respect to the lawsuit. He has not reviewed his notes and does not know what his testimony will cover.

18:12 – 20:2. Service Agreement. Marshall helped determine what ultimately was contained in the services agreement, but did not participate in all sections. Allens and Hoover did the bulk of the negotiating. Marshall ran projections as to how the numbers would apply in their operations for sections like 4.5 and capacity payment. Marshall has been one of the principals involved in the issue of liquidated damages. Joe East was the general manager before Mr. Stream and was also very involved with liquidated damages for the first year to 18 months.

20:3 – 21:24. General Managers. East was the general manager from January 1989 through March 1993. Hoover was the general manager involved in negotiating the agreement and Stream is the current general manager. East and Stream are the only GMs that had the facility after the cogeneration facility came on line. Marshall has worked for all of them and has always had the same participation in the liquidated damages issue. East and Stream have both had a role in reference to Marshall's assessment of liquidated damages, but all of the assessments have originated under the accounting department with Marshall's signature.

21:25 – 25:19. Notices Under Schedule 4.5(b)(i). There is no contractual responsibility for Marshall to respond to Slate Quarry's notices of scheduled 8 outages and Marshall has not done it as a matter of course. If the notice is proper and timely, it affects whether or not they are exempt from liquidated damages. Neither Stream nor Marshall feel it is incumbent upon them to notify Slate Quarry if the notice is insufficient in any way. Marshall's fiduciary responsibility is to Bedrock and its shareholders. Marshall does not think that there is any obligation under any standard of good faith or duty to cooperate to notify Slate of improper notices. At one point, late in the process, Marshall made a note to Stream to the effect that Slate finally read the contract due to the fact that the notice as accurate for avoiding liquidated damages under the contract. Prior to that they were only giving a month to six-week notice when the contract required a minimum 90-day notice. Marshall reiterates that he did not feel it was necessary to notify them when their notices were not proper.

25:20 – 29:1. 90-Day Requirement; Steam Interruption Plan. The 90-day notice requirement was to allow Bedrock time to determine how they would manage a steam interruption. Under subpart (d), they were required to provide a plan to show how they would mitigate liquidated damages under a steam interruption, which they did. The engineering department prepared the plan under the direction of East. Marshall has a copy of it. It is a general operating methodology used when there is a steam interruption to get the mill back up as soon and as economical as possible. Marshall refers to it as a 24-hour/day SOP. It is the procedure for if the plan shuts down for any reason. Marshall has not reviewed it in about five or six years, but remembers that it was not intended to be a detailed manual on how to run a paper mill. The plan was shared with the AESCB, but they never received a response. The document was prepared sometime after the plant started up in January 1994. The plan related to how they would operate with a loss of steam from Slate including economic analysis to determine whether to run only one machine or whether they should purchase more power from Jacksonville Electric Association to minimize the negative profit impact.

29:2 – 32:22. Steam Interruption Plan. Bedrock purchased steam from Slate and electricity from Jacksonville Electric. A lot of Slate's steam goes through Bedrock's turbine, and they generate about half of their electrical load there. Within 90 days, they would conduct an economic analysis on the best method to run the operation. They had to plan on purchasing additional gas as well. The first 90-day notice they got was for a fall 1999 outage. [*OBJECTION: form.*] They were in the process of doing their analysis

when U.S. Generating contacted them that they were going to move their outage forward, negating their 90-day notice. At that time, they stopped the process. Marshall does not recall how much had been completed up to that point. There was documentation at the time, but Marshall does not know if it is still maintained. It could be with his accounting manager, William Gregory. Marshall thinks that they received 90-days' notice on the April 2000 outage. The notice did not specify the steam interruption dates, but they scheduled their annual outage during the same time so it did not matter. Therefore, analysis was not necessary for that outage.

32:23 – 34:20. Fall 2000 Outage. Marshall heard Stream's testimony about the July notice for the fall 2000 outage. When they received that notice, they had plans to take some downtime on the No. 2 machine every month for the last four months of the year. The only other provision was to look at purchasing gas for the No. 1 machine to run during their downtime. This was an automatic process as they could nominate the gas they wanted to use in the middle of the previous month. They quantify the amount based on the operating plan for the coming month. That is done on a monthly basis. When they received the July notice, these plans were already in place, including taking some downtime each month on the No. 2 machine through September. The only additional thing they would have to do would be to buy whatever gas they would need for the outage.

34:21 – 38:3. Coordination of Outages. The types of outages at Marshall's facility included annual, monthly and unanticipated. The annual and monthly outages are planned. Unanticipated outages are due to mechanical failures or something that can't be controlled. Stream testified that annual outages are arrived at as a result of the company's consideration of its own production needs and the interrelationship of various aspects of it. The monthly outages are planned within the facility because they do not have a major divisional impact. They are only 12 hours in duration. They are to take care of routine maintenance on a monthly basis. As soon as they get through with one, they plan for the next one. The machines are staggered during the outages, and they lose production for the period of the outage on that day. Marshall plays very little role in the coordination of outages. As the controller, he makes sure that they are budgeted properly, but the outages are planned more from an operational side.

38:4 – 43:25. Fall Outage. Marshall is generally the person notified of the Slate outages and then communicates those outages to the steering team, the engineering and maintenance group at Bedrock. He distributes notices whether it is in compliance or not. Marshall, the general manager, and the production manager participated in the decision about whether the notice was in compliance with the contract. Marshall reviewed S7 again to determine if his recollection regarding the timing of the notice and the fall outage were the same as Stream's. The July 20 notice was not distributed until the 25th or possibly as late as the 27th. Marshall remembers that he did not see it for several days because he had no accounting manager at the time and one of his other professional accountants was in and out on medical leave. They were in the middle of budgeting and trying to implement a new system. Stream and Marshall both remember a hallway conversation about the notice. They decided that the notice was insufficient to avoid the

application of liquidated damages for that fall outage. Marshall thinks that they had that conversation on the 26th or 27th. They did not make a decision that there would be no follow up discussions with Slate that their notice was insufficient.

44:1 – 49:16. Fall Outage. Marshall discussed the notice with Sandy Flower on or after the 26th or 27th. It was to make sure that he was aware of the upcoming outage, but they did not discuss whether the notice was sufficient to trigger the provisions of Section 4.5(b)(i). Peter Harris reports to Flowers, so Marshall did not contact him directly other than copying him on the document. The handwritten notation on the document is Marshall's. The first time he notified anyone at Slate that he felt their notice was insufficient was October 4, 2000 in a letter (S6). He spoke with Edwards on the phone to let him know the letter was coming and the circumstances behind it. The letter was hand-delivered while they were on the phone. Marshall told Edwards that they were changing their philosophy and if there were not enough orders, they would scale back the whole division. The price of natural gas had sky rocketed and was predicted to continue going up. The previous year's notice was insufficient and they elected to alter their schedule so that they would not have to pay liquidated damages. Marshall was letting them know in case they wanted to adjust their schedule again. He reminded them of what they had done the previous year. Because of this year's 10-day outage, Buster Thomas had explained that it was going to be a huge liquidated damage situation. The phone conversation contained much more than the October 4 letter because it was easier to communicate that way. He took no notes of the call nor was anyone else present. He did not recall Edwards asking why he had waited so long to notify him that the notice letter was not consistent with his understanding of the requirements of the service agreement.

49:17 – 52:5. Gas Purchase/Nomination. At the mill, they had nominated gas for 10 days in order to operate the boilers necessary to run the No. 1 machine, but gas above that was purchased during the outage because it had not been nominated. They had not nominated gas as a result of the notice letter. *[OBJECTION: mischaracterization.]* Every month they did a pro forma or forecast of how they were going to operate for the next month. As a result of the process, the accounting manager took the result and nominated gas accordingly. Marshall had given him the 10-day figure. He arrived at the figure because the corporation had notified him in late July that they were going to be down for 14 days every month September through December on No. 2 machine only. That was built into the financial forecast. They only nominate the gas on the month before they use it. They nominated gas for October based on Slate's notice.

52:6 – 53:21. Gas Purchases. They did not have an overriding contract with a gas supplier. They purchased their gas on the open market on a monthly basis by making a nomination in the middle of the previous month as to how much they wanted. That had a major impact on the price of gas as to whether they underuse or overuse gas. They bought gas on a spot market. The purchases were set up that way by the division office in Atlanta. Marshall thinks that it was transferred to the corporate office after the merger.

53:22 – 58:14. Gas Invoices. Marshall was the principal person responsible for the collection of documents in response to the request to produce. Document S 0163 through

S 0187 are the gas invoices for the year 2000 from Lego, the transportation company. The invoice represents the transportation cost only. The cost of the gas is in the back section from Richard Energy going to Rubble Macaroni (they had never changed the name). The initial bill for the month of October was the November 10th Richard Energy bill. That would have been the one that covered the period of the steam outage except for the supplemental costs that were passed on for the imbalance for October. That was included in the liquidated damages supplemental invoice, S 198 through S 201. Richard Energy prepared S 200, which captures the financial impact of burning more or less gas than what was nominated. Marshall cannot remember how much they nominated for that 10-day period, but could retrieve it fairly easily. The scheduled quantity relates to the amount that they nominated, 1,824,690 before taking the shrinkage out. Shrinkage is what they would expect to lose as a result of transportation in the pipe. “Less metered read volumes” is what was actually consumed for the month of October. There was an imbalance of 229,742.2. There were imbalances at the burner tip, and at the city gate, and at the pipeline receipt point. 12.65 is the imbalance percent, not the shrinkage factor from those, so it would be a percentage of 1.815 to 2.045.

58:15 – 63:10. Gas Invoices. Marshall assumes that the fees that can be charged based on the overage or underage consumption of gas are under whatever regulatory method regulates the way the gas companies bill. It is not pursuant to an agreement with Richard Energy. The number 160,910.04 was arrived at based on the above calculations and the addition of taxes. The number was struck through with William Gregory’s handwriting, Marshall’s accounting manager. Marshall thinks he was just rewriting a number that was hard to read. “Less Bradenton” was another Bedrock Corporation facility that pulls off the same gas line. Depending on how they nominated, the bill addresses both facilities. The total number includes what both facilities nominated. They can’t quantify either individually based on the bill. Bedrock nominates based on their boiler need projections. They have a daily quantity and they nominated based on what the notice letter had provided for 10 days. Marshall shared the information from the notice with his accounting manager and he did what he needed to mitigate and minimize liquidated damages. The corporate office reported to Gregory how much was theirs and how much was Bradenton. Bradenton had a very small portion of the overage. If they had been within budget, it wouldn’t reflect it as opposed to the overages. The gas consumption numbers on page 201 were derived from their operation from various departments together and then accounting generates the schedule. That should give the total volumes of gas used during that period of time. It is in MCF format on the internal report while the gas bill is in therms.

63:15 – 68:9. Fall Outage. Marshall called Edwards on July 18th to notify him of some downtime in October on the No. 2 machine and to ask if they knew when they were going to have their typical fall outage. Edwards was not sure of the exact dates, but thought it would be late in the month. If they notified Bedrock early enough, Marshall could make adjustments to schedule their downtime to coordinate with Slate’s outages. There was not a discussion about the requirements of 4.5 during that conversation. The next contact regarding the fall outage was Marshall’s receipt July 21. Marshall cannot recall if they had their next conversation before or after the letter. The June-August period was

challenging due to the workload and Marshall being short-staffed. Marshall participated in a lunch meeting at Jack's fish with Stream. Collin Randall wanted to introduce them to Buster Thomas, Randall's new plant manager. Randall wanted the two companies to work together better and to each designate a representative. Stream designated Peter Harris for Bedrock. Bedrock had just come up from being down on No. 1 machine for six to seven weeks. Randall asked Stream for his prognostication on what it looked like for the mill the rest of the year and Stream said that if he could predict the economy, he could respond about the mill. It was a day-to-day situation. There was not a discussion about scheduling the outages between the plants during the meeting, nor was there a discussion about the anticipated shutdown time on Machine No. 2.

68:10 – 71:25. Fall Outage Communications. When Marshall called Edwards on July 18th, he was filling him in on some of the detail about the mill's plans that he had wanted to know during their meeting. Stream had just received the notification that day. Randall designated Thomas to be the lead in the team building and Stream nominated Harris. The two did work together in the operational aspects. Marshall thinks they had one or two meetings. They did not feel like there was much that they needed to discuss. The day-to-day operation relationship had always been fine. The control room operators spoke daily. Harris and Thomas maintained regular and open communications, but Marshall does not think that they also spoke daily. Harris did not report to Marshall; he reported to Flower. Marshall spoke with Edwards about once a month. They have been operating in that mode since mid 1994. Marshall and Edwards have had more consistency between the two projects than the people in management now.

72:1 – 73:11. Relationship with Slate Personnel. Marshall thinks he and Edwards had a good relationship. They would speak about their personal lives, not just work. There was a mutual respect and trust between the two of them. Marshall used to speak with Tom Coogan, the plant manager at Slate. Collin Randall kept a low profile. Coogan periodically met with Bedrock's general manager, East, and Marshall was included in those meetings. Marshall's interface was with whoever the general manager was at that time.

73:12 – 75:23. Edwards Response. On October 6, Edwards responded to Marshall's letter, document S5. Marshall received it on October 10. S4 is a letter dated October 9, which appears to be his response. Marshall discussed Edwards' letter with Stream and also with Rob Magma, in-house legal counsel in Chicago. As of October 4, Marshall was aware that the potential gas cost for the outage period would be substantial as a result of the swing in gas prices. Marshall believes that he discussed this with Edwards by phone as well as in his October 9 letter. Marshall asked Edwards their basis for feeling that they met the requirements of the minimum 90-day notice and he responded that their legal advice was that it would suffice. Marshall told him that their legal advice had told them otherwise.

75:24 – 77:2. November 16 Letter. Between the October 9th letter and the November 16 letter, Marshall did not discuss the issue of liquidated damages with anyone at Slate.

The only person at Bedrock that he discussed it with was Stream. They were watching the gas prices change daily and that they were going up.