

1972

**American Gypsum Trust, A Common Law Trust, And John Paul Jones, S. Lewis Crandall, John Russell Ritter, Donald W. Mcewen And Barry Phillips v. Georgia-Pacific Corporation : Abstract Of Record**

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**VOL. I**

**IN THE SUPREME COURT  
OF THE STATE OF UTAH**

**AMERICAN GYPSUM TRUST, a  
common law trust, and JOHN  
PAUL JONES, S. LEWIS CRAN-  
DALL, JOHN RUSSELL RITTER,  
DONALD W. McEWEN and BARRY  
PHILLIPS,**

*Plaintiffs-Respondents*

vs.

**PACIFIC PACIFIC CORPORATION  
and PACIFIC PACIFIC CORPORATION,  
a corporation,**

*Defendant-Appellant*

**ABSTRACT OF**

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**FILE**

SEP 8 - 1972

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DALL, JOHN RUSSELL RITTER,  
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RY PHILLIPS,  
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vs.

GEORGIA-PACIFIC CORPORA-  
TION, a corporation,  
*Defendant-Appellant.*

Case No.  
12887

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**ABSTRACT OF RECORD**

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TRANSCRIPT OF PROCEEDINGS

\* \* \* \* \*

[Tr. 14]

\* \* \* \* \*

CLARENCE FLOYD HUMMEL

called as a witness by the Plaintiff as an adverse witness, was first duly sworn and took the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR. MCCARTHY:

Q. State your full name and address, Mr. Hummel.

A. Clarence Floyd Hummel, 515 North 3rd West, Richfield

[Tr. 15]

Utah.

Q. And you are the plant manager of the Sigurd plant of Georgia-Pacific, are you not?

A. Yes.

Q. And when did you commence your duties as plant manager at the Sigurd plant?

A. Recalling dates as best as I can, June of 1966, I believe.

Q. June of '66?

A. Yes, sir.

Q. And will you outline briefly for the court what your duties were before that time?

A. I was at Acme, Texas, as a production superintendent which in effect would be the Assistant Plant Manager.

Q. That's the gypsum plant of Georgia-Pacific located at Acme, Texas?

A. Yes, sir.

Q. Acme, Texas is somewhere around the panhandle of Texas, isn't it?

A. It's near there, yes.

Q. And where were you before Acme?

A. Fort Dodge, Iowa.

Q. Also, one of Georgia-Pacific's plants?

A. Yes.

Q. And before that?

A. Wilmington, Delaware.

Q. Another of Georgia-Pacific's plants?

A. At that time Best-Wall.

Q. At that time Bestwall. I take it then you were an employee of Bestwall Gypsum Company?

[Tr. 16]

A. Yes.

Q. Which was merged into Georgia-Pacific, I think it's agreed, in April of 1965?

A. That's correct.

- Q. And Bestwall Gypsum Company, which was merged into Georgia-Pacific it at that time, when Bestwall was the predecessor in interest so far as these gypsum operations are concerned of Georgia-Pacific, was it not?
- A. Yes.
- Q. And Bestwall owned six or seven plants, gypsum plants, in the United States, did it not?
- A. At the time of the merger?
- Q. About the time of the merger?
- A. Yes. I would have to count them up. I would have to say that it would be about six or seven.
- Q. And all of those gypsum operations were taken over by Georgia-Pacific?
- A. Yes.
- Q. The westernmost plant that Bestwall had was the Sigurd plant, was it not?
- A. Yes.
- Q. I show you here, Mr. Hummel, a map which has been obtained from the files of Georgia-Pacific, which purports to be dated January of 1963, Bestwall Plant Shipping Areas, it says, and you will observe that outlined in blue is the marketing area of the Sigurd plant as of that time?
- A. I assume that is correct.
- Q. And was that the approximate marketing area of the Sigurd plant when you took



over as plant manager in June of 1966?

[Tr. 17]

A. I couldn't tell you whether it is the same or not.

Q. Well, when you took over in June of 1966, it was a fact, was it not, that the Sigurd plant was shipping gypsum board into the northwestern states, Portland, Seattle, Oregon, Washington?

A. Yes.

Q. You were also shipping into the Intermountain area?

A. Specifically where?

Q. Well, any place in the Intermountain area, you were shipping into Utah, Idaho, Western Colorado--

A. Yes, sir.

Q. And you were shipping into the Bay area of California, were you not?

A. Yes, sir.

Q. And you were also shipping into the Southern California market into Los Angeles, were you not?

A. Yes.

Q. So that looking at this again would you say that that pretty accurately describes what was the marketing area of the Sigurd plant when you took over in June of 1966?

A. I would say generally it would.

Now, at that time in 1966 you were shipping the majority of the gypsum board products that were required by Georgia-Pacific to satisfy the Southern California market, were you not?

I don't know what per cent we would be shipping into that area as compared with one of our other plants.

As compared with Acme?

I do not recall.

[p. 18]

You don't know whether--

I don't know what percent that would be.

But you were shipping some--

We were shipping into Southern California.

Into Southern California?

Yes.

Now, when when you came in 1966, at the close of the year of 1966, you had a plant profit and loss statement, didn't you?

Yes, sir.

And according to that plant profit and loss statement you had a pretty good profit for the year 1966, didn't you?

I believe we did. I don't recall the figures.

Somewhere in the neighborhood of a half million dollars before taxes, net profit?

A. I don't know what the figure was.

Q. All right. Well, I show you your plant P & L for 1966.

A. I don't have my glasses.

Q. Will you trust me to read it for you?

A. Fine.

Q. All right.

MR. LATIMER: Will you identify the exhibit please?

MR. MCCARTHY: Exhibit 2 and the map is Exhibit 1. Exhibit 2 is the plant Profit and Loss Statement showed before taxes \$433,000.

Q. Does that sound about right?

A. I guess that's right. You're reading the the

[Tr. 19]

document.

Q. And in Exhibit 3 your Plant Profit and Loss Statement at the end of 1967 shows a net profit before taxes of \$534,000. Does that sound about right?

A. May I see the document?

Q. You certainly may.

(Witness looks at exhibit.)

\* \* \* \*

A. December of 1967 shows the net profit before--

Q. Yes.

A. Taxes of \$534,356,000.

Q. Thank you. As a matter of fact, 1967 was a very good year for the Sigurd plant, was it not?

A. I would say that it must have been a good year.

Q. And at the time that you were operating in 1966 and most of 1967, the sales that were being made out of the Sigurd plant was being credited with the sales to the ultimate customer -- the purchase price that the ultimate customer paid, was it not, on that Profit and Loss statement?

A. Could you elaborate on this just a little?

Q. Well, when you got an order from a customer at the Sigurd plant and you sold this lathe and board, gypsum board, the Sigurd plant was credited with the sales price of that ultimate outside customer, was it not?

A. I would assume, yes.

Q. That was true in 1966 and most of 1967, was it not?

Tr. 20]

A. I would assume whether directly or indirectly. I didn't particularly check that item. I don't know.

Q. But as far as you know you were credited with the sale price to the outside customer?

- A. I assume he got I got some credit for it, yes.
- Q. All right. Now, as a matter of fact, 1968 was the was the last profitable year that you have had at the Sigurd plant according to your plant profit and loss statement, was it not?
- A. If that's what the statements indicate, sir.
- Q. Well, you're pretty familiar with what your plant profit and loss statement shows subsequent to 1967?
- A. I am, but I'm not sure what it is for 1969. May I see that P & L Statement?
- Q. We will have to dig it out.
- (Mr. McCarthy hands Profit and Loss Statement to witness)
- A. December, 1968, shows a deficit of \$90,000.00.
- Q. Yes.
- A. I don't recall those figures.
- Q. You had a deficit in 1968, '69, '70, had you not?
- A. I believe there has been one for '69 and '70, yes.
- Q. And you have another deficit in '71, will you not?
- A. I think it's a little early to present that. I don't know.

- Q. And it was in about the latter part of 1967, was it not, Mr. Hummel, that the Lovell plant came into operation?
- A. I don't remember when they started. I think that's a matter of record, whatever the date might be.
- Q. I am sure it is. I think it will be agreed it

[r. 21]

was the latter part of 1967 that Lovel came into operation.

- A. All right, sir.
- Q. And when they did come into operation, it was determined by the officials of Georgia-Pacific Corporation that the Lovel plant would serve the Northwest market, which the Sigurd plant had previously served; isn't that true?
- A. I would guess, yes.
- Q. Well, that is the fact, is it not?
- A. All right, fine.
- Q. And thereafter if you shipped any materials other than--and I think you were still permitted to ship plaster to fill a car out with other products; isn't that correct?
- A. Yes.
- Q. But if you wanted to ship a whole car-load of gypsum board, you had to get permission from Portland?

A. Yes.

Q. From Mr. Richards, didn't you?

A. Yes.

Q. So close as far as any effective thing is concerned you were out of the Northwest market?

A. We were reduced so far as shipments.

Q. That's right. Just to filling out cars which already had plaster on them?

A. It would be a specific product that they ordered from the Sigurd plant.

Q. All right. Products which couldn't be gotten any place else?

A. Not necessarily.

[Tr. 22]

Q. Then as far as goes that occurred the latter part of that profitable year of 1967, so that during 1968 you really didn't have the benefit of that Northwest market at all, is that correct, except on this very reduced level?

A. That's correct.

Q. And then being familiar as you are with the Acme plant, isn't it a fact that in 1967 the Acme plant began to make most of the shipments of gypsum board into the Southern California market?

MR. TAYLOR: If you know, Mr. Hemmel.

A. I don't know that they shipped most of it.

Q. Well, your shipments into Southern California were very much reduced in 1967?

A. That's very possible.

Q. The latter part of 1967; isn't that the fact?

A. I presume that they were reduced, yes. I would have to go back and verify these figures.

Q. And the market that you were told to serve was the Bay area; isn't that right?

A. Yes, that was my prime market.

Q. That was your prime market?

A. Yes.

Q. And you were pretty much confined to that prime market, were you not?

A. Because of price, yes.

Q. Well, as a matter of fact, the Sigurd plant could ship into Southern California cheaper than the Acme plant, could it not?

A. No. I could have shipped into Southern California if I could have got my in plant cost low enough to make a

Q. 23]

profit.

Q. But I'm talking about the freight rates.

A. I'm talking about the total price.



- Q. Well, I'm talking about the freight rates so far as the freight rates are concerned.
- A. I don't know. I wouldn't compare--
- Q. The freight rates into Southern California were cheaper from Sigurd than they were from Acme.
- A. I'm concerned with the total.
- Q. All right. I understand what you're concerned with, but answer my question if you will please.
- A. Will you restate it please?
- Q. So far as freight rates are concerned, could ship cheaper from Sigurd than Geopac could ship from Acme into Southern California; isn't that correct?
- A. I don't know. You see, I'm not concerned with the freight rates.
- Q. All right. So far as freight rates are concerned, Sigurd could ship just as cheaply into the Northwest as Lovell could. It's just a standoff, wasn't it, so far as freight rates were concerned?
- A. I'd have to check them.
- Q. You don't dispute that that might be a fact?
- A. That it might have been, no.
- Q. Now, isn't it a fact that in 1968 and every year since 1968, when sales were made from the Sigurd plant, that you were credited at the Sigurd plant with a price of that material rather than the

price to the ultimate customer?

A. I don't know that that's true.

Tr. 24]

Q. You don't know whether that's right or not?

A. No, I do not.

Q. Is the price that you sell, we'll say, using that term in quotes to a distribution center the same price that the distribution center sells to an ultimate customer?

A. I don't know.

Q. You don't know?

A. I don't, no, sir. I'm not involved with the accounting procedures to that extent.

Q. Well, as a matter of fact, what is the capacity of your plant at Sigurd?

A. At one hundred percent capability?

Q. Yes.

A. Near 140 or 141 million feet.

Q. Well, as a matter of fact you ran pretty close to that in 1967, didn't you?

A. Was that the year we ran ninety-seven percent capacity?

Q. That was the very profitable year that I just showed you?

A. Yes.

Q But you haven't run near to that capacity at any time since then, have you?

A. No.

Q. In fact it has been going downhill, hasn't it?

A. Generally from the 1970.

Q. From 1967?

A. Well, from the ninety-seven percent.

Q. Which is in 1967?

A. Oh, all right.

[ Tr. 25]

Q. Now, it's a fact, is it not, that in about 1968 the Johns-Manville Corporation acquired the Apex plant or Pabco Plant, I guess you call it, which is located at Apex, Nevada?

MR. TAYLOR: Again, if you know.

A. I don't know the date.

Q. It was about that time, was it not?

A. All right, fine.

Q. And it's a fact, is it not, that Georgia-Pacific entered into an exchange agreement with Johns-Manville Corporation whereby Johns-Manville at Apex was to manufacture certain products for Georgia-Pacific, certain gypsum board products?

A. I believe there was some sort of an agreement.

Q. That's right, and the Georgia-Pacific plants were to manufacture some product for Johns-Marville: isn't that right?

A. Now, so far as the agreement, I have no knowledge of that, but we did make some board for J.M., yes, sir.

Q. And J.M. made some board for Georgia-Pacific at Apex?

A. I believe.

Q. You know that, do you not, Mr. Hummel, because the orders for that product at Apex, so far as Georgia-Pacific is concerned were channeled through the Sigurd plant, were they not?

A. That's right, but I'm not sure it was the year 1968.

Q. Well, it was somewhere around that time, was it not?

Tr. 26]

A. Yes, I know that they did make some.

Q. All right. And so when any one of the California branches wanted to place an order for a product at the Apex plant, they would have to send an order form to your plant, would they not?

A. I don't recall the exact procedure, but we did handle some of the paper work.

Q. You handled the paper work?

A. In the office, yes, sir.

Q. All right.

A. I didn't, myself.

Q. But people working under your jurisdiction did?

A. Yes, sir.

Q. All right. And when an order would come then you would TWX, I guess you call it, Apex to release so much material under the Georgia-Pacific brand to the branch or whichever one of the Georgia-Pacific branches would place the order from California?

A. I don't know the exact procedure, but it would generally follow that, I suppose.

Q. And this was really orders which went to Apex, Nevada, which might very well have gone to Sigurd and you might have filled? Isn't that true?

MR. LATIMER: I object to that on the ground it is argumentative.

MR. McCARTHY: Well, I am leading the witness and I'm entitled to lead an adverse witness.

THE COURT: He may answer if he knows.

A. I don't know where those orders would have gone.

Q. They came from California, did they not, market

[Tr. 27]

which you at one time had been serving exclusively?

- Q. I didn't serve it that exclusively. We had competition in there and it increased through the years.
- A. I'm talking about exclusively as part of Georgia-Pacific's concern.
- Q. Not exclusively, no.
- Q. You served it all exclusively except Southern California, which you shared with Apex or Acme, isn't that true?
- A. That's possible, yes.
- Q. Now, I want to show you some documents, Mr. Hummel, and I show you what has been marked as Plaintiffs' Exhibit 4 which is from Mr. Hummel to Mr. Richards, dated March 7, 1968, and would you look at that please?

(Witness looks at exhibit.)

- Q. Now, do you recall that document? I assume you have been reviewing these documents these last few days?
- A. I haven't, no.
- Q. Okay. Do you recall this, Mr. Hummel?
- A. Not particularly. I can read the fact that I have written it, but I can't recall it particularly.
- Q. Well, you say here: "Subject, dated March 7, 1968. Subject: Sigurd Production Capacity for 1968. This is addressed to Mr. T. W. Richards." He's the production manager, isn't he, in Portland?
- A. Yes.

Q. You say, "That the Sigurd plant production set at one hundred percent capacity, it will be extremely difficult to achieve if business continues as it was in February. Sigurd plant was down eleven days due to the lack

[Tr. 28]

of board and plaster business. This was further complicated by a very limited storage capacity and wide product line and inventory. We would have to be assured of steady business volume or adequate warehouse storage to even out sporadic sales through larger inventory and to maintain constant production schedules. The total days lost to date is almost forty percent of total days lost in 1967." That would indicate you were somewhat worried about getting enough orders to keep that plant going, were you not, Mr. Hummell?

A. I was concerned with getting more warehouse space.

Q. And also more orders, more business?

A. More warehouse space so I can inventory and increase business.

Q. And get more business, sure. I show you plaintiffs' Exhibit 5, which was the reply you got from Mr. Richards, if you will identify it, I'll read it out loud so the court will know the contents of it.

(Witness looks at exhibit.)

A. All right, sir.

Q. This is in reply to the one I just read, dated March 10, 1968. "I am in complete

agreement with your position in regard to your letter of March 7, 1968. Part of the problem is the result of the Johns-Manville purchase of Pabco--that's the Johns-Manville purchase of Pabco, isn't it?

A. Yes.

Q. At Apex?

A. Yes, sir.

Q. And that would refresh your recollection that that

[Tr. 29]

took place in 1968, wouldn't it?

A. Thank you.

MR. TAYLOR: What's the number of that document, Mr. McCarthy?

MR. MCCARTHY: Exhibit 5.

Q. "The other part of the problem is the start up of the Lovell plant. I am applying as much direct pressure to the sales department as I can and am most hopeful of greater business for both Sigurd and Lovell. It is because of this problem that I would ask that you investigate additional warehousing at the Sigurd plant." Incidentally, did you ever get that additional warehousing?

A. Not yet.

Q. Not yet. Does this sort of allay your fears and think you were going to get more business?



It says: "This will confirm--subject: Sigurd plant--this will confirm your conversation with Mr. McKaskell when you were in Portland today. We need orders for an additional five hundred thousand square feet per week over the present order level out of Sigurd. It is assumed that the bulk of this will go into Northern California--that had been assigned to you as your prime market, had it not? "But all of it cannot be absorbed there and will need the assistance of Hans Umbriet and place additional orders at Sigurd for his area." Now, Hans Umbriet was also another salesman down in the Los Angeles area, wasn't he? "Of course this should not be done at the expense of--of course this should be done at the expense of Las Vegas volume rather than Acme." In other words, what he's saying is that the orders shouldn't go to Apex plant in Nevada at the expense of Acme, sending the orders to Acme, to the Georgia-Pacific plant there, but it doesn't say anything about not doing it at the expense of Sigurd though, does it?

3. No.

[Tr. 31]

\* \* \* \*

4. There's a P.S. on that letter which says: "P.S.: The attached copy of TWX to Ernie Reynolds--he was a salesman in the Northwest region in charge of the Northwest, wasn't he?

5. Yes.

6. "Indicates that we need this additional business for Sigurd. Recently we have

been making some shipments into the Northwest from Sigurd rather than Lovell." Now this TWX attached to this from Mr. Reynolds from Mr. Myer says: "Effective May 6, all orders for Northwest region should be shipped from Lovell unless covering items not available there."

A. Yes.

Q. Please inform Al Wright and branches." I presume you must have got a copy of that at one time, did you not, those orders from Portland saying that effective that date there would be no more shipments by Sigurd into the Northwest?

(Witness looks at exhibit.)

A. I don't know whether I got a copy of this or not.

Q. But that was a fact in any event, wasn't it?

A. It's pretty much a practice, yes, sir.

Q. Well, it's a fact that effective that date you were ordered not to ship anything more into the Northwest; isn't that true?

[Tr. 32]

A. Unless specifically ordered from Sigurd.

Q. Unless specifically permitted by Portland to ship into the Northwest?

A. Yes, sir.

Q. But you occasionally got special permission to do so?

For various reasons, yes.

I show you Exhibit 7 from Gerald Hunt.  
Now, who's Gerald Hunt?

He's my in plant expeditor in charge of orders and things.

And he works under your supervision, does he not?

Yes.

And this is from Gerald Hunt to Mr. Richards, your boss in Portland?

Yes.

And it's dated May 20th, 1968, not too long after this order went out. And it says: "Sigurd plant still in need of business." Do you recall that?

(Witness looks at exhibit.)

I can read it, but I don't specifically recall this TWX.

Did you get any help so far as you know?

I don't recall what was the result of that was.

Well, according to your Exhibit 8, which dated May 27th, 1968, here's a TWX from Mr. Birch. He was one of the sales up in Portland, was he not?

What's the date on that?

This is May 27th, this is a week later.

All right.

[ Tr. 33]

Q. 1968.

A. I believe he was in Portland at that time.

Q. This is to Mr. Wertz at Portland. He was the Georgia-Pacific salesman in the Bay area, was he not?

A. Yes, sir.

Q. And Mr. Birch says to Mr. Wertz: "Sigurd plant very short of orders. Warehouse now capacity. We will have to shut down Wednesday if orders are not received. Please inform all your branch managers of this critical situation with Sigurd." Do you recall that?

(Witness looks at exhibit.)

A. I don't specifically recall that, but I am sure that it existed and at the time it was handled accordingly.

Q. Here's a TWX dated June 21, 1968, from Mr. McKaskell to Mr. Wertz.

MR. TAYLOR: What number is that?

MR. MCCARTHY: Exhibit 9.

Q. It says, "Sigurd has been advised of transfer of some excess orders at Lovell for shipment to Northern California branches. Please proceed to coordinate with both branches."

A. Excess orders?

Q. That's what it says. Does that surprise you?

No, it doesn't, because the nature of our business, it fluctuates considerably.

\* \* \* \*

Q. 34]

\* \* \* \*

Now, didn't there come a time, Mr. Hummel when you made some complaint about all these orders which were being placed at Apex and were not coming to you?

Well, it's possible, because I've always tried to get all the business I could get by nature.

Well, for example here in June 25th or June 26th, 1968, Gerald Hunt, that's your expeditor, is that what you call him?

Yes, sir.

He sends a TWX to Portland to Mr. Richards, and he says: "Our distribution warehouses are placing a lot of orders with Johns-Manville at Apex, Nevada. In the past three days they have placed nineteen carloads, six cars by G-P, Georgia-Pacific, San Diego and 13 cars by G-P, Anaheim." Wouldn't you say that was pretty much in the nature of a complaint?

Well, that could have been because our customers felt they could get faster service out of that plant. They needed the board and they didn't want to wait for Sigurd or we could have been on a backlog of business.

Well, I'm not asking you to speculate, I'm asking you isn't that in the nature of

a complaint, wouldn't you characterize that as a complaint?

A. No. It's a statement of fact, I'd say.

Q. All right.

MR. MCCARTHY: I will introduce some of these without particularly questioning this witness about them.

Q. Didn't there come a time, Mr. Hummel, to your knowledge where Georgia-Pacific ever started to supply a

[Tr. 35]

California market in 1968 from their plant at Blue Rapids, Kansas?

A. I believe they did ship a little board into California.

Q. In fact a substantial amount of board, wasn't it?

A. I don't know what the amount was.

Q. I show you here a communication dated July 3rd, 1968 from Mr. McKaskell to Mr. Umbreit and again this is the Vice-President of sales in Portland to Mr. Umbreit who is in charge of sales in the Los Angeles area, and he says in this communication: "Sigurd is not shipping into the Northwest except where it is absolutely necessary when mixed cars of plaster are called for," and then in the next paragraph he says: "You will in the future be notified of any movement of Sigurd orders to Blue Rapids ahead of time," which would indicate some of the orders for Southern California were going

to go to Blue Rapids, would it not?

1. They could have had reference to plaster products, couldn't they?

2. They could have, but they could also--

3. I think it could.

4. But the facts would also show they were shipping some gypsum board and--

MR. TAYLOR: If the court please, I object to this line of questioning. Now, this is typical. This witness is not a party to that document. We don't object to the document. I think that--

\* \* \* \*

[r. 38]

\* \* \* \*

1. I am passing 14 for the moment. I show you, is it a fact that in July 1968, you were again calling for help as far as business for the Sigurd Plant is concerned?

2. I would send one of those if it got down to less than a three or four day backlog, as a matter of course.

3. I see. That is an example of a call for help, is it not? Or at least an appeal for more business?

4. I would say that it makes them aware.

5. I have here Plaintiff's Exhibit 16 to Mr. Humel from Mr. Richards, your boss, to you, dated July 16, 1968 and it is

entitled "Shipments into the Northwest". It says "I note for the week ending July 11th that the Sigurd Plant shipped 631,000 square feet of board into the Seattle Market while Lovell shipped 333,000 square feet into the San Francisco Market. This is a considerable freight penalty in that your freight from Sigurd to San Francisco is 56¢ versus Lovell's 81¢ rate. I find it difficult to imagine 631,000 square feet of board that Lovell does not or cannot manufacture. Please have Gerald Hunt give me a breakdown of the orders going into the Northwest Market or a copy of the orders for the next 30 days.

[Tr. 39]

We cannot continue to pay a freight penalty in order to suit the distribution division's idiosyncracies. Do you recall that communication?

- A. Not this one in particular but I know that there have been instances where we would give him a breakdown for one reason or another.
- Q. Mr. Richards was rather disturbed, was he not, that you had been shipping into the Seattle Market rather than the Lovell Plant?
- A. I told you I was competitive and would get all the business I could.
- Q. It's been pretty tough going at times, hasn't it not?
- A. Not necessarily.



Well, here is a communication, Mr. Humel, Exhibit 17 from Gerald Hunt, your expeditor, to Mr. Richards in answer to this communication I just showed you and he says in answer to your letter to Mr. Humel of July 16, 1968 entitled Shipments into the Northwest. The Northwest Area now includes all of the States of Utah and Idaho which is in the main part, the Sigurd Market and not a Lovell Market. In recapping the weeks ending July 11, 1968, I find that only 175,680 went into the Lovell Market Area and each of these cars had items which could not have been furnished by Lovell. They were mainly lathboards with a small amount of plaster. I will, however, send you a copy of each order that we ship into their market area for the next 30 days. \* \* \*

\* \* \* \*

[Tr. 40]

\* \* \* \*

Passing 18. I show you the Plaintiff's Exhibit 19 to Humel from Richards which is dated July 30th. It says permission to ship Valley Lumber, Grants Pass, Oregon, this one order. This would be an example, would it not, that where you wanted to ship a load of gypsum board into the Northwest you had to receive permission from Portland?

It could have been a specific request that it wouldn't even relate to what you are trying to find.

If you did ship into the Northwest a straight load of gypsum board, you had to get permission and permission was generally given in this fashion?

A. -- profit from that.

Q. Just answer my question; this would be the kind of permission you would have to receive to ship a straight load of gypsum board into the Northwest, would it not?

A. Maybe, yes it was.

\* \* \* \*

[Tr. 44]

\* \* \* \*

Q. Passing 28, 29, 30. Ordinarily Salinas, California, would be in the Bay Area and would be in the prime marketing area of Sigurd, would it not?

A. It has been, yes.

Q. And you would customarily regard that as market that you would be serving, isn't that right?

A. I would say, yes.

Q. Didn't there come a time when the powers in Portland decided that they would serve Salinas out of Acme?

[Tr. 45]

A. It might have been for a freight advantage or total profit advantage, I don't know.

Q. You say a freight advantage or total profit advantage?

A. It could have been, I don't know.

\* \* \* \*

Well, in Plaintiffs' Exhibit 31 Mr. Burch says concerning our recent conversation I would like to seek your cooperation in placing all gypsum wall board orders for Salinas at Acme. We have a crazy freight rate at Salinas which makes it extremely unprofitable for us to ship that branch out of Sigurd. Then in Exhibit 32 the Freight Department comes back to Mr. Richards and says, under date of June 13, 1969, we are confused by your statement that it is more profitable to ship Salinas, California, from Acme rather than from Sigurd. Our check with the current 120,000# rate from Acme to Salinas reveals the rate of 78¢ per hundred weight and that the transportation charges are therefor 6¢ per hundred weight cheaper from Sigurd. Since this date have you been permitted to ship into Sigurd?

Q. Into Sigurd?

A. Into Salinas?

Q. I have shipped into Salinas.

A. Since June of 1969.

Q. I would suspect that I have, yes.

A. You just suspect.

Q. 46]

A. I would have to go back and verify it if I told you that I would just be guessing.

Q. And in June '69, June 12, 1969, June 11, 1969, actually, Plaintiffs' Exhibit 33, Sigurd Plant needs orders to maintain a five-day schedule. Please advise distribution centers. Isn't that an example of a

cry for help?

A. I guess.

\* \* \* \*

Q. Plaintiffs' Exhibit 35 is a monthly report of business conditions from Mr. Jorgensen to Mr. Richards. Mr. Jorgensen is the manager of the Blue Rapids Plant in Kansas, is he not?

A. What are the initials there?

Q. They are--

A. We have two Jorgensens there.

Q. This is J. S. Jorgensen, Blue Rapids Plant?

A. That would be Shar.

Q. And he talked under the heading "Service". The extension of our marketing area to more distant points during the month lengthen the turn around time on our flat car pool

[Tr. 47]

resulting in some shortages in mid-month. This could probably be attributed to the movement of fourteen of our cars to the Los Angeles market. That would substantiate your statement would it not, that the Blue Rapids Plant was sending some gypsum products to the Southern California market?

A. I don't recall that I made that statement.

Q. Well, it is a fact is it not?

A. Apparently, it is.

\* \* \* \*

[Tr. 48]

\* \* \* \*

Q. Here is Exhibit 41 which is a communication from Mr. Niederkorn, he is some sort of a sales official up in Portland was he not?

A. Yes ye was.

Q. It is addressed to a Mr. Umbreit who is your sales manager down around Los Angeles, I believe, which is entitled "Shipments from J-M Plants". Johnsmansville, I think we agree. It's talking about--it says, to sum up our approved shipping methods the following is offered by the plant. Apex, Nevada, 1-rail shipments, billed at rail price, Sigurd pays railroad freight bill. Does this mean, Mr. Humel that when

[Tr. 49]

one of the California branches ordered some products from the Apex plant of John Mansville, which order is processed through you, that your plant is charged with the freight on that shipment?

\* \* \* \*

Q. I don't know what they would have been referring to there or what the conclusion was. It is evidently asking a question and for comments on it and I don't know what the decision was.

\* \* \* \*

Q. All right. Did it occur to you, taking pride in your plant here at Sigurd, that as far as your profitability was concerned that it was somewhat unfair for you to be charged with freight on a shipment out of Apex to some of the California branches of Georgia-Pacific and you didn't get the benefit of the sale of the gypsum board itself?

A. I am sure that I would never allow that.

Q. You would never allow that?

A. Not within my authority range, I would voice an opinion.

[Tr. 50]

\* \* \* \*

Q. That wouldn't do your balance sheet any good, your profit and loss statement any good, would it, to be charged with freight for shipments out of Apex?

A. No, sir.

\* \* \* \*

[Tr. 52]

\* \* \* \*

Q. Is it a fact, as a matter of fact, I think you have agreed with me that production since '67 had gone downhill generally speaking. When your volume drops off and your fixed costs remain the same, of course, that presents quite a problem doesn't it, to a manager?

- Q. Well, we've been fortunate in being able to decrease our in-plant costs in view of that. Now our volume hasn't totally dropped since 1967.
- A. Not totally, but it has declined, hasn't it?
- Q. It has come back, too. I would say in relation to our competition we have done a lot better.
- A. But in relation to Acme and Lovell, you have done a lot less, too.
- Q. I don't know that that is true.
- Q. You will agree with me that as a general proposition that when your volume drops off as far as your orders are concerned and your fixed costs remain the same, of course, your profit of the plant is going to shrink, isn't it?
- A. Well, I could say that that wouldn't necessarily

Tr. 53]

be true.

Q. I see.

- A. I could have shipped into Southern California at any time if I could have made money.

\* \* \* \*

- Q. Here is Plaintiffs' Exhibit 47 from Mr. Umbreit the Los Angeles Man, to the Branch Managers, it says.
- A. Was I copied on that.

Q. No, you were not? It says we have received instructions from our top management in Portland that the eight branches in the Western Region drawing materials for the Acme Plant will have to weekly place orders totalling 2,110,000 square feet of wallboard at this plant, speaking of the Acme Plant. We were not asked to try and reach this goal, we were told to reach the target immediately. And he lists the branches here and among the eight are Anaheim, Los Angeles, Riverside, San Diego, San Fernando. Those were all places to which you have from time to time shipped?

[Tr. 54]

A. And still do.

Q. From time to time. Not in the quantity you once did?

A. I am shipping them as much now as I ever did.

Q. Acme is shipping a good deal more, isn't it?

A. I am shipping all I can handle.

Q. You mean you have got all the business you want?

A. Right now, I have got all the business I need.

\* \* \* \*

[Tr. 61]

\* \* \* \*

CROSS-EXAMINATION



BY MR. TAYLOR:

1. Mr. Hummel, in your direct examination you discussed the general problem in the industry or you mentioned a general problem in the industry. Will you tell us what you meant by that, sir?

2. I had reference to the general economic situation that was created by the slow down in building and was affecting all of the industry at that time pretty much nation wide, but originated, I believe, first in California and then spread to the East.

3. Now, how many years, sir, have you been involved personally in the gypsum industry?

4. About 13 years.

5. Now, would you compare for us the general economic conditions in the industry from your experience in the three years concerning which Mr. McCarthy asked you so many questions, 1968, 1969 and '70, and the other ten years?

6. Well, I would say generally, there is no real comparison excepting extreme contrast, the last three years

7. 62]

the bottom seemed to literally fall out of the whole market.

MR. TAYLOR: I have no further questions.

\* \* \* \*

[Tr. 63]

\* \* \* \*

GLENN EDWARD WILSON

called as a witness by the Plaintiff, being first duly sworn, took the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR. MCCARTHY:

\* \* \* \*

Q. State your name please.

A. GLENN EDWARD WILSON. I live at 242 Iron Mountain Boulevard in Lake Oswego, Oregon. That's a suburb of Portland.

Q. And you are Vice-President of Georgia-Pacific Corporation, are you not?

A. That's correct.

[Tr. 64]

Q. And how long have you been Vice-President?

A. Since early 1968.

Q. That's a corporate Vice-President?

A. That's correct.

Q. And you are also general manager of the gypsum division of Georgia-Pacific Corporation?

A. Yes, sir.

Q. And how long have you been General Manager?

A. Since mid 1969.

Q. All right. Will you please tell us what connection you have had with the gypsum division of Georgia-Pacific since the merger of Bestwall and Georgia-Pacific?

A. At the time of the merger in April of 1965, I was Vice-President of manufacturing of Bestwall Gypsum Company. At that time that we were acquired by Georgia-Pacific I became a division Vice-President of Manufacturing for Georgia-Pacific.

Q. And specifically Vice-President of the Gypsum Division?

A. Yes. But I was not a corporate Vice-President at that time.

Q. But you were in effect in charge of the Gypsum Division of Georgia-Pacific in all respects except sales; is that correct?

A. Except sales up until mid 1969.

Q. Then you became the head man so far as sales is concerned also?

A. That's correct.

Q. And what was your position with Bestwall? I think you said you were Vice-President also?

Q. 65]

A. Yes. I began my experience in Bestwall in 1958, as a production manager for their paper operations. I was also a production manager for the gypsum operations, was

assistant to the President and then Vice-President of manufacturing.

Q. And when did you become Vice-President of Manufacturing for the Bestwall Company, approximately?

A. Oh 1962, 1963, about that time.

Q. And that was a corporate position--

A. Right.

Q. As Vice-President?

A. Correct.

Q. And did you have anything to do with sales in Bestwall?

A. I'm not sure that I can really answer that question, having to do with the operation of a plant or plants you have to have something to do with sales. I did not personally direct any sales.

Q. But you knew generally what was going on.

A. That's correct.

Q. At the time just prior to the merger of Bestwall and Georgia-Pacific in April of '65, how many gypsum plants did Bestwall have?

A. We had nine.

Q. And would you mind telling the court where they were located?

A. We had a gypsum plant at Wilmington, Delaware, Brunswick, Georgia, New Orleans, Louisiana, Akron, New York, Grand Rapids.

Michigan, Fort Dodge, Iowa, Blue Rapids,  
Kansas, Acme, Texas, and Sigurd, Utah.

Tr. 66]

Q. Sigurd, Utah, being, of course, the  
westerly most plant?

A. At that time.

Q. Just prior to the merger?

A. At that time, yes.

Q. And would you mind telling me what kind of  
sales force the Bestwall Gypsum Company had  
in the westernmost area of the United  
States just before the merger in April of  
'65? They had salesman out, did they not  
in the western parts of the United States?

A. Yes, we did have a field sales organization.

Q. Where were they located in the western part  
of the United States?

A. I--

Q. In principal cities?

A. In principal cities, that's correct.

Q. What would you estimate the number of that  
sales force to be?

A. I couldn't estimate it. I wasn't that close  
to the numbers and people's names and so on.

Q. I think Mr. McKaskell estimated it around  
fourteen or fifteen men, would that sound  
about right?

- A. If he says so, I am sure that's what it is.
- Q. In fact, he was Vice-President in charge of sales for Bestwall, was he not?
- A. That's correct.
- Q. And did you and Mr. McKaskell work close together?
- A. Extremely close.
- Q. I take it that one of your many jobs has been to administer this lease, which is the controversy here between

[Tr. 67]

American Gypsum Trust and Georgia-Pacific has it not?

- A. It would have to be in my position.
- Q. I think you made available to me or one of your lieutenants at least at Portland, this map which has been marked as Exhibit 1.
- A. Yes, sir.
- Q. Which outlines the various shipping areas of the various plants of Georgia-Pacific, although this map is dated 1963.
- A. That is correct.
- Q. And was the Bestwall map which was acquired by Georgia-Pacific, was it not, at the time of the merger?
- A. That is correct.

Q And has been utilized by Georgia-Pacific in connection with this marketing operation?

A A portion of it, yes.

Q Well, a portion of it. I'm concerned with the portion that's on this map.

Q At what particular time?

A Well, as of April of 1965?

Q It was being used.

Q It was being used?

A That's correct.

Q And does this area outlined in blue on this map correctly delineate what was then considered the marketing area of the Sigurd plant?

A In general.

Q Well, in general, are there any exceptions?

A Yes, the Southern California was an exception.

Q Southern California which is marked with stars and

Q. 68]

down here it says, "Southern California will be served by Acme and Sigurd."

A That's correct.

Q Take it then that all of this area outlined in blue which was the Sigurd marketing

area including Southern California, excluding that area which was also served by Acme.

A. At that time.

Q. And to what extent was it served by Acme and to what extent was it served by Sigurd?

A. I do not know in 1965.

Q. You do not. But I think you told me in your deposition that early in 1967 the situation was that Sigurd was serving a majority of the gypsum products in the Southern California area and that Acme was serving what was then the minority?

A. Did I say that? I would have to take a look at my deposition.

Q. I will be very glad to show it to you, sir. Do you dispute the statement that I made?

A. No, I just want to check it.

Q. All right.

MR. TAYLOR: The year, Mr. McCarthy, is 1967.

MR. MCCARTHY: Yes.

Q. Here I'm talking about 1965, I think and the question was and this is on page 23 where we are talking about the split of the market--

A. Yes.

Q. "Would you say it was sort of a 50-50 position or-- Answer: I am not sure."



11. 69]

That's what I meant, I am not sure and I wasn't sure what it was.

And you went on to say, "I can't give you an exact breakdown. The majority of what was sold in Southern California would have been shipped from Sigurd," is that a correct statement of fact, sir?

I don't know.

You don't deny that you made that statement?

I made that statement. I made the statement that I was not sure and I can't be sure because I don't have any records that tells us exactly.

All right, sir. I call your attention to page 63 and we're talking about the Apex market, Apex, Nevada. "And would this ordinarily have been the market area of the Sigurd plant? Answer: The shipments were made into Southern California which would have been within the prime marketing area of Acme at that time. Question: I see, and how long has Southern California been the prime marketing area of Acme? Answer: Since 1967.

That's correct.

Did you make that statement?

Yes, I did.

And is that a correct statement?

That is a correct statement and I have records to 1967, but I do not have records for 1965.

Q. And it went on there, "Question:" After you said 1967, "Question: Prior to that time it was Sigurd. Answer: Sigurd had the greatest majority of shipments prior to that time." Did you make that answer.

A. I made that answer.

[Tr. 70]

Q. Is that a correct answer?

A. I'm not sure.

Q. Do you deny that that's a correct statement of fact?

A. I made the answer, but I can't be completely sure without saying that I felt that that was a true statement, to the best of my knowledge it was a true statement.

Q. And do you still feel it is a true statement?

A. To the best of my knowledge, yes.

Q. Thank you, sir. At any rate since 1967 there is no doubt but what the majority of the shipments to Southern California have been from Acme?

A. That's correct.

Q. And a relatively small number from Sigurd--a small amount I should say.

A. What do you mean by a small amount?

Q. Well, certainly less than fifty percent, wasn't it?

Q. I think it was less than fifty percent, but I suspect the total was higher than it was in 1965.

A. See. All right. Now, except for this problem we're having just now about Southern California, there was no question but what in 1965, the rest of this area outlined in blue was the Sigurd market, was it not?

Q. That was shipped by Sigurd?

A. Yes. Now, I think when I took your deposition in January, 1971, you said there was another marketing map being made up to replace the one then in existence?

Q. That is correct.

Q. I assume that map has now been completed?

A. 71]

Q. That map is in its final stages right at this time.

A. From January, it's still not finished; is that right?

Q. It's a pretty long and complicated procedure to check individual counties of the United States on freight rates with variable plant costs and delineate an area, Mr. McCarthy.

A. I see, and it's not completed yet?

Q. I say it's in its final stages of preparation.

A. Well, there's no question, of course, that Lovell came on in the latter part of 1967?

- A. That's correct.
- Q. And when it did come on line, then the prime marketing area for Lovell was the Pacific Northwest; isn't that correct?
- A. Yes, the main marketing area was, yes.
- Q. And you said that Southern California became a prime marketing area of Acme, after 1967?
- A. Yes.
- Q. And then the prime marketing area so far as the Sigurd plant then in 1967 was determined to be the Bay area of San Francisco; isn't that correct?
- A. Salt Lake City, the intermountain area and the Bay area?
- Q. Yes. Now, I also show you here, Mr. Wilson, two organization charts which I want to introduce in evidence. One of them is dated May of '65, Plaintiffs' Exhibit 57, and another is dated February of 1968, Exhibit 56?
- A. Yes.
- Q. I think you can identify that those are correct charts

[Tr. 72]

of the organization of Georgia-Pacific and it includes the gypsum division?

(Witness looks at exhibit.)

A. That's correct.

and shows the parties at least who held offices as of that date?

That's correct.

I have a document here identified as Plaintiffs' Exhibit 58 dated May 24, 1967 from Mr. K. A. McKaskell who at that time was Vice-President of Sales, addressed to Mr. W. A. Hunt, who was Executive Vice-President of Georgia-Pacific Corporation; isn't that correct?

That is correct.

And a copy of this document was sent to you?

Yes.

And among other things that document is talking about possible purchase of the plant of Gypsum Products of America at Lovell, Wyoming, and says, "Confirming our review last week and also formally recommending that we proceed with this plant, I give you this observation: Based upon our present estimate of 1967 sales in the Northwest, we will be able to achieve 25% market penetration by selling approximately three million feet more in this market. This is a sensible expectation, I think. The balance of the Lovell production would go into the Intermountain area which has more favorable freight rates than if we shipped it from Sigurd. We are also estimating approximately five million feet in Alaska in this study. If we can't get it there, I'm confident we can get it from the Northwest. So in summary and in effect I am completely confident that we can sell to capacity

[Tr. 73]

from Lovell within a reasonable length of time after it's start up. As far as Sigurd is concerned, I also feel confident that the figures that we are putting into the potential type of total market of Central California at 9.6 and Southern California at 6.7%--he's talking about percentage of market penetration, isn't he?

A. That's correct.

Q. "Can be achieved with our distribution advantage. Although we are basing this study on the Sigurd capacity of 120 million feet, by shipping into the State of California I believe that the branches could serve as a reservoir in lieu of a plant warehouse which Sigurd would require if we were to operate at an absolute maximum capacity of approximately 144 million feet." Is that a correct statement of maximum capacity of the Sigurd plant?

A. That would be my estimate of the maximum capacity.

Q. "We are now working on a study which at this time indicates that it will require us to sell an additional one hundred million feet into the State of California should we install another board machine at Acme. I believe that this can be done provided we are able to put the board in warehouses in this state at a cost of no more than two dollars above the estimated cost of the competitive mills located there." And another paragraph which says: "It appears that the volume from Sigurd plus an additional one hundred eight million feet from Acme

would require us to take 13 to 15% of the total potential market. This would be equitable since counting us as a plant there would be a total of 7 manufacturers selling in the market place." In other words, he's going to count Georgia-Pacific with nine plants

Mr. 74]

as only one plant in this sentence.

I don't think he meant that, Mr. McCarthy.

That's the way it sounds, at any rate.

There are 81 gypsum plants.

"However, if we're going to take it to that extent we must be prepared to sell competitively [sic] in case things get rough." Now, it would appear from this document, would it not, Mr. Wilson, that you were going to have a greatly increased production of gypsum board, would it not?

That's correct.

At Lovell and at Acme?

Correct.

And so that you had to get an increased market penetration in order to dispose of that amount of gypsum board, would you not?

Well, we either had to get an increased market penetration or the total market had to increase in size and we would maintain the same penetration, one of the two or a combination.

- Q. Well, perhaps a combination. At least here Mr. McKaskle was thinking in terms of increased penetration, was it not?
- A. That was the point that I was making.
- Q. Of course, when you attempt to get increased market penetration with additional volume of board, the tendency is that is to drive prices down, is it not?
- A. I am not sure that I can answer that one. It depends upon how you would get it. You would get it through increased service to customers that wouldn't affect the market price.

[Tr. 75]

- Q. Well, there is not very much difference in gypsum board manufactured by the various manufacturers, is there?
- A. You mean from a quality physical standpoint?
- Q. Yes.
- A. There's not very much. There is a great deal of difference in the service provided.
- Q. In fact, you interchange with other plants?
- A. That is correct.
- Q. It's treated more or less like it was flour or sugar, isn't it?
- A. It's treated like gypsum board.

\* \* \* \*



\* \* \* \*

Well, I'll show you another document which has been marked Plaintiffs' Exhibit 63 which is another document I obtained from the files of Georgia-Pacific, which has a date on it of June 12, 1967, which was about the time of these negotiations, was it not?

It sounds about right.

\* \* \* \*

I see. Apparently the final proposal was not made available to me. I notice, however, in this document called Exhibit A of this proposal under comments, is this statement: "Prime justification of this purchase is to provide facilities that will permit us to increase sales and profits of gypsum products in the Western market. This is not possible under present conditions, due to the limited capacity of our only plant at Sigurd, serving the intermountain area, the Pacific Northwest, Northern California, and a portion of Southern California. Limited remaining ore reserves at our Sigurd, Utah plant do not warrant in-

creasing productive capacity in that location." And it goes on, "The facility at Lovell will have a productive capacity of eighty million square feet per year, which will be sold in the Northwest and the Intermountain market within an obtainable market penetration. Although Lovell is located some distance from the Pacific

Northwest market there are no known gypsum deposits located in the Northwest and the accessibility of gypsum at Lovell combined with low fuel and power costs will place this plant in a very competitive position with other manufacturers throughout the market. The facility near Lovell is owned by the Gypsum Products of America which was formed by local capital to build a gypsum wallboard plant. This facility was brought to our attention and after evaluation of all aspects we reached the tentative agreement to purchase the assets of Gypsum Products free from encumbrances for \$3,200,000. Terms of the purchase provided for the assumption of a 4-1/2% ARA loan with principal and interest totaling \$2,100,000. This leaves an actual cash appropriation for the assets of \$1,100,000. The total investment of \$3,600,000 represents the replacement value of the facility and places no value on the gypsum deposits. The plant has been designed and constructed in such a manner so that a small expenditure for additional mining equipment could increase the wallboard capacity by fifty percent. This expenditure will not be made until our sales position warrants further increases to plant productive capacity." Now do you recall those arguments in favor of purchasing Lovell, Mr. Wilson?

A. Yes, in fact I wrote that.

Q. You wrote this?

A. Yes.

A. Yes.

Q. Well, good. And do you think that those arguments are as valid today as when you wrote them?

Q. Oh, absolutely.

Q. Good. Now, how about this statement: You say, "That justification for the purchase of this plant is due to the limited capacity of our plant at Sigurd, which is now serving the whole west coast market, because the limited remaining ore reserves at our Sigurd, Utah plants do not warrant increased productive capacity at that location." Now as of this date, when you wrote this, which I suppose was in June of '67--

A. Yes.

Q. What were the ore reserves to your knowledge of gypsum?

A. At that time?

Q. At that time.

A. I can't answer that without some back up documents, Mr. McCarthy.

Q. Well, what are the ore reserves now?

A. At Sigurd?

Q. At Sigurd.

A. In my opinion, the ore reserves would be at the level that we have operated, say, the last five years, the ore reserves would total fourteen to fifteen years.

Q. In other words, you are talking about the demised premises, the leased premises?

A. No, I'm talking the total.

Q. Now, in talking about the total.

A. Yes, sir.

.....

.....

Q. Now as a matter of fact with some capital expenditure or investment of this machinery, that you speak of, the productive capacity could be brought up considerably, couldn't it, with some capital expenditure?

A. I think it would take a very, very large capital expenditure.

Q. And don't you think fifteen years of reserves is adequate to make that kind of capital expenditure?

A. If you doubled the capacity of that plant, you wouldn't be talking about fourteen to fifteen years, you would be talking seven to seven and a half years of life and you couldn't make the type of capital investment that would be required with only a seven to seven and a half years of life.

Q. Well, you say that the capacity, you said in the proposal that the capacity was 144-

A. Eighty million feet, I think is what it said.

Q. Well, 144,000,000 feet.

A. Oh, or standard, yes.

Q. The standard maximum capacity?

That is correct.

What would be the capital expenditure involved to bring the Sigurd plant up to continue to produce at this level that you stated in 1967 of 144 million feet?

It doesn't need any capital investment, it only needs orders.

It only needs orders. In other words the plant

[84]

is fully adequate right now to produce up to 144 million feet?

Well, 140 to 144, that's correct.

All right. In 1968 it produced 122 million feet.

1968?

1968?

All right.

In 1969 110 million. Am I talking right, million?

Yes.

123 million in '68 and 110 million in '69?

Correct.

And 118 million in 1970?

That's correct.

- Q. So that the only thing that we've done is to bring it up to 154 million fact orders?
- A. That's correct.
- Q. It is a matter of fact, you've had plenty of orders and you've had plenty of orders at Acme, haven't you, to keep that plant going at a very large capacity and in fact increased the production there?
- A. Yes, but Acme has run at a lower percent of capacity than Sigurd has operated.
- Q. In fact, you have increased Acme from 14 million in 1966 to 330 million in 1970; isn't that correct?
- A. That's correct.
- Q. And you haven't been short of orders there?
- A. Business has been better in the Southwest than it's been in the West.
- Q. And in Lovell you have increased from 55 million
111. 851
- in 1968 to 69 million in 1970; is that correct?
- A. That's correct.
- Q. So you haven't been short of orders there?
- A. No, but Sigurd showed a greater increase last year than Lovell did.

\* \* \* \*

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\* \* \* \*

Q Now, this plant at Acme was enlarged in the later part of -- I guess it was being enlarged during 1968 and was gone into production the latter part of 1968?

A I think that's right.

Q And here is a letter written by Mr. Brooks as the sales manager, isn't he for the Southwest region?

A Yes.

Q It says, "To branch managers, dated April 12th, '68, and it says: As you undoubtedly know, the growth Company is growing." The growth company is Georgia-Pacific, is it not. That's your trade--

A Yes.

Q One of the trade names that you have used in the past?

A Yes.

\* \* \* \*

.. 87]

Q "As you undoubtedly know, the growth company is growing at Acme, Texas, by an addition of a multi-million second production line. This substantial increase in production capacity will place this plant at probably the largest gypsum complex in the world." Is that a true statement? Is that the biggest gypsum complex in the world?

- A. I don't know that, Mr. McKaskell, but I will note that was written from Dallas, Texas, and that might have a hand in it on it.
- Q. That may be true. At any rate, it is one of the largest gipsco plants in the world.
- A. It is one of the largest ones, that's correct.
- Q. Here's a communication written by Mr. McKaskell, with a copy to you from Mr. E.G. Reynolds. Mr. Reynolds is a sales manager in the Northwest area?
- A. Yes.
- Q. And among other things, Mr. McKaskell says he says: "Incidentally the State of Wyoming where your plant is oddly enough, has virtually no coverage--" He's talking about sales coverage?
- A. Yes.
- Q. Why would he refer to the State of Wyoming where your plant is located? Does Mr. Reynolds have some ownership interest?
- A. It could be Mr. McKaskell way of making up his sales organization by saying when that plant needs an order, that's your plant.
- Q. In other words, when the northwest region wanted to place an order, they would place it at the Lovell plant,

[Ti. 88]

and as far as Mr. Reynolds is concerned, was his plant, is that correct?



That is correct. If the order was within the Lovell shipping area.

Which is the whole Northwest area?

Not Mr. Reynolds' whole Northwest area, because Mr. Reynolds is suppose to--Mr. Reynolds is what we call the manager for the Northwest area, but the Northwest area includes Salt Lake City, Boise and that portion also which is not within the Lovell shipping area.

So Mr. Reynolds wouldn't regard Lovell as his plant if he wanted to get an order for Salt Lake City?

That's correct.

\* \* \* \*

Here is a document, No. 72, Plaintiffs' Exhibit 72, again to Mr. Reynolds from Mr. McKaskell, dated June 12, 1968, in which it is entitled: "Lovell shipments." Mr. McKaskeell [sic] says, "As we discussed, it is absolutely necessary to step up Lovell shipments in line with the ever increasing capacity to produce. The requirement for the next three months and then more after that, but later is a minimum total of 25 CL." What does that mean?

I think it means carloads.

Carloads per month in addition to present volume." Then he goes on, "Attached is an outline of the Lovell bonus program, which provides for incentives to the branches for achieving the sales volume which we need." And he goes on and gives more pep talk and he says, "As a final

work, we didn't get it until the end of the year, that is, since we had already started the first 12 days of the Lovell program and the Lovell bonus program. It was put out in January.

- A. Yes, sir. I didn't see anything about that.
- Q. It was attached to a letter about the Lovell bonus program.
- A. If I had a copy of it. I didn't pay any attention to it.
- Q. Well, at any rate, bonuses were being offered for increased sales of products out of Lovell?
- A. I assume that they were.
- Q. Was ever any bonus incentives offered for increased sales out at Sigurd to your knowledge?
- A. I can't tell you the exact time, but I know we have offered them from time to time to get something moving.
- Q. Now, attached to this is another communication dated January 14, 1969, from Reynolds to Branch Managers and subject, "Lovell Bonus Program." He said, "I would say the program was very successful for 70% of the distribution centers in the Northwest region. You shipped 100 car-loads of gypsum more in the last half the year than you did during the first half." Then he goes on and lists--
- A. It sounds like they got those 25 cars.

It sounds like it. He goes on and lists where the cars came from, what branch and included in those branches is Salt Lake City, Great Falls. Would they take their products from Lovell too?

(Witness looks at exhibit.)

Apparently Salt Lake City is included in the Lovell bonus plan?

(p. 90)

I can't--I don't know if they were in it or not, but I note that they didn't make any bonus.

Okch, but they appear to be included in the plan so far as this document is concerned?

They could very well have--oh, yes, the Salt Lake City branch has the responsibility for sales in Southern Wyoming, which would be the shipping area of the Lovell plant.

So Salt Lake has the responsibility, but the board comes from Lovell?

Well, they handle the sales of wallboard in Southern Wyoming from the Salt Lake City branch.

I see.

And that's how they would be in the Lovell bonus program.

Well, here we're in June of 1968. Incidentally, when actually did Acme go on line that second machine?



Q. See. Certainly you could not justify the cost of shipping gypsum board from Blue Rapids to the West Coast, could you?

A. No, except you had to maintain your customers and take care of your customers, which we did, even at a penalty to Georgia-Pacific and the Blue Rapids plant, but the customer came first.

Q. Well, in 1967, you only produced 123 million square feet at Sigurd, when you had a capacity of 144; is that right?

A. We had a couple of months in 1968, where we shipped everything that we could make and that's the period that--

Q. That's the period of this cheery note?

A. That's right, the cheery note that Sigurd was oversold and we had to ship some board from Blue Rapids to the west coast.

Q. 92]

\* \* \* \*

Q. Plaintiffs' Exhibit 76, a letter dated June 18, 1968, from McKaskell to G. E. Wilson. He says--again he discusses the quality problem at Sigurd with you, and then he says, "Meanwhile I feel very strongly that unless we can put a product in the California market which is equal to competition, now that we don't have to make a product for the Northwest"--he is speaking, of course, now

Q. 93]

Q. That Sigurd doesn't make products for the Northwest, doesn't he?

A. That's correct.

\* \* \* \*

... 14.

\* \* \* \*

Q. 77, page 20. I know you Plaintiff's Exhibit 77, which is a cover letter from K. D. Wertz. Now, is there a man in the Berkeley area, isn't he?

A. That's correct.

Q. It says, "See below," and he lists McKaskell, Schmidt, just about all the salesmen in the company down there, and he says: "Subject, Gypsum production. I was advised today by Mr. Birch that the Acme plant now has its

[ Tr. 95]

second line in full operation." This is dated October 21, 1968.

A. Mr. Birch might have been a little bit expansive too.

Q. This is Mr. Wertz. Now, has the second line in full operation. "This means that the Southern California branches will no longer take any of Sigurd's production unless there is a lathe or some special board product needed that Acme does not produce." Is that a correct statement: the situation that pertained from then on, so far as Sigurd is concerned?

A. At that time, yes.

\* \* \* \*

Q. I pass 83. Now, Exhibit 84, Mr. Wilson, is an exhibit entitled, "Total rock cost." And I think this was taken out of a book, which was made available when I was in Portland looking at documents.

A. Yes.

Q. 96]

Q. And this shows rock costs as such, for all your various plants?

A. Yes.

Q. And looking at it for the year 1969, it shows rock cost per ton. It shows--

Q. May I see it?

A. Surely. 44¢ for Acme, 44 and a fraction, I rounded it off.

Q. Yes.

Q. For Acme for 1969.

A. Yes.

Q. Blue Rapids \$1.11. Sigurd 81¢

A. Yes.

Q. Lowell 76¢.

A. Yes.

Q. And all the other plants are higher, are they not?

A. Correct.

Q. So that would indicate, so far as rock is concerned that in the order of the expense, it is Acme, Lowell, Sigurd, and then Blue Rapids?

A. That's correct, yes.

Q. This says, "Direct cost per ton." Does that mean that that included also the royalty payments?

A. Correct.

Q. For the rock cost?

A. That is correct.

Q. So that if you could eliminate the royalty payments so far as Sigurd was concerned your rock cost would be down around Acme's, wouldn't it?

A. No.

[Tr. 97]

Q. It would be considerably cheaper, wouldn't it?

A. No, because that included only the 11¢ per ton.

Q. That included only 11¢ per ton?

A. Correct.

Q. But that would take it down some, wouldn't it, take it down 11¢?

A. Very little, but it wouldn't be close to Acme yet.



Well, it would be better than Lovell, wouldn't it?

That's correct, but it wouldn't have been the next year, in 1970.

show you what has been marked Plaintiffs' Exhibit 85, which I think was also supplied to me in Portland. It is called 1970 standard costs. Suppose you explain to the court what standard costs are in terminology of Georgia-Pacific.

Well, it's when we put together each year, the factors that make up our manufacturing costs and we establish what we call a standard which is really a--which we hope is a good projection of what it is actually going to cost the plants to make board and it's both, we hope a good projection, but a goal for the plants to shoot at.

And it is also based upon what the past experience has been at those particular plants, do they not?

To some extent, yes.

It necessarily would have to be so, wouldn't it?

Oh, no, because if we have a plant that had some operating problems the year before, we don't take those operating problems into account.

Except for those unusual circumstances, you do take past performance into consideration very substantially, do you

98)

not?

Q. to the west coast, is it?

- A. Yes, all right. In a lot of cases, if you have stock, I think it is better to have a regular board that the two boards that you have is a regular board of directors and a regular board of directors, is that correct?
- Q. That inch would be the board of directors, or the west coast it would be the regular stock, rather than the regular board?
- A. All right, it is 5 8 inch regular stock?
- Q. Yes.
- A. Now, half inch regular, it shows the standard cost so far as Acme here is \$17.33, Blue Rapids \$21.82?
- Q. Yes.
- A. Lovell \$22.95?
- Q. Yes.
- A. Sigurd, \$22.23?
- Q. Yes.
- Q. Which would make Sigurd at a lower cost than Lovell, would it not?
- A. Mr. McCarthy, we went over that yesterday and we had a figure transposed that that was \$23.22, rather than \$22.23.
- Q. Oh, you've been over this yesterday?
- A. Yes, sir.

Q. I see. Now, what is it for Sigurd?

A. That was last year was \$23.22.

Q. \$23.22.

A. You have some other standard costs that point that out.

Q. 99]

Q. All right, are there any other changes on here?

A. Not to my knowledge.

Q. This was the only item you found yesterday?

A. That's a big item.

Q. All right. Now, let's go to 5/8 inch regular. At Acme, \$21.30?

A. Yes.

Q. Blue Rapids, \$25.02?

A. Yes.

Q. Lovell, \$25.53?

A. Yes.

Q. Sigurd, \$25.07?

A. Yes.

Q. Which is cheaper than Lovell?

A. Yes.

Q. Now, that's the same as what you said that

A. Yes, sir.

Q. All right. What is the cost of the  
material stock you're talking about?

A. Yes.

Q. Okel, Acme, \$23.43?

A. Yes.

Q. Blue Rapids, \$29.69?

A. Yes.

Q. Am I in the right column?

A. Yes.

Q. Lovell, \$31.76.

A. Yes.

Q. Sigurd, \$29.84?

A. That's correct.

[Tr. 100]

Q. Sigurd is cheaper?

A. That's right.

Q. In fact in most categories Sigurd looks  
pretty good except when you compare it  
with Acme, doesn't it, the largest gyps  
complex in the world.

A. I might add this also that Blue Rapids  
be the smallest gypsum complex in the world  
and that's even better.

Q. Now, that's Plaintiffs' Exhibit 86, dated May 27, 1969, from Mr. Umbriet, your Los Angeles man, to Mr. Ken Brown, he's the manager of the Acme plant?

A. At Acme, yes.

Q. He says, "Now that we are once again building up our volume, of shipments from your plant into the Southern California market, intransit fares again rears its ugly head." When he says "once again" and "he's building it up," what does he refer to there? Has there been some succession so far as Acme is concerned?

A. I don't know. I don't know what the time is-- I don't know what--

Q. I said, May 27, '69.

A. That would have been shortly after the start of the second machine.

Q. So the shipments into Southern California from Acme were increasing?

A. That's correct.

Q. In fact, you said that in 1967, Acme was supplying the majority of shipments into Southern California, I take it that they supplied a great substantial amount over and above that?

A. Yes.

Q. In '69?

A. That's correct.



At Reno. It says: "Re Los Angeles District. We have approved ten cars from Blue Rapids for the Los Angeles area."

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What time would that have been?

This was June 25, 1969, a few more than the two you were speaking of, isn't it?

I don't think I referred to two.

I thought you said there had been two cars.

From Lovell into Northern California, but not from Blue Rapids to Los Angeles.

All right. From Blue Rapids to Los Angeles.

I don't really know what was involved.

In view of those costs we just looked at, it doesn't look like it would be a very economical operation to send ten cars from Blue Rapids into Los Angeles?

I can only assure you that it wouldn't have been sent unless we needed the material and couldn't get it from any place else, because we wouldn't have taken that kind of a loss.

Yes, pass. Here's a communication, Exhibit 80, dated July 3rd, 1969, from a weekly condition report from the plant manager at Blue Rapids. It says, "Shipments to the Western regions boosted our weekly board shipments to 2,121,000 feet." I guess it's feet, square feet?

Yes.

- Q. To provide some background, is that a warehouse?
- A. The western region is a prime shipping area to Blue Rapids, because the west region includes Denver, Colorado.
- Q. I see.
- A. Which is really a prime market for Blue Rapids, and that's probably the answer to that one.
- Q. All right. Here's another one from the same

[Tr. 103]

plant, dated July 8th, 1969, in which he says: "That month we made shipments of 14 flat cars to the Los Angeles and San Diego markets." That would be the same time you talked about?

\* \* \* \*

- Q. Well, isn't it a fact that you have--you considered in the latter part of 1970 enlarging the Lovell plant, did you not?
- A. In 1970.
- Q. The latter part of 19-- Well, the latter part of '69, yes, the latter part of '69, and still under some discussion in 1970.
- A. That is correct.
- Q. Did you ever enlarge it?
- A. We're in the process.
- Q. You're in the process of enlarging it?



Yes.

To what extent are you enlarging it?

[104]

We are adding another kettle in the mill.

And what is the magnitude of the capital expenditure for that?

I think the total is somewhere between 450 and five hundred thousand dollars.

Pretty substantial?

But relatively small for a capital expenditure in a gypsum plant.

However, I have here a series of communications, Plaintiffs' Exhibit 94, 95, 96, 97, 98, all pertaining to that subject?

Yes.

Which apparently was on again and off again for a while. Would you now say it is definitely in the process?

It's in process, that's correct.

And when will it be completed?

Sometime early next year.

And to what extent, how many million square feet of additional board production will you have?

It won't change the board production at all. The board machine remains just exactly as it is now.

- Q. What would that increase amount to?
- A. It would be probably 25 to 30 million, say, or 40 to 50 million, that is, a very big increase in capacity.
- Q. Is that production?
- A. Right. It's not being done for that purpose, Mr. McArthur. It's being done to correct a dust problem where we have been installing an electrostatic precipitator in the mill and it's a logical thing to install a kettle, so

[Tr. 105]

we don't have to go back in and tear something out of the mill the next time. As I say it is not designed to give us more capacity, it's a logical thing to do to correct a dust problem.

- Q. But it will increase the board capacity forty to fifty million square feet?
- A. It will give us that availability, that's right.
- Q. And where do you propose to sell that additional production?
- A. In the Northwest.

\* \* \* \*

[Tr. 110]

\* \* \* \*

- Q. I want to show you here Plaintiffs' Exhibit 60, Mr. Wilson, which is a communication dated May 24, 1967, and it's

to Mr. McCaskill and yourself from John H. King, he's your rail rate specialist, isn't he?

He's our Traffic Manager.

Traffic Manager. And the subject is "Rail Rates". Per your request attached is a rate study of gypsum board to West Coast destinations in comparison to Lovell with the railroad station at Hymes, Wyoming. When we are talking about Hymes, we are talking about Lovell, is that correct?

Q. That's correct.

A. And attached to this is a study entitled "Gypsum Board" from various locations and I am sure you have looked at this yesterday, too, didn't you?

Q. Yes, I did.

A. And, it's true, is it not, that as far as Seattle and Portland is concerned the rail rate to Seattle and Portland

is [11]

from Sigurd, Utah, is the same as it is from Hymes, is that correct?

BY MR. LATIMER: What is the date of that document?

MR. MCCARTHY: It is dated May 24, 1967.

Q. And it is also true, is it not, that as far as the rail rate is concerned from Sigurd to San Francisco and to Los Angeles it is 54-1/2 per 85,000# which is a cheaper rate than from Acme, Texas to San Francisco or to Los Angeles?

A. That is correct.

Q. Which is eight per cent, 2000 as shown on the chart?

A. Eight.

Q. 1964 for Sigma.

A. That is correct.

Q. Now, as a matter of fact, we have already supplied your counsel and he has already shown them to you, we had a rate study made of these rail rates on that present time and if you look and it is noted that the respective tariffs are listed thereon--

A. Let me say that I have seen it and we haven't had a chance to check it, but I assume that it is essentially correct.

Q. And this also shows that with respect to those same shipments and destinations to the Sigurd freight rate is equal to Los Angeles into the Northwest and it is better than Acme into either Los Angeles or San Francisco.

A. That's correct. May I see the last date?

Q. Yes.

(Tr. 112)

A. The last date on there is in 1970, 1970 on it.

Q. Yes, November 1970.

A. Yes.

\* \* \* \*

. 113]

\* \* \* \*

Now, here's Exhibit 99, West Coast Freight rates, from Acme, dated December 4, 1970 and this is from John King to Mr. G. E. Wilson, yourself and it is a fact, is it not, that this communication emphasis some sadness in the fact that the rail freight as far as Acme to Southern California have been increased proportionately larger than the same rates from Sigurd to Southern California?

That is very correct.

And you say, it says here, he is complaining about the railroad. Every few days we call them (he is talking about the railroad) to find out when he can expect some relief. We of course, have not gotten a commitment; however, we did learn that they were studying the possibility or giving consideration of a possible reduction, did that ever come through?

Not yet.

Which would limit the freight rate increases from Acme to not more than what had been applied from Sigurd so the proportion is even better than on that study of '67?

Much better.

And in other words, costs more from Acme to Southern California than from Sigurd to Southern California, proportionately?

Not proportionately but as the freight rates moved

. 114]

up the base or the difference between the two has increased.

Q. That's right, which would limit the rate increase from Acme from what it would have had been applied to Standard. But that is this is not really what we want, in other words, you would like it the other way around, isn't that right?

A. Well, we just like to maintain them at a lower level that's true.

Q. We realize this is not what we want; however, there is some glimmer of hope that at least for a slight reduction if we really put the pressure on them. Didn't you say that hasn't worked yet?

A. Not at all.

Q. And then down here, he says, in view of the above the future does not look too bright and we obviously need some help. Would it be possible to completely discontinue rail movement from Acme to Los Angeles? If this movement could be dropped up he thinks he could get some relief. If you discontinue the movement?

A. To some extent.

Q. To some extent. Did you increase Standard proportionately?

A. That is correct.

Q. I show you what has been marked as Exhibit 102 which is this Exchange Agreement which we have discussed from time to time between John-Mansville Corporation and Georgia-Pacific and this is dated January 1, 1954 and there is

Q. 115]

attached to it, as 103, an amendment for exchange of gypsum products between John-Mansville Sales Corporation and Georgia-Pacific Corporation. Now when I took Mr. McCaskill's deposition he talked about the fact that he thought there was an exchange agreement in effect prior to this date. Can you substantiate that?

A. Not to my knowledge, there was not.

Q. He seemed to think that when John-Mansville took over Pabco in 1968 that shortly after that, there was an exchange agreement executed between the two companies?

A. I am confident that there was never an exchange agreement executed other than this one.

\* \* \* \*

Q. Well, this Exchange Agreement which we have identified as dated January, 1969 concerns an exchange of ten million square feet of products between the Georgia-Pacific

Q. 116]

Acme Plant?

A. Right.

Q. In exchange for ten million square feet of gypsum products from John Mansville's Apex, Nevada, Plant?

A. That is correct.

- A. Now, then, was that actually the Georgia-Pacific branch that was taken from the Apex Plant?
- A. For a period of time.
- Q. Yes and was the board taken by John Mansville from the plants that Georgia-Pacific was taken from--
- A. I might be able to explain it to you if you would like.
- Q. Well, no, just a minute--Did John-Mansville take an equivalent amount of gypsum board from the Apex Plant in connection with this exchange agreement.
- A. They owned the Apex Plant.
- Q. I mean the Acme Plant.
- A. From the Acme Plant--no, they did not.
- Q. Notwithstanding--
- A. Well, at the end of the year, we incurred some penalty as the agreement calls for, then at the end of 1969 agreed mutually with them to terminate that agreement--that exchange.
- A. Nevertheless, they did--the Georgia-Pacific branches in California did draw on the Apex Plant of Johns-Mansville?
- A. That is correct.

[P. 117]

\* \* \* \*

Q. Now, of course, these orders into the



Apex into Johns-Mansville's Apex Plant by the branches of Georgia-Pacific were orders which could have flowed to Sigurd?

No, not to Sigurd. They would have flowed to Acme but they would not have gone to Sigurd.

Well, why would you determine that they would go to Acme and not to Sigurd?

[110]

Because we shipped Acme into Southern California and that's the only area that we were taking any board. When we took the Southern California branches, Anaheim, San Diego and so on and so if we didn't take it from Apex it would not have gone to Sigurd it would have gone to Acme, so that Acme suffered rather than Sigurd.

The reason being that you have already substituted Acme for Sigurd.

Not, not substituted--

I thought you said you were still sending some product from Sigurd down to Southern California?

That's true.

Why couldn't Sigurd have supplied that rather than Apex?

Because it would have been supplied from Acme.

Yes, thank you. Now, when you were an employee for Bestwall, Mr. Wilson, I think you delineated to the Court some of the gypsum plants that Bestwall had

which were merged into Georgia-Pacific?

A. That's right.

Q. Bestwall also had some paper plants, didn't they?

A. That's true.

Q. Where are they located?

A. In Thoronau, Ontario; Detroit, Michigan; which is Camden, New Jersey and Picher, Oklahoma.

Q. Do the paper plants plus the gypsum plants, is that the total operation of Bestwall, wasn't it?

[Tr. 119]

A. Nope, we also had a quarry in Nova Scotia.

Q. This was a gypsum quarry?

A. Right.

Q. Which they also went into Georgia-Pacific?

A. That is correct.

Q. The paper plants, the quarry and the gypsum plants were all merged in?

Q. Yes, this was the pooling of interests.

Q. And these paper plants, the only product they were concerned with was manufactured paper for gypsum board?

A. No.

Q It is true of the Prior Plant?

A Yes, I would say almost 100% yes.

Q And what about Delaire Plant.

A Delaire was predominantly for gypsum board plus they produce a little more of other grades that they sold on the outside and Thoreau, Ontario, produced some gypsum board paper, newsprint and a lot of other grades. In fact, the great majority would have been for things other than gypsum wallboard.

Q Now all paper used at the Sigurd Plant, however, at least for a vast majority of it, came from Prior didn't it?

A At what time?

A Let's say since the merger between Bestwall and Georgia-Pacific.

A The majority, yes, since the merger.

Q And does Prior also supply paper for Acme?

A Yes.

Q 120]

Q And paper for Lovell, also.

A Yes.

Q And, isn't it a fact that even during a good deal of the time that Bestwall was running the Sigurd Plant that the paper came from Prior?

A That's not true.

- Q. Now, what is the name of that?
- A. Most of it went to the Central Fibre, which is a subsidiary of Packaging Corporation of America.
- Q. Now, what is the name of that?
- A. In '57 and '58?
- Q. Yes.
- A. The great majority came from Central Fibre, I think.
- Q. I show you here Plaintiff's Exhibit 159, Mr. Wilson, which is dated January 23, 1959, addressed to Mr. H. S. Crandall, Trustee for American Gypsum Trust. It is on the stationery of Bestwall Gypsum Company. It says: "Dear Mr. Crandall: In examination of our records of 1957 shown two errors in our statement originally submitted to you on May 22, 1958. The first is that the cost of sales figure included inter-company profit on Prior paper in the amount of \$7,847.18. Both of these errors have been corrected in the attached revised statement and we enclose our check in the sum of" and so on representing additional royalties due you for 1957. Does that refresh your recollection?
- A. Yes. Prior paper was being used at the Siquard

Tr. 121]

Plant and this amount would have somewhere roughly between five and ten percent of the paper that was used at the

1. Well, what percent of the paper that is used at Sigurd now is Prior paper?
2. Oh, I would say in excess of 90%.
3. There came a time when you had some discussion with Judge Ritter about this subject of Prior paper, did you not?
4. Yes, I did.
5. When was that discussion?
6. As I said in my deposition, I don't know I think it was in early 1970.
7. And you went to Salt Lake--
8. I went to Salt Lake and saw him in his chambers, yes.
9. And what was the substance of the discussion?
10. Well, the substance was basically that I was trying to explain that what we were trying to do which was a logical way to handle the movement of paper between Prior and Sigurd and that was to charge the Sigurd operation at what it would have cost Sigurd to buy this paper somewhere else on the open market.
11. And did Ritter's point of view, was it not that under this lease arrangement and the arrangement under the Bestwall regime and even through the Georgia-Pacific regime for two years was that the computing of this Prior paper should go in at actual cost?
12. I guess that's part of the reason why

Q. Now, correct?

A. Yes.

Q. That's that that you are going to use in your report. And that you are going to use the same thing in your report?

A. Yes, in effect.

Q. And that was the result of the fact that that?

A. Not to my knowledge.

Q. And as a matter of fact, I think you would agree with me now on the basis of your deposition, that in 1967 and 1968 the Georgia-Pacific in computing the royalty took the Prior Paper in at cost that was used at the Sigurd Plant?

A. We did that.

Q. But what has been the situation since then?

A. I hope we've put it in at fair market value. I think we have.

Q. That's what your intention is after '67 and '68?

A. Yes, it is also our intention to put it in '69 and '60.

Q. I think you have previously identified the document Mr. Wilson, it was written by Mr. Dodge of Georgia-Pacific, and it substantiates the testimony you have just given?

A. That is true.

and I have here a document identified as Plaintiffs' Exhibit 100 which is an affidavit signed by you which we have talked about before which you made out in connection with one of the Motions for Partial Summary Judgment and in this Affidavit on Page 4, Paragraph 3, you make the following statement: In 1936 due to difficulty in calculating the 7% royalty a letter agreement was reached between Western Gypsum and American

. 123]

Gypsum Trust which provided, in effect, that 10% of the cost of sales would be deducted from gross profits of selling, advertising, and administrative expense. A copy thereof is attached hereto as Appendix "A" but this agreement was never incorporated formally into the Lease.

Q. That is correct.

A. It is true, however, is it not, Mr. Wilson, that during the entire period that Georgia-Pacific has--each year that Georgia-Pacific has made an accounting to the American Gypsum Trust on royalties that this 10% formula, 10% cost of sales, has been taken into account in connection with the selling, advertising, and administrative expense.

Q. Every year that Georgia-Pacific has account?

A. Yes, sir, every single year.

Q. If it has been, if this is what the record, then I would have to admit that.

- Q. Well, in this statement that says that the agreement was amended--
- A. Correct.
- Q. This is your statement.
- A. Yes, this is my statement.
- Q. Is it true, also, Mr. Wilson, that in connection with those royalty computations that have been submitted to the Trust of American Gypsum Trust each year since Georgia-Pacific took over this lease that there is for 1965 and '66 that in computing those royalties the Sigurd Plant was given credit for ultimate sales outside sales to outside customers?

[Tr. 124]

- A. I think that is the case.
- Q. And what was the situation subsequent to 1966?
- A. Well, since that time we have changed our method of distribution, the market places have changed and all manufacturers have changed their methods of distribution so that material doesn't move from a manufacturing plant to an ultimate user in one step as it did previously and that's the reason we made the changes.
- Q. As a matter of fact as far as Sigurd is concerned the new method of operations that you speak of really didn't go into effect until the latter part of 1966, is that right?
- A. I think it was a gradual thing, really.



Q I mean it didn't get full grown as far as Sigurd is concerned until about 1968?

A That is probably the case. There was a mixture back and forth in '67.

Q I see. So that in 1965 and 1966 and most of '67 the operation was carried on pretty much the way it had been under Bestwall, was it not?

A In the '65 and '66 that I think would be essentially correct and it changed appreciably starting in --

Q Some mixture in '67.

A That's right.

Q And so--before this new change that you speak of the Sigurd Plant was credited with the actual sales, the total sales price to the outside customer, was it not?

A That's because we actually shipped it to the

Q. 125]

customer.

Q Then you established a new system of distribution where you set up distribution warehouses in various points around the United States, isn't that right?

A Yes, these were already in existence.

Q All right but they became integrated into your gypsum operation for the first time?

A Yes. I think you would look at it better that the gypsum got integrated into the warehouses.

- Q. Alright, at any rate you started for the Sigurd Plant started to sell to the distribution center.
- A. That's right.
- Q. Then, the distribution center, in turn, after putting a mark-up on it, would sell to the outside customer? Isn't that correct?
- A. That's correct.
- Q. So that instead of the Sigurd Plant getting credit for the sales to outside customers it got the credit for the transfer price to the distribution center?
- A. That's correct.
- Q. And did you and Judge Ritter discuss this point of disagreement as far as accounting for the royalties was concerned?
- A. To the best of my knowledge we started to discuss it but I was running out of time. I think I had to run for an airplane and it was also obvious that we weren't getting any place with our other discussion and so I don't think we

[Tr. 126]

really talked about it in any detail at all. The only thing that I do recall is that there was a Mr. Crandall there who said, well, before we say anything about it, we would like to see what the distribution division is doing and at this point I invited Mr. Crandall to come to Portland and take a look.

.. He wanted to see what kind of profit the distribution center was making.

.. I think that was what he wanted to see.

.. Isn't it true, Mr. Wilson, that with respect to the majority of the gypsum board that is sold by Georgia-Pacific, since this new set-up is concerned, that even though the paper work is handled by the so-called distribution centers that we sometimes refer to as branches, that the actual board moves directly to the outside customer from the plant?

A. No, that is not true.

Q. Well, a good percentage of it?

A. No, that is not true.

.. What percentage of it moves directly to the outside customer?

A. Well, somewhere between 20% and 25% in the Western part of the country and 75% to 80% will move into the warehouse, be unloaded, and be trucked back out in small quantities.

.. In the Western districts.

.. Yes.

.. Mr. McCarthy: I think that's all.

#### CROSS EXAMINATION

MR. TAYLOR:

.. Mr. Wilson, reference has been made to

I believe

(11. 1956)

Exhibit 10, at the end of the lease agreement?

A. Yes.

Q. Do you recall, sir, the circumstances that led to the sending of that particular letter to the Trust?

A. Do you mean this is from Mr. Diekenback of Western Gypsum?

Q. Yes, that is correct.

A. Yes. Western Gypsum at that time was the subsidiary of Certainteed Products. Certainteed Products in 1956 took the Gypsum Plants that they owned and they spun the gypsum plants off to form a separate company called the Bestwall Gypsum Company and the Bestwall Gypsum Company was formed in mid-1956. At that same time a third corporation was formed so that you had the Certainteed Products Company, you had the Bestwall Gypsum Company, the third company was called the Bestwall Certainteed Sales Corporation. This was a separate corporation that performed the selling functions for both Bestwall and Certainteed. Also, Bestwall Gypsum Company at that time did not have any officers who were solely working for the Bestwall Gypsum Company. They had common officers between Certainteed Products and Bestwall. In fact Certainteed officers stayed as officers of Bestwall Gypsum Company. This created a problem how you accounted under this lease for selling and administrative expenses and since this dissented change came about,

this letter of agreement was negotiated between the parties to reflect that change.

. [28]

Q. Now, sir, did those same circumstances continue after Georgia-Pacific obtained the interests of Bestwall in the gypsum operation?

A. No, they did not. They changed.

Q. Now, you talk, sir, in your direct examination about the Prior paper facility and its supplying paper during certain periods of time to the Sigurd Plant.

A. Yes.

Q. Would you tell us, first, when the Prior, Oklahoma Plant was constructed by Bestwall?

A. Yes. Construction was started in 1950 at Prior, Oklahoma by Certainteed Products to build this paper mill. The paper mill was completed and started up in early 1952.

Q. And what year, sir, did the bulk of paper used at Sigurd become supplied from Prior, Oklahoma, rather than purchased from the West Coast?

A. Ten years later, in 1962.

Q. And during that ten year period, the purchases were made at fair market value, delivered to the Sigurd Plant from the West Coast, is that a fair statement?

A. Well, they were purchased, I wouldn't really say that they were at fair market

11. 10.

Q. It was not until late 1967 or early 1968 that you supplied the Florida market? Is that correct?

A. Yes, that is correct. I think that was the first time, I believe, and I think that the first paper came from some place in Kansas.

[11. 11.]

\* \* \* \*

Q. Now, sir, in 1969 if you would assume, for me just for the purpose of this question, please, that it had been maneuvered one way or another so that Sigurd could have supplied from the Sigurd Plant board in an equal amount for the Southern California market. Would that have been sold at a profit or loss?

MR. MCCARTHY: I object on the ground that is speculative.

BY THE COURT: You may answer if you know.

A. It would have been at a substantial loss.

\* \* \* \*

[11. 12.]

\* \* \* \*

Q. Now, were there material changes in freight rates between 1967 and 1968 which affected your Georgia-Pacific Western States marketing plans?

A. Yes.

Will you tell us about that?

This happened in mid to third quarter of 1967 where we had been working toward the establishment of a lower rate on movement of board from Acme, Texas, to Southern California which would have been in larger cars than we had previously. This was obtained in 1967 and when we obtained that lower rate, this was the time we made the decision to relocate the New Orleans equipment at the Acme, Texas, Plant.

Now, sir, has there been any significant changes in that rate from January 1, 1971 to this date which again has caused some major changes in your 1971 standards and in your marketing concept for the western part of these United States?

Yes, there has.

Will you tell us about that?

There was a general freight rate increase of which there have been numerous ones in the last year and a half to two years but one that became effective I will say within a day or two of April 12, 1971. This was another percentage increase and by the time we fully digested that one and got it cranked through the system, this meant that it was now.

[131]

Cheaper for Sigurd to ship into the Los Angeles area than Acme, Texas, and two weeks ago we changed our marketing areas so that the Sigurd Plant is now shipping into Southern California into the Los Angeles area.

Q. Now, you testified about some correspondence relating to the acquisition of the Lowell Plant wherein in one of the letters it indicated that to justify the acquisition of that plant there must be an increase of from 13% to 15% of the assets' share of income, correct?

A. Yes.

Q. Was you able to meet that projected increase in marketing concentration?

A. The latest that I have would indicate that we have attained roughly about 16%.

Q. Now, sir, from 1965 at the time of the merger to the end of 1970, would you tell us approximately how much Georgia-Pacific was able to increase its sales of gypsum products?

MR. MCCARTHY: Would you repeat that question?

Q. Yes, from 1965 through 1970. I am asking him to state generally what the increase in Georgia-Pacific's percentages are-- Georgia-Pacific's total gypsum production?

MR. MCCARTHY: In any part of the country?

MR. TAYLOR: Well, any part of the country in the Western part of the United States, if there is a difference.

(Witness excused to get data from his brief case)

A. In 1964, the last year before we merged into Georgia



Acme, the Bestwall Gypsum Company sold 1,208,695,000 square feet of gypsum wall-board. In 1970 we sold 1,518,785,000 or roughly a 25% increase.

Was that was on a national basis?

On a national basis, yes.

Now, will you give us the comparable figures for the western part of the United States?

MR. MCCARTHY: Tell us what areas that includes?

Yes, if you will?

In 1964 the western part of the United States would have included shipments from the Sigurd Plant and some shipments from the Acme Plant into Southern California. I can't give you the exact footage that we shipped in total because I don't have the breakdown from Acme but I can make a pretty factual estimate. We shipped 121 million feet from the Sigurd Plant and I would estimate that we probably shipped 25 million feet from the Acme Plant so we probably shipped a total of 140, yes about 145 or 146 million feet.

1964?

140 million or 146 million. Right.

Would you give us a comparison with

A. In 1970 we shipped 118 million feet from Sigurd plus 69 million feet from Lovell, plus an estimate 80 million feet from Acme for a guess of about 270 million feet into the Western part of the United States.

Q. Approximately double?

A. Yes, approximately double.

[Tr. 133]

Q. Now, I believe you testified, sir, on direct examination that in 1967 the, I think you used the word "majority" from your deposition, the part of the Southern California sales was made from Sigurd?

A. In 1967?

Q. Yes, in 1967.

A. In 1967, yes.

Q. Now, sir, had that been true at all times during--

A. Pardon me, can I change this testimony. In 1967 the majority was coming from Acme.

Q. I see.

A. Into Southern California.

Q. Prior to 1967, it came from where?

A. I think the majority came from Sigurd but I can only guess at that. I think that majority, came, prior to 1967, from Sigurd.

Q. My question is, do you mean by prior to

Q. to go all the way back through the history of the operation of Sigurd by Bestwall?

A. Sir.

Q. Right, was there a period at the time when Bestwall when Sigurd was not permitted to market at all in the Southern California market?

A. Yes, that is correct.

Q. And, that was true, sir, when you came to work for Bestwall?

A. That is correct.

Q. [134]

Q. And what year was that?

A. In 1958.

Q. And who was supplying the Southern California market in 1958?

A. The Southern California market was being supplied from a plant in Phoenix, Arizona that, at that time, was the Union Gypsum Company which has since been acquired by National Gypsum.

Q. Did Bestwall have a proprietary interest in that plant?

A. Bestwall had a proprietary in it prior-- which would have been Bestwall prior to the spin-off.

Q. After that was disposed of, then other arrangements were made in that market area?

A. That is correct.

\* \* \* \*

{Tr. 135}

\* \* \* \*

Q. \* \* \* would you tell us, sir, whether in the business at your various plants, production tends to be constant or sporadic?

A. It is sporadic. It's a seasonable business really but with the summer months and the good building climate are the periods of time of the year when we are most busy and make the greatest number of shipments.

Q. And, sir, in a representative year, do you find times when you have over-production and under-production in the same year?

A. Oh, yes.

Q. Now, sir, you were employed by Bestwall for more than five years prior to the acquisition by Georgia-Pacific?

A. Yes.

Q. Have you examined the production of the Sigurd Plant, sir, for the five years that it was operated by Bestwall, prior to 1965 where in mid-year it went Georgia-Pacific?

A. Yes.

Q. With the production of the five years in which the Sigurd Plant had been operated by Georgia-Pacific, 1966-1970?



covery motion, by personal interrogation and every other way tried to discover records, honestly believing those that they gave us. The earliest records of any nature they have given

[Tr. 137]

me is 1967 and they represented to me at that time again, they didn't have any records prior to that and I move to strike any testimony with respect to any exhibits, or any information, or any documents that have anything to do with the period prior to the time they made documents available to us.

MR. TAYLOR: Now as Mr. McCarthy well knows, his discovery requests was limited in time to five years, number one. Number two the very exhibit from which--the very information which Mr. Wilson is now testifying about was offered in evidence to this Court and was offered to be showed to Mr. McCarthy at the motion, of the argument on the First Motion for Partial Summary Judgment and it certainly is information that is available to him and if he hasn't looked at it, then we can't --

MR. McCARTHY: It comes as a complete surprise to me as I didn't know this information existed.

MR. ROOKER: Neither did our accountants who were working with--

MR. TAYLOR: Again, your Honor --

MR. McCARTHY: I think it is grossly unfair.

MR. TAYLOR: Again, if the Court please, Mr. McCarthy's discovery request was limited.

-- the requests were based on information commencing in 1965. Now I would like him, I have any different notion as to what his discovery requests contain or asked for, I would like him to show it to me. Because this has been my reading of them.

MR. McCARTHY: As to my discovery requests, will

11. 138]

Back that, if we were limited that way, but time and time again, at the depositions, I have asked these witnesses, I have asked Mr. Wilson, I have asked Mr. Burch, I have asked Mr. McCaskill, I have asked them, where are the records for the Bestwall operation before Georgia-Pacific took over. I got nothing but negative answers, they don't have any knowledge as to where those records are.

(From the Witness):

Can I add something, Judge?

THE COURT: Indeed, you may.

(From the Witness)

These records came from this book and another book that were in our files. You gave me information to get it today that I got from a copy of this book so that this information was available to you and I can--

MR. McCARTHY: Where and under what circumstances?

(Witness)

Can I show you where it came from? You have an exhibit here that came out of this

book.

MR. McCARTHY: I don't know anything about it?

(The Witness)

Would you like to see it?

MR. McCARTHY: Yes, but I am at a complete lack.

THE COURT: The Court is interested in the particular phase of this case, that is, a good number of things said in reference and on the part of Georgia-Pacific to reduce the capacity at Sigurd. The Court has, from time to time inquired as to the capacity, for example, during the

[Tr. 139]

period under Georgia-Pacific as against the prior management. I would like very much to know. I think I granted to counsel an order for production of documents so that we could obtain of course, the particular information required to litigate this question. Now, I don't know what your discovery order revealed as to the discovery documents but the witness has indicated that some information or some of the exhibits came from the particular document or pamphlet--

MR. McCARTHY: Your Honor, I will have to plead again--

THE COURT: I don't like to believe that there was effort to preclude any evidence on the part of this witness or on the part of Georgia-Pacific--



MR. McCARTHY: There was not limitation in

THE COURT: This order for production was issued to commencing September 1970 and thereafter agrees that Plaintiff or his counsel and it states may go to the offices of Georgia-Pacific in Portland and there be afforded free opportunity relating to transportation and distribution of products in the latter's records including executive committee, directors meetings of Georgia-Pacific Corporation. Of course, I intended that that order would permit you to examine everything that would fall within the limits of the particular order for production.

MR. McCARTHY: I represent to the Court that I repeatedly pressed upon the Defendant my desire to see

(p. 140)

the records antedating anything that they showed me and most of the things they produced came in '68 and on and a few things in '67 and nothing earlier than that and I was told repeatedly that nothing existed, earlier than that.

THE COURT: Of course, I --

(of the witness)

Mr. McCarthy had an exhibit which he read -- a comparison of rock costs in 1969 that was taken from this book that has exactly what I said it had in it. You had

MR. McCARTHY: I wasn't permitted access to that book --

... the Witness.

You did.

MR. MCCARTHY: I was given this particular document--

MR. ROOKER: That was in an affidavit filed sir, regarding rock costs, and not in that book.

MR. LATIMER: Your Honor--

MR. ROOKER: If your Honor will allow please, I would like to corroborate what Mr. McCarthy says, sir, we were present in Portland together. He asked for this information from Mr. Foster, Mr. Foster went to Mr. Wilson and got two sheets of paper and said they were from a book and we asked for the book and we were never given the book and that's where those two pieces of paper came from. They weren't in the files, they were in Mr. Wilson's personal possession and we were never permitted to see the book, even though we

[Tr. 141]

expressly asked for the book. Now we learn for the first time that that's the book we never seen it even though that's the book we expressly asked for.

MR. TAYLOR: Now wait a minute. The book that counsel is talking about is here on this table and was prepared by Mr. Foster and has absolutely nothing to do with the documents in Mr. Wilson's hand. I think that is absurd. And again this very information I handed to Mr. McCarthy in this Court and offered in evidence that was rejected as to nature the very percentage figures that

in this question and this was months ago.

MR. GIBBNEY: You never offered it to me, sir, I have no recollection of it. I never saw it and never seen it. I will not press my motion--

MR. TAYLOR: The record of that hearing can be had and is available.

THE COURT: Gentlemen, I am going to admit the things that we are now concerned with at the present. I shall come some later on the sale as to its prohibitive value. You may continue.

MR. TAYLOR:

On my question, sir, had you compared the percentage of capacity production at the plant in the five years before '65 to the five years after '65?

We have.

And in what period was the percentage of capacity production greater, the earlier or the later?

After 1965.

\* \* \* \*

\* \* \* \*

MR. TAYLOR: Now, if the Court please, I am making a motion for the production of documents in this case, counsel with their characteristic clarity and we wouldn't have to put our business, placed in some

cost and the other control factors of making board are much, much greater than the tonnage rock.

\* \* \* \*

[Tr. 152]

\* \* \* \*

RE-CROSS EXAMINATION

BY MR. McCARTHY:

\* \* \* \*

[Tr. 157]

\* \* \* \*

Q. Now, Mr. Wilson, I was asking you yesterday, you recall, about the proportion of--the proportion of sales of gypsum products in the Western and Northwestern Region that went through the warehouse and distribution centers as compared to the deliveries direct to customers?

A. Um-huh.

Q. And I think you gave me some figure like 20 and 80%? Do you recollect that?

A. I think I said 70 to 75% went through the warehouse and the remainder went directly to customer. I think that's

[Tr. 158]

what I said--I hope that is what I said.

Q. The 70-75 went through the warehouse and the other 25 to 30 were delivered to

customers?

I think that's what I said.

I know you, Mr. Wilson, Plaintiffs' exhibit 107 which has been put together on the basis of records that Georgia-Pacific made available to our accountant and you will note that in the Northwest Region for '67 31.8% went through the warehouse, 68.2% went direct. In the Western Region the comparable figures were 59.6 through the warehouse, 41.4 direct for a total of both of 48.6 for the warehouse, 51% direct. And comparable figures for '68 are the warehouse 63%, this is a combination of both Western and Northwestern Region.

Q. Well, I thought you asked me only for the Western Region.

A. Alright, perhaps, I did. Let's take a look at the Western Region if you want. This is a combination of both.

Q. Alright.

A. In '68 it was 53% to the warehouse; 46% direct; '69 58% through the warehouse; 41 direct. '70 62% to the warehouse; 37 direct and that it is true that in the Western District there were more sales through the warehouse than direct.

Q. What were -- what was the percentage in 1970 in the Western Area?

A. In 1970 it was 72% to the warehouse; 27 direct

in the 69 year 67 warehouse, 32% direct; '68 63% warehouse, 37% direct; '69 66% warehouse, 40% direct. But the comparative figures were higher in the Northwest, far as sales made direct are concerned.

A. That is correct, in the Northwest Region.

Q. Now, I think also yesterday, Mr. Wilson, we were talking about the Prior paper and I showed you a letter, as I recall, which indicated there had been adjustment in 1957 and '58 by Bestwall because in computing the royalty they had put the Prior paper in at the purchase price rather than the actual cost. Do you recall that?

A. Yes.

Q. And then you later said that at that time the amount of Prior paper being used in '57 and '58, during that period, was comparatively small?

A. Yes, sir.

Q. And what date was it that you fixed as to when Prior paper became the substantial source of the paper for the Sigurd Plant?

A. I think that began in '62 to the best of my knowledge.

Q. I think you are correct, sir. And let's see. The files of American Gypsum Trust, which have been made available through Defendant's counsel, you will observe that in 1962, the American Gypsum Trust requested a very substantial adjustment in connection with the computation of royalties of \$120,000 was involved, I believe?

[Tr. 160]

Q. That was the basis upon the Prior paper being purchased, that is the royalty computed as if it were purchased from an outside source rather than at its cost basis?

A. That is correct.

Q. And the adjustment requested in this particular exhibit 109 which is dated September 21st of \$17,684.57 and I show you Exhibit 108 which is a communication from Bestwall Company in which they enclose a check in this instance for \$25,000.00 and part of it was based upon this figure of \$17,184.57.

A. Yes, sir.

Q. Which is the same amount as requested by the Trustees.

A. Yes, sir.

Q. Which would indicate that in '62 at least substantially all of the paper for the Sigurd Plant was being taken from the Prior Plant?

A. Yes. Could I ask a question?

Q. I can ask a question of the Court--I am examining.

Q. What was the date that American Gypsum first requested that settlement?

A. 1964.

Q. At that time in 1964?

Q. September of '64.

A. And what was the date that Bestwall Co. made the adjustment?

Q. In 1965.

A. What time in '65?

[Tr. 161]

Q. In May of '65.

A. Thank you.

Q. Now your counsel very kindly has furnished me last night with a copy of these maps which we had quite a discussion about. (Would you mark those?)

Q. When did you come to work for the Bestwall Company?

A. 1958.

Q. In 1958. Now you told the Court last that there was a period of time in 1958 when the Southern California market was being supplied by some plant in Phoenix

A. Yes.

Q. And this plant in Phoenix was named Union Gypsum Company?

A. Yes, sir.

Q. And you said that Union Gypsum Company had some connection with Certainteed?

A. Yes, that's correct.



What was the connection?

The connection was that in 1950 Certain-ty Products expanded their Fort Dodge, Iowa Plant and put a -- replaced a small gypsum board machine with a larger gypsum board machine. Sometime shortly thereafter, they sold that equipment to the people who formed Union Gypsum Company and they also supplied some technical assistance to help--to get this plant going and started up and as I was told that they took an option on that plant along with the small financial interest that they had in it through supplying the gypsum board machine from the

. 162]

Fort Dodge, Iowa, Plant --

Which was a small machine, you say?

Yes.

How many board feet?

I do not have any knowledge of that.

A relatively small operation, was it?

Yes, yes.

Right and this was in what year?

In 1950 when the Fort Dodge Plant was expanded.

Right and in 1950 and when did the machine in Phoenix Area get going?

Best of my knowledge, it was '52

Q. But Certainteed did not control this Gypsum Company, they only had some financial connection with it.

A. That was my understanding.

Q. And then for a time you say that this plant did supply some material in the Southern California market?

A. That is correct.

Q. Did it have an exclusive territory in the Southern California market?

A. I don't really know.

Q. You don't know.

A. No, sir.

Q. Well, was Sigurd also supplying in that area?

A. I don't know prior to 1958.

Q. You don't know whether it was or not? It could have been as far as you know?

[Tr. 163]

A. I don't know.

Q. Alright and then when was Bestwall spun off from Certainteed?

A. In 1956.

Q. When Bestwall was spun off from Certainteed in 1956 it did not include this Gypsum Company, did it?

A. No, sir.

What remained with Certainteed?

I don't know who it remained with but it was not included in the Bestwall--

It was not part of the Bestwall operation?

That's correct.

And you don't know whether it was connected in any way with Certainteed except by a small financial interest?

That's correct.

So that it would not really be accurate to say that there had been any division of territory between Bestwall and Certainteed as far as the Southern California market was concerned?

I am sorry I didn't follow that question.

Certainteed and Bestwall didn't divide up the Southern California market and Bestwall say that we aren't going to sell in Southern California because of Union Gypsum Company in Phoenix?

After Bestwall spun off, Certainteed to my knowledge was never in the gypsum business and did not sell gypsum board--after Bestwall spun off.

[64]

Is 1956?

That's correct.

Well, I thought you said that in 1958 this Phoenix Plant of Union Gypsum Company was the one that was doing the selling in

Southern California?

A. Bestwall continued to take material from the Plant after 1956--

Q. I see. Bestwall continued to take material from that plant?

A. That's correct.

Q. And was Bestwall supplying Southern California exclusively from that plant?

A. I don't know.

Q. Well, what was it taking the material, some sort of an exchange arrangement?

A. Mr. McCarthy, I can only assume from maps and at the time the way the market maps were laid out was that Southern California was primarily to be serviced from Union Gypsum. If Bestwall couldn't get enough material from Union Gypsum, then I am sure they must have sent some in from Sigurd.

Q. Well, was 1958 the only year involved in this situation was obtained?

A. No, this was also prior to 1958.

Q. Well, after the spin off which you said took place in 1956--

A. Yes.

Q. And did Bestwall continue to take material from

[Tr. 165]

Union Gypsum Company in 1956?

That's correct, as I was told.

By whom?

Malcom Meyer.

Is this some officer in Certainteed?

He is President of Certainteed and at that time he was Executive Vice President of Bestwall Gypsum Company.

Is this is what you have been told?

Yes.

By Mr. Meyer.

Yes, sir.

Now, I notice that on this map marked Exhibit 110 it shows two circles; it shows a circle here for Sigurd, I presume, and a circle down here and kind of dots, is that the Union Gypsum Company?

Yes, sir.

It was really an independent company, wasn't it?

That is correct.

At which Bestwall had some arrangement with for the purchase of materials?

That is correct.

Now, what happened after 1958?

The decision was made not to take any more material from the Union Gypsum Company.

Q. Well, then here in Exhibit 111 in the year 1960, we have a map which although it doesn't have colors on it, has heavy lines which indicate about the same marketing area

[Tr. 106]

as that is the 1964 map that we have here as an exhibit?

A. Well, with the exception of Southern California -- GOES.

Q. Well, it doesn't have any line here for Southern California. The line comes right up here on the east side of Arizona?

A. That's what I meant. It's essentially the same with the exception that later on the line went on over further.

Q. This line here?

A. Yes.

Q. You mean the line down around Arizona?

A. Right -- went over to--

Q. As far as this is concerned this shows that Sigurd has a larger marketing area than that 1963 map Exhibit 1, doesn't it?

A. Yes, that's correct.

Q. That's for 1960? And in 1961 again it shows the same--a larger marketing area than Exhibit 1.

A. That's correct.

Q. Now, I think you were discussing yesterday with Mr. Taylor, this proposition about this 11¢ [sic] per ton royalty that you had to pay the American Gypsum Trust on the rock mine was not of enough consequence to affect any of your economic decisions?

A. That's correct.

Q. Would you say to what extent would there have to be of a payment to the American Gypsum Trust so that it

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would affect your economic decisions?

A. I don't think a payment to the American Gypsum Trust would affect an economic decision that we would make.

Q. Would you say that if you had to pay an addition to this 11¢ per ton royalty, a royalty amounting to around 90¢ per thousand square feet, would that affect your economic decisions?

A. Affect what economic decisions?

Q. Any of these decisions you are talking about in answer to Mr. Taylor's questions?

A. I can't answer a question of that sort without something specific in mind to answer.

Q. As to whether you would continue to operate the Sigurd Plant as to what area you would ship into from the Sigurd Plant --

A. We would pay a 90¢ royalty--

Q. Yes.

A. To American Gypsum Trust which would mean that we would make about \$9.00 per thousand; we would be very very happy to pay 90¢ per thousand to American Gypsum Trust and receive \$9.00 per thousand.

Q. Now, you are assuming that if you paid that you would make something else, I am just asking if 90¢ per thousand square feet wouldn't be a sufficient important consideration that it would effect your economic decisions?

A. No, sir, because we would make enough.

Q. And if you had to pay a royalty in addition to the

[Tr. 168]

11¢ per ton of around \$100,000 a year to the American Gypsum Trust, that wouldn't make any difference to you, it wouldn't affect your economic decisions?

A. We would want very much to continue operating Sigurd because we would be making roughly a million dollars, and we certainly wouldn't throw a million dollars away to save \$100,000.

Q. Alright. There is one other thing I wanted to--you and I were discussing yesterday the number of marketing people that Bestwall had in the Western Area of the western part of the United States. I think, to my recollection, it was around fifteen people and you were inclined to agree with me?

A. No, I don't think I agreed with you, I



Q. That's what Mr. McCaskill told you then  
A. Well, probably be right but I

Q. I looked Mr. McCaskill's deposition and he  
said about 20 to 24 people, would that be  
or like it?

A. Whatever Mr. McCaskill said would be cor-  
rect.

Q. And in fact he testified and I presume it  
is within your personal knowledge, that  
you had a Western Region Sales Manager that  
was located in Salt Lake City?

A. Yes, sir.

Q. Bill Mole?

A. Yes.

Q. And then there were various area managers  
or superintendents in some eight areas?

A. I don't know how many there were.

Q. At any rate there was a pretty substan-  
tial sales

Q. 169]

force as far as Bestwall was concerned in  
the Western part of the United States--  
the Continental Divide west?

Q. How many did Mr. McCaskill say?

A. 20 to 24.

Q. That's what Mr. McCaskill said and  
that's substantial, we had a substantial  
sales force.

\* \* \* \*

[Tr. 166]

\* \* \* \* \*

BY MR. TAVIOL: (G. K. KOSK.)

Q. Let me ask you, did you know that the products that were transferred from the Gypsum Division to the Distribution Centers were transferred from sales to the Distribution Centers on a gradual basis, starting in 1966?

A. Yes.

Q. Well, tell us, will you tell when the products manufactured by the Gypsum Division were transferred into and became handled and distributed by the Distribution Centers?

A. When it was completed or when it was--

Q. When it began, over what period of time and it became complete?

[ Tr. 171]

A. Well, it started in late 1966 and 1966 is when this started. I think this exhibit where he shows how much went through the warehouses would give you an example as to how this progressed and increased.

Q. And by what period of time had it become integrated so that it was a fully functioning unit through the warehouse?

A. Oh, in 1967, it would have been fully functioning through the warehouse organization.

Q. Throughout 1967?

that is correct.

Thank you.

THE COURT: Let me ask, if I may please, when the distribution center came into being about 1965 and '66?

Judge, the Georgia-Pacific has a division of the company that has warehouses in major and principal market areas in the United States. This is called the distribution division or the distribution centers. They were in existence at the time that we became part of Georgia-Pacific in 1965.

THE COURT: Was the distribution center, then, a sort of a medium for distributing the various products you were selling to your various customers? Would you say?

The purpose of the distribution division was established in Georgia-Pacific to sell products and to distribute the products that Georgia-Pacific manufactured prior to the time that Georgia-Pacific acquired Bestwall Gypsum Company. The principal products that it moved through this warehouse system was plywood which is one of the main products

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that Georgia-Pacific manufactures.

THE COURT: So that service, of course, was rendered then by the distribution center the ultimate handling of a product from the date of its manufacture to the date of its delivery to the customer.

- A. This was the principal reason for Georgia Pacific acquiring Bestwall; that they thought that this was a natural marriage of products in plywood and gypsum that they could provide a service that would increase their sales of gypsum by Bestwall, that no other manufacturer could provide because they did not have this distribution division set-up to provide that service; two products going to a job site at the same time.

THE COURT: So, if I were a customer, I was looking for some material I could go to the distribution center and probably see plywood and various gypsum products?

- A. That's correct.

THE COURT: And make my choice.

- A. Yes, sir, but you would generally be a lumberyard dealer, generally speaking, a small lumberyard doesn't want to buy a full carload of gypsum wallboard which would say be enough to build ten houses. He wouldn't want to buy that much plywood which would probably be enough for twelve houses but he could buy a small truckload that was mixed, part gypsum and part plywood and this would solve his inventory problem and make his operation much more economical.

\* \* \* \*

[Tr. 173]

\* \* \* \*

THE COURT: Can you fix a market area with any hope that it will endure? For a period of years, that is?

Q. No, sir, because we establish a market area, that is it is based on a combination of the cost to produce at the plant, plus the freight to deliver to that market area, and plant costs and plant conditions change or as freight rates change, this has to change, this area that you will ship, all this comes under consideration.

THE COURT: Of course, you can't prevent the entry into your market of competition?

A. Oh, no, sir.

THE COURT: That is all.

MR. MCCARTHY: On REDIRECT

\* \* \* \*

Q. Georgia-Pacific regards them as independent profit centers, does it not?

A. That's correct.

Tr. 174]

Q. And they regard each plant as an independent profit center?

A. Yes, sir.

Q. As for example, when you take material from the Sigurd plant and put it into a distribution center, what you do is you transfer that material from the plant to a distribution center on the basis of what you call a transfer price?

A. Yes, that's right. That's correct.

Q. And then the distribution center, in turn, sells this same gypsum board on a retail

level at a different price at a mark-up price, hopefully?

A. Some sales are made on a retail basis and in some market areas they are made on a wholesale basis.

Q. On a wholesale basis?

A. That is correct.

Q. To an outside customer?

A. That's correct.

Q. And you hopefully hope that this distribution center will show a profit on the basis of their sales and, of course, their costs would be the transfer price and you hope that the Plant will be a profit center by virtue of the transfer price that you credit them with, isn't that correct?

A. Yes, that would be correct.

\* \* \* \*

[Tr. 175]

#### RE-CROSS EXAMINATION

BY MR. TAYLOR:

\* \* \* \*

Q. Yes, was the availability of the warehouse in the customers market area more important with respect to California or less important, than other areas where you market?

A. I see. It turned out to be much more important in California than any place else.

Q. Why?

We started originally in California to, on the concept of putting the materials into the branch, selling the small lumber dealer mixed truckloads. This did result in an increase in volume for us as you could readily see as what happened in 1967. At this point our competition in California that had plants located in that market place decided that they had to do something to compete with our method of providing this service, so they chose that time to make available truckload quantities directly from their plants to customers. This, then threw the Sigurd Plant at a great disadvantage, cost wise. If we had to make truck shipments from Sigurd to an in-user so that what we did at that point is that we moved full carloads of materials to our distribution division where they were unloaded and reloaded onto trucks and trucked a short distance to the customers. Without that distribution center, we would have been out of business.

Q. 176]

A. Now, sir, would the construction of a warehouse at or near the Sigurd Plant have solved that problem?

A. No.

Q. Why?

A. Well, you had to make a truckload delivery and it would not have helped to have a warehouse at the Sigurd Plant because the warehouse had to be in the market area so that you could move the product from Sigurd by rail to the market and then distribute it by truck from there.

Q. You indicated that when the rail cars at the distribution center is unloaded, would you explain to the Judge the other physical functions performed in the distribution center? What happens after it comes off the rail car and into the warehouse?

A. Well, of course, it is first unloaded, taken into the warehouse and you have, at this point, a general warehouse function and when an order is received for a truckload quantity, whatever material is ordered, somebody has to physically go back and pick that board up again and load it back on the truck and deliver it to the customer.

Q. Now, with respect to deliveries to the customers, and service out of, say the Sacramento warehouse?

A. Yes.

Q. Now, does the warehouse provide a service wherein the board is actually taken from the truck, placed on, say, the third floor in room 29 right at the elbow of the applicator?

[Tr. 177]

A. Quite often, this is the case now.

\* \* \* \*

[Tr. 179]

\* \* \* \*

DEPOSITION OF H. B. RENSHAW

\* \* \* \*

BY MR. MCCARTHY:



Mr. Renshaw, will you state your full name and address for the record?

Yes. It's H. Byron Renshaw. I live at 575 Northwood, Akron, Ohio.

And you're presently an employee of Georgia-Pacific Corporation?

I am.

And for how long have you been an employee of Georgia-Pacific Corporation?

Since 1954.

And by whom were you employed prior to that?

I was in public accounting in Pasco, Washington, for about a year and a half after my graduation from the University of Washington.

And you say you've been employed by Georgia-Pacific since '54?

Yes.

Will you state the various capacities in which you've been employed?

Since 1954?

Since 1954.

I started off as an accountant working in Olympia, Washington. The plant there was a plywood plant. In

1956]

1956 I became chief accountant of what was

then known as the Washington Mill Group, which was a financial accounting operation. In 1958 I was transferred to Portland, Oregon, engaged primarily in a special assignment to merge two divisions together.

Q. What divisions were merged?

A. It was the Washington Mill Group and the Portland Division. In October of 1958 I was transferred back to Olympia, Washington, as assistant plant manager. In 1965 upon the acquisition of Bestwall I was transferred to Paoli, Pennsylvania, as division controller.

\* \* \* \*

A. \* \* \* In 1967 I was transferred to Portland, Oregon, as assistant controller on the corporate controller staff. In 1969 I was transferred to Akron, Ohio, as division controller of the Weather Seal Division. \* \* \*

Q. Which is what?

A. General manager of the Weather Seal Division.

Q. Specifically then your connection with the Gypsum Division was from 1965. Do you recall about what date, what month?

A. Yes. It was around the first of April.

[Tr. 181]

Q. That was approximately the date of the merger between Bestwall and Georgia-Pacific, was it not?

A. Yes.

Q. And you went in at that time?

A. That's correct.

Q. And your duties as controller of the Bestwall Gypsum Division continued until sometime in 1967. Do you recall what date in '67 or what month?

A. It was either January or February. It was early '67 that I was transferred back to the West Coast.

Q. And did Norm Foster succeed you?

A. Norman Foster succeeded me.

\* \* \* \*

Q. 182]

\* \* \* \*

Q. During the time that you were connected as controller--that was your title, I take it, while you were connected with the Bestwall Gypsum Division?

A. Division Controller, yes.

Q. During that period of time, some two years, was an accounting made to the trustees of the American Gypsum Trust in connection with the gypsum operations at Sigurd, Utah?

A. Yes. We of course calculated the royalties that were due. We also made our offices available for--what's his name--Lou Crandall, who came in and audited the books. And we engaged in quite a bit of correspondence with the American Gypsum Trust relative to the method in which the allocation was made.

Q. At the time that you went there was there a Mr. Diefenbach?

A. No.

Q. He had left the Bestwall operation?

A. I don't believe Mr. Diefenbach was ever connected with Bestwall as such. He was an employee of Certain-teed.

[Tr. 185]

Q. I see. In the accounting capacity?

A. I think he was, yes. There was a letter. I know at one time, in which he referred to himself as chief accountant.

Q. Have you seen that letter?

A. Many years ago.

Q. Let's refresh your recollection on it. Will you mark this Plaintiffs' Renshaw Exhibit 1?"

MR. MCCARTHY: It's now been marked Exhibit 113 in this proceeding and I will call the court's attention to the exhibit. This is a letter dated August 3, 1956 to Mr. S. L. Crandall, who has been identified as one of the Trustees, and it states: "After a review of the 7% profit computations for the past few years, we suggest that the best approach toward simplification is to agree that all items below the gross profit will amount to a predetermined percentage of the cost of sales. We suggest that this percentage be set permanently at 10%." And on the next page another paragraph reads as follows "The suggested 10% figure covers the charge for selling advertising, and administrative

expense and a credit for purchase discounts. It does not include any other items of other income or other deductions as it is our thought that these are non-recurring in nature, could not be contemplated by any formula, and have had no significant net effect on past computations."

Will show you what has been marked as Plaintiffs' Exhibit 1, Penschaw, a letter dated August 3, 1956; addressed to Mr. S. L. Crandall and signed by Mr. Diefenbach. I ask you if this is the letter to which you just referred?

A. This is the letter.

Tr. 184]

\* \* \* \*

Q. In this letter, of course, Mr. Diefenbach proposes that in calculating the rental on the payments to the American Gypsum Trust that it should be computed on the basis-- at least one of the computations should be a 10% charge for selling, advertising, administrative expense, and a credit for purchase discounts? Isn't that correct? Right where I marked.

A. That's correctly quoted, yes.

Q. And during the time that you were in charge of the accounting of the Gypsum Division between '65 and '66, did you in fact in accounting to the trustees of the American Gypsum Trust use this computation?

A. Yes, we did.

Q. There came a time, did there not, Mr. Penschaw, when you in company with a Mr. [redacted] and had a conference with Judge Ritter?

A. We did.

Q. And I believe that was in the latter part of 1966, was it not? December of 1966, specifically?

A. It was either December of '66 or January of '67, but I think it was the last week in December.

Q. And who was Mr. Smith?

A. Mr. Smith at that time was legal counsel for the Bestwall Gypsum Division.

Q. And he had worked for the Bestwall Gypsum Company, had he not?

A. That is correct.

Q. Did he have anything to do with the accounting or

[Tr. 185]

was his just purely legal duties?

A. No. His was strictly legal duties.

Q. And you were the division controller?

A. Yes.

Q. And what was the nature and purpose of your trip?

A. Let me preface this just a bit. In 1965 when Georgia-Pacific took over Bestwall and I was sent out as division controller, of course their accounting methods were completely different than what would be required by Georgia-Pacific as the succeeding operation. During that period of time in 1965 and through a good part in 1966 we were spending a considerable

amount of time in reorganizing the accounting operation at Bestwall. It was about in the fall of 1966 that I became personally aware of this method of allocation that had been established under the prior management.

And this was the time when Mr. Diefenbach's letter was called to your attention--or had you known about it before?

No. I had not known about it. In fact we had made certain changes in the allocation in which it was then Judge Ritter that called my attention to the letter.

\* \* \* \*

Tr. 186]

\* \* \* \*

You did review a letter that you wrote to Judge Ritter following the conversations that you and Mr. Smith

Tr. 187]

had with him?

Yes.

And who was present at the time of this conversation with Judge Ritter, and where did it take place?

It took place in his chambers in Salt Lake. The Judge was present, Mr. Crandall was present, Mr. Smith and myself.

The four of you?

Yes. Oh, and Bill Mole, who is a Bestwall Georgia-Pacific employee residing here in Salt Lake.

- Q. And what was said and what was discussed?
- A. Well, basically the purpose of our visit, of course, was to get away from the method of allocation.
- Q. This 10% formula?
- A. This 10% formula. I felt that for a number of reasons a 10% factor, especially calculated on cost of sales, is totally incorrect.
- Q. Under Georgia-Pacific's method of--
- A. I don't think it reflects actual cost.
- Q. This 10% figure that had been carried on between Certain-teed and Bestwall and trustees, as far as the accounting of Georgia-Pacific was concerned, you thought was unsatisfactory; is that correct?
- A. Well, not only from the accounting of Georgia-Pacific but from my professional knowledge as an accountant. It did not reflect actual costs or actual profits.
- Q. I see. This was the purpose of your visit?
- A. Yes, sir.
- Q. And what did you do--present your arguments to the trustees of why it should be changed?

[Tr. 188]

- A. Basically, yes. We had a long conversation, discussed a number of ways of what we could do with the thing. We must recognize at this point that under the Certain-



teed method of accounting, there was an extreme difficulty on the part of their accounting staff in determining what actual costs were. Their corporate management did not demand it, whereas ours does. And as a result, they came up with this arbitrary figure, which in 1956 might have been adequate. As a result of our studies, we were to determine that the costs were in effect considerable higher than this arbitrary 10% figure.

- Q. And I think you wanted it changed, did you not, to something like 15% of selling expenses or--
- A. We had calculated out--based upon our 1965 and 1966 results in which the actual costs of selling, general administrative expenses, ran between 16 and 17% of net sales. In discussing it with the Judge and Mr. Crandall, they were completely appalled at the idea that we would even think of changing a long-standing arrangement. So the 15% figure you referred to was a negotiated figure on our part to try and put it into a more realistic level from an accounting standpoint.
- Q. It was 15% of what?
- A. Net sales.
- Q. Of net sales. And you made this proposal to them?
- A. Yes.
- Q. And what did they say?
- A. They said they would have to think about

it. And while they were thinking about it, I was transferred.

{Tr. 189}

Q. I see."

MR. McCARTHY: At that point what is now Plaintiffs' Exhibit 114 was marked and this was a letter dated January 30, 1967, addressed to the Honorable Willis W. Ritter, Trustee, American Gypsum Trust, and this consists of a two-page letter and discussing the subject what is referred to in the deposition, consisting of certain exhibits attached.

"Q. Is this the letter, Mr. Renshaw, or a copy of a letter which you wrote to Judge Ritter and a copy of the schedules which you attached?

A. Yes. These are the same ones I referred to a few minutes ago.

\* \* \* \*

{Tr. 190}

Q. Did there come a time, Mr. Renshaw, when you received a statement of the royalty calculation from Judge Ritter with respect to the royalty or 7% royalty. I'm speaking of, the rental--7% net profit problem for 1965 and '66?

A. I don't remember it but you have a piece of paper there so you're going to refresh my memory."

MR. McCARTHY: At this time what has now been marked Plaintiffs' Exhibit 115 was marked and shown as an exhibit, of Mr. Renshaw.

I show you a statement, Mr. Renshaw, apparently originated from the trustees of American Gypsum Trust, dated February 3, 1967, it purports to be a calculation of the 7% royalty for '65 and '66. I ask you if you recall receiving that? You notice the date of it is February 3.

Yes.

Which is shortly after your letter?

Yes. This was discussed during the meeting that we had with the Judge and Mr. Crandall.

What was that?

What they have done here is they've calculated the amount of the royalty due for the two-year period, based upon the conditions as outlined in Mr. Diefenbach's letter.

And had they not used the same basic figures as contained in Schedule C attached to your letter of January 30 as to net sales and everything else except the 10%?

Except for the calculation--

Except for the 10% formula?

Yes.

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But the figures are the figures that you ~~supplied~~ supplied in connection with your Exhibit C, are they not?

Yes, they are. At that meeting--

Q. Go ahead.

A. We agreed that because of the lateness of our bringing this to their attention, the change in the method that we wanted to make that we would continue for 1965 and '66 under the old method, but we wanted to change it from that point forward.

Q. I see. And then.

A. So this was a negotiated--

Q. After that meeting they did submit this statement?

A. And I think we sent them a check."

MR. MCCARTHY: At this point what has been marked Plaintiffs' Exhibit 116 was marked. This is a letter dated February 14, 1967, addressed to The Honorable Willis W. Ritter, Trustee, and it states: "Dear Judge Ritter: Attached please find our check in the amount of \$79,645 to cover the royalty due for 1966 under the formula which has been used for the past several years. It is our hope that you will be able to review our computations of the new proposal within a relatively short period of time so that we can discuss whether or not any adjustment is necessary for the two years in question." That is signed by H. B. Renshaw, Divisional Controller.

Q. And is this not the transmittal letter signed by Mr. Renshaw in which the 7% royalty was paid in accordance with the statement which the trustees had submitted to you?

A. That is correct.

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\* \* \* \*

MR. McCARTHY: At that time there was another exhibit which was marked which is now Plaintiffs' Exhibit 117 which is a letter dated November 29, 1967, to Honorable Willis Bitter, Trustee, signed by Rod Dodge, Chief Accountant, Gypsum Division, and it states in the first paragraph: "Enclosed are copies of the Sigurd plant computation of royalty payments for the years 1965 and '66. These new computations are based on the same formula that we used in 1964 and prior years. That is using a 10% figure for Administrative and Selling expense. You will note that our computation varies slightly from the computation which you submitted to us on your billing of February 3, 1967. The reason for the variation between your computation and ours is due to the increase in the vacation reserve. This reserve increased in 1965 and increased again in 1966. This variation results in an overpayment by us of \$245.00 in two years. We will take this

Mr. 193]

overpayment of \$245.00 into consideration when computing the royalty for the year ending December 31, 1967. Sincerely yours, Rod

Mr. Renshaw, are you familiar with this letter which is dated November 29, 1967, addressed to the trustees of American Gypsum Trust and signed by Rod Dodge, in which there is a recomputation of the royalty payments for '65 and '66?

Mr. Renshaw, I'm not aware of this one.

Q. You recognize Rod Dodge's signature, is it?

A. Well, I would have to assume it is Rod's. I don't think I have ever seen his name written out. To go back a minute, you were asking earlier about Rod's connection with the Gypsum Division--Rod became chief accountant of the Gypsum Division after I left the Division. He was chief accountant under Norm Foster.

Q. I see. So that Mr. Foster was in fact Division controller as of this date?

A. As of that date, yes.

Q. I see a notice on the letter--a copy to Mr. N. L. Foster. At any rate, Mr. Renshaw, you will observe that this computation of the royalty payments also use the 10% figure for administrative and selling expense, but a variation occurs with respect to only one item, according to the letter, between Georgia-Pacific's computation and the statement submitted by the trustees in connection with an item called "Vacation Reserve." This, it says, results in overpayment by Georgia-Pacific of \$245 for the two years. Would you see if that's correct from your examination of the letter and of the schedule attached?

[Tr. 194]

A. Well, without getting into a detailed analysis, it does say there was an overpayment of \$245.

Q. But the 10 % formula is still used in those calculations, is it not?

Yes. Let me make one comment here which might clear it up.

Well, answer my question--

Yes. The 10% is still used in here.

All right.

And so that we understand why we may have a lag in the date between my letter of February and January and the November date, is it was in March of 1967 that we transferred all of the accounting of the Bestwall Gypsum from Paoli, Pennsylvania, to Portland, Oregon. To the best of my recollection not a single accountant that was on my staff moved to Portland, which meant that Mr. Foster and Mr. Dodge went through a complete reorganization of hiring and training new people. As a result, it would appear that the follow-up in my letter did not take place--as to the change in the formula. And I would think it would be due primarily to the chaotic conditions which I knew that those fellows were undergoing.

At any rate, even as of November 29, '67, the 10 % formula was used in these calculations?

By an accountant.

By an accountant working under the supervision of Mr. Foster?

Yes.

And on these computations for '65 and '66 to which your attention has been called, the sales figures shown on

[Tr. 195]

which the computation of 7% royalty is based, are the sales to outside customers, are they not?

A. I would have to assume that they might be but I haven't seen a detailed analysis of the sales.

Q. You can look at these documents and see if you can ascertain that. (Indicating) I think you'll find that that's the fact.

A. This is the one I want to review because these are my figures (indicating). Yes. These would be the figures on the sales to outsiders.

Q. And also the item of paper in there is based upon actual cost of paper at the Pryor plant, is it not?

A. Yes. Actual manufacturing cost at the Pryor plant.

Q. Right. And that was the figure used in these computations of royalties?

A. That was the figure that was used, yes; but it was incorrect.

Q. But it was used for both '65 and '66 and also in Georgia-Pacific's recomputation in November of '67?

A. Yes. To answer your question, the answer is yes.

Q. Let me ask you one other question. That's the end of your cooperation with this problem, isn't it?



... hope so.

... mean you had nothing to do with the accounting in the Gypsum Division after that time?

MR. McCARTHY: And Mr. Taylor asks a question that he can put in, if he wants.

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MR. TAYLOR: I would like it in, would you put it now?

MR. McCARTHY: All right. I'll put it in. Mr. Taylor says: "You said, "But that was correct." I take it from that that in your opinion as accountant it was not a correct accounting procedure?

... I don't think the profits of one manufacturing facility should be determined on the basis of actual costs reflecting either efficiencies or inefficiencies of another one."

MR. McCARTHY: That's the end of Mr. Taylor's questioning. Then McCarthy asks:

... But while you were controller of the Gypsum Division, that's the way it was figured, was it not?

... I found out about it.

... right. You never made any change as far as your accounting to the trustees is concerned, did you?

... We were attempting to negotiate it

Q. You were discussing it with them but no change was actually made?

A. No."

Mr. McCaskine: That concludes the deposition, Your Honor. I would like this to be considered as an interrogation of an adverse witness.

THE COURT: It may be so considered. \* \* \*

\* \* \* \*

[Tr. 197]

\* \* \* \*

NORMAN FOSTER

called as a witness by the Plaintiffs, being first duly sworn, took the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR. ROOKER:

[Tr. 198]

Q. Would you state your name please, sir?

A. Norman Foster.

Q. By whom are you employed?

A. Georgia-Pacific.

Q. In what capacity?

A. Division Controller, Gypsum Division.

Q. What is your professional training?

several years in public accounting on the Controller staff for All State Insurance Company and now with Georgia-Pacific, Division Controller.

Are you a Certified Public Accountant?

Yes, I am.

\* \* \* \*

How long have you been Division Controller of the Gypsum Division of Georgia-Pacific Corporation?

Since--my assignment with the Gypsum Division began January 1, 1967.

As Division Controller?

That's correct.

And what was your assignment immediately prior to that?

I was on the Controller staff with the-- on a corporate level in Portland with Georgia-Pacific Controller staff, as manager of planning and budgets.

How long did you work in that capacity?

About one year and a half.

Now, Foster, you are, I take it, familiar in detail with the accounting system of Georgia-Pacific Corporation?

Yes, I am.

[199]

Are you also familiar in detail with

the accounting system as it applies to gypsum manufacturing operations?

A. As well as I can.

Q. Is that familiar to gypsum manufacturing operations?

A. I'm sorry, I don't understand your question.

Q. Are you familiar in detail with the accounting system of Georgia-Pacific Corporation as it relates to gypsum manufacturing operations?

A. As well as I can.

Q. Are you familiar in detail with that accounting system as it relates to the sale of gypsum products?

A. The sale of gypsum products?

Q. Yes.

A. Here again, as well as I can.

Q. Do you know of anyone in the Georgia-Pacific Corporation who is better acquainted with the system in those connections than you?

A. Not at all, I.O.

\* \* \* \*

[Tr. 200]

\* \* \* \*

Q. Does Georgia-Pacific Corporation prepare or maintain any documents that reflect the sales prices of gypsum products to

outside customers?

on a per unit basis?

any basis?

Do you have sales statistics that show the sales prices to outside customers.

Where are those documents originated?

In Portland, Oregon.

Do you have access to them?

I do.

201]

What are they called?

They're called Profit and Loss statements.

For what operations?

For the warehouse division.

Are you also familiar with the accounting system of Georgia-Pacific Corporation as it relates to the manufacture of paper?

Yes.

Now, we've had a good deal of discussion in this case thus far, Mr. Foster, during which you have been in attendance, about the practice of transfer of paper from the paper plant in Oklahoma to Sigurd, Okla. Are you generally familiar with the changes which have taken place here in the courtroom?

Yes, I am.

Q. And it's true, is it not, that at all times through 1966 that paper from Georgia-Pacific or Bestwall plant at Pryor, Oklahoma, was used at Sigurd, that paper was accounted for in the accountings to American Gypsum Trust on the basis of its cost to manufacture; is that right?

A. From what years?

Q. At all times through 1966.

A. On the initial statements going to the American Gypsum Trust they were, but they were revised December of 1968, when it was determined or discovered that this was incorrect.

Q. And who decided it was incorrect, Mr. Foster?

A. Our interpretation of the lease agreement.

Q. Who interpreted the lease agreement in that fashion?

A. Myself and probably some counsel.

[ Tr. 202 ]

Q. What counsel please?

A. I can't remember, but there was discussion about the subject. The terms of the lease stated that we would pay a royalty based on the products manufactured from the rock extracted from the leased premises. The manufacturing process of paper does not use gypsum.

Q. Mr. Foster, how long had this program which you decided was in error been in effect when you decided it was in error?

It was not a unilateral decision. It was a joint decision.

By whom?

By the interpretation of that lease.

By whom?

By myself and Mr. Glenn Wilson.

Not by American Gypsum Trust?

This was presented to them.

Did they accept your interpretation?

No, they did not.

Now, I ask again, Mr. Foster, how long had this program that you and Mr. Wilson decided was in error been in effect when you made that decision?

There had been a period of years during the transfer and the merger, I should say of Bestwall with Georgia-Pacific that we have had a series of accounting controllers and during this period we weren't aware of the exact nature and terms of this lease agreement until in 1968 that we read them in earnest.

Now, I understand, Mr. Foster, that you would like to explain why you didn't decide you wanted to change sooner,

203]

That that doesn't answer my question, how long had the thing that you decided you wanted to change been the practice?

\* \* \* \*

Q. Well, Mr. Foster, when did they start using Pryor, Oklahoma, paper at the Sigurd plant?

A. It's been stated in this courtroom earlier in 1962 or '63.

Q. And at all times from that date through 1966 Pryor paper was accounted for on the basis of actual cost, was it not?

A. Yes, the record evidences that.

\* \* \* \*

[Tr. 204]

\* \* \* \*

THE COURT: I note, of course, in January of 1959, there is some correspondence with reference to the particular paper item. The letter I'm referring to is Exhibit 104 and it reads: "An examination of our records for 1957 shows two errors--this is Bestwall writing to--rather the Chief Accountant Mannino--and reads, "In our

[Tr. 205]

statement as originally submitted to you on May 22, 1958: The first is that the cost of sales figure included inter-company profit on Pryor paper in the amount of \$7,847.18; the second is that the cost of sales figure included \$4,254.38 of expense incurred on assessment work on mining claims." I'm looking for an instrument which would indicate there was some negotiation of this paper price. I think that was the nature of your question.

MR. ROOKER: Your Honor, my question was to whether Mr. Foster was aware that the



... of whether Bestwall or Georgia-Pacific  
is entitled to take an inter-company profit on  
... paper had been discussed previously and  
settled in favor of the trust, that is on the  
position that it would not be entitled to  
inter-company profit.

THE COURT: I see. Are you aware of the  
question now, Mr. Foster?

Q. My main concern was the interpretation of  
the lease. I did not know at that time that  
this was done preceding the '65 and '66.

Q. Did you endeavor to find out, Mr. Foster?

A. I endeavored to research the problem, but  
I did not become aware of these documents  
here.

Q. You have been aware of those documents for  
some time now during the discovery phase  
of this case, have you not?

A. Not until about two weeks ago.

(An instrument was marked  
Plaintiffs' Exhibit No. 127).

Q. Mr. Foster, I show you what has been  
marked as Exhibit 127, which is a letter  
dated January 28, 1968, directed

A. 206]

to Mr. S. L. Crandall, one of the trustees  
of the trust, signed by R. E. Dodge, on  
which you are a copy. Did you receive a  
copy of that letter at or about the date  
it bears?

A. (Witness looks at exhibit.)

Yes, I did.

Q. Are you familiar with the contents of the letter?

A. Yes, the contents of this letter became available to me when I received my copy and this triggered my question of how this lease was being determined.

Q. Well, once again, Mr. Foster, Exhibit 17 represents in part a discussion of whether Georgia-Pacific is entitled to an inter-company profit on Pryor paper, does it not?

A. It really determines whether the profit of one operating unit or facility can be transferred to another operating facility when the other one we have to generate the income for a royalty payment.

Q. Now, isn't it true, Mr. Foster, that Mr. Dodge in writing this letter agreed to exclude the inter-company profit on Pryor paper in computing the American Gypsum Trust royalty for 1965, 1966 and 1967?

A. He didn't exactly agree to it, he pursued what he thought was being done before.

Q. And what he thought was being done before was the exclusion of that inter-company profit, wasn't it?

A. Yes, that's true.

Q. And that's what he did in this letter, wasn't it?

A. He continued on what he thought was being done preceding the origination of this.

Q. Now, are you trying to imply that what he thought

and that there was not what was being done?

You can't get that inference, I hope.

That was what was being done before, was it?

It was being done and he was continuing what he thought was being done before.

Yes, he was continuing what was being done before?

That was being done before, right.

And that never got changed until you and Mr. Wilson decided to change it in 1968; is that right?

Upon a review of the lease agreement itself.

\* \* \* \*

[ 208 ]

\* \* \* \*

Mr. Foster, let's leave the matter of Prior paper profit now for the time being and turn for a moment to the question of the revenues for which Georgia-Pacific accounts on the sale of gypsum products of Sigurd. So that we will be clear when we discuss this with one another during your testimony, as I understand it, the position Georgia-Pacific takes is that you are required only to account for the transfer price from the Sigurd plant to a distribution division, isn't that right?

- A. That's correct.
- Q. Who fixes that transfer price?
- A. Market price of the sale of gypsum less a functional discount.
- Q. Who sets the functional discount?
- A. It is an established functional discount.
- Q. Who establishes it?
- A. The management of Georgia-Pacific.
- Q. Unilaterally?
- A. Yes.
- Q. What factors do they take into account when establishing that discount?
- A. Because the cost is necessary to warehouse and service the customers, the warehouse divisions sales do.

[Tr. 209]

- Q. Now, as I understand it, Mr. Foster, the distribution division doesn't provide any manufacturing activity, is that right?
- A. Manufacturing? No, they do not manufacture gypsum products.
- Q. It's the selling agency of Georgia-Pacific, is it not?
- A. Warehousing and servicing operation of this corporation.
- Q. Well, it sells wallboard?

... bills wallboard and services the customer.

\* \* \* \*

I would like you to tell me if you can, Mr. Foster, a single year in the history of the Sigard Plant, since 1946, when the lease in question was entered into when the lessee was not accounted for its sales based on sales to outside customers?

I am sorry, I do not understand your question.

And you now want to account on the basis of this transfer price, it is right, isn't it?

Well, yes.

[210]

Alright, now tell me when you first decided you wanted--

Please, let me say one thing. There has been a basic change in marketing of our wallboard products.

MR. ROOKER: Your Honor, I object to the witness making speeches, that's not in response to the question and move that it be stricken.

THE COURT: He, of course, is endeavoring to reach your particular question by this particular statement he made here. Give him the question to him again, let's see if he can come up with something.

I would like to know, Mr. Foster, and I think the question can fairly be answered "yes" or "no", or excuse me answered by a specific year, when was the first year in which the lessee under this lease decided

to try to do a little sales on the basis of this transfer price instead of the real price to outside customers?

\* \* \* \*

A. Well, it's a question of distribution  
direction.

Q. Is that to be fair to you when you endeavor  
to account on the basis of the transfer  
price?

[Tr. 211]

A. Yes.

Q. And before that during 20 years of the  
history of the lease, that never occurred  
had it?

Q. Is that a yes or no question?

A. No, I said no.

THE COURT: Of course, he could hardly be  
able to answer the full 20 year period, I  
don't suppose.

MR. ROOKER: Well, I guess your Honor is  
quite right--

THE COURT: But he could, of course, during  
the period when he was credited with his  
actions. When the Defendant had the property,  
that would be difficult to say.

MR. ROOKER: That's very true.

THE WITNESS: I would only know from 1907  
forward.

Q. Do you know of any year prior in which that occurred Mr. Foster?

A. No, I do not.

Q. Do you have any reason at all to believe that it occurred in any prior year?

A. No, I have no reason to believe that it did.

Q. As a matter of fact, Mr. Foster, you have good reason to believe that it never did occur, do you not?

A. I can't say with certainty, but I don't believe that there was.

Q. Thank you. Now would you please identify the management personnel at Georgia-Pacific Corporation who participated in fixing the transfer price?

[r. 212]

A. The transfer price was established by a market price that gypsum board may be sold to customers. Management does not establish a price without responsiveness to the market, competitive conditions of the location, sir.

Q. Well, you're not trying to tell are you, Mr. Foster, that the transfer price is the same as the retail price to outside customers, are you?

A. No, I am not.

Q. What is the relationship between the two.

A. The relationship between the two is a

functional discount of 9.8% that is provided to the warehousing operations to enable it to provide the services that they do.

Q. And that is an expense, then that you seek to charge to Signal Office?

A. It is a cost of operations.

Q. And, as I understand that deduction you seek to take doesn't relate to anything except the activities of the distribution system as you described them?

A. That is correct.

Q. Now I come back again, Mr. Foster, to this question, who are the people in the management of Georgia-Pacific who set this 9.8% as the amount for this functional discount?

A. I am not able to answer precisely, but it is the top management of Georgia-Pacific.

Q. Did you participate in that decision?

A. I did not.

Q. Did Mr. Wilson?

[Tr. 213]

A. I can't answer that.

Q. Do you know of anyone on the accounting staff at Georgia-Pacific who participated in that decision?

A. There was not -- nobody in my accounting staff or any accounting staff preceding



... participated in that percentage.

Q Now, how much of that 9.8% functional discount ends up being profit to the distribution center?

A THE WITNESS: Are you referring to gypsum products?

Q MR. ROOKER: Generally.

A THE WITNESS: Are you referring to gypsum all products?

Q MR. ROOKER: All products.

Q Is that 9.8% the same for all products?

A No it isn't.

Q That's unique for gypsum?

A It is similar to plywood functional discounts.

Q Alright, does that allow a profit to the distribution center.

A If you combine plywood, panelling, gypsum products and all products, it does permit a profit to the distribution division.

Q Do you know what considerations are taken into account in fixing the amount of that discount?

A It is equivalent to what dealers, wholesalers were getting as a functional discount before we started using the warehouses.

Q [214]

Q. Now, is that the formula or a procedure, set of criteria that are applied uniformly as between all Georgia-Pacific Gypsum plants and all of its distribution centers?

A. Yes, it is.

\* \* \* \*

[Tr. 215]

\* \* \* \*

Q. It is true, is it not, Mr. Foster, that the price of gypsum products in the Western United States has suffered a very severe decline during the last three years.

[Tr. 216]

A. Yes, they have.

Q. And how did that compare with the price decline that has occurred in the Eastern United States?

A. I believe the price decline of gypsum was universal throughout the United States; however, in the California Western Region it dropped earlier.

Q. Did it drop more?

A. It dropped more. I haven't made a complete study as to compare the East Coast with the West Coast but I do know that the price decrease occurred in California and the West Coast earlier.

\* \* \* \*

[Tr. 222]

\* \* \* \*

Mr. Foster, assuming that one were to endeavor to ascertain the prices at which wallboard being produced at the Sigurd plant are sold to outside customers, what records would you consult in making that determination?

Q. I mean the sales price that is in effect at a given time, in a given location.

A. Yes, prices at which the product was actually sold?

Q. You mean to determine it was sold at or what it could be sold at?

A. What it was sold at?

Q. 223]

Q. You would refer to the invoice prepared by the distribution division marketing it.

A. You would have to relate those invoices individually to the invoices between the Sigurd Plant and the distribution center, would you not?

Q. Well, in the warehouse, the product, the identification of a particular order or a particular lot of wallboard through the warehouse would be very difficult.

A. In fact, it is impossible, isn't it?

Q. You're--yes it would be very difficult.

A. That in the records maintained by Georgia-Pacific Corporation today, your testimony is that it is quite impossible for Georgia-Pacific Corporation to account for the sales price it receives on the sale of a sheet of wallboard manufactured

at Sigurd, Utah, to an outside customer, say the Rio Grande Lumber Company in Salt Lake City?

- A. It would be difficult but there is a method because we do know what the distribution division pays for a wallboard and we also know how much they sell it for.
- Q. But we can't trace that individual sheet of wallboard from the plant to the buyer, can we?
- A. No.
- Q. So, we have to make some assumptions and use averages in connection with computing that sales price, don't we?
- A. You have to make an assumption as to that one particular wallboard but if in a given period of time--one month these averages are very clearly established.

[Tr. 224]

- Q. And is it your opinion that by using these averages that a reliable sales price to the outside customer can be derived?
- A. The best method to us is--to obtain the ultimate sales price to the customer is review the invoice that the product was sold for.
- Q. Have you endeavored to do that in connection with the Sigurd products for the period at issue in this case?
- A. I am sure that the sales department conducts a very accurate pursuit of this information nation wide.

Q. I am sorry that I don't make my question clear, Mr. Foster; in connection with the trial of this lawsuit have you endeavored to make a determination of the prices at which the Sigurd product has been sold to outside customers during the period at issue in this case?

A. Yes, I have.

Q. Do you have the results of that study.

A. I have them.

Q. Where are they, please?

A. I have them either here or in the car outside.

Q. Can you tell us, please, from what records that study was made?

A. From the invoices that were prepared at the distribution division to the customer.

Q. You studied each and every invoice?

A. Yes.

Q. During the entire period in question?

A. 225]

Q. No. This was a sample.

A. Pardon me?

A. It was a statistical sample.

Q. I see, you have used averages based on the sample, is that right?

A. This study provided me with the information

that I needed to satisfy me.

Q. And how large was the statistical sample?

A. For a three year period.

Q. But how large was the sample during that period? How many invoices did you use?

A. 150.

Q. And it is your opinion that 150 invoices was a sufficient sample for accurate statistical summary?

A. It satisfied myself.

\* \* \* \*

[Tr. 233]

\* \* \* \*

Q. Mr. Foster, I would like to ask you a few questions to satisfy my own curiosity about Plaintiffs' Exhibit 118. This is a summary or group of the plant profit and loss statements for the Acme, Lovell and Sigurd Plants for the period of 1965 through 1970? Now if you will direct your attention, please, to the plant profit and loss statement for the Sigurd Plant for 1965?

A. Yes, uh-huh.

Q. What is the net profit of the plant as shown on that plant profit and loss statement?

A. \$787,000.00, may I round off the figures?

Q. Excuse me, what are the net sales?

Q. Net sales? \$4,103,000.

\* \* \* \*

Q. All right.

\* \* \* \*

Q. What is the net sales figure on that proposed settlement?

A. \$4,500,000.

Q. Whereas, the plant profit and loss statement shows net sales of \$4,103,000, is that right?

A. Yes.

Q. Do you find any explanation for the difference?

A. No.

Q. Would you please look at the plant profit and loss statement for 1966? What is the net sales figure shown on that statement, please? Maybe you could just read to the Court one after the other the net sales figures shown on your proposed settlement and the net sales figure shown on plant profit and loss statements, if you would please?

A. \$6,178,256, and that's what is shown on the settlement--\$6,178,256. Right here.

Q. The net sales figure, please?

A. Yes, we have on the P&L we have \$4,103,000.

Q. All right.

Q. On the settlement statement we have

the same figure with the exception that there was a functional discount as a reduction of sales price, which we spoke of early, that went to the distribution division, that reduces that figure, that reconciling items gives us the same figure, so the two are comparable.

Q. Now in 1966, you excluded that so-called functional discount, in accounting to the Trust in the final analysis, did you not?

A. Yes, it's a reduction in sales price, that's right.

Q. I say you excluded it I mean you paid a royalty on that amount, did you not?

A. In '66?

Q. Yes.

A. This statement here shows we did not.

Q. That is your proposed statement, you ultimately settled with the Trust and you did.

A. The ultimate statement is this one here. The initial one was.

Q. I show you, Mr. Foster, Exhibit 127 which has been received in evidence, I ask you if that document does not show that the function discount was eliminated in accounting to the Trust in 1966?

A. Yes, it was, on the initial royalty statement.

Q. It was on the statement that was paid on. Was it not?



Q. S.

Now, you have explained the difference between net

Q. 1964

sales figures on the plant's profit and loss statements, compared to the Georgia-Pacific proposed settlement for 1966.

Can you explain the difference for 1965?

A. I haven't reviewed it for 1965 and at this moment, I can't explain it.

Q. Now, would you please look at the same two figures for 1967?

A. Yes.

Q. And what are they, please?

A. Here, again, the net sales price on the royalty computation and, as explained on page 2, the net sales price on the profit and loss statement has been reduced by the functional account of \$705,424.

Q. Directing your attention again to Exhibit 127 Georgia-Pacific Corporation paid the 7% royalty on that so-called functional discount in 1967, didn't they?

A. Yes, it did.

Q. Thank you. What records would you examine, Mr. Foster, in a sense, to explain the difference between those two figures that you observed for 1965?

A. I haven't attempted to do it but I imagine I would have to go back to the general ledger. I haven't done it--

Q. Is that correct, 1965?

A. I don't believe so. We go back as far as '66.

\* \* \* \*

{Tr. 237}

#### CROSS-EXAMINATION

BY MR. TAYLOR:

Q. I show you a copy of Exhibit 127 and that is a letter from Mr. R. E. Dodge to S. L. Crandall dated June 28, 1968 and I believe you earlier testified that you received a copy of that document?

A. I did.

Q. And that triggered an investigation by you for the first time into the computation, mechanics of the computation, of the royalty under this particular lease?

A. It did do that and with that I analyzed the lease, brought it to the attention of our legal department, approached Mr. Wilson and from that we did calculate and submit to the Trust a revised royalty statement for the years '66 and '67.

Q. And that resulted in the counterclaim, the arithmetic for the counterclaim?

A. That was the substance for the counterclaim for the overpayments.

\* \* \* \*

#### REDIRECT EXAMINATION

MR. ROOKER: When did you prepare those

...ed statements?

THE WITNESS: December 9, 1968, they are  
same date as you showed me on your  
...its.

... and just so we're clear, that paper Mr.  
Taylor

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... was asking you about, is used in making  
wallboard, isn't it?

... Yes, it is and it is also included in the  
sales price.

\* \* \* \*

JUDGE WILLIS W. RITTER

... called as a witness by the Defendant, was  
first duly sworn and took the witness stand  
and testified as follows:

DIRECT EXAMINATION

BY MR. CHAMBERLAIN:

Q. Will you state your name, please?

A. Willis W. Ritter.

Q. You are a Federal Judge, is that correct?

A. Correct.

... Judge Ritter, there has been attached to  
the Plaintiffs' Complaint in this proceed-  
ing a Fifty Year Lease dated November 6,  
1946 and I believe, your Honor, it has  
been admitted by the pleadings, by the  
answer of the Defendants, are you

familiar with that document?

A. Yes. I drew it.

Q. May I hand you, then, a machine copy of that instrument and ask you if you can identify that as a true copy of the one which is appended to the Plaintiffs' Complaint.

A. Yes, I think it is.

Q. Is the Plaintiff in this action, American Gypsum Trust, the successor to the interests of the Lessor under that instrument?

A. That's right.

Q. The Trustees, the present Trustees, of the Trust are named as parties Plaintiff in this proceeding, is that correct?

[ Tr. 239]

A. Yes, that's correct.

Q. Do you, Judge, own any economic interest in this Lease or in the real property affected--

A. None whatsoever.

Q. Judge, can you give to the Court the explanation or the preliminary negotiations affecting this Lease?

A. Yes, I think so I think I can.

Q. Will you tell us how this instrument came into being.

A. Alright. A fellow by the name of Sid Eliason came into my law offices in

Walker Bank Building, he was then the Western Sales Manager of the United States Gypsum Company and the Pacific Coast Sales Manager and the company he worked for, United States Gypsum Company, owned some gypsum claims here at Sigurd. They adjoined the American Gypsum Trust claims on the west and as a matter of fact over the years, there is a big claim there known as Mammoth Claim which has been mined by both the original Jumbo Plaster Company who sold to United States Gypsum on the western side of the claim and by American King Cement and Plaster Company and later on by the American Gypsum Trust on the east side; so United States Gypsum people were well acquainted with the gypsum deposits down in this area and its Western Sales Manager, Eliason, was well acquainted with our deposits. When he came in, he was interested in acquiring some kind of an ownership in our claims. He talked about two or three different arrangements. He said that there were four of the executives of the United States Gypsum Company who were

12. 240]

going to leave the company, didn't care to remain with that company. They were interested in going out and embarking on a venture of their own in the manufacture and sale of gypsum wallboard and they wanted to put a plant in down here at Sigurd and they wanted to make some deal with us and so we had some negotiations about that. The four men were: Eliason and I have already told you what he did, William Mole, who was in the Chicago Office of United States Gypsum Company, and in an executive position, the third one was Eddie Hildebrand, and the fourth

one was Dick Hess. Hess came from Dodge, Iowa, it is my recollection of it. He was manager of one of the U.S. Gypsum plants there at Dodge, Iowa, and those four men were the men who acquired from us, first an option for a lease and then the lease and that the draw was to be a company, known then, I don't think it exists any more, as Western Gypsum Company and the Western Gypsum Company, when it was organized, was owned 50% of its stock by these four individuals and 50% of the stock by the Certainteed Products Corporation and immediately after this transaction with us the Certainteed Products Corporation loaned them some money and they built the plant.

Q. Mr. Eliason, whom you named, is the lessee in the original instrument in 1946, is that correct?

A. That's correct.

Q. Now, Judge Ritter, what were the principal considerations in negotiating this lease.

MR. TAYLOR: I am going to object, the lease speaks for itself.

[Tr. 241]

MR. CHAMBERLAIN: Your Honor, please, there is pending before this Court partially decided, a Motion for Summary Judgment on the issue of whether or not Paragraph 7 of this lease is applicable or enforceable or operative. The Motion is addressed to this rather unique proposition of law but it has nevertheless been raised by the Defendants and that is that where there is a provision for a minimum royalty the lessee--the lessor

cannot enforce a provision for requirements. The provision that the lessee will take all of its requirements from the leased or demised premises. That brings into question by their motion, we take the position that this instrument can be interpreted entirely within the four corners; that it is not susceptible to any construction, but nevertheless, they have raised in this case the question of interpretation of this lease because there are two diametrically opposing provisions in this instrument if their position is correct. We contend that it is not but they have injected, infused what they claim is an ambiguity in this lease and I think that this witness is competent to testify concerning the reasons for all those provisions. Now, Your Honor, this witness is not going to introduce, not going to expose this record to any error and he certainly isn't going to invite any error into this record. Your Honor and this witness can develop, through his narrative, what the facts are as they bear on this question that has been raised by the Defendants in their motion. Now you have no jury here, if in the matter of the testimony, there is something that is not relevant, is produced or elicited by some awkward

Pr. 242]

movement on my part, it would be very simple for you to strike it. I don't believe there is any other way that we can get to these facts.

THE COURT: Let me say this, the Court is aware, of course, that this motion for partial judgment has been addressed to those two problems as indicated and the Court granted one and denied the other. There is no doubt but what the parties back at this time had in mind, of course, \$15,000 from

year to year and \$12,000 as mineral payments; no doubt that they should have and enjoy for 7% of the profit realized from the sale of the product. Those items are recited, it seems to me that you are seeking now to place the construction upon the language employed; would it make any difference whether they intended that the mineral annual payment was in addition to these other things, isn't that a question of law. It seems that this was the point raised by counsel for the Defendant in this case; that when parties engage in production and there is a minimum rental fixed and together with the language employed in this contract that they claim they are under no obligation, of course, to mine any part of that leased property so long as there is a minimum rental.

MR. TAYLOR: Your Honor, may I impose this in a little different way? That is our position and it is based upon our contention that the lease is unambiguous and Mr. Chamberlain has made the same assertion, so I don't think we need to look beyond the four corners of the document for that issue.

[Tr. 243]

MR. CHAMBERLAIN: If, Your Honor, Mr. Taylor is correct in his interpretation of paragraph 7, then there are two diametrically conflicting provisions in this lease: one of them which says that they pay, I think Your Honor has it, I don't think I need to go any further--

THE COURT: He may--I am going to hear it, he may answer the question.

\* \* \* \*



MR. CHAMBERLAIN: I will be lucky if I can state it. Your Honor, the question was, Judge, excuse me, Judge Ritter, what were the principal considerations involved in the negotiations between you and Mr. Eliason, the predecessor in interest of these Defendants?

Well, these fellows -- wanted.

MR. TAYLOR: I will interpose the same objection.

THE COURT: He may answer, there is no objection at this time.

THE WITNESS: The approach to that is, I asked myself what was it we bought and what we bought was a piece of the action.

MR. TAYLOR: Now if the Court please, now he is stating a legal conclusion that flies in the face of that document and he is the scrivener of the document itself and I think this is improper testimony and I object to it. I move it be stricken.

Mr. 244]

THE COURT: I think that's his way of stating, of course, that they bought a piece of this operation.

MR. TAYLOR: Now if he were to testify, if the Court, please that Mr. Eliason made some kind of concession but to have him sit for many years subsequent and characterize that in legal conclusions, I think it is improper.

MR. CHAMBERLAIN: I believe Your Honor ruled on it, I think.

THE COURT: Yes. I think he intended, of course, that they wanted their \$12,000 plus a percentage of the profits. Go ahead.

THE WITNESS: I am talking about the 7% of the net profits before taxes and that is a piece of the venture. Now in the days when this lease were drawn, we didn't talk in terms of a piece of the action, and that's not my kind of language anyway but it is nowadays. We were making a deal. These men came out of the United States Gypsum were some of the best in the business, experienced, and they came to us because we had a plant here and some gypsum and that's a rather strategically located plant down here at Sigurd as has been proved by the experience of 20 years operation. The things that we were encouraged to believe then materialized and they came about and then most important thing we were talking about at that time was, of course, well to start with management. We wanted to be sure ourselves that we were going to have some proper management if we were going to have interest in that venture. We wanted to be sure that we had some proper financial backing--

[Tr. 245]

MR. TAYLOR: May I interrupt, just a moment, please? Again, I must object to this testimony. The Judge is talking about what he had in mind, secretly, and if he wants to tell us what he told Sid Eliason and I think that would be proper evidence but to sit here and tell us what subjectively he and his client were thinking about all those years ago, I think is improper.

MR. CHAMBERLAIN: May I ask the witness one question, Your Honor?

THE COURT: Now let me say this. I am aware he is attempting to relate now, the matters and things, of course, that transpired between he and his associates and the witnesses. The Court is going to let him tell the story as he is now telling it, I do feel, if you probably object to or contemplate objecting to, that part of it, of course, has no probative value as far as this proceeding is concerned. I will so decree as far as this is concerned. Go ahead.

THE WITNESS: Well, we were concerned in selling out this property in four considerations: Management, a financial responsibility, were they going to get a proper plant in here and perhaps most important of all, were they going to be able to sell that product, and where. Sid Eliason, as I have already told you, was Western Sales Manager for U.S. Gypsum Company, and the market, the market which we have served and the market that we intended to serve which we sought to serve was the Western United States, particularly down on the western coast, of the Pacific Coast, the Pacific Northwest. There

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was an opportunity. This was a pretty optimistic conversation and talk, like that cheery letter we heard about yesterday, the pretty cheery suggestions about the opportunities and that's how it turned out, as a matter of fact.

\* \* \* \*

Q The lessor in this Exhibit A to the complaint is American King Cement and Plaster Company, is that correct?

A Yes.

Q. And is that corporation still in existence?

A. No.

Q. How did you effect a dissolution of that corporation?

A. Well, after we got started in these negotiations and saw that we were going to receive a check and we were going to pay out checks and we were not going to be carrying on an operation, would not be operating a business, so we abandoned that corporation, the real estate was exchanged for the shares of stock and the corporation was abandoned.

Q. And the Trust now holds this lease and fee title to the patented mining claims and property interests in any

[Tr. 247]

unpatented mining claims for the benefit of numerous individuals?

A. That's right.

Q. Some of those individuals are Mrs. Tillie Collings of Monroe, is that correct?

A. Yes.

Q. Edgar Cox of Richfield and Dr. E. W. Poulson of Richfield, who is now deceased?

A. Yes.

Q. Walter Christensen of Monroe RFD, now deceased?

A. Yes.

approximately 50 or 60 other similarly situated beneficiaries? Is that correct?

right.

\* \* \* \*

### CROSS EXAMINATION

MR. TAYLOR:

Now, Judge, as I understand your testimony, there were four considerations for the lease: the first was management, the second was financing, the third was the construction of the plant, and the fourth was the ability to sell the product. I assume also that you were also interested in getting some rentals or some royalties, or some lease payments?

THE WITNESS: Of course, the document tells you about that.

And the document, Judge Ritter, tells me about building the plant and it tells me about the royalties, will you, sir, show me in this document, which you drew, where it

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talks about any of those other considerations?

Those were the things, of course, that induced the agreement.

Will you tell me, sir, would you agree with me, sir, that you did not discuss any one of those three subjects in the lease agreements?

\* \* \* \*

THE COURT: The court is cognizant of the fact that these four items are not part and parcel of this Lease.

MR. TAYLOR: And will the Court also note the first paragraph of the lease where it recites the considerations of the lease and, of course, prominent by their absence are those four considerations.

THE COURT: It is so ordered.

MR. TAYLOR: I believe that when you initially negotiated the Lease that certain people were not in the picture. I believe you so stated in your deposition?

THE WITNESS: Well, at the beginning, at least, at the beginning.

Q. And they came along after the lease was negotiated and participating in the financing?

A. Well, Eliason negotiated an option for a lease and I suppose that between that time, and I have no personal knowledge of that, I suppose between the time he got the option for

[Tr. 249]

the lease and the time they came down and exercised the option in his name and then assigned it to Western Gypsum Company, I am sure he had found his money, and somewhere along there, I don't know when they told me it was Certainteed Products Corporation that was putting around \$3,000,000 in there to build a first-rate, modern plant, a modern plant that would be

adequate to serve the market we were talking about.

I am not sure I understand you, maybe you don't recall, but did Certainteed come in the picture before or after you signed the lease?

I don't know what you mean by coming into the picture, did they advance the money, I don't know but I suppose they made some kind of arrangement.

But you don't know?

No.

Now, sir, you indicated the identity of the Trustees. Were you ever a Trustee of this Trust?

Yes, I was.

For what period of time?

I was one of the original trustees.

And for how long did you serve, sir?

Well, I resigned formally in documents that are in the file of the Court at the time toward, sometime in the winter of 1970.

Just before the lawsuit was filed?

Yes, that's right.

And there is a John Russell Ritter, who is one of

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the plaintiffs, I assume that is your son?

A. That is.

Q. And that the beneficiaries, or some of the beneficiaries of the Trust are your children or grandchildren and family?

A. That's right.

THE COURT: Is that all?

MR. TAYLOR: Yes, I think that is all.

THE COURT: Thank you, Judge.

MR. TAYLOR: May I ask this one question, sir, you indicated you drew the lease. I assume that you were the attorney for the original lessors.

THE WITNESS: I was the attorney for a man named Ted Johns who owned virtually all of the million shares in American King Cement and Plaster.

Q. And was a predecessor in interest of the plaintiffs themselves?

A. Well the claims belonged to the company.

Q. Yes, and you represented that company?

A. That's right.

\* \* \* \*

[Caption Omitted]

DEPOSITION OF WILLIS W. RITTER

\* \* \* \*

[Willis W. Ritter Dep. page 3]



DIRECT EXAMINATION

Q. MR. BEHLE:

Q. Please state your name.

A. Willis W. Ritter.

Q. And the address?

A. 250 Post Office and Federal Building.

Q. I show you what has been marked Exhibit A as part of the complaint in this action, purporting to be a fifty year lease of the mining properties involved and ask you if you are the same party whose name appears twice on page 17 thereof?

A. Yes.

Q. And briefly in your own words will you tell us what your participation was in connection with the drafting and execution of this instrument?

A. I drew the lease.

Q. You were then of course in private practice?

A. Yes.

Q. And represented the lessor, American Keene Cement and Plaster Company?

A. That's right, I was attorney for them.

Q. Later on -- and there is no disagreement on dates, the lessor's interest was I believe assigned to the plaintiff herein, American Gypsum Trust?

A. Well, I don't think the word assigned.

Q. The complaint alleges that that occurred that act occurred

[Willis W. Ritter Dep. page 4]

January 9th of 1948?

A. Let me see what you've got. Now what happened on that is the American Keene Cement and Plaster Company was dissolved and the shareholders exchanged their interest as shareholders for the property, the real estate, in exchange for and surrender of the shares for the property owned by the corporation of American Keene Cement and Plaster.

Q. An undivided interest as tenants in common?

A. That's correct.

Q. And then to manage the property?

A. And then the unit, the former shareholders who were at that time tenants in common of the real estate, entered into a trust agreement and they surrendered their certificates and in the liquidation and the legal process, the result was that they obtained equitable interests in a trust and that is known as the American Gypsum Trust.

Q. And under the trust agreement I believe there were five trustees, of whom you were one?

A. That is correct.

... since have resigned and I believe  
that John Russell Ritter is your successor?

I don't know, I don't know who succeeded  
you but I resigned and my son John is one  
of the trustees now.

\* \* \* \*

Willis W. Ritter Dep. page 5]

\* \* \* \*

I might say that officially we don't find  
any successor person to whom these notices  
should be given since your resignation  
but in any event there should be a suc-  
cessor because you are no longer personally  
interested.

\* \* \* \*

Willis W. Ritter Dep. page 7]

\* \* \* \*

I see that in connection with the basic  
terms of the rental on the agreement,  
which to refresh your recollection and of  
course you are free to look at a copy,  
provided for a term of fifty years, the  
first twenty years to be at one rate and  
then the remaining thirty years at a  
slightly lower rate.

That's right.

My question then is do you recall  
if the first twenty and the additional  
thirty, a total of fifty, were based  
upon estimates that you might recall of  
ore reserves or gypsum reserves?

It wasn't based on ore reserves at all.

Q. What was it based in, Judge?

A. It was based on negotiations between S. Eliason and my

[Willis W. Ritter Dep. page 8]

clients and I and it is just one of the benefits, one of the advantages, one of the terms that they wanted in there. They paid the difference in the terms between the first twenty and the rest was that they pay \$3,750 a quarter or \$15,000 a year minimum rental in return for a hundred thousand tons of rock and pay fifty cents a ton for any rock used in excess of a hundred thousand. That is what one of those little checks was for you know. When the twenty years expired that was reduced to twelve-thousand, three-thousand a quarter and twelve-thousand a year minimum annual rental and instead of it being of course fifteen cents a ton for the excess, it's twelve cents a ton for the excess.

Q. With the twelve-thousand minimum?

A. Those were just negotiated terms and the lease had nothing whatever to do with the rock. We had a round figure that we have always talked about and I have never seen a geologic report about it but it's been the tradition in my connection with this business that the report those fellows got showed that there was enough gypsum to run that plant for a hundred years down there.

\* \* \* \*

[Willis W. Ritter Dep. page 9]

\* \* \* \*

and then shortly thereafter Western Gypsum was acquired by Certain-Teed and that was in the original negotiations as at least a possibility.

Well, in the beginning, until he got that option, I don't think we knew about Certain-Teed but shortly afterward we did and understood that Certain-Teed was brought in to do the financing for them.

\* \* \* \*

Willis W. Ritter Dep. page 10]

\* \* \* \*

Well, all I know about that is of course every time this lease has been assigned, the assignee has come to us and asked for the assignor to make an appropriate assignment of the lease.

And I suppose that also pertained in 1956 when Western Gypsum then assigned the lease and its assets to this Bestwall Gypsum Company?

Well, I don't remember a thing about that. If you are getting down to any specific one, I don't remember.

But your recollection generally is that they had to come to you and the assignment would be given?

Oh, certainly.

Discussion?

You are talking about to me. It wasn't just to me, they came to the trustees.

Q. But insofar as you personally can recall.

A. Yes, that's right.

\* \* \* \*

[Willis W. Ritter Dep. page 11]

\* \* \* \*

Q. Judge, the record shows that sometime before the assignment from Western Gypsum to the Bestwall Gypsum, which was

[Willis W. Ritter Dep. page 12]

consummated December 31st, 1956, there were some conversations and negotiations between Mr. S. L. Crandall, yourself, and a Mr. E. A. Diefenbach.

\* \* \* \*

Q. (By Mr. Behle) Do you recall those conversations?

A. I have never had any conversations with Diefenbach.

Q. You yourself?

A. No.

Q. However, those conversations did result, if you recall, in a letter of August 3rd, 1956, directed to Crandall and signed by Diefenbach and a copy to you.

A. That's right.

Q. Do you recall in general terms such a letter?

all that, yes.

\* \* \* \*

Mr. Behle) And this again is because of my lack of knowledge as to the case but is there a reply to that letter?

W. Ritter Dep. page 13]

I'll help you out on that. I don't believe so, I don't believe there was a reply to that letter.

\* \* \* \*

Mr. Behle) But you speak of extensive correspondence, were they kept by Mr. Crandall basically?

Basically they were because that correspondence had to do

W. Ritter Dep. page 14]

with the accounting procedures and that letter of Diefenbach had to do with the accounting procedures. That is what it is dealing with and every year Crandall would go back and audit their books on this, they went back to Pennsylvania.

\* \* \* \*

So Crandall would go back and audit their books and if they had any differences why there was correspondence about that. He carried on that correspondence.

\* \* \* \*

W. Ritter Dep. page 15]

\* \* \* \*

Now Randall handled all of the matters that had to do with accounting and I handled the legal matters and after we got this thing set up, there weren't any legal matters. We didn't have any problems with any of the lessees to any extent until we got into Georgia-Pacific.

\* \* \* \*

Q. Do you recall any personal conferences, other than the written correspondence that you had in connection with this matter, with any representatives first of Georgia-Pacific?

[Willis W. Ritter Dep. page 16]

A. Oh, yes. In this office one time Wilson was in here.

Q. That is our friend Glen Wilson that we met the other day?

A. And I think Foster was here.

\* \* \* \*

Q. Wilson, and you do not recall if anybody else was here at that time other than the two of you?

A. Well, yes, there was an attorney here, a house attorney from up there. I have forgotten what his name is.

MR. McCARTHY: From Georgia-Pacific you are speaking of?

THE WITNESS: Yes, there were three of them.

[Willis W. Ritter Dep. page 17]



and I have a kind of notion there was another, an accountant. I believe there were four, three or four.

Q. (Mr. Behle) Was the accountant's name perhaps Niebergall?

A. He's the house attorney.

Q. Do you recall him being here?

A. Oh, you bet.

Q. On that occasion?

A. Yes.

Q. And it occurred here in your chambers?

A. Yes, very close to where you are sitting.

Q. Can you tell us as best as you now remember about what was said by whom, the substance? I am sure you can't remember the exact words.

A. Well, Niebergall wrote a letter after he got up there stating his understanding of what was said and --

MR. McCARTHY: You have a copy of that.

THE WITNESS: Does he have a copy of

MR. McCARTHY: Yes, in fact they produced a copy of it to me the other day so I know we've got a copy of it.

THE WITNESS: Well, he spelled out what he talked about.

MR. McCARTHY: Very specifically, Cal.

THE WITNESS: Yes.

[Willis W. Ritter Dep. page 18]

\* \* \* \*

- Q. Do you recall anything that would be significant in this case that was said particularly by way of any admissions other than set forth in Niebergall's summary of the conversation?
- A. Well, I don't remember what Niebergall's summary of the conversation was but what we were talking about was our unhappiness with their accounting procedures. They weren't paying us royalties and we were unhappy about it and we told them why.
- Q. But the substance of the conversation you don't recall at this time?
- A. Well, I know what we talked about, yes.
- Q. Well, the subject matter but I mean what was said by whom?
- A. Oh, no, I don't remember that.
- Q. I believe Mr. Wilson said that they had a fair market value concept and they were trying to discuss that with you. Do you recall anything that was said in that connection, that was of the paper that was used in manufacturing?
- A. Yes, I remember something about that. You are talking about one of the major differences between us. Paper is an important factor in the manufacture of wallboard and they use a lot of it and they get their paper in the main from Pryor Paper. That is a corporation,

... is a wholly owned sub-

... W. Ritter Dep. page 19]

... of Georgia-Pacific Corporation and  
... found out through his audit pro-  
... what they were doing. Georgia-  
... was entering into an inter-company  
... transaction between the Georgia-Pacific  
... Corporation and its wholly owned subsidiary,  
... Pryor, the effect of which was that instead  
... of using Pryor's costs for the manufacture  
... of paper supplied to the Sigurd plant, what  
... Georgia-Pacific was doing was going out in  
... the market and taking a computed figure,  
... ascertained in some way by looking at the  
... market for paper such as Pryor manufactured  
... and then instead of charging us the cost,  
... Pryor's costs of manufacturing, they were  
... charging us those costs plus a write-up  
... to a figure that they regarded as what  
... Georgia-Pacific would have to pay for it  
... if they went out in the open market. Now  
... that is not the terms of our lease.

.. This is what they called a fair market  
.. value?

.. I don't know what the hell they called it  
.. but it is phoney accounting, that is what  
.. it is. As a matter of fact --

.. Go ahead.

.. As a matter of fact, at the end of the  
.. year they had to wash all that crap out  
.. of the accounting for Internal Revenue  
.. purposes but they never washed it out for  
.. the purpose of computing our royalty and  
.. there you have it.

.. Do you recall the substance of any conver-  
.. sation about this dispute on the paper cost?

A. Well, the only conversations I had with anybody about it --

[Willis W. Ritter Dep. page 20]

Q. Well, is this the meeting we are talking about?

A. It was this meeting or if you say there was another one here, there may or may not have been, I don't remember it, but the only conversations I had were -- the auditors are the ones that went up and saw them you know and Crandall went up and Crandall took a CPA with him the last two or three times and Georgia-Pacific just wouldn't supply the information, just wouldn't supply the records. They were adamant about this position. If Wilson says anything, has anything to say about this, whatever he calls this market situation were with respect to paper. They were just dead set on departing from the terms of the lease. That lease requires them to charge against us only their costs.

Q. I appreciate that but again after the conversation, do you recall any of the substance of the conversation among the three of you that I think you said were here, Crandall, you and --

A. About what? I told you about paper, now what else?

Q. But you have told me pretty well your contentions but I am asking if you remember anything of the substance of the conversation?

A. The substance of the conversation is in that letter of Niebergall's.

\* \* \* \*

W. Ritter Dep. page 24]

\* \* \* \*

Mr. Behle) Now the Niebergall-Foster conversation with you in this room, can you recall the substance of what was said by either of the three of you at that time as best you remember?

Well, that is the same question you have been asking me and I don't recall the specifics of that conversation. I know in a general way what our differences were and I thought Niebergall when he wrote a letter after he went back up to Portland stated them about the way they were.

No, I was asking first as to the one conversation and then the other but in any event you don't --

I don't remember two conversations. I remember Wilson being here, Niebergall being here, Foster being here and I think there was another accountant who was with them.

Have you ever discussed this matter with any of the people

W. Ritter Dep. page 25]

were with the predecessors of Georgia-Pacific on the lease at the lessees end?

In the beginning Certain-Teed had a fellow named Johnson. Johnson came out here to help straighten out some of the accounting procedures. As you fellows

well know you can't in a legal document provide for everything that you come up against in accounting procedures and so Johnson came out and we had conversation about those accounting procedures and I sat over there when my couch was on the east wall, I remember him well, and he told a story that I have got a lot of mileage out of. Do you want that in the record? It is a good story, I want to tell you that story sometime.

Q. Well, was there anything significant with respect to these disputes, issues in dispute now?

A. Oh, there were a lot of things, that is why he was out here.

Q. But I mean that still carry over today to the current controversy?

A. No, the only thing that has any carry over is that ten per cent formula. Now preceding that, that time until the present, that's been the historic accounting procedure here. I say there is lots of writing about it. There is in the correspondence and in the accounting file. I think the attorneys have that. If they haven't got it we'll find it or look for it. We had a very happy relationship about this for

[Willis W. Ritter Dep. page 26]

years. As a matter of fact Crandall got passing up the annual audit for as long as three years. He went down to Florida on a mission for three years and we didn't have any audit during that time and also towards the end of that audit, in that period down in Florida is where Bestwal-

I think got into difficulty about not the ten per cent formula, they followed that, but the Pryor paper matter. Somewhere down the line in the history of the lessees in this case you will find a controversy between us and them about the paper and Crandall wrote them a letter and that's all it took. They knocked out that idea of making an inter-company profit on paper and charging us with that figure and there is a communication about that and I think you fellows have that document.

MR. MCCARTHY: It was introduced in evidence.

Now that is I believe Bestwall. Up until that time we had had, oh, of course accounting items every year where something is overlooked or small matters of accounting, none that have carried over and that Pryor paper thing didn't carry over. As a matter of fact that accounting procedure has been followed all the way through the twenty years of this lease. Even Georgia-Pacific themselves followed the proper accounting procedure. Talking about the ten per cent, Georgia-Pacific followed that ten per cent formula for general administrative and selling expense for the first two years they had the lease up

[This W. Ritter Dep. page 27]

there.

(By Mr. Behle) Can you recall any other conversations with -- I guess I have asked you this several times -- with anyone else that would have a material or relevant bearing on this controversy?

A. Conversations with whom?

Q. With anyone. This is fishing as deep as  
as wide as I can.

MR. ASHTON: You exclude us, don't you?

MR. BEHLE: Other than with counsel.

A. Well, of course I have talked to the  
lawyers about it. I have talked to  
accountants about it. I have talked to  
Crandall about it. We have talked to the  
trustees about it and what we have talked  
about is the subject matter of this  
lawsuit.

Q. (By Mr. Behle) But you don't recall any-  
thing that we should know by the way of  
evidence that would be relevant in the  
matter and that would help us in develop-  
ing the facts?

MR. McCARTHY: I object to the question  
as not calculated to lead to discoverable  
testimony.

MR. BEHLE: Well, it saves a lot of time.

A. I don't think we should be objecting to  
any questions. I am trying to give you  
everything I have. We'll take a look for  
the records for you. Those I don't keep  
and never have kept and so far as my con-  
versations with anybody on the other side  
are concerned, Johnson in the beginning,  
yes, and of course in the very beginning  
the negotiations for this lease were made  
by

[Willis W. Ritter dep. page 28]



Q. I represented Ted Jones. I represented the American Keene Cement and Plaster company. I had no -- I didn't represent American Keene except in a collection matter or two until they got into some litigation with constructive trust suits against them. Well, the main suit against them that I tried, tried it in this court, was a mortgage foreclosure suit. When I came into the thing in the middle '30's, thereabouts, depression time, the Gypsum Trust, the United States Gypsum Company got some land down there adjacent to ours and they hired Henry Moyle and Henry Moyle found out that Ted Jones and American Keene held a mortgage through a fellow in Pittsburgh, his name was Golden, and Henry went back on behalf of U. S. G. They were getting ready to build a plant they have down there and Henry went back to Pittsburgh and inspired that fellow to file a mortgage foreclosure suit down in Richfield to squeeze out Jones and American Keene and this was the first serious business I did for them and I came in then at the close of the trial with the former Attorney General of this state, a nice old guy. His son was one of my law students and I can't think of his name.

MR. BEHLE: Joe Chez.

MR. ASHTON: Barnes Clough.

Well, anyway he tried it and he had a heart attack at the end of the trial. He came up here and went to bed and it was tried before the old Judge down there, tough old guy, Bates,

W. Ritter Dep. page 29]

do you remember Bates?

Q. (By Mr. Behle) Nephi J. Bates.

A. Right. Well, that was tried before Bates and their attorney got a heart attack and couldn't finish so Jones came around and asked me if I'd take on where he left off and I said I will if you will take me over to him and have him agree to it. I don't want to steal his business while he is in bed with a heart attack and that was done and I took on the after trial motions and one thing and another. Bates issued the order to foreclose the mortgage. I appealed it to the Supreme Court of Utah and it's in the books, Golden against the American Keene Cement and Plaster Company and the high court gave what us judges often do, instead of deciding the lawsuit they sent it back for a new trial. As soon as it got back to Bates' court, Henry removed it to the federal court and we tried that lawsuit before Johnson and I won it. Along late in the day one afternoon, Johnson wound that pencil up in his ear and he said, "Mr. Moyle, I don't see how you are going to recover in this lawsuit." Well, that was how I got into the thing. Now from then on all they had down there was a plaster mill making Keene cement and going through the depression times it wasn't a very successful operation. Jones got sick and decided he wanted to get out and he talked to Sid Eliason about buying it and Sid Eliason turned down the chance to buy it. Jones virtually begged him to buy it for \$50,000, lock,

[Willis W. Ritter Dep. page 30]

stock and barrel. Sid passed that up.

said no, he wouldn't do that. Then Jones died and we went through a lot of estate problems. This is how I got my interest. I acquired stock for my fees and very early turned that stock, all of it as it came along, over to a trustee, a family trust. My wife's been a trustee, has been since around '37 for herself and my four kids so I have no financial interest in the thing at all. I have acted as a trustee simply to represent my family there and primarily because I had grown up with this thing.

You have all the background.

I have the whole background and history of it. Now the only conversations, communications or contacts with the people on the other side of that lease have been in relation to accounting problems about paying those royalties. \* \* \*

Willis W. Ritter Dep. page 31]

One thing you mentioned in connection with the cost of the paperboard controversy, a lot of that was washed out in connection with the revenue, tax procedures and income settlements?

Not just the paper account. Georgia-Pacific has done this. There wasn't much controversy about that earlier. There has been relatively no controversy about it since the Diefenbach letter because both sides acted upon the proposal in that Diefenbach letter. Whenever there is any correspondence in the file about that, both sides recognized and approved that and it is approved in writing. Every time we had an audit there was something about that, the audit procedure. Every time Crandall audited the books

annually and found where they departed from that ten per cent formula, called to their attention, sent back a correction and they had correspondence about it and it was approved on that ten per cent basis. That is the kind of records we have or had, I don't know where they are.

Q. But I had noticed in reading the lease that the accounting differences were supposed to be adjusted, if you could not adjust them yourselves, in accordance with the determination of the IRS?

A. Well, there is a provision in there about that. That is the standard of accounting. There is a provision there about the accounting practice or whatever it is, I don't remember

[Willis W. Ritter Dep. page 32]

that detail but if the accounting practices were --

Q. If there was a dispute --

A. It was going to be good accounting procedure but if there was any question about whether it was good accounting procedure, we'd take the Internal Revenue Service method of accounting when they audited the returns.

Q. Was that provision ever invoked so far as you can recall?

A. No, not that I know of. We didn't have any controversy, serious controversy about this until Georgia-Pacific. We could have had serious difficulty if we hadn't followed the Diefenbach letter.

\* \* \* \*

\* \* \* \*

GORDON L. BELL

called as a witness by the Plaintiffs, being first duly sworn, took the witness stand and testified as follows:

DIRECT EXAMINATION

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BY MR. ASHTON:

Q. Dr. Bell, will you state for the record your full name please?

A. Gordon L. Bell.

Q. And Doctor Bell, where do you reside, also for the record?

A. 515 North 22nd Street, Bismark, North Dakota.

Q. What is your profession?

A. I'm a geologist.

Q. Will you tell us, Doctor Bell, where you first got your academic training relating only, of course, to your professional training?

A. The BA Degree and the MA Degree at Berkeley in Geology, University of California, and the PHD in Geology at the University of Utah.

Q. When did you obtain your preliminary degrees and ultimately your Doctorate?

- A. In 1941, for the first two and I got it both at the same time, the same setting and 1952 for the PHD.
- Q. Now, after you, and while you were obtaining your degrees, can you tell us something of your practical experience in the field of Geology?
- A. Well, after I received the Master's Degree at Berkeley, the Government put me to work on war minerals, particularly optical calcite for bomb sites and then I was transferred into here at Marysvale on the alunite for aluminum and worked at that until, well about 1946, I became interested in the gypsum and then started studying the gypsum deposits here in the gypsum hills out of Sigurd and then did some consulting work. The war was ending and

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then they asked me to teach at the University of Utah.

- Q. And did you teach at the University of Utah?
- A. Yes.
- Q. For how long?
- A. I taught there for '47 and '48 and then at the Idaho State University at Pocatello '48 and '49 and then back to Utah and taught extension courses and got my degree.
- Q. Have you taught at any other universities other than the University of Utah and Intermountain Universities that you

referred to?

Yes.

In California?

I was Field Assistant in Geology at Berkeley and Mining Assistant to Doctor Bulin at Berkeley and then I taught four years at the University of North Dakota.

And, Doctor, have you besides the practical experience you have given us and the academic training that you have given us, have you contributed to the literature and read the literature particularly in your field relating to gypsum?

Yes, I have. I was quite intrigued with these gypsum deposits for their structure and composition and their, their general geological setting and I did a job, several jobs on the gypsum, mapping and testing their quality and also helped a little company at Gunnison on some oil.

\* \* \* \*

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And then I gave a talk on the gypsum here out of Sigurd here and these deposits at the School Mines at Butte, Montana. I think that was 1948. I was on the-- Do you want some big words?

Well, not necessarily.

Well, I have to give the title.

All right.

Diaphthorite Meta morphism. That's the

changes that go in gypsum.

Q. And, Doctor, did you spend considerable time, coming to the last question that anticipated you, both before you obtained your Doctorate and after you obtained your Doctorate in the gypsum area around Sigurd?

A. Yes, I did.

Q. And what years were those that you did that extensive work?

A. '46, 1946, to--actually different times to 1952, and when I mapped the Crescent deposits and then in 1954 I wrote a report on the Crescents.

Q. Are those Crescent deposits also sometimes referred to, Doctor, as the Jensen claims?

A. Yes.

Q. And we have had some testimony in this case that those Jensen claims are owned by the Defendant Company. Will you tell us geographically and in simple geology where they are located with reference to the plant?

A. They are within from two to six miles airline of the plant, Sections 12 and 13 for the Crescent, 21 and 22 and 23, 27, 28 and 33 for the Keene.

Q. Are they sometimes also called the American Keene

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which are the claims the subject of the



...at?

...some of my terminology; will be the old time terminology.

...we'll get it so it will relate to the old time terminology, Doctor.

...this also includes Western Gypsum Claims in this same--

...and those Western Gypsum Claims are the ones we're going to talk about on these exhibits; is that correct?

...Yes.

\* \* \* \*

... \* \* \* I would like you to tell me, because we are going to be talking about

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different beds as though they are different things. Is all of the gypsum that we're talking about whether it be the Jensen claims or the American Keene, are they all part of a common geological formation?

...Yes, they are all deposited simultaneously, all part of the same formation.

...Now, are they all inter-related?

...Yes, they are.

...Now, Doctor, when you were examining the gypsum fields or the deposits and the beds in 1946 to 1953, did you have occasion, and I may go a little backwards from the way you and I talked about this, did you have an occasion to estimate

the reserves that are located in now what are called the Jensen claims?

A. Yes.

Q. And what kind of study did you make to determine the reserves which are in the Jensen claims?

A. I worked with a Mr. Benoni Rockwood, Jr., a consulting geologist for, I believe Certain-teed. I don't remember who he worked for, and we made a thorough investigation of these reserves in these early times. I suppose prior to the purchase of these deposits and then I made a very thorough examination of all of these deposits, some that U. S. Gypsum has now for--I can look up his name here--for Utco Products, Richard Hellerback, he's deceased, in Salt Lake City, and I sampled the beds throughout the area and tested for the water which is a means of determining the composition of the percent of gypsum.

Q. And did you do some mapping, particularly having in mind the estimating of the reserves of these Jensen claims?

[Tr. 259]

A. Yes.

Q. Or called the Crescent claims, I think, in 1952 and '3?

A. Yes.

Q. I show you what is identified as Plaintiffs' proposed Exhibit 130, Doctor, and ask you if you have had an opportunity

before to look at this particular map which I now show you, which is so identified?

Yes, I made it.

And is that your work product?

Yes, sir.

And does that particular map show the location generally up in the right-hand of the Crescent Claims and also some drawings on the side that show some drift?

It shows a plan and then the cross sections of the drill.

And is this particular map which you have identified show what you have explained?

Yes, sir.

\* \* \* \*

Now, also at that time did you make a report in which you estimated the amount of gypsum which was located in those claims which are identified in Exhibit 130?

I did.

And I have here what is identified as Plaintiffs' Proposed Exhibit 131, is that a copy of your report?

It is.

When did you make that report?

[Tr. 260]

A. 1954.

Q. And does that report reflect the estimate of reserves of gypsum which you found in the properties described therein and also in the map which is identified as Plaintiff Proposed Exhibit 130?

A. Yes, sir.

Q. Thank you.

\* \* \* \*

Q. Now, have you had an opportunity to review those particular claims which we have just described, 130 and 131 recently?

A. Yes, I have.

Q. Has there been any mining done on those particular claims since you made your estimate of reserves in the 1950's?

A. None.

Q. Now, can you tell us then, referring to your earlier work, and the refreshing course which you gave yourself out on the claims recently, how much gypsum reserves there are now in place of a quality and kind suitable for the manufacture of plaster board in those so-called Jensen claims?

\* \* \* \*

[Tr. 261]

\* \* \* \*

Q. Are you familiar with the manufacture of plaster board and the kind of gypsum that

used in the manufacture of plaster board?

the primary use of gypsum the making of plaster board and the related plaster products?

plaster board and plaster.

And are you familiar in your profession as a geologist and your study of gypsum of the kind and quality of gypsum that is required for the use in the making of plaster board?

Yes.

Now, will you answer my question as to how much gypsum of the kind and quality suitable for the making of plaster board exists at the present time in the Crescent claims?

MR. TAYLOR: Now, may we voir dire the witness before he answers?

THE COURT: You may.

MR. TAYLOR: Because I would like to--

THE COURT: You may. Go ahead.

#### VOIR DIRE EXAMINATION

MR. MOORE:

Mr. Bell, could you tell us whether you have been in the Sigurd plant and examined the products that are going into the Sigurd plant?

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- A. I mapped the site for the Sigurd plant. I watched it under construction and I visited it in those days.
- Q. You visited it in those days?
- A. Yes.
- Q. Now, are you familiar with the ore, the chemical analysis that is going on in that plant at this time?
- A. I am not at this time. I had heard that they don't have such rigid specifications as they used to because they have better crushing facilities.
- Q. Are you aware of the exact chemical analysis that goes on and the requirements that are made to produce the gypsum board in the Sigurd plant?
- A. I would have to say yes, because it's about the same as it was before. It has to be good gypsum.
- Q. It has to be good gypsum, but you're saying you are basing this on what happened in 1956 or earlier?
- A. Yes.
- Q. And not at the present time?
- A. Yes.
- Q. Are you familiar with the fact that the composition of the board in 1956 has changed from the composition of the board at the present time?

Q. I'm not aware of that.

Q. Are you aware that there is a lighter board now at this time than there was at that time?

A. I am not aware of it.

Q. Are you aware that there is--you have to have a higher quality to produce a lighter board at this time than in 1956?

A. Well, I don't--I've heard that, yes, I've heard

[p. 263]

that, and I'm aware of this that we need specified a certain grade of gypsum but we mine and accept and use a lot lower grade gypsum in the various plants.

Q. You're not going on the chemical analysis at the plant, but you're going on hearsay; is that correct?

A. I'm going on the fact of the ore that you use. I know the ore that you use and it's the same ore that they used then it would have to be the same composition and I know that people establish those things the same as I heard in the court today that by useage we establish words and by useage we establish contracts and by useage I know what you use in your plants from those deposits that I analyzed very thoroughly.

Q. And you know the exact mix?

A. I don't know anything about your mix, but I know the rock that you use and its composition, the grade of that rock.

MR. MOORE: We will submit at this time, Your Honor, the witness does not know the position nor the requirements of our plants to the mineability of the ore that goes into that plant and therefore he is not qualified as a witness to testify to that point.

MR. ASHTON: Well, if the court please, that sort of thing goes to weight. This is simply gypsum. There isn't any great chemical composition of gypsum.

THE COURT: Of course, the court is completely unaware of any particular problem of this sort, but it does occur to the court that if per chance the requirements as of this time or during recent years would require, say, a different type of product, a different type of rock than the

[Tr. 264]

witness is acquainted with in the fifties, I rather think he would be obliged to determine whether or not the rock now available from these deposits is suitable for the quantity available for the type of product they are now manufacturing at the Sigurd plant.

Q. (By Mr. Ashton) Let me put it this way: Are you familiar, generally, with the type of gypsum that is used in the manufacture of plaster board?

A. I am.

Q. Are you familiar, did you go near the site and see the type of gypsum which was being mined out and taken to this particular plant?

A. I did.



Do you see any waste gypsum around the plant in any kind of waste pile?

No, not.

From that you concluded they were using the gypsum which was on the premises which you looked at, which you are about to describe in the making of plaster board?

Yes, and gypsum doesn't change, it has been there all those years.

I understand. Now, then, my question to you again, Doctor is: Can you now give us your estimate of the amount of gypsum in place which is suitable and used for the manufacturing of wall board in the Jensen claims?

MR. MOORE: We will still object to that question, Your Honor, because we don't think it has established a foundation.

THE COURT: Of course, he has testified that he has made considerable inquiry into these deposits in and about

[p. 265]

the area where these claims are located. Did you make any effort to determine, say, the availability in terms of tons or other measurements?

WITNESS: Yes, sir.

THE COURT: I'm going to let him answer.

MR. ASHTON: That's what we want to talk

Q. Now, would you tell us in tons how many tonnage of gypsum reserves there are and you may, if you like, give us also the quality based upon a geological measure by purity, percent purity in the Jensen claims.

A. You mean the Keene claims or the--

Q. The Jensen claims.

A. Crescent?

Q. Crescent. So that we're clear, Doctor, I know that you called the Jensen claims the Crescent claims and the Crescent claims the Jensen claims, they are the same, and that's all I want to know is the tonnage in those claims?

MR. MOORE: Your Honor, could I voir dire once more?

THE COURT: You may.

#### VOIR DIRE EXAMINATION

BY MR. MOORE:

Q. Mr. Bell, do you know how much salt in the ore that the plant can stand in determining the production at the plant in determining the use of the ore?

A. You are talking about halite?

Q. Yes, halite, correct, which is your terminology.

A. It has to be less than one percent. I don't think you want any halite in the ore, if you can get it.

Q. Do you know how much the plant can stand?

A. Yes.

Q. How much plant can stand and my understanding it is less than one percent.

Q. How did you determine that from the plant records?

A. Yes.

Q. Where is your source of information of how much a plant can stand?

MR. ASHTON: Do you intend to go on, Mr. [redacted]? This isn't voir dire, Your Honor, this is cross-examination.

A. That's all right. It's from scientific reports. That's in my mind it is one percent. They don't want any. If you touch it with salt and touch it with some of these other things that you people call contaminants, it is done, it is dead. And I'm aware of this light plaster board, but stayed clear of any review because I was just hired to reserves and I know these reserves are the same and they are using them. That's my point.

Q. (By Mr. Ashton) Now, will you give me your estimate of the tonnage reserve in the Jensen or Crescent claims?

A. Yes. I have here some notes that I remember.

Q. Now, I have to do what a lawyer has to do, like you have to do as a geologist. The notes you have in your hand are notes which you prepared?

A. Yes.

Q. And they are prepared in your own handwriting?

A. Yes, sir.

Q. And by the use of those notes can you refresh your recollection?

A. Yes.

Q. And I'm now talking, Doctor, about the Crescent claims

[Tr. 267]

the ones that are known as the Jensen claims and not the American Keene. Can you give me now your estimate of those reserves?

THE COURT: Was that estimate of tonnage for example, made recently or when? Can you tell us that please?

MR. ASHTON: May I say, Your Honor, I thought I laid a foundation. He made it in '52 and refreshed his recollection the other day and nothing had been mined from them when he saw them in '52?

THE COURT: All right.

MR. ASHTON: I didn't mean to interrupt but I wanted to make that clear.

THE COURT: Quite all right.

Q. All right.

A. Nine million tons, round numbers, and that's what I call, I believe in the report, measured ore, and then there is a down dip extension of three more

million tons and in the two beds in the  
continent.

\* \* \* \*

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\* \* \* \*

Q Now, at the time you were examining these  
claims in

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1946 - '52, you also looked at all the  
gypsum deposits in that gypsum area,  
did you not?

A Yes.

Q Also, I suppose, you looked at the claims  
which are now known as the American Keene  
claims?

A Yes.

Q And was your answer yes?

A Yes.

Q Now, then, Doctor, at my request did you  
go back to the American Keene claims  
within the last thirty days for the pur-  
pose of refreshing your recollection in  
examining the American Keene for the pur-  
pose of making an appraisal of the gypsum  
of quality and kind described located on  
those claims?

A I did.

Q And when did you go back?

A First month, April, and again the day

before yesterday.

Q. And by going back and looking at those claims and refreshing your recollection from your prior knowledge of gypsum in the Sigurd area, then you were able to locate these claims on the ground?

A. Yes, sir.

Q. And did you have provided for you a map which was produced for us by the Defendant company, which related to those particular claims?

A. Yes.

Q. And I show you what is identified as Plaintiffs' Exhibit 128 and ask you if that is one of the maps which was provided for you?

[Tr. 270]

A. It is.

Q. And also what is identified as Plaintiff's Proposed Exhibit 129, is that one of the maps that we provided for you?

A. Yes, it is.

Q. And do those particular maps show the location and some of the geology and contours of the American Keene claims as located thereon?

A. They do.

\* \* \* \*

Q. Now, Doctor, by using these particular

... which were provided and by using your  
expertise as an expert in the field of  
geology and particularly in gypsum, were  
able to go out on these properties and  
locate the gypsum deposits for the pur-  
pose of making the appraisal of the reserves  
there existing?

Q. Did.

Q. And will you tell us where you first went  
and having had some advantage of discuss-  
ing this with you, did you first go to  
the beds which are located on Exhibit 128?

Q. Did, the South Quarry area of Group 1.

Q. Now, I wonder, Doctor, if you would put  
that up right there and tell the Judge  
where you went and what you saw and let's  
take one of those beds with particularity  
to show the method which you employed and  
again you can refer

Q. 271]

to any notes you made which are made in  
your own handwriting for the purpose of  
refreshing your recollection?

Q. Yeah. I went here with Mr. Moore and Mr.  
Plant Superintendent.

Q. H. Hummel?

Q. S.

Q. That the gentleman who testified here  
yesterday?

Q. S.

Q. All right.

A. And we visited Quarry 1 up here for visual observation. We could see Quarry 15 from there, where they were working at that time in April, and the amount of--and the extent of the ore here, I made this measurement too, and of Quarry 1, 2, 3, 4 and 5 and looked across here to 10.

THE COURT: The record may show that these 1, 2, 3, and 4 and 5 up to 10 are so marked.

MR. ASHTON: Thank you, Your Honor.

Q. All right.

A. From there we went on through to the north group.

Q. Well, let me stop you on this first one because I would like to examine the method you employed. Did you go out and estimate the size of those beds and depth and the quality for the purpose of estimating the reserves there?

A. I watched for quality and the nature of the rock, the type of rock for gypsum, in other words, in all of our visits and I relied on their map for the measurements and the structure.

[Tr. 272]

Q. And also did you check by relying on their map and looking on the ground check on the ground for the purpose of correlating the ground position and the map position?

A. Yes.



Now, what were the reserves that you found that you computed to be in existence on this particular claim as shown on Exhibit 128?

\* \* \* \*

Yes, these are, as I recall, some of the Pancost Country and these quarries have been used for a number of years. I don't know just how frequently they have been mined, but conferring with these gentlemen, Mr. Hummel, at my suggestion, they will go back and mine some more in here. There's lots of ore in here left in these quarries. And my estimate of the tonnage is again in round numbers of 1, 2 and 3 and 5, 22,000 tons.

And that's on the property shown on Exhibit 129?

Yes. Now, in Group 1, No. 10, it has an extension here, the bed continues east in two segments and on into the Western Gypsum claims for 1600 feet and I used just those to the claim line and calculated 32,000 tons.

Now, was the method you employed one that you would characterize as conservative or one that was projected into a liberal area?

Conservative. My dimensions, for example, on these beds which have not been mined on are 800 feet for the north one, 170 feet long, twenty feet wide and 20 feet deep. That's practically sticking out of the ground.

(p. 273)

\* \* \* \*

- Q. Do you frequently find in the mining of gypsum particular, Doctor, that after you mine down to the projected depth, as you see it geologically, it sometimes often continues?
- A. Yes, as shown in the Crescent.
- Q. Yes.
- A. The Crescent is typical of all of these.
- Q. And you can find this to be the conservative method used by geologist customarily in estimating exposed beds; is that right?
- A. Topography. Mother nature has cut down through these beds the same as we have excavated them or the same as we would drill through them and we're trained to see that bed as it is in the hill and we can project a reasonable distance. If we can see it on two sides, we can project through. Now, I'm aware of the nature of these beds because I'm still trying to gather more information here for structural studies and realize that the complexity and that has been referred to before and the great [sic] exposure of these so-called pods that they mine on.
- Q. Now, Doctor, after making an estimate of the reserves on 129 what group did you next go to?
- A. To the north group in Section 29.
- Q. Will you identify it for me on Exhibit No. 129?

107.

Which one is that please.

I went with the same men, Mr. Moore and Mr. Hammel, to all these north deposits and they taught me the names

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that they had given them and the groups. There was Group 2, we've talked about this one before, and--

Now, let's stop at Group 2 and do our job. Did you appraise the reserves existing on Group 2?

Yes. Relying again on the measurement and the geology on this map and the quarry position, where they were working. They were working at exposing at the time of our visit. We drove by there twice in fact and drove to this Quarry and then went on up to these others.

Now, referring to your notes, if you need to to refresh your recollection, will you tell me please what reserves you found existed in Group 2?

Okeh. 55,000 tons.

Now, after appraising the reserves at 2 and estimating, I should say the reserves at Group 2, where next did you go?

We went on through the deposit to--by four. Four was supposedly mined out.

Did you estimate any reserves in 4?

A. I used some distance here--22 and 3, I think I used on No. 4, 35,000 tons.

Q. And is that the amount of reserves you found in place, of the quality and kind on 4?

A. Yes.

MR. MOORE: Your Honor, I object, this is the first time on these maps that he's referred to the quality and kind.

A. Okeh.

MR. ASHTON: I referred to quality and kind on the first map. I didn't refer to it on Claim 2. I re-

[Tr. 275]

ferred to it on Claim 4 and it's inferred in all my questions and in all his answers.

MR. MOORE: I raise that objection to what I did on the Crescent claims, Your Honor.

THE COURT: Well, of course, I think he contemplated, that they were all pretty much the same type and quality and kind.

A. Yes, they have to be.

THE COURT: That's typical, I think you said, with gypsum.

A. Right.

THE COURT: I think I'll permit the answer to stand.

MR. ASHTON: And-- Had you finished, Your Honor?

THE COURT: Yes.

Now, give me the reserves in 4 please.

THE COURT: I think he did.

Good.

Go to the next one please, Doctor Bell.

Then we went on to 5 and up to 3 and visited this quarry, 27 and 28 of 3.

Which one do you want to talk about next, Doctor Bell, 3?

I'd like to.

All right. Tell us about what you did at 3 and what the reserves were.

THE COURT: Now, for the sake of the record he referred to 28 and 27 in 3, that is there are numbers?

Quarry 28 and Quarry 27.

THE COURT: Of 3.

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\* \* \* \*

Group 3. We visited that and it had a face exposed and I remembered that as the old flat iron, as we called it, from the face. It's an enormous piece of bed rock. Mr. Hummel remarked about that-- well--but I was amazed in going there and seeing the amount of ore blasted into the valley, into the canyon. I cautioned some of these gentlemen, that they would

hear about it again and here it is.

- Q. Now, all right, we'll hear about that in a minute, but I want to talk now about the reserves which you estimated here.
- A. Okeh. This is Group 3. I used 26, 27, and 28 242,385 tons.
- Q. All right. Now, will you go to the next one you want to talk about, Doctor, and we'll talk about all of them in due course?
- A. Well, No. 30 over here on--
- Q. That is in Group No. 3?
- A. Yes, and they showed me where they had quarried and Mr. Hummel said they would go back and clean up that quarry, those are his words, there's more ore there and I recognized the ore extending from that and and said, "Well, there's a good bed," and last visit the day before yesterday they were on there, drilling and preparing for mining.
- Q. But in any event, when you say you talked about that, that is computed in the reserve which you estimate to be in Group No. 3?

[Tr. 277]

- A. No, I haven't given you a total of 3 yet.
- Q. All right.
- A. All right, the total for 3 is 418,000 in round numbers.

\* \* \* \*

- Q. What's the next group you looked at?
- A. Have we talked about 4? Yes, we talked about 4 - 35,000. 5, I include 20,000 ton in Group 5.
- Q. And Group 5 is the one indicated on the map as Group No. 5; is that correct?
- A. Yes.
- Q. And what about Group No. 6, is there a 6?
- A. Yes, you bet.
- Q. How much did you estimate there was located on Group 6?
- A. 200,000 tons. That's in Bed 40 and 41.
- Q. And finally--now does that comprise all of the deposits or reserves that exist in Group No. 6?
- A. Yes.
- Q. Now, Group No. 7 please.
- A. 7, I used--I calculated 125,000 tons.
- Q. Now, did you aggregate and add up in round numbers the total reserves which existed on the American Keenes as shown on the two Exhibits referred to which are 128 and 129?
- A. Yes, sir.
- Q. And what is your total of the estimated reserves?

A. Round numbers 900,000 tons.

\* \* \* \*

[Tr. 278]

\* \* \* \*

Q. All right. Now, Doctor, with that 900,000 tons and the 12,000,000 which are located on the American Keenes are all these claims within 6 miles roughly of the Sigurd plant?

A. Yes.

Q. Assuming that that plant uses 200,000 tons a year, can you calculate for us approximately how long those reserves will last for that particular plant?

A. Well, if you had ten million, that would be fifty years.

Q. And do you have in excess of ten million?

A. Yes, we do.

Q. Now, Doctor, when you were examining these--

A. I'll tell you why, because you haven't considered any of the Western claims. There's lots of ore in the Western claims.

\* \* \* \*

Q. \* \* \* What is your present occupation?

A. I am the engineer geologist for the North Dakota State Highway Department, Bismark, North Dakota.

Q. And in that particular job and also in your profession as geologist and consul-



tant and other things, have you become familiar with mining operations, particularly mining operations of gypsum?

[Tr. 279]

A. Would you ask that again please?

Q. In your experience as a geologist and also in the experience of the present job which you have, have you become familiar with the moving of dirt and the mining of properties particularly gypsum?

A. Yes, I have.

Q. Have you observed the operation of--

MR. MOORE: I object.

\* \* \* \*

MR. ASHTON: \* \* \* He's qualified as an expert and--

MR. MOORE: But you qualified him as an expert geologist.

THE COURT: Yes. Of course, I can see a difference between a geologist and a miner. I think your question was addressed to mining.

MR. ASHTON: That's right.

THE COURT: Mining. Whether or not a geologist, for example, could testify concerning that particular matter would be a question as to whether or not he had had any practical experience.

MR. ASHTON: That's what I was doing when he interrupted me.

THE COURT: And I assume from what he said of course, he does. Have you had some experience in mining of this particular type product

THE WITNESS: No, I haven't, Your Honor. I have guided them and advised the methods of mining and where to

[Tr. 280]

mine and the way to mine in a most economic way. We don't mine the--

Q. Doctor, I appreciate you're not a miner, but have you consulted with and advised mining companies in the method of mining properties and removing dirt and ore?

A. Yes.

Q. Is that one of the jobs you do as a consulting geologist?

A. You bet.

Q. And are you familiar with the methods used by U.S. Gypsum in the mining of this particular property?

A. Yes.

Q. And have you observed how they are doing it?

A. I have.

Q. And did you observe how these properties were being mined and I am talking now about the properties being mined by the Defendant company when you were out here the other day?

A. Yes.

Q. And will you tell--

MR. MOORE: I still would object--

Q. Will you tell the court what you observed?

A. Yes, the word has already been introduced "high grading" and I would like to define that.

MR. MOORE: I object to this.

\* \* \* \*

THE COURT: He's attempting to tell us now, for example, some of the things he observed, such as high grading

[Tr. 281]

and there has been some reference to that particular word before--

A. Yes.

THE COURT: Here in the course of this trial thus far, high grading. I am interested in that. I'm interested in knowing what he has in mind when he says high grading. Now, go ahead and tell us.

A. Thank you. I would like to define that term as used here. High grading here has been practiced all along since this plant was built in terms of mining the most accessible areas of gypsum beds. Leaving the less accessible. In other words, the most expedient way to gain the gypsum from this property without mining the remaining parts of the beds and this bothers me from what experience I've had in the last 14 years with the highway. We couldn't leave things like

that.

THE COURT: Let me ask you this: Suppose you were operating and milling this particular type of product, that is your job, somebody owns these claims out here and you were buying so much per ton, wouldn't you pursue that particular method?

A. I would, it's human nature.

THE COURT: Yes.

A. But it isn't good mining practice.

THE COURT: Well, of course, I don't know just what good mining practice is.

MR. ASHTON: It isn't in view of this lease which requires them to--

THE COURT: I know, but I take it the purpose of this thing is to get into the record the fact that they are

[Tr. 282]

taking the most accessible--

MR. ASHTON: You bet.

THE COURT: Ore, which is human nature.

MR. ASHTON: That's what I said in my opening statement, Your Honor, we are involved in human nature from the beginning of this lawsuit.

THE COURT: Well, the court is not concerned about high grading. I didn't know what high grading meant. I wanted to know what it means.

A. Yes.

THE COURT: Take the best ore and leave it, but in this particular case, of course, he is merely indicating that they have taken the surface and most accessible ore. What's wrong with that?

MR. ASHTON: I'm having him describe it.

THE COURT: Go ahead.

Q. Did you also look at the U.S. Gypsum properties and see how they are mining their property?

A. Yes, sir.

Q. I see.

MR. ASHTON: Incidentally, there's nothing wrong with it, Your Honor, if they take all of it open.

THE COURT: Sure.

MR. ASHTON: This is the point I'm getting to.

Q. And did you observe a different method being used by U.S. Gypsum plant?

A. Yes.

Q. And describe what you saw there being used in their mining operation.

A. Yes. U.S. Gypsum Company cleans their beds, pre-

[Tr. 283]

pares it for mining ahead of mining and then mines it clean.

Q. Did you observe--

A. A very pleasing sight.

Q. Are these particular beds which you observed being mined clean, were the beds cleaned and mining the whole thing in one operation? Or is it pot mined?

A. Where?

Q. On the American Keene claims.

A. Well, they are mining the accessible parts and I'm aware of the fact that there are areas in this--in the Keene's deposits which are cleanly mined. There are some, and there are some that have faces beyond their safety, to get the ore and I sensed this and I see that they have mined these big fellows and mined all along and there is one up here that bothers me, this fellow, No. 29--

THE COURT: He's referring to 29 on Group 3, isn't he?

A. They have blasted off there and bulldozed all over the place and left it. This would require money to get back into. They are now mining on 28 and 27 in Group 3 with a face that's too high and I understand what they're after, all the tonnage they can get and I wouldn't recommend it for their own good. It would be less expensive to mine it in stages.

Q. Now, did you make an examination of the area for the purpose, particularly around the mill site and other places to see if there is any accumulation of

a waste ore or stock piling of overburden?

THE COURT: I think the testimony thus far is there is none around here.

[Tr. 284]

A. That's right.

Q. Is that right?

A. I found no waste pile.

Q. What is the significance of that to you, Doctor Bell?

A. That they are using the ore as it comes.

THE COURT: In its entirety?

A. Yes.

THE COURT: It couldn't be otherwise?

A. Right.

Q. So that the ore which they are mining and using is ore which certainly by its useage is suitable in quality and kind for the manufacture of wallboard?

A. It doesn't go any place but into that board and into the box car or truck.

Q. And is the gypsum which you have observed in place and which you have estimated for us as reserves is the same quality and kind of that which they had shipped and used in that mill?

A. It is. It must be the same rock.

MR. ASHTON: That's all.

THE COURT: You may cross-examine.

MR. MOORE: Your Honor, at this time before we start cross-examination, we would like to move to strike that testimony with reference to high grading. We feel that this witness has not been qualified as a mining expert and knowledgeable in mining techniques.

MR. ASHTON: If the court please, I think he has and all he has told us is what he observed.

THE COURT: Of course, with reference to that

[Tr. 285]

particular matter we have here a situation where these people are obliged to pay a fee for tonnage, on a tonnage basis. Consequently, I don't know whether we could oblige them to use the same method of mining that is followed, say, by--I'm assuming there is a difference between types of mining, which might make a difference in costs. Consequently, I don't know whether we could reach out and say under this contract that you've got to mine these claims, for example, as U.S. Gypsum does, the sister producer.

\* \* \* \*

[Tr. 286]

\* \* \* \*

MR. ASHTON: We may be by a question I am going to ask, Your Honor.

THE COURT: Go ahead.

Q. Have the procedures which you observed, Doctor Bell, impaired the reserves so



that they will not be able to get the same amount of reserves out of this property if they had mined them in a normal, reasonable manner?

A. I will have to say--

MR. TAYLOR: May we have an objection?

THE COURT: Just a moment, he wants to object.

MR. MOORE: I object to that on the grounds of irrelevancy and no foundation as to the--

THE COURT: He's a geologist and not a miner--

MR. ASHTON: Your Honor, could I do something more so that we can save a problem?

THE COURT: Yes.

Q. One of the things you do as a geologist is design methods and manners of mining a particular deposit for mining companies?

[Tr. 287]

A. Yes.

Q. And do you prescribe the procedures that they follow in extracting ore and deposits in a most efficient manner?

A. I do. I recommend the method of mining and the structure of the ore and its composition and the best way I think they could get at it for economic mining.

Q. And based upon your experience as a geologist are these particular properties being mined in a workman-like and efficient manner?

MR. MOORE: Same objection.

Q. Answer that yes or no.

A. I have to answer that yes, because they are doing this mining in the most easily mining areas.

Q. Are they impairing the reserves by the method which they are employing?

MR. MOORE: I object, your Honor, on the same grounds.

Q. Impairing their mining reserves?

A. They are.

Q. And how please?

A. Well, 29, as I gave as an example, they blast, well 28 where they are mining right now. They blast off and Mr. Hummel says they are going to clean it up, but all they do is cover it up with fill, they don't clean that up. You heard him say it, and then they have a face which is too high. The mining face is too high, and they should be preparing for haul roads and mining--it's dangerous, in fact, if you want my opinion. These are my opinions. I think their shovel is in a dangerous position and any-way

[Tr. 288]

they don't realize the foundation they're

on. They trust the ground to hold them where they are and those big trucks can't get on there. But, nevertheless they should be preparing quarry levels ahead.

Q. Is that being done on the U.S. Gypsum claims?

MR. MOORE: Your Honor, I'll renew my objection to the last question and make a motion to strike.

THE COURT: I'm going to take the objection under advisement. I would like to hear a little more about it and I'll determine if it's going to have any probative value.

Q. Now, Doctor, you were in the process of telling us how you think that their mining practices as you observed them are impairing the reserves, and I think you were talking about one place that was blasted and one place which was covered, are there any others?

A. I would imagine, and this is an opinion--

MR. LATIMER: Let's not give your opinions or imaginations.

A. I realize that.

Q. You are getting tangled up with a word and of course we cannot use imaginations. You've got to use your best judgment.

A. Now, I realize where I was. But my judgment then and my impression of Group 4 is, and Group, I think, 7. Yes, Group 4 here and Group 7 have more ore than I even estimated.

Q. And why do you say that?

A. Because they have mined at it and not mined it.

Q. And have you estimated the reserves that you gave

[Tr. 289]

simply because their methods have made it so there is no more than you have estimated which now can be mined; is that right?

A. Say that again please.

Q. Is that why you made the reserves on Group 4 less than they actually were because of their mining practices there?

A. Yes.

MR. MOORE: I object, Your Honor, that's a leading question.

A. But I said it was.

THE COURT: Of course, that's leading.

MR. ASHTON: The answer is in, do you want to strike it?

THE COURT: We will strike it.

Q. Tell me why you made the reserves on Group 4 less than they actually were?

A. Because of the mining methods.

Q. All right.

MR. ASHTON: I think that's all.

MR. MOORE: We again renew our motion to strike this.

THE COURT: I think I will permit the testimony to stand as it is. I frankly am doubtful about its probative value. I don't know, as I say, it appears to me that there is a difference between the geological version of mining practice and the practicality of it. For that reason, I don't know that it has too much probative value. That's my point and for that reason I am going to make that observation and permit the proof to go in.

[Tr. 290]

\* \* \* \*

Q. Are the reserves which you have estimated on the American Keene reserves which you think can be properly mineable?

\* \* \* \*

THE COURT: But you couldn't estimate the costs, of course, I take it?

A. I think my estimate is 33¢ a yard for removing the shale, which would amount to \$16,000.00 for a year's supply and this is average, and according to the work that we see, the contracts that I see, 50¢ a ton would be enormous. [sic] Those men are making money up there at 19¢ and 30¢ for the big price. This will cost you money if you remove the shale for these 30 feet which I used in calculation, from the sides of these beds. 40 and 41 are good examples; otherwise your mining costs will be the same. You will

[Tr. 291]

have the added cost of removing shale from

the sides and let that bed stand a thousand feet or whatever you can mine ahead or clear ahead and then mine under it in stages as you clear the next one and so on.

\* \* \* \*

THE WITNESS: May I say something more in qualification?

THE COURT: Go ahead. Go on.

THE WITNESS: The St. Louis University people invited me to become a full member of American Mining and Metallurgical Engineers in 1953, I believe. And I was a member of that as long as I paid my dues and so I am recognized in that area and have advised the Howell Copper Company of Utah, Mr. Kettle, President, on the mining methods for the copper ore and Mr. Steen came in later and made his fortune and I have open pit practice. We had a plant there too, but always on a consulting basis. These are on consulting basis and my interest here is unbiased and really for the good of the thing.

\* \* \* \*

[Tr. 292]

\* \* \* \*

#### CROSS-EXAMINATION

BY MR. MOORE:

Q. Just to clarify this point: Would you state the society you were a member of or invited to be a member of, Mr. Bell?

A. Yes, I was a member of AIME. American Mining and Metallurgical Institute.

Q. Now, are you aware, Mr. Bell, that a salesman who is selling rock drilling equipment, who probably has no mining experience at all, except for poking holes in the ground, can be a member of the AIME?

A. I am now.

\* \* \* \*

Q. You talked about determining the reserves in these groups. Now, would you explain-- Isn't it a fact, Mr. Bell, that you drove to the--I think you mentioned, for the sake of clarification, to Mining Site No. 1 on Exhibit 128 with Mr. Hummel?

A. And you.

Q. And myself, yes. Now, could you explain the

[Tr. 293]

method of observation from Point No. 1 \* \* \*

\* \* \* \*

Q. Now, with reference to the deposits on the northern area--

A. Southern area?

Q. Yes, the southern area. Isn't it a fact that you drove to the Vantage Point of Number 1?

A. Yes.

Q. Now, did you physically move on, except for this Number 1 and 2 and did you physically move on to any other areas in that northern section?

A. As I testified, I was on Number 1 and observed these others and 10 from the position of 1.

\* \* \* \*

(A map was marked Defendants' Exhibit No. 132 for identification.)

[Tr. 294]

\* \* \* \*

Q. Thank you. Now, you testified that you from the vantage point of number 1, you looked over the rest of the southern quarries; is that correct?

A. Correct.

Q. Now, did you specifically physically walk any of these other quarries?

A. I physically walked all of this in 1946, '7 and I believe '8.

Q. So between 1946, '7 and '8 have you walked those quarries?

A. Not until I saw this place.

Q. Now, since 1946, '7 and '8, Mr. Bell, have those quarries been worked? Have they been mined?

A. Yes.

[Tr. 295]

Q. Has the topography of the area been changed at all?

A. Not appreciably.



Q. Has the mining changed the topography at all?

A. Only where you have the little pods.

Q. Only where the gypsum is?

A. Only where your little quarries are.

Q. Okeh, where the quarries are, then the topography has been changed?

A. Yes.

Q. And so from 1946 until 1971, you have not physically walked those properties?

A. No.

\* \* \* \*

Q. So you have not made any review or estimates from those reserves so you are using your memory as to what those deposits were at the time in 1946 until 1970; is that correct, Mr. Bell?

A. That's right.

Q. And so the only other observation that you have made in 1971 for the Northern group is standing on Pod 1--

A. Southern Group.

\* \* \* \*

[Tr. 296]

A. Yes.

\* \* \* \*

Q. Now, would you explain the method of starting on Pod 1 and determining [sic] those reserves?

A. Yes. Talking with you fellows, estimating the size of those quarries down through the topograph, which I had. I had a quarry map of the geology on it. I didn't have to walk that at that time, and there it was, I was taking those trips over again in my mind with your measurements which are good.

Q. You will say that the measurements on the map are accurate.

A. They are fairly good, yes, they are fairly good. There is an error in topograph up near 25.

Q. But other than the error on 25, you would say that the mapping of the deposits on the maps submitted to you for your examination by the Defendants were accurate?

A. They are accurate enough that I could go out and find them all myself.

\* \* \* \*

[Tr. 297]

\* \* \* \*

Q. From your vantage point, you say from the vantage point of 30 you observed the other reserves? Was that your statement?

A. Yes.

Q. Okeh, now from the scale would you approximate the distance between the vantage point you have and the gypsum

deposit as outlined on the map which you have said are accurate?

[Tr. 298]

A. 1200 feet.

Q. Would you indicate by number the gypsum deposits you observed?

A. 28 and 29; is that correct, and the north extension of 30, and then I observed up here--

Q. Correct.

A. I observed over on 4 and 38 and 39, part of 39, I couldn't see the other part of it, 40 and 41 and 25 from that place.

Q. From the vantage point of 30; is that correct?

A. Yes.

Q. Would you estimate again the distance from your vantage point at 30 to these other pods that you have just indicated? You can estimate.

A. The distance there is two miles. That's an estimate.

Q. And you walked none of these claims in 1971? The only time you walked these was in 1946?

A. '46.

MR. ASHTON: To '52.

A. The only walking I've done here is during our visit to get out and look and learn

the terminology and review the beds as I knew them and as I said, I recognized that one on number 28 as the flat iron, and if I can recognize that, I've a pretty good memory of these deposits. I have to have to talk that structure.

Q. Okeh. Now--

A. That's our training.

Q. That's correct. Now, on the date on which you and Mr. Hummel and myself observed these claims, especially

[Tr. 299]

the northern claims, the first day, would you approximate the amount of time you took in estimating these reserves?

A. In the two days, I suppose I used a half an hour.

Q. Thank you.

MR. ASHTON: Which one are you talking about as these?

A. That's down in the southern part, 1, 2, 3, 4 and 5 and 10.

Q. And 10?

A. Yes.

Q. One-half an hour in making these observations?

A. These observations located these deposits in my mind completely oriented them and then I used your map and geology with my observation of the geology to compare it

with the calculations.

Q. From the vantage point you could estimate the exact amount of ore that had been mined from these other pods that you say had been mined and deposits had been taken out?

A. Well--no.

MR. ASHTON: I object to that. He never said he estimated the amount of ore that had been mined.

MR. MOORE: He had estimated the amount of deposits there and he said that he had taken into his calculations the amounts that had been extracted.

MR. ASHTON: Only in determining quality and kind, not amount.

Q. Then you did not at any time take into consideration from 1946 until 1970, the amount of ore that has been extracted from the mines in this area?

[Tr. 300]

A. Yes, I have and I told you about it, in fact. You must still use 500 tons a day and you said, "Yes," and that rate I can easily calculate you use two million tons.

Q. And you calculated from the time in 1946 until 1970 how much you had estimated at that time and taken away during from 1946 to 1970?

A. On the basis of your statement five hundred tons a day and that would be probably a 100 thousand tons a year for 18

years. That one million eight hundred thousand tons, and that's the basis, the only calculation I did on the amount of years, and that--

Q. So you didn't physically observe the amount that was actually taken?

\* \* \* \*

A. On the basis of this and my memory, there's still a million tons left here. My memory says from our work that there was three million tons in this particular area.

Q. That's your memory from 1946; is that correct?

A. And '54.

Q. Now, is it also a fact that in the total of two days we spent we talked about the half hour at the southern section--

A. Yes.

Q. How much time did you spend on the remaining part

[Tr. 301]

in the northern section in making these observations in 1971?

A. In my mind I think a half a day then and three-quarters of a day the next day and then half a day, the day before yesterday.

\* \* \* \*

Q. So you spent a total the second day of approximately, taking time out for lunch,

approximately three hours - right, Mr. Bell?

A. Three hours.

Q. Total time in examining the Defendants' property?

[Tr. 302]

A. Yes, okeh, fine.

Q. All right.

A. Yes.

\* \* \* \*

[Tr. 303]

\* \* \* \*

Q. Now, Mr. Bell, could you take the pen again and indicate your methods and areas of physical presence in observing this deposit and would you indicate to the Reporter what you are doing and where you're marking?

A. I would like to qualify that with the statement that this has been a review for me and that I had charge of the staking of all the patented claims for Senior and Senior in Salt Lake City with 26 surveyors and six bulldozers. I mean sixteen surveyors.

Q. Mr. Bell--

[Tr. 304]

A. I believe the record will show that, that in--

Q. The record has shown that in 1946 you had made these observations?

A. No, this is a new observation I didn't mention yesterday and I had charge of the staking of the--

Q. Perhaps--

A. This is a review for me and I earned the privilege of riding and looking for as you know, this came back to me in your presence.

Q. And would you indicate on the map the physical observations in 1971?

A. Yes (indicating).

Q. You testified yesterday you stood on one position here and observed and now you're making on Group No. 3.

A. I walked there with you.

Q. Now, you are making the line more extensively in Group 3 near--

A. Near 30.

Q. Near Deposit 30.

A. Yes.

\* \* \* \*

Q. Now, again directing your attention to Group No. 6, would you outline the physical observations you made there?

A. There's a road down in this valley, which isn't



lad [Tr. 305]

on this map and I walked along this road and off these claims in one place.

Q. So you didn't move off the road in observing these claims?

A. No. The road goes by the end of them and you can see them.

\* \* \* \*

Q. Now, would you indicate on Sheet No. 6 the distance between the place which you physically observed as you

[ Tr. 306]

marked here and the outer edges of Group Number 7, as indicated on the map, the northeasterly area?

A. That is about fourteen hundred feet (indicating).

Q. Thank you. Now, I don't believe yesterday--we talked about this--

A. South Quarry.

Q. South Quarry, but didn't mark the south quarry. If you will just momentarily mark your physical observations there?

A. They are on this ridge right here (indicating).

Q. Now, you are indicating for the record--

A. As I testified, I observed these other deposits.

Q. From one point near Group No. 1 or Deposit No. 1.

A. With your and Mr. Hummel's explanation.

Q. Correct.

THE COURT: Identify that Exhibit number?

MR. MOORE: Yes.

Q. Now, if I remember your testimony yesterday earlier you testified with respect to the Jensen claims or otherwise known as the Crescent claims, that you drilled through those claims and you determined the width of those claims and approximate size and is it not true that you said from the determination of that width and the fact that all of these claims originated approximately the same time and the same formation that you could then estimate the width of all of the other ones, particularly in the American Gypsum Trust series?

A. No, no. These are all the same family. These are all of the same origin and in the same nature and composition and I used the drilling and the channel sampling

[Tr. 307]

for the Crescents and then I sampled all of these Keenes for this Mr.--I told you about.

Q. How did you do--

A. I channeled sampled those veins.

Q. Would you explain to the court what you mean by channel sampling?

A. Cutting a channel across the outcrop on the veins.

Q. Now, was this below the outcrop?

A. This was through the weather material.

Q. Through the weather material, but it would not be as to depth, it would be as to width; is that correct?

A. It is as I explained yesterday where nature has cut down through the vein the same as a drill core or the same as excavation and that shows on the map, and I used topography. There is some exposures on these veins one hundred feet in depth.

Q. That's on the topograph and physical observations?

A. Right.

Q. Now, what about the areas which you could not physically observe that you could not see because of the shales and other materials that's covering these deposits?

A. I don't use any measurements but what I can see, than what is shown on the map.

Q. The actual physical outcropping?

A. Right.

Q. Is the only--

A. But there's lots more ore than that here.

Q. You can testify as to a certainty as to that?

A. Of course, yes, there's projected ore here on the Crescent it's projected another two hundred feet and that's

[Tr. 308]

quite certain.

Q. From the two hundred feet on the Crescent claims you can say with certainty that there is another 200 feet in all of the claims on the Trust properties?

A. No, that isn't so or what I say at all. As I remarked, I use each one as an individual just like people. Although these are of the same origin, they have their characteristics and they have been folded since their deposition, since their chemical deposition in the old ruins and they now have structure and they have therefore ribs and they have attitude, they have dips and strikes, and I use those and I use canes as drill holes or exposure in depth. I do not project anything I have not seen. Although there is ore up there, it is covered, and some of it has been mined, according to the reports.

Q. Now, Doctor Bell, we are talking about ore that can be recovered and ore that is mined. You testified yesterday, did you not, that from your physical observation you did not see any waste materials that had been left by the lessee in doing his mining operation; is that correct?

A. I testified that I saw no waste.

\* \* \* \*

[Tr. 309]

\* \* \* \*

Q. But that wasn't my question, Doctor Bell. Did you observe any areas where rock had been left that had been drilled, shot or drilling had occurred and shot at or had been left?

A. Only through wasteful mining practice.

Q. Is it not a fact, Mr. Bell, that as we were observing the quarries that Mr. Hummel pointed out to you the specific quarry and indicated to you that they had drilled and shot that area in hopes of mining that area, had taken a load down and the people had rejected that because it was not fit to put in the mill, that he pointed out that specific area to you and showed you or told you the reason it was not because there was too much salt in that amount; is that correct?

\* \* \* \*

A. Yes, I made that statement. I think-- I'm not sure which one it was, but he made the statement, that's right.

Q. Now, did you make any observations as to the truthfulness of that statement?

[Tr. 310]

A. Yes.

Q. What was your conclusion?

A. He showed me a block of salt of salty shale and I concluded it was salty shale.

\* \* \* \*

- Q. Mr. Bell, are you saying that without any chemical analysis, without any other method of observance that you feel that the men at the mine actually know whether the salt and hydrite or impurity content was such that couldn't be used at the mill?
- A. Oh, you're leading me into this, by visual observation, your man said, "This is no good," and "That is no good."
- Q. Please answer the question, Doctor.
- A. I think I am.
- Q. No, you are telling me what my man said and I asked you specifically in your opinion can you physically or could they physically observe the rock without chemical

[Tr. 311]

analysis know that would be appropriate or inappropriate for the mill process.

- A. I think a good quarry man can tell. We should, however, a chemical control, water control on the quarry face, as you mine this, and in my talk in Butte I tried to convince them in a scientific way that you can photograph these faces and tell the differences in rock, but not entirely the composition.
- Q. Mr. Bell, could you photograph an ore deposit and tell the difference in photography after it had been surfaced cleaned and just photographing that whether that was immediately known as anhydrite or gypsum?

- A. That was what I was trying to devise, all there is is a color difference and no you cannot.
- Q. You cannot by a plain physical observation?
- A. No.
- Q. Even standing there and looking at the two, can you actually tell if it had been scraped clean and you are looking at a bare rock that you cannot tell the difference between anhydrite and gypsum?
- A. You can't tell with your eyeball and some of the rock--
- Q. Well--
- A. Just a minute.
- Q. You've answered my question.
- A. But I'm not through. Some of the rock that you saw as hydrite, was not anhydrite. If all the rock you saw was anhydrite, you would have big piles of this anhydrite some place. You use this rock. You use it because it has the same composition as gypsum with a

[Tr. 312]

higher silicate content. It's harder and its more dense and it's blue and it looks like anhydrite.

- Q. Let me follow up that question. You said you could not physically observe by looking between the two, even if you were up close. Now, Mr. Bell, if you could not physically observe between

anhydrite and gypsum when you were up close could you do it at 1400 feet?

A. Well--

MR. ASHTON: I object to the question, he said you couldn't tell by eyeballing.

MR. MOORE: That's right.

Q. Now, you indicated to me in your earlier testimony, Mr. Bell, that you have looked at these--

A. In review.

Q. In review from 1400 feet on to half a mile and sometimes in here a mile and you're telling me--

A. Two miles.

Q. Excuse me, two miles. Now, you're telling me in doing that you could tell the difference between gypsum rock and Anhydrite, just by that physical observation?

A. And I can tell that from that distance and didn't say I could. I went over and checked that on the forty, where I made the line and I walked all of these twice, once for composition and once for the claims.

Q. Will you please state again the years you walked these claims?

A. '46, that's the analysis I have, the composition taken from my notes in 1946.

\* \* \* \*



\* \* \* \*

Q. Now, moving away from this aside that we have been talking about, as to getting yourself oriented and the length of time it took to get yourself oriented to the American Gypsum property, Mr. Bell, let's go back to determining impurities and anhydrites as compared to gypsum so far as physical observation is concerned. Let's talk now about and we already discussed the salt deposits, the salt mixture that required us to abandon or that we had spent a great deal of money in drilling and exploring and then completely leaving it there. Would that be good mining practices to spend that much money and leave it there if it was mineable rock?

A. Your statement says it was not good practice to drill and then mine and if you didn't find salt in the drill then your exploration was faulty.

Q. This is the only point that Mr. Hummel had shown you. He indicated that they couldn't tell until they took it down to the plant; isn't that correct?

A. All he said is they took it down to the plant and they couldn't use it.

Q. Okeh. Now, you are saying that their explorations were faulty if they did that. Now, isn't it conceivable to you that in their exploration instead of dumping [sic] waste over the edge of the property, that they would in their drilling determine perhaps go down two feet through

[Tr. 319]

gypsum and then hit anhydrite or hit salt and they wouldn't have any waste. They would leave that in place because it was impractical to drill that whole thing, put powder in it, take it out of the ground and then dump it over the side, after they had gone through all of that expense down at the plant, would they do that?

\* \* \* \*

A. Yes, he said move over and put another hole.

Q. Okeh, let's put that into our assumption then. Now, we have drilled a pattern of holes in this group and that's what I was referring to, I'm sorry, instead of this one hole--

A. Yes.

Q. A pattern of holes. Would you then go ahead and

[Tr. 320]

and mine it out and dump it over the side or would you leave that in place and knowing there was insufficient ore to take out?

A. I would leave that where I found it.

Q. All right, and that would be logical, wouldn't it?

A. That would be logical, you bet.

Q. Thank you. Now, in the quarries that you observed that had been mined since

the time that you had previously observed these areas, between the time of 1946 and 1970, in making your physical observations in 1971, Mr. Bell, could you have determined from 1700 feet or two miles whether or not test holes had been drilled to determine whether they could mine as we had previously talked about just now, and had run into impurities that would indicate that they couldn't take the ore out? Whereas, the prior observations may have indicated there was plenty of ore there?

MR. ASHTON: I object, as to this being a futile gesture, how can anybody determine a drill hole for two miles?

MR. MOORE: That's my point exactly.

MR. ASHTON: It isn't a question, it's an absurdity, and I object to the form of that question as not being a question which anybody could answer.

THE COURT: Well, he has testified that these deposits were separated from the place of observance by a distance, as I recall, 1400 feet or two miles. I think counsel has a right to ask if perchance he could determine from that observation if per chance there had been some effort to determine the marketability of the rock at any given

[ Tr. 321]

point in that distance.

\* \* \* \*

Q. Mr. Bell, do you know whether there was any efforts to determine the practical mineability of the deposits here in

question, speaking specifically of the American Gypsum Trust, subsequent to your examination in 1946?

A. I don't know.

\* \* \* \*

[Tr. 328]

\* \* \* \*

REXCROSS-EXAMINATION

[Tr. 329]

BY MR. MOORE:

\* \* \* \*

[Tr. 330]

\* \* \* \*

Q. Now, you testified Mr. Bell, that you staked placer claims for and with Senior and Senior, is it not true that there is a great deal of difference, Mr. Bell, in staking out claims and the work involved in staking out claims and determining ore reserves?

A. Yes, they are two different things.

\* \* \* \*

[Tr. 345]

\* \* \* \*

GRANT R. CALDWELL

called as a witness by the Plaintiffs, being first duly sworn, took the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR. ROOKER:

Q. State your name please, sir.

A. Grant R. Caldwell.

Q. What is your profession please?

A. I am a Certified Public Accountant.

Q. Will you please tell the court when you became certified and what your professional activities have been since the time you became certified?

A. I became certified in 1952. I began my public accounting career in 1950. In 1952, I became a partner in the firm of Messina, Jackson and Caldwell and remained

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with that firm until 1962 and upon the death of the senior partner, I organized my own firm and on October 1st of 1968 merged with Main, LaFrentz and Cole, which is a national and international firm of Certified Public Accountants.

Q. What is your position with Main - LaFrentz?

A. I'm presently managing partner of the Salt Lake City office, a member of the advisory board of the firm and a member of the forward planning committee.

Q. Mr. Caldwell, would you please tell the court how many partners Main LaFrentz has and how many professional employees it has?

A. In the United States they have approximately 166 partners and approximately four thousand employees.

Q. Are you a member of any professional society?

A. Yes. I am a member of the American Institute of Certified Public Accountants and also a member of the Utah Society of CPAs.

Q. In the course of your work in your profession, Mr. Caldwell, have you been called upon to perform management consulting work?

A. Yes, sir, I have.

Q. Would you please explain to the court what the principal activities that you have engaged in in that connection?

A. Generally in this regard, a management service engagement relates to merger acquisition situations, feasibility studies in regard to proposed acquisitions, analyzing the financial situation of a business in helping management arrive at conclusions in regard to the operations of the particular business, this type thing. The industries that

[Tr. 347]

I have been engaged in this connection would encompass manufacturing, for example, the concrete pipe manufacture, meat packing industry, motion picture exhibitors, the petroleum industry[sic] as it relates to the retail and wholesale distribution of petroleum products. I am sure there have been others.

Q. Now, in the course of your professional activities, Mr. Caldwell, have you been called upon to examine and make accounting and financial interpretations and applications of legal documents?

A. Yes, sir, I have.

Q. Has that been a substantial part of your activity?

A. Yes, it has.

Q. Have you also installed and analyzed accounting systems?

A. Yes, I have.

Q. And have those included electronic data processing accounting systems?

A. Yes, it has.

Q. Have they included systems similar to that which you have discovered in the course of your activities which you will describe later today that Georgia-Pacific Corporation has?

A. Yes, sir.

Q. Now, have you appeared previously, Mr. Caldwell, as an expert witness in courts of record?

A. Yes.

Q. Could you please advise the court of some of the courts in which you have appeared as an expert?

A. I have appeared in federal courts in San Francisco,

[Tr. 348]

Salt Lake City, Hawaii. I appeared in a number of District Courts. I've appeared before Grand Juries. Is this what you had in mind?

Q. Yes, sir. Have you appeared as an expert on behalf of both Plaintiffs and Defendants in such cases?

A. Yes, sir, I have.

Q. Could you describe to the court, Mr. Caldwell, some of the kinds of cases in which you have appeared as an expert witness?

A. Cases involving the Motion Picture Exhibitors.

Q. Anti-trust cases?

A. Yes, sir. Is that what you had in mind?

Q. Yes, sir.

A. Rather than the specific cases?

Q. Yes.

A. Contract cases, a number of variety of causes of action.

Q. Mr. Caldwell, you were employed by the Plaintiff in this case for the purpose of advising counsel; is that right?

A. Yes, sir.

Q. And for the purpose of testifying as an expert at the trial of this case?



A. Yes, sir.

Q. Would you please describe to the court what the purpose of your engagement was at the time you were employed?

A. To determine the lease rentals owing by Georgia-Pacific to American Gypsum Trust as related to the lease agreement.

Q. Now, in the course of your work have you done such

[Tr. 349]

work such as examinations, examined such documents as you deem necessary to accomplish that result?

A. Yes, sir.

Q. Will you please explain to the court what documents you have examined?

A. We have examined the plant profit and loss statements of the Defendant, Georgia-Pacific, their plant general ledgers, the distribution region and center profit and loss statements, their all plant sales reports, their manufacturing cost statements. We further have examined all of the settlements made with the American Gypsum Trust in regard to the 7% lease rental payments back to 1957 and all of the related correspondence. We have examined the lease and I might state that this general description, of course, is confined to those records described which were available.

Q. Did you find any instances in which records that you would like to have

examined which were not available for examination?

A. Yes, sir.

Q. Would you please relate those to the court?

A. For example, in 1965, which is still a year in disagreement between the parties, the only available document is a plant profit and loss statement. There are no underlying documents or no other records available whatsoever in that connection. We also find for the year 1965 that the sales, for example, on the profit and loss statement--

MR. ASHTON: Excuse me, I didn't hear you.

A. For example, in connection with 1965, the plant profit and loss statement indicates sales of some \$300,000 less than that which is contained in a proposed settlement,

[Tr. 350]

the difference between those sales is unidentified and unexplained. There were no regional, that is distribution division regional profit and loss statements available for 1965 or 1966. There were no all plant sales summaries available for years prior to 1967. And I think that about covers it, Mr. Rooker.

Q. Mr. Caldwell, in the course of your examination of documents and the fulfillment of your engagement as you have described it, was your effort to compute an amount equal to 7% of the net profit of Georgia-Pacific Corporation from the

sale of products using rock from the American Keene claims?

A. Yes, sir.

Q. And in connection with that effort did you employ sound accounting principles in the gypsum industry?

A. Yes, sir.

Q. And did you take into account in connection with that effort standards of includability of income and deductability of expenses as defined under the Internal Revenue Code?

A. Yes, sir.

Q. And did you follow as nearly as it is possible for you to do so the provisions of paragraph E of the Lease Agreement at issue in this case?

A. Yes, sir, as nearly as possible, based upon the availability of records. I might indicate also one other area of information which was not available and that is the compilation of invoices which would represent the selling price to the ultimate purchaser of the product. The records are so maintained by Georgia-Pacific, that that

[Tr. 351]

effort would be impossible under any set of circumstances.

Q. I take it you were here when you heard Mr. Foster testify on Friday to the same effect?

A. Yes, sir.

Q. And I take it you agree with him?

A. Yes, sir.

Q. Now, could you please advise the court, Mr. Caldwell, how much time you and others in your firm, and working under your supervision had expended in the effort in connection with this case?

A. I don't have an exact figure, but I am sure it would be something in excess of 450 hours.

Q. Mr. Caldwell, also in connection with your examination of the documents and your effort to make a determination of the amounts owing to the Plaintiffs in this case, did you also have conferences concerning [sic] the documents you examined with Mr. Foster?

A. Yes, sir.

Q. Would you please relate to the court the circumstances of those conversations and please include any explanations of the documents that he gave to you in response to your questions that are significant in the computations that you have made?

A. Well, Mr. Liddell and I went to Portland and we spent two days examining documents which we had requested. We initially spent time with Mr. Foster in asking him specific questions on which we of course maintained notes and responses to those questions and was directed toward the proposition of having available to us any financial

records of whatever kind would relate to the determining the net income of

[Tr. 352]

of the Sigurd plant as an independent economic unit rather than a profit center per se of Georgia-Pacific. For example, any documents which would furnish us information relative to what the product was ultimately sold to the purchaser for and specific questions relating to the inter-relationship between the plant profit and loss statements and the distribution region and distribution centers.

Q. Mr. Caldwell, could you describe to the court generally and we will get into the specific documents in a moment, but could you describe to the court generally the kind of studies which you made and the general approach which you utilized in the effort that you have described?

A. Yes. Our first efforts were directed towards examining the lease rentals which had been paid and accepted by American Gypsum for all years for which such information was available prior to Georgia-Pacific's acquiring the plants from Bestwall that encompassed the years from 1957 to 1964. We noted in particular the type of adjustments which were being made. For example, the ten percent of cost of sales to cover the selling general administrative expenses. Certain other adjustments which were being made in regard to non gypsum products exclusion. We examined in detail the treatment of the prior plant inter-company profits and in general we examined those in detail to determine how the lease rental was being computed historically. For the years 1965 through 1970, we examined initial

settlements and payments which had been made by Georgia-Pacific and then subsequently the revised proposed settlements which are being proposed now by Georgia-Pacific and we further made an analyses of the effect of the Lovell plant coming into the

[Tr. 353]

picture, that is the unit prices which the Lovell plant was receiving for their product, the results of the operations of the Acme plant with the addition of a second machine, increasing substantially the volume and essentially in this connection as an overall picture and summary, in trying to be brief, we have Number 1, used the historical approach in determining how settlements were made. We have estimated the economic effect of the Lovell plant selling into a market which had been previously served by Sigurd and the estimated effect of the Acme plant selling into a market which had been previously served by Sigurd. We have also estimated the effect of the Sigurd plant operating at less than an optimum capacity.

- Q. Mr. Caldwell, in connection with your examination of the Georgia-Pacific records and your engagement as you have described it, have you prepared computations and documents for presentation to the court explaining the results of your studies?
- A. Yes, sir.

\* \* \* \*

Q. Mr. Caldwell, I hand you what has been marked as Plaintiffs' Exhibit No. 135, which is entitled Summary of 7% Lease Rental Computations, as made for years 1957 to 1964 and as proposed by Georgia-Pacific Corporation for years 1965 to 1970.

[Tr. 354]

A. Yes, sir.

Q. I will ask you if you prepared that document?

A. Yes, sir, I did.

MR. ROOKER: May we hand this to the court please? Mr. Caldwell has a copy.

Q. Mr. Caldwell, could you please explain to the court what the purpose of this study is?

A. Essentially, to make a comparison of the 7% lease rental expressed in terms of the amount of rental paid for S.M., which is thousand board feet for board and lathe. This is broken down into two major segments. First, for the years 1957 through 1964 and then secondly for 1965 through 1970, setting forth the most recent proposals for payment of lease rental by Georgia-Pacific.

Q. Now, Mr. Caldwell, could we go through this one column at a time and have you explain to the court the source of the figures contained in the columns and the basis for arriving at the figures that are computed in the document?

A. Yes, sir. For the years 1957 through 1964 the source of all of the common figures were taken from the lease settlement documents which was provided American Gypsum Trust by the lessee during those years. Of course, it first sets forth the net sales, the cost of sales, the gross profit, the selling--

Q. Gross profit, I take it, is a deduction of costs of sales from net sales; is that right?

A. Yes, sir.

Q. Okeh.

A. Then the selling general and administrative expenses which may be noted to be 10% of the cost of sales

[Tr. 355]

item in each of those years.

Q. Is that true up to and including 1970?

A. Yes, sir. However, beginning in 1965 there were some minor adjustments made in the proposed settlements relating to vacation reserves and other minor items which was not treated as part of the cost of sales, so that you will note in years 1965 to 1970 the amounts shown are not exactly 10% of the cost of sales. The settlement computations so indicate the 10%, but there are minor adjustments that cause the amounts to be slightly different than 10% of the cost of sales. Further, in 1968 and in 1970 the proposed settlement computations are set forth in a little different form. The cost of



sales factors are the so-called direct cost of sales items as shown on the plant profit and loss statement. There are three other line items that appear on the plant profit and loss statements separate and apart from the direct cost of sales. Those are the plant expense, administrative expense and fixed costs. In years prior to 1968 they have all been encompassed in the cost of sales factors to which the 10% would apply, so beginning in 1968 actually the selling general and administrative expenses are computed on a slightly different basis. Actually the amounts as computed by Georgia-Pacific being less than the historical method of computation. In this connection, I might explain that for the year 1969, at the time that this was prepared we did not have a copy of the proposed settlement for that year from Georgia-Pacific. Subsequently, Mr. McCarthy wrote a letter requesting it and in examining it, the only difference would be in regard to the selling general and administrative expenses

[Tr. 356]

which would be some approximately forty thousand dollars less than the amount shown here, and correspondingly would reduce the loss by approximately forty thousand dollars. However, the statistics are not distorted by virtue of the fact that there is a loss under their proposed computation, there would be no lease rentals due.

Q. The next column, Mr. Caldwell, is entitled Net Profit. Could you explain to the court how that column was derived?

A. The net profit is merely the subtraction of the selling general and administrative expenses from the gross profit.

Q. Now, the next column is entitled 7% lease rental, would you explain to the court please how that figure was derived?

A. The 7% lease rental has been historically determined by considering that as a deduction in computing the amount to which the 7% applies.

Q. Do I understand then that the figure in the column entitled 7% lease rental is not 7% of the column entitled net profit?

A. No, sir, it is not, it is 7% of the column entitled net profit after 7% lease rental.

Q. And has that been done consistently throughout the entire period you have examined it?

A. Yes, it has.

Q. Now, at the column entitled net profit after 7% lease rental then is a computed figure based on the prior two columns?

A. Yes, sir.

[Tr. 357]

Q. Would you explain to the court what the column S.M. Unit - Board and Lathe represents?

A. That's in thousand square feet, expressed as units, for example, the 84,910 being the first amount shown for the

year 1957 would be 84,910,000.

Q. Square feet of board and lathe?

A. Square feet of board and lathe.

Q. So the SM unit used throughout your calculation represent 1,000 square feet of board and lathe; is that right?

A. Yes.

Q. And finally the column entitled Percent of 7% Lease Rental to SM United of Board and Lathe, would you explain to the court how that computation was made?

A. That's merely a percentage relationship between the 7% lease rental and the SM units of board and lathe.

Q. And the last column, Mr. Caldwell, would you explain that please?

A. That's merely a division of the SM units of board and lathe into the 7% lease rentals.

Q. Do I understand then that for example in the year 1957 American Gypsum Trust received as a 7% lease rental 44¢ for each SM unit of board and lathe manufactured at the Sigurd plant?

A. Yes, sir.

Q. And those figures are for 1958 66¢, '59. 71¢, 1960 79¢, 1951 83¢, 1952, 92¢ 1963 93¢ and 1964 86¢?

A. That is correct.

Q. And then do the figures below the line entitled Settlements per Georgia-Pacific computations as proposed

[Tr. 358]

show what happens to that 7% lease rentals per SM unit after Georgia-Pacific acquired Bestwall?

A. Yes, it does.

Q. So that in the first year, 1965, that drops to 51¢?

A. Yes, sir.

Q. And '66 to 48¢?

A. Yes.

Q. And in 1967 to 37¢ and thereafter becomes zero?

A. Yes, sir.

MR. ROOKER: We offer Exhibit 135, Your Honor.

THE COURT: Any objection?

MR. TAYLOR: None, sir.

THE COURT: It may be received in evidence.

(Whereupon, Plaintiffs' Exhibit 135 was duly received in evidence.)

Q. Mr. Caldwell, I show you next a document which has been marked Exhibit 136 entitled Selected Statistics from Plant Profit & Loss Statements for the year ending

December 31 as indicated, covering the year 1966 through 1970 inclusive. Was that prepared by you or under your supervision?

A. Yes, sir.

Q. Would you hand that to the court please?

A. Yes.

Q. Would you please explain to the court, Mr. Caldwell, what the purpose of this document is?

A. It is to show the operation relationship between the Acme, Lovell and Sigurd plant for the years 1966 through 1970, as obtained from the plant profit and loss

[Tr. 359]

statements.

Q. Now, could you explain to the court the source of the information contained on the document?

A. All of the information was obtained from the plant profit and loss statements.

Q. Now, would you point out to the court the figures that as the accountant and analyst you regard as significant on the document?

A. Well, I think that the most significant figures are the first and the last, the first being the SM units of board and lathe sold and the last figure being the operating income or loss per ton and the reason for using the ton is that on the plant P & L's that is the unit in which the operating income is expressed and the

significant factor is that for example the Acme plant in 1966 was selling 145,080 units. The Sigurd plant 117,208 units, the operating income per ton at Acme was \$7.24, the Sigurd plant \$10.28. Then in looking at 1967 Acme increases the units of board and lathe to 214,750, Sigurd increases to 140,532 units. The operating income per ton \$11.57 at Acme, \$11.73 at Sigurd. Then in 1968, which was the first effective year for the Lovell plant Acme again increases to 235,215 units, the Lovell plant sold 55,172 units, Sigurd declines to 123,166. The operating income per ton, Acme at \$7.53, the Lovell plant at \$2.44, the Sigurd plant at \$1.28. Then in 1969, Acme units had increased to 304,656 units, the Lovell plant to 67,390 units, and the Sigurd plant had decreased to 110,549. Again checking that in relationship to the operating income or loss per ton, Acme had a profit of \$4.37, the Lovell plant \$2.52, and at this point the

[Tr. 360]

Sigurd plant was at a loss of \$1.11. Looking at 1970, Acme had increased again to 330,534 units, the Lovell plant had increased to 69,284 units and the Sigurd plant was at 118,122 units. Looking at the operating income or loss per ton, the Acme plant \$1.33, the Lovell plant a loss of 58¢, and the Sigurd plant a loss of \$1.77. I might say that in this exhibit that one cannot compare the years of the plant against itself by virtue of the fact that change in accounting methods and what the plant profit and loss statement indicates. The only competent use of this schedule is to compare plant against plant.

Q. So if I understand that correctly what you're saying is because of the change in accounting methods there is nothing significant in itself of the reduction in operating income of the Sigurd plant to \$10.28 in 1966 to a loss of \$1.77 in 1970; is that right?

A. That's correct.

Q. But that the significance is in a comparison of the fact that the 1966 while Acme was making \$7.24 per ton, Sigurd was making \$10.28 per ton, whereas in 1970 Acme was still making a profit of \$1.33, but Sigurd was now losing \$1.77?

A. Yes.

MR. TAYLOR: I object. It is leading and argumentative and it's already been stated on the record.

THE COURT: It's a conclusion, of course, the court can observe the difference between 1966 and 1970.

MR. ROOKER: We offer 136, Your Honor.

THE COURT: Any objection?

MR. TAYLOR: No, sir.

[Tr. 361]

THE COURT: The exhibit No. 136 will be received in evidence.

(Whereupon, Plaintiffs' Exhibit No. 136 was duly received in evidence.)

Q. Mr. Caldwell, I hand you next a document that has been marked for identification Exhibit 137 and ask if that was prepared by you or under your supervision?

A. Yes.

Q. This document is entitled Profit Royalty Computations 1957 to 1964. Will you please explain to the court the purpose of this document?

A. This is a compilation of the settlements between lessor and lessee, prior to Georgia-Pacific's acquiring the plants.

THE COURT: It is limited, of course, to the profit element of the contract?

A. Yes, sir.

THE COURT: Okeh.

A. And this information is the same information which is summarized in the first exhibit. The only purpose is to set forth the type of adjustments that were being taken into consideration for purposes of making the 7% lease rental payment.

Q. And does Exhibit 137 accurately reflect, Mr. Caldwell, the contents of the settlements of the 7% net profits payments during the period of 1957 to 1964?

A. Yes, sir.

MR. ROOKER: We offer Exhibit No. 137.

THE COURT: Any objection?

MR. TAYLOR: No objection.



THE COURT: It will be received in evidence.

(Whereupon, Plaintiffs' Exhibit No. 137 was duly received in evidence.)

Q. Mr. Caldwell, during the course of the trial namely on Thursday and Friday, was there certain testimony elicited from employees of the Georgia-Pacific Corporation that caused you to be concerned with whether you had examined all of the documents you needed to examine in order to make a complete and accurate determination of the 7% net profit interest?

A. Yes, sir.

Q. Would you please tell us whose testimony that was, and what the substance of it was as you recall it, or what it was about it that raised a question in your mind?

A. It was Mr. Wilson's testimony in regard to the comparative [sic] increase in the number of--in the quantity of board and lathe that was being sold in essentially Sigurd's market as compared to the U.S. as a whole. As I recall the testimony it indicated that the number of units in California and Northwestern market had doubled whereas nationally the increase was approximately 20%. It further indicated that at least in the Northwestern market that a market penetration objective of some 16-1/2% had been made. I related this, of course, to the increase in the Acme unit sales as set forth in the exhibits which I just reviewed. I further related that to the

fact that in 1968 Georgia-Pacific acquired a plant at Lovell, Wyoming, which took the market previously served by Sigurd which represented increased productive capacity into that particular market, related this, of course, to a very sub-

[Tr. 363]

stantial sales price decline and reference to the face, I believe by Mr. Wilson or Mr. Foster, I've forgotten which, the fact that the price decline was much more severe and started earlier in the California market than the other parts of the country.

Q. Now, on the basis of that you were present in Court when we made arrangements with counsel and the court for the production of additional documents; is that right?

A. Yes, sir.

Q. Those documents were furnished to you in the early afternoon of Sunday, I believe, yesterday; is that right?

A. Yes.

Q. I show to you a packet of documents marked collectively Exhibit 138, representing the plant profit and loss statements for all of the gypsum plants of Georgia-Pacific Corporation for the years 1967, 1968, 1969 and 1970 and ask if those were included among the additional documents which you examined?

A. Yes, sir.

Q. Now, as I understand it, Mr. Caldwell, you had previously had access only to

the plant profit and loss statements for the Acme, Sigurd and Lovell plants; is that right?

A. That's correct.

Q. Now, what did you find in examining these additional documents that was significant to you, if anything?

A. Well, I think there were two things that as far as the other plants were concerned during the years involved that is from 1967 through 1970--

THE COURT: Pardon me. You mean by other plants

[Tr. 364]

you mean other than Acme, Lovell and Sigurd?

A. Yes, sir.

THE COURT: Go ahead.

A. That would encompass the plants at Akron, Blue Rapids, Fort Dodge, Grand Rapids, Brunswick, Wilmington, and we made a study from the plant profit and loss statements which set forth the SM units of board and lathe which indicated that in those plants just referred to that the increase in SM units sold as between 1967 and 1970 were either just modest increases or in some instances decreases.

Q. Mr. Caldwell, I hand you a document marked Exhibit 143 and ask you if that is the study which you refer to?

A. Yes, sir.

MR. ASHTON: Did you give the court a copy of that?

MR. ROOKER: Yes, I have.

May I offer Exhibit 138 in evidence, Your Honor, that is the summary of the--

THE COURT: Do I have that? I have 135, 136, and 137.

MR. ROOKER: We offer 138.

THE COURT: Any objection to 138?

MR. TAYLOR: The only objection is relevancy, if the court please. We think it is not relevant-- I have the wrong one. Well, we have no objection. The only objection is relevancy as to those documents. We deem them not relevant to any issue and other than that we have no objection.

THE COURT: Exhibit 138 will be received in evidence.

[Tr. 365]

(Whereupon Plaintiffs' Exhibit 138 was duly received in evidence.)

Q. Calling your attention, Mr. Caldwell, to Exhibit 143, is that the study that you have just referred to?

A. Yes, sir.

MR. ROOKER: May I hand the original to the court?

Q. Tell us when that was prepared please.

- A. It was prepared late yesterday afternoon and into the evening of last night.
- Q. Was it prepared by you or under your supervision?
- A. Yes, sir.
- Q. And will you please explain to the court the purpose of that study?
- A. The purpose of the study was to determine the relationship between volume increases and in relation to price at the plants other than Lovell, Sigurd and Acme.
- Q. Mr. Caldwell, what was the source of the information contained on Exhibit 143?
- A. The plant profit and loss statements.
- Q. That is Exhibit 138?
- A. Yes, sir.
- Q. Now, could you please point out to the court the figures that you deem significant in connection with your examination and your undertaking as an expert in this case?
- A. Well, I think the figures--

MR. TAYLOR: I am going to object until the document is received because we will object to this document for the same reason of relevancy. We think these

[Tr. 366]

figures are not relevant to any issue in this lawsuit.

THE COURT: I note that Akron, Blue Rapids, Fort Dodge, Grand Rapids, Brunswick, Wilmington, Lovell and Sigurd. I take it that the Plaintiffs' theory, is, is it not, that the Sigurd plant had acquired, of course, a market area. My impression is that these plants, Blue Rapids, Fort Dodge, Grand Rapids, Brunswick, Wilmington are quite unrelated, are they not, to that particular area?

MR. ROOKER: They are unrelated to that market area, Your Honor, except in this connection, if I may explain to the court. As Mr. Caldwell explained in his testimony an examination of the additional documents that were produced yesterday shows conclusively that in doubling the capacity of the plant capacity at Acme, Texas, and in adding the additional plant capacity at Lovell, Wyoming, Georgia-Pacific was under significant economic pressure to increase its sales in what had historically had been the Sigurd market and as Mr. Wilson testified, they doubled their sales in the period from 1965 through 1970.

THE COURT: Yes.

MR. ROOKER: And at the same time there was an enormous deterioration of price in that market, yet if one looks comparatively at the statistics for the other plants of Georgia-Pacific Corporation where they did not have the additional plant capacity, one sees that the price deteriorations was much less significant. It is our position that this is important information to cause what Georgia-Pacific has done here is they have penalized the Plaintiff in this case by acquiring the additional volume of sales at the expense of the profitability of the Sigurd plant.

[Tr. 367]

THE COURT: Well, I'll go along with you so far as your theory is concerned that so far as Acme and Lovell are concerned. They are related, of course, but these others who lie in the East, what effect do they have?

MR. ROOKER: The effect, Your Honor, is that we have to look at the sales price of gypsum in that market and compare it with the sales price of gypsum in the Sigurd market and when we look at it we find that the other market was at the same price in 1967 as the Sigurd market, but by 1970, the Sigurd price has declined some 30%, as Mr. Caldwell has testified, whereas the price in the other markets which were not subject to Georgia-Pacific's strenuous effort to double its volume of sales, declined only about 18%. Is that your figure, Mr. Caldwell?

WITNESS: Yes.

MR. TAYLOR: I will object to him stating the figure, because I think it's irrelevant.

MR. ROOKER: Now, our position, Your Honor, is that under the terms of this contract, under the terms of the lease, Georgia-Pacific Corporation is not entitled to penalize the net profit interest of the Plaintiff in this case for the sake of increasing its volume of sales.

THE COURT: I understand your theory that if the sales from Lovell and Acme, of course--

MR. ROOKER: No, it's the sales from Lovell and Acme that created the pressure.

THE COURT: There has been no intrusion for example into the market area of these other companies, except Acme and Lovell.

[Tr. 368]

MR. ROOKER: That's correct, Your Honor.

THE COURT: Then how can we relate the matters and things, for example, the matters and things in some geographical areas other than the market area we're now talking about?

MR. ROOKER: Because it provides a base for determining the comparative [sic] price deterioration in the unrelated area where there is not the additional effort to sell with the price deterioration in the areas where there was an additional effort to sell and one has--

THE COURT: I will confess I am not an economist, yet I recognize that costs, for example, of an article, no matter what it might be, can vary geographically. In the production of meat, for example, I have engaged in that for sometime in my life, we know, of course that one hundred pounds of lamb for example over at my ranch at Monroe isn't valued as a hundred pounds of lamb would be in the suburbs of Chicago or Omaha or Kansas City. That is what I am prompted to ask, what effect these geographic area have on price?

MR. ROOKER: If the court will permit me to go into this with Mr. Caldwell, I think he can explain the entire background.

THE COURT: Go ahead.

MR. ROOKER: I think Mr. Taylor's



original objection was to any inquiry about 143 because I haven't offered it, so I offer Exhibit No. 143.

MR. TAYLOR: And I object on the ground it contains vast amounts of wholly irrelevant evidence here. He is talking about all kinds of assumptions about markets and

[Tr. 369]

market areas. There's no testimony on this record with respect to that and this witness we assert is not competent to state those opinions as to what influences--what influences the market around the New York plant, what influences the market around the various plants around the country? This is an attempt to put a lot of garbage into this record which has absolutely nothing to do with this lawsuit from which they can boot strap inference on inference on inference without evidence and we think it's incompetent and object on that ground.

\* \* \* \*

[Tr. 370]

\* \* \* \*

Q. If the Court please, may I suggest that Plaintiff's Exhibits 143 and also the other documents that appear in handwritten form that are all in the same category and to which Mr. Taylor, I am sure, will make an objection to all of them, I think they are relevant and propriety will be eminently clear to the Court when Mr. Caldwell concludes his testimony, I am sure that if the stuff turns out to be nothing but garbage as Mr. Taylor characterizes it, the Court will have no trouble to determine that,

and I suggest that the Court receive the documents, subject to the motion to strike of Mr. Taylor, and after we have all the evidence before the Court, the Court may make its determination.

THE COURT: I was about to propose such a procedure as that, Mr. Rooker.

MR. ROOKER: Thank you.

\* \* \* \*

[Tr. 371]

\* \* \* \*

Q. Now, Mr. Caldwell, could you please advise the Court of the purpose for the preparation of Exhibit 143 and of the date it reflects that you regard as significant to your computation of the 7% rental to the Plaintiff?

Q. MR. TAYLOR: I am going to object to that on the grounds that again we're talking about--the answer to that question would determine the relevancy of documents themselves. He's assuming an interpretation of the lease in question.

THE COURT: Well, I am going to hear him on that particular question as to the relevancy at all of the Akron and a number of the plants operating in the entire country as it might relate to the profit element in the entire county as it might relate to this litigation.

MR. TAYLOR: If we are talking about numbers, that's one thing but if the Court please this is not an economist, this man won't be able to competently to testify about the market pressure in any given

market, what competitive persons were doing, what competitive plants were being constructed, whether or not gypsum was sold just like the farmers himself sells his product, and I would object to any evidence from this witness of an economic line of attack for which he has not been qualified to testify.

THE COURT: You may, at some time later in this proceeding, move to strike and the Court will then make a finding but I am going to hear him for the purpose of informing

[Tr. 372]

the Court on that particular subject.

\* \* \* \*

- Q. Yes, let's take one part at a time. Would you please explain to the Court the purpose for compiling the data relating to all of the gypsum plants of George [sic] Pacific Corporation as you have done on this document?
- A. The basic purpose for doing this study was to get the percentage change in prices in the plants other than Acme, Lovell, and Sigurd and comparing the price decline in relation to the volume trends and, of course, it is not a matter of being an expert in economics but it is a very sound presumption that when you have a greater percentage price decline in the market where the units sold is increasing that it becomes a significant factor as it relates to the Sigurd profit and loss.

MR. TAYLOR: Now, may I interrupt at that point just for a moment because this is

typical of what I was suggesting to the Court. Now he is talking about a market presumption not knowing what the competitive firms are doing and he is assuming that the only business in this market is Georgia-Pacific and I think that is prejudicial, I think it's incompetent evidence, and I would move to strike that.

THE COURT: That's my feeling, gentlemen, with reference to that particular matter. The many factors, competitive and other, it seems to me would or could, I would put it that way, could have a very variance that would justify

[Tr. 273]

say price in one market area as against another. I can conceive of many situations that might, of course, lend itself to such variances and that is the difficulty I have.

MR. ROOKER: If we were taking a comparison of the Sigurd Plant solely with, say the Acme Plant, then I think that point would be very well taken or might be but we are not doing that. What we are doing is taking all of the United States as an average as compared with the Sigurd Plant and Mr. Caldwell will testify that in his examination of these documents which they produced for the first time yesterday, including not only those offered in evidence but the remainder, that it is apparent that there is no other factor that had influence upon the greater price deterioration in the Western United States except the enormous increase in volume of sales as compared to the stability in volume of sales in the balance of the country and that's on the records.

MR. TAYLOR: Now, if the Court please, that is exactly what they are trying to do through this expert who is not an expert in the field of which he is talking about. He says, "This is the only factor". Now, if the Court please, there are dozens and dozens of economic factors that effect these various markets, most of which are not pertinent to this motion. Now, he isn't giving any consideration to what factors are in the market place in these various places including who was building plants, what were the prices, what was the building business, how did it vary from region to region. He isn't qualified even to speculate in those areas, yet he has raised a pre-

[Tr. 374]

sumption that this is the logical economic indication from the numbers that are relevant to this proceeding. Now, on the basis of this record, where we have not had an economist or anyone else who is competent to tell us about what this market is, what effects it, what the history of it is, what causes people to buy and sell, what influences that market and what economic factors were working in the various years involved, this is simply incompetent.

MR. ROOKER: Your Honor, I take it from Mr. Taylor's argument it really is that increased volumes of sales is irrelevant to price deterioration and that is not an accurate statement at all.

MR. TAYLOR: I think whether or not--

MR. ROOKER: May I finish, please?

MR. TAYLOR: Certainly, I thought you were through.

MR. ROOKER: If there are other factors that made an influence on the market price that Mr. Caldwell doesn't know about, I am sure Mr. Taylor is going to present them but it is clear that the increased value of sales does have a direct effect on the degree of price deterioration. Therefore, Mr. Caldwell's testimony is probitive and relevant. If it is incomplete, I am sure Mr. Taylor can complete it for us. I don't think it is but it is perfectly clear that Mr. Taylor is not right when he says that this evidence is irrelevant. This is clearly one of the relevant factors and perhaps in this instance, if we can satisfy the Court, the only one.

MR. TAYLOR: Now, whether or not it's an economic

[Tr. 375]

factor is a matter that neither Mr. Caldwell nor Mr. Rooker is competent to testify about. There's no evidence on that subject in this record. Now, Mr. Rooker and I can argue the economics with the Court but on this record there is no evidence that that even is a factor under the circumstances in the market at that time and again it's completely speculative they're indulging in presumptions without any foundation whatsoever; there's no competent evidence against which to measure or to weigh it and we don't even reach the threshold level where this can be dignified by considering it evidence at all. It imposes no burden on the Defendants; the Plaintiff, at this point of the proceeding, has the burden of proving what the market was and if we manipulated it or if we did something wrong to show what it was. Now, if the Court please, I don't think there is one bit of evidence on this record that demonstrates

any economic fact which would make this kind of presumption relevant at all and the presumption certainly can't be proven even by Mr. Rooker's statement that it is a clear economic fact or through Mr. Caldwell and we will submit it.

THE COURT: It seems to me, Gentlemen, that this Court and other Courts, as well, will eventually be required to determine whether or not the management of the Defendant Georgia-Pacific has invaded a market area with a product from a plant other than Sigurd and I refer to the Acme and Lovell Plants. I doubt very much that the Court is going to reach and take a look at Akron [sic], Ohio, and determine what happened in Akron had a direct significant [sic] effect on Sigurd.

[Tr. 376]

MR. ROOKER: Your Honor, we are not interested in having the Court do just what Your Honor said you did not think you would do. We don't want the Court to look at what happened in Akron, Ohio, at a given time. What we do want the Court to do is to have the information before it so that the Court can compare what happened in the Sigurd Market with what happened in the entire balance of the United States, not just Akron, not just Wilmington, but the entire United States as compared to what happened in the Sigurd market. All we want to do is put this information before the Court so the Court can have the information before it and be in a position to make a complete judgment in the matter. There is no jury here to raise any prejudice but if the information is, as Mr. Taylor has characterized it, then I think the Court will disregard it. Then if it seems appro-

priate to the Court to consider it, he may.

THE COURT: My particular point is this, Keith, we are all aware of this particular situation and there are areas in the United States where suddenly, for example, something might happen to its principal industry. For, example, I am thinking in the Northwest where at the present time they are encountering difficulty there in particularly the building and airplane activities. I presume part of that country is somewhat depressed by the decline in these businesses. We don't know, whether the railroads are going to operate and what effect this is going to have upon some particular area, and I am concerned about this particular type of evidence as it applies to some particular area. And we are confronted

[Tr. 377]

here with the problem of determining whether or not there was or has been an effort on the part of Georgia-Pacific to a measure, invade this particular area. Counsel, in the beginning said the contract said all of your needs. They have receded, somewhat from that position and, I think, understandably, and later on said all we want is this market area, the market we have served and was serving at the time of this merger and we think we are entitled to be protected in that market area as against, for example, some other area acquiring it, and I refer to Acme and Lovell, invading it and supplying a greater part of its needs. That's been my feeling from the very beginning and for that reason I am having some difficulty relating it to Akron, Ohio, or some other plant. I feel that the general economic situation of a particular area can in a measure effect the total quantity of a given product sold in a particular area.



Those are the things that are bothering me in this reference here.

MR. ROOKER: I think, first of all, I might have explained something that might have been inaccurate or misleading to the Court. First of all I would like to make it clear to the Court that on the basis for recovery we intend to rely chiefly upon, which Mr. Caldwell will explain, we are going to rely on the plant capacity of this Sigurd Plant.

THE COURT: I will go along with that.

MR. ROOKER: Secondly, it's clear I think the Court will agree on the fact that Acme and Lovell have, in fact invaded the Sigurd Market. I don't think there is any

[Tr. 378]

question about that, it isn't denied by the Defendant; they admit that statement. Now, what we have to do here, Your Honor, is to find a basis for measuring, for measuring the effect of that invasion of the Sigurd Market by Acme and Lovell, on the results of operations using the Sigurd Plant capacity and that's what this information is absolutely necessary for.

THE COURT: Well, of course, I--I think I indicated before when you gentlemen were urging the language of the contract which provides that all of its needs. Well, back in 1946 the Judge and others, of course, contracted with some people who wanted to operate and manufacture this raw product into some usable product and they said alright build a plant and I think I indicated previously, instead of all its needs, I think the most you could ask for is the total amount of board or products that they

could manufacture from the Sigurd Plant, at its capacity rather than attempting to describe a particular market area. That's my feeling now.

MR. ROOKER: Your Honor, if you will recall, Mr. Foster testified when I was examining him and Mr. Caldwell has reinforced that testimony that it is quite impossible to determine the actual price which Georgia-Pacific sells this board and lath to outside customers. So what we have to do in order to make a determination of the price for which Georgia-Pacific is accountable is to use averages in this market area and that is the purpose for which Mr. Caldwell prepared his study which he was explaining. Now in determining what average price should be used, we have to take into consideration

[Tr. 379]

the effect of the invasion of the Sigurd Plant market by Acme and Lovell and the information on Exhibit 143 is a base reference for Mr. Caldwell's exhaustive studies making that determination to which he will testify. This information represents base reference statistics for Mr. Caldwell's testimony in that connection.

THE COURT: Well, I am going to admit the testimony but I will consider it as to whether or not--

\* \* \* \*

[Tr. 382]

\* \* \* \*

Q. Your Honor, do I understand that Exhibit 143 has been received subject to--

THE COURT: 143 has been received.

Q. Now, Mr. Caldwell, based upon your examination of the documents and the effort which you have expended in your engagement as you have described it, do you have an opinion as to whether or not it is necessary to examine and take into account the statistical information contained on Exhibit 143 for the purpose of computing the amountings [sic] owing to the Plaintiffs under the lease?

MR. TAYLOR: I am going to object if the Court please.

MR. ROOKER: I just asked him if he had an opinion.

THE COURT: That's all.

MR. TAYLOR: Alright, I will withdraw it until he answers.

A. Yes, sir.

MR. TAYLOR: Now, may I object? Now, if the Court please, he's calling for an opinion that only an economist can answer or the Court in this proceeding. He has not been

[Tr. 383]

qualified as an expert in the field of marketing, in the field of economics, in the field of manufacture, practicing marketing, distribution of gypsum products. He is an accountant. Now there's no foundation laid on this record for the statement of that kind of an opinion and we object to it on that ground.

THE COURT: This Court may, or may not, give any weight to this particular opinion but I am going to permit him it but I am going to reinstate the same thing regarding its weight as I have previously said regarding these other matters.

\* \* \* \*

[Tr. 384]

\* \* \* \*

Q. Would you state your opinion, please Mr. Caldwell?

A. My opinion is that the prices at Acme, Lovell, and Sigurd declined substantially more in each of the years from 1967 through 1970 than the average for all the other plants in the United States and that the production going into those markets increased substantially more at the same time and based upon the financial information that the price decline would at least, in part, or all be attributed to the increased production going into the market place. There may be other factors but this would certainly be a dominant factor in creating that situation.

Q. No, Mr. Caldwell--

MR. TAYLOR: If the Court please, to avoid my jumping up, may we have continuing objections--

THE COURT: Yes, Counsel may have an objection to

[Tr. 385]

this particular type of proof as has now been elicited from this witness.

Q. Mr. Caldwell, would you please identify for the Court, the Court has a copy before him of Exhibit 143, the information summarized on this exhibit that you seem significant in connection with the opinion you have just stated?

A. For each of the plants listed for the years 1967 through 1970, we have first set forth the SM units of board and lath sold. For example, at Acme the number of units went from 214,750 to 330,534. The Akron plant increased from 74,000 to 97,000; Blue Rapids plant decreased from 67,975 to 64,929; Fort Dodge plant decreased from 212,248 to 187,920; the Grand Rapids Plant increased from 111,372 to 112,762; the Brunswick plant increase from 271,308 to 282,758; the Wilmington Plant decreased from 178,686 to 146,911. The Sigurd Plant operated for one month in 1967.

Q. The Lovell?

A. Lovell Plant operated for the one month in 1967 and it had 2,210 SM units and increased up to 69,284 in 1970. The Sigurd Plant declined from 140,532 to 118,122. Looking at the net sales of board and lath for SM it may be noted that there was only one plant higher in 1967 than Sigurd that being the Fort Dodge plant which had an SM unit price of \$36.04 while Sigurd was at \$35.98. Without going through all the other plants, they were a lesser figure. In 1968 it may be noted that Sigurd declined to \$26.00; there was one lower which was Acme at \$25.97, three cents lower. In 1969 the Sigurd

[Tr. 386]

Plant had decreased to \$23.83, that being lower than any plant except Acme. In 1970 had declined to \$21.92, that being lower than any plant except Acme. Then we have set forth the SM units of board and lath for each year from 1967 through 1970 and it may be noted that Sigurd is about the same level as far as the direct costs of board and lath. In 1967 being at \$19.94, in 1970 at \$19.98. The cost of goods sold, of course, is only important in relation to computing the gross profit factor. Now it may be noted that in 1967 that there was only one plant, Fort Dodge, that had a higher gross profit factor than Sigurd, Sigurd being at \$16.04, Fort Dodge being at \$17.64. The decline of the Sigurd Plant has been substantially more precipitous than any of the other plants declining from \$16.04 down to \$1.94. What we have done in this connection is prepared a study using 1967 as a base for the plants other than Acme, Lovell, and Sigurd and adjusting this plant transfer price for the distribution division commission which appeared on the plant P&L statements. In arriving at this unit adjustment we got the percentage relationship between the total distribution division commissions as appearing on plant P&L statements as a percentage of total net sale. While--

Q. Excuse me, Mr. Caldwell, so we understand that clearly, do I understand that in 1967 Georgia-Pacific was not using that transfer price factor in the same fashion as it is today?

A. That is correct.

Q. Would you explain that to the Court, please?

[Tr. 387]

A. In 1967, at least for a portion of the year, they were reporting on the plant P&L statement a distribution division commission which testimony indicates was set at 9.8% of the sales to the distribution division. Subsequent to 1967 the invoices were reported net at plant level of this distribution commission and it no longer appeared. The only reason for our adjustment here is to, within the limits of our ability based upon the information at hand, to get a comparable price in 1967 in getting the percentage changed in the subsequent years. All plants have been treated on a consistent basis in this connection.

Q. Mr. Caldwell, I hand you and it has been marked for identification as Plaintiffs' Exhibit No. 141 and ask if that is the study you have just been describing.

A. Yes, sir.

Q. We offer Exhibit 141 to the Court.

THE COURT: Have you seen the Exhibit 141?

MR. TAYLOR: No, if the Court please. We object on the same grounds that we objected to the prior one and in addition we note it obviously contains a number of other assumptions where the witness hasn't even discussed or talked about including an arbitrary deletion of many sales that would have to be

included even on their key. We are objecting on those grounds.

Q. Have you deleted any sales?

A. No sir, this is the board and lath sales for each of the plants which is by far the predominant product handled.

[Tr. 388]

Q. Where are these figures taken from?

A. Right from the plant Profit and Loss Statements for each specific plant.

Q. Included in Exhibit No. 13?

A. Yes, sir.

MR. ROOKER: We renew our offer--

MR. TAYLOR: One question, please, may I ask one question?

THE COURT: Go ahead.

MR. TAYLOR: Mr. Caldwell, have the sales to outside firms like John-Mansville been included on this computation, this Exhibit-- what's the number?

MR. ROOKER: 141

A. They have not been excluded; if they appear on the face of the plant profit and loss statement.

MR. TAYLOR: If they are not on that page, they have been excluded.

A. That is correct.



THE COURT: Normally they would be found on the profit and loss statement, would they not?

A. Yes, sir.

THE COURT: I am going to receive Exhibit 141 in evidence. You may have your objection to it, of course, and the Court is going to treat it as I indicated my feeling were previously, in the same vein.

Q. Mr. Caldwell, would you again explain to the Court, I don't think that you have completed your explanation

[Tr. 389]

of the purpose for this study and the method used for making the study?

A. We started with the 1967 unit price for SM of board and lath.

THE COURT: I am looking at Exhibit 141, is that correct?

A. Correct, Your Honor.

THE COURT: Alright, go ahead.

Q. Is what you have just described the series of entries contained on the first line, containing dollar entries, Mr. Caldwell?

A. Yes, sir.

Q. Perhaps you can identify some of those numbers so that we are certain we are following?

A. Akron \$33.66; Blue Rapids \$34.50; Fort Dodge \$36.04; Grand Rapids \$34.62;

Brunswick \$32.04; Wilmington \$34.11; and course Sigurd does not appear on here but was at \$35.98. We have made an adjustment for the distribution division commission explained to make the figure as near comparable to the 1968 figure as possible based upon the information available. We have then set forth the unit prices for 1968, 1969 and 1970. All of these figures of course, appear in the statistical summary which is the preceding exhibit.

Q. Is it Exhibit 141?

A. Yes, sir. Then we have shown the decrease of 1968 from 1967. First, the amount and then the percentage. For example, the amount of decline at Akron per SM units of

[ Tr. 390]

board and lath between 1967 and 1968 was 77%. I won't bother to go through each of the other plant unit changes.

MR. TAYLOR: Now may I interject at the point, if the Court please, I note there that the witness is now talking about a conversion of a 1968-1969-'70 figures. Not only is he taking them for the whole United States but now he is relating them back to 1967 to project his numbers and calculations. Now, the Court will recall the evidence on this record that the Sigurd plant produced more board and operated at a greater rate of capacity in the five years its had this plant than did its predecessor before. Now when the Plaintiffs first stated their theory here, now Georgia-Pacific when you came along you saw a production level in the market area and you were obligated to maintain it. On the evidence on this record, they have done that. Now in that period when Georgia-Pacific has had this

plant, the highest period was 1967. As a matter of fact on this record, that's the highest production that that plant has ever had in its history. Now this witness, through a series of inferences and on a subject on which he is not competent to state, is pyramiding all of the 1968, 1969, and 1970 levels to a 1967 level. Now, I don't know how evidence can be more incompetent than that; we renew our objection and move again to strike the exhibit.

MR. ROOKER: Your Honor, Mr. Taylor's vehemence [sic] and outrage and anger and whatever else he has is wholly irrelevant. Sigurd doesn't even appear on the exhibit. In fact, if Sigurd had its highest sales in 1967, it's completely

[Tr. 391]

irrelevant to this document.

MR. TAYLOR: Then the document's irrelevant to Sigurd.

THE COURT: Of course, Exhibit 141 has been admitted into evidence and then to, gentlemen, it's evidence that may, or may not, have any weight.

Q. Mr. Caldwell, would you proceed with your explanation of 143?

A. Yes, sir.

THE COURT: 143?

Q. Your Honor, I am sorry, 141.

A. The decrease of 1968 related to 1967 as shown in both the unit dollar amounts and in percent. For example, at Akron

77¢ decline in SM board and lath unit and that represents a 2.4% reduction. Then we have shown the same information for each of the plants and come up for an average of \$1.42 per SM reduction and a 4.4% reduction. This compares to Sigurd at \$5.37 unit price deduction and a 17.1% percentage reduction. In 1969 we have shown the same statistical date, [sic] the average unit reduction in 1969 from 1967 \$2.85, an average for the plants as shown 8.9%. This compares with Sigurd a unit reduction of \$7.54 and a percentage reduction of 24%. In 1970 we again have shown the same unit price and percentage reduction. The unit price reduction being an average of \$5.59 and a percentage reduction of 17.4%. This compares with a unit reduction on Sigurd of \$9.45 and a percentage reduction at Sigurd of 30.1%.

[Tr. 392]

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- Q. Mr. Caldwell, I believe that at the noon recess we had just completed our discussion on Exhibit 151, [sic] the Computation of declines of sales prices; is that right?
- A. Yes, sir.
- Q. Now, I show you what has been marked for identification as Exhibit 151 and ask if you prepared that document or if it was prepared under your supervision?
- A. Yes.
- Q. And would you please explain to the Court what that is?
- A. Yes.

MR. TAYLOR: May I see it? What is it?

MR. ROOKER: Yes.

MR. TAYLOR: Thank you.

A. This is the same information, measuring the percentage of price decline and SM units of board and lathe price decline for the years 1968 through 1970 as measured against 1967 for the Acme, Lovell and Sigurd plant. During my testimony in regard to the prior exhibit I made reference to the statistics in regard to Sigurd as related to the other plants average.

Q. And after the noon recess was taken did Mr. Latimer

[Tr. 393]

ask you for a copy of that document?

A. Yes, sir.

MR. ROOKER: We offer Exhibit No. 151, Your Honor.

MR. TAYLOR: Same objection.

THE COURT: You object?

MR. TAYLOR: The objections are the same. In addition, if the court please, the witness has indicated that he has taken into consideration practices of the party and according to the first exhibit, I think 138, he has the production practices of the parties for 1957 through 1964 and at no time did they even approach this limit he has computed to in this exhibit, the maximum of 1967. It's the most speculative conclusatory thing and it's objectionable.

THE COURT: The court is going to admit the exhibit, as I say, for such probative value as it may have.

(Whereupon, Plaintiffs' Exhibit No. 151 was duly received in evidence.)

- Q. Mr. Caldwell, would you tell us please the next step that you took in your study in connection with the computation of the rentals owing to the Plaintiff under the terms of the lease?
- A. Yes, sir. We have gone to the settlement computations between the parties for the years 1962, 1963 and 1964. We have computed the average of the net sales for those years as used in the lease rental computation. The average sales for those three years totals \$4,821,317.

MR. TAYLOR: May I inquire as to what the witness is really reading from, whether it is in evidence or

[Tr. 394]

something he is proposing to offer?

- Q. Mr. Caldwell, to solve that problem, I show you what is marked Exhibit 140 and ask you if that was prepared by you or under your supervision?
- A. Yes, sir.
- Q. Is that the study to which you have reference in your testimony?
- A. Yes, sir.

MR. ROOKER: This document is entitled Computation of average 7% lease rental per SM for years 1962, 1963 and 1964. We offer Exhibit 140, if the court please.

MR. TAYLOR: Mr. Rooker, I assume that this contains information from the various exhibits containing information for all plants; is that correct?

MR. ROOKER: No, sir, it is not.

MR. TAYLOR: It is not?

Q. Am I wrong about that, Mr. Caldwell?

A. The percentage of price decline, average.

Q. Yes.

A. For all plants has been used in this schedule.

MR. TAYLOR: And it is a necessary part of this computation; is it not?

A. Yes, sir.

Q. And that is taken from Exhibit No. 141, is it not?

A. Correct.

MR. TAYLOR: I would object on the same ground, Your Honor.

THE COURT: It will be admitted on the same reasons and on the same grounds as heretofore stated.

(Whereupon, Plaintiffs'  
Exhibit

[Tr. 395]

No. 140 was duly  
received in evidence.)

Q. Will you please explain to the court, Mr. Caldwell, the purpose and nature of the study set forth in Exhibit No. 140?

A. The purpose of the study is to arrive at the lease rentals owing under the terms of the lease to American Gypsum, computed by using the averages for the years 1962 through 1964, expressed in terms of cents per SM units of board and lathe which were received during those years from the lessee under the lease. We have then used the percentage price decline which constitutes the averages of all plants of Georgia-Pacific other than the Acme, Lovell and Sigurd plant.

Q. Mr. Caldwell, let's address ourselves first to the first part of the exhibit so we can be sure we understand that. That is the one that's captioned at the left, 1962, 1963 and 1964?

A. Yes.

Q. Limiting ourselves to that part of the exhibit, from where did that information come?

A. That came from the settlement statement which is provided American Gypsum Trust by the lessees for those years.

Q. Now, can you explain to the court please the various entries and the computation reflected therein in that part of the document?



- A. Yes, as I previously stated the first column represents a computation of the average sales for those years as used in the lease rental computation.
- Q. Do I understand then by that, Mr. Caldwell, correctly

[Tr. 396]

that during the years 1962, 1963 and 1964 American Gypsum Trust received an average of 90.25 for each SM of board and lathe manufactured at the Sigurd plant?

- A. Yes, that is the conclusion of the fore part of the schedule.
- Q. Fine. Then would you please explain the balance of the exhibit to the court?
- A. We have then indicated for 1968, 1969, and 1970 the percentage decline in each year of the average in the plants other than Acme, Lovell and Sigurd as was previously discussed in the prior exhibit. We have then indicated again the average sales price for the years '62 through '64. That appears as the next line item for each of the years '68, '69 and '70. The next line item is a restatement of the average net profit for those years.
- Q. Is that beginning with the figure \$1,712,645?
- A. Yes, sir. Then we have computed the decrease in profit attributable to decrease in selling price, which merely means the line item A has been multiplied by line item B to arrive at the decline in selling price. Those amounts

are \$212,138.00 for 1968, \$429,097.00 for 1969 and \$838,909 for 1970.

Q. Now, to make sure I understand this correctly and the court does, Mr. Caldwell as I understand it, you have taken into account then in making this computation the impact of the decline in price of wallboard; is that right?

A. That is correct.

Q. Okeh. Would you proceed with your explanation?

A. The next line is entitled adjusted Net Profit which

[Tr. 397]

is merely the subtraction of the decrease in profits due to decrease in selling price from the average of the net profit for the three years used as a base. We have then computed the 7% lease rental and then we have expressed that lease rental as a dollar amount related to the average number of units of board and lathe, which represents the average of the years 1962, 1964 and being 124,152 SM's.

Q. Now, excuse me, Mr. Caldwell.

A. The results of that computation is that from the 925¢ representing the average received by American Gypsum Trust for 1962 through 1964, as percentage lease rental, would then decline to .7907 in 1968, related to the percentage decrease in selling price and would decline to .6763 in 1969 and to .4604 in 1970.

THE COURT: Is that .46 or .146?

A. Your Honor, that's .4604, the decimal point is a little wild.

Q. Mr. Caldwell, could you please explain to the court the reason for using 1962 through 1964 as a base period for the computation of the lease rental owing under the lease?

MR. TAYLOR: Before you answer, Mr. Caldwell, I assume that following the recess the objection to this testimony continues?

THE COURT: Oh, yes, it will continue.

A. In my opinion, it's the most reliable data in computing the lease rentals by virtue of the fact that it is absolutely impossible to reconstruct the net income of the Sigurd plant as an independent economic unit.

Q. Now, Mr. Caldwell, based upon all of the studies which

[Tr. 398]

you have made as you have discussed them now with the court and your examination of all of the books and records of Georgia-Pacific Corporation that you have identified, do you have an opinion as to the amount of lease rentals owing by Georgia-Pacific Corporation to American Gypsum Trust for the year 1965 through 1970, inclusive, under the terms of the lease as you have described your use of those terms in your studies?

A. Yes.

THE COURT: That would be limited then to the 7% of net profit?

MR. ROOKER: That is correct, Your Honor.

THE COURT: That is the purpose of this computation, was it not?

A. Yes, sir.

Q. Do you have such an opinion, Mr. Caldwell?

A. Yes, sir.

Q. Now, in addition to that as an added factor in your opinion, have you added any tonnage royalty?

A. Yes, sir.

Q. And would you please explain to the court the reason for that?

A. The tonnage royalty has been added attributable to bringing the plant to the 1967 level of operation and would apply to the approximate tonnage that would pertain to the increased production.

Q. Would you state your opinion please?

MR. TAYLOR: I am going to object to the opinion it contains and culminates all of the objections we have been talking to, of course, and we think it's an improper

[Tr. 399]

opinion on these myriads of invalid assumptions that have been made and we object to the opinion on that premise.

THE COURT: May I ask on Exhibit 140, that computation covers 1962, 1963 and 1964. I had difficulty following in the last three

columns of 167, 168 and 169 or '68, '69 and '70. They aren't marked on here. They are 7% lease. This is what I refer to, these items here.

A. Your Honor, the first series of computations are related to computing the averages for 1962, 1963 and 1964, these being the actual sales that were used in the computation of the lease rentals actually settled between the parties.

THE COURT: During that period of time?

A. Yes, sir. The second column represents the net profit before the 7% lease rental again as reflected in the computation of the lease rentals which was settled between the parties. The last column, let see, excuse me, the next column represents the actual amount of the 7% lease rental which was paid for those years and the last column is the number of SM units of board and lathe, the final figure in those columns represents the average of the three years. Then in coming down to 1968, 1969 and 1970, the first line represents the percentage decrease in selling price related to those plants other than Lovell, Sigurd and Acme. Then the next line represents the average sales price. The next one, the average net profit. The next line represents a computation applying the 4.4% against the next profit to determine the effect on net profit. The percentage decrease in net profit, of course, was very much more substantial than a decrease in selling price, and the next line is the adjusted

[Tr. 400]

net profit which is a simple subtraction.

Then we have--then computed the lease rental on those adjusted profit figures and divided those lease rentals by the average of the SM units of board and lathe to determine what the decrease would be in a unit of SM board and lathe compared to the average for the years '62 through 1964.

THE COURT: I get it.

Q. I think, your Honor, I asked Mr. Caldwell to state his opinion as to the total amount of lease rental plus tonnage royalty owing to American Gypsum Trust by Georgia-Pacific Corporation under the terms of the lease based upon his studies as he has identified it.

THE COURT: For what years?

MR. ROOKER: For the years 1965 through 1970.

A. The amount is \$410,032.00.

MR. TAYLOR: I assume the court overruled my objection?

THE COURT: Oh, yes.

Q. I show you, Mr. Caldwell, what has been marked for identification as Exhibit 139 and ask if that is a summary of your studies as you have described them?

A. Yes, sir.

THE COURT: Do you have a copy of this?

MR. ROOKER: Yes, he does, Your Honor.

THE COURT: Exhibit 139.

- Q. A document entitled Computation of 7% lease rental for years 1964-1970 based on Computation Preceding three years as Related to SM output of board and lathe. We offer Exhibit 139.

MR. TAYLOR: We object to it for the same reasons.

[Tr. 401]

THE COURT: It will be received for such probative value as it may have.

- Q. Now, would you please explain the nature of this summary, Mr. Caldwell?

A. Yes, sir. The first line item are the net sales of board and lathe by the Sigurd plant actually sold for the years 1965 through 1970 expressed in SM units. The second line item entitled Average 7% lease rental for SM board and lathe units, 1962, 1964, adjusted for price decline in 1968, 1969 and 1970 and refers to a schedule which is the previous exhibit which we just discussed.

- Q. That's Exhibit 140?

A. Yes, sir. Reading across. The lease rental for SM unit for 1965, 1966 and 1967 is the average for the years 1962 through 1964. The subsequent line items the .7907, the .6763 and the .4604 represents those same unit prices adjusted for the price declines. Then the third line item entitled 7% lease rentals is merely a multiplication of the SM unit price times the number of SM units. The next line item is a reduction against those lease rentals for the

amounts paid by Georgia-Pacific in prior settlement computations and, of course, the next line item is merely the subtraction for the balance. The next line item are or indicates the additional SM units to bring the level of production in 1968, 1969 and 1970 to the 1967 level of \$140,532 which is something--

Q. Dollars or SM's?

A. Excuse me, units, which is something slightly less than what has been indicated to be plant capacity of 144,000 units. Those additional SM units have been multiplied by

[Tr. 402]

the same unit prices as appears above for the years 1968, 1969 and 1970. And, of course, the next line is merely the result of that computation. The next line indicates the approximate tonnage royalty that would relate to the increased production and, of course, the final line represents the total sum of the amounts above, as related to the lease rentals.

Q. Thank you. Mr. Caldwell, I show you what has been marked for identification as 142 and ask if that was prepared by you or under your supervision?

A. Yes.

Q. What does that document represent please?

A. That is a computation arriving at the percentage of the distribution division commission to total net sales in each of the plants.



Q. For the year 1967?

A. Yes, sir.

Q. And is that simply background statistical data utilized in connection with the studies you have identified?

A. Yes, sir.

MR. ROOKER: I offer Exhibit 142, Your Honor.

MR. TAYLOR: The same objection, your Honor are applicable to this exhibit also.

THE COURT: I am going to admit the exhibit as heretofore stated, of course, the probative value it possesses.

MR. ROOKER: Okeh.

(Whereupon, Plaintiffs' Exhibit No. 142 was duly received in evidence.)

Q. Mr. Caldwell, prior to the receipt of the additional documents which were delivered to us and to you yesterday,

[Tr. 403]

have you made computations similar to those which you have testified to which have been received in evidence to determine the amount of lease rental owing to American Gypsum Trust under the terms of the lease?

A. Yes, sir.

Q. Would you please explain to the court the difference between the computations formerly made and the computations which

have now been received in evidence?

A. The only difference is the difference in the unit price resulting from using the average price decline in plants other than Lovell, Sigurd and Acme.

Q. So as I understand it, the former study that you did was based upon the actual price decline that was experienced in the Sigurd market; is that right?

A. The price decline in the prior computation was predicated upon the unit prices of board and lathe at the Sigurd plant for the years 1967 through 1970 which were adjusted by a unit price increment to estimate the adjusted sales price to the customer and then the computation was made in exactly the same manner as appears in the revised exhibit.

Q. I show you what has been marked for identification as Exhibit 144 and ask if that was prepared by you under your supervision?

A. Yes.

Q. And does that represent the prior computation that you have been speaking of?

A. Yes.

MR. McCARTHY: What is the title of that?

MR. ROOKER: The document is entitled computation of 7% lease rental for years 1965-1970, based on Computation

[Tr. 404]

of the preceding three years as relates to

SM outlet of board and lathe.

Q. Mr. Caldwell, do you have an opinion as to whether or not--let me restate that: Do you have an opinion as to whether Exhibit No. 144 represents as reliable and accurate a computation of the lease rental owing to the Plaintiff in this case as the former documents which are summarized as Exhibit 139?

A. My opinion is that the former documents are more competent.

Q. Now, do the documents marked Exhibit 144 have any value in authenticating or verifying the other documents which have been received?

A. No, sir.

Q. Do they provide, Mr. Caldwell, an alternative method of computation albeit less reliable in your opinion?

A. Yes, sir.

MR. ROOKER: We offer Exhibit 144, Your Honor.

THE COURT: Do you have a copy of it?

MR. TAYLOR: Yes, we do, if the court please and we have our similar objections to this document that it includes numerous assumptions of a similar nature involving necessarily determinations of economic factors. For example, as I understand this document, it projects out to a sales price in areas where sales could not be made. As I understand the document, it computes, if it is the same one I have, it alternatively computes production at Sigurd either at the

maximum year or in some cases substantilly [sic] in excess of production. We object to this exhibit.

\* \* \* \*

[Tr. 405]

\* \* \* \*

THE WITNESS: Your Honor, the Exhibit 144 has been prepared in exactly the same manner as the prior exhibit except the price decline has been measured by Sigurd's own price decline rather than the average for plant other than Sigurd, Lovell and Acme. Other than that it is the identical computation and the maximum units do not exceed the 1967 production as in fact they are based upon the 1967 production as is indicated. We indicate the line item additional for years 1968, 1969 and 1970 to bring unit sales to 1967 level.

THE COURT: There has been frequent reference to the year 1967 and the court recalls, of course, the apparent amount of business transacted by the Sigurd plant at that particular time. The thing I am trying to follow is this: Is it your position that the Defendant corporation should have maintained the same level in '65, and '66, '68 and '69 and '70 as it maintained in '67?

THE WITNESS: Yes, sir, and that's particularly in view of the fact that, of course the Lovell plant was acquired in 1968 and the volume of the Lovell plant when added to the actual production of the Sigurd plant in each of those years would have exceeded actually the 1967 level, so there certainly wasn't a question to whether or not the

[Tr. 406]

units would have been sold.

THE COURT: Now, let me interrupt you at that point: is it your position then that the plant at Sigurd has the capacity to provide the Defendant corporation with the board and lathe that the two companies combined provided?

THE WITNESS: No, Your Honor. This particular schedule merely contemplates operating at 1967 levels which is something less actually than capacity and by virtue of the requirement provisions in the lease that as far as computing the amount of lease rental that at least the 1967 level of production and sales should have been achieved.

MR. TAYLOR: Now, again, if the Court please, I submit that this witness does not have the background and the foundation to make these various opinion and judgment assumptions which is the whole premise of those statements for I think--

THE COURT: Of course, that's their case, whether or not you can disprove it is a matter of defense. My point is this, if this court knew what was intended by the parties, the contractual parties back in 1946, continuing through the contract period of fifty years, what was the--in this case here--what is the duty of Georgia-Pacific toward the Trust as defined in the contract? That's the thing that's been bothering this court from the very beginning. Are they obliged. They said the contract provides, of course, that all your needs shall be supplied, all your needs, and as I indicated they said, "This market area." Now, the thing I would like

to get in mind, what does the Plaintiff contend that the Defendant corporation

[Tr. 407]

has failed to do what--

MR. ROOKER: May I say--

THE COURT: Go ahead and tell me.

MR. ROOKER: No, go ahead, Your Honor, and I will speak to it if I may.

THE COURT: Are they obliged to produce to manufacture, call it what you please, a specific number of SM units over a period of years? Is that the measure of their duty or are there other factors, for example, that in some particulars may affect not only the duty but the capacity to do these things. That's the problem the court is wrestling here with with all these exhibits. Consequently, can we tie in this litigation here, can we tie, for example, the duty of the Defendant corporation to any one particular year? Is it a fixed circumscribed duty based upon the language of that contract, or its needs as modified by saying its market area.

MR. ROOKER: Your Honor, our position is that the contract means what it says.

THE COURT: Yes.

MR. ROOKER: And that we are entitled to have them satisfy all of their requirements from the lease.

THE COURT: Yes.

MR. ROOKER: From the leased claims, and that is our position, but we are not asserting that broad a claim in this litigation

today.

THE COURT: I'm aware of that.

MR. ROOKER: We have narrowed our claim to this proposition that so long as the market historically served by the Sigurd plant which has been defined here, has adequate

[Tr. 408]

units in it to absorb the production of the Sigurd plant at its capacity or indeed for even less than that, because we have taken less than the capacity. We have taken a 1967 level of production as a proven level, as long as the market has enough sales in it to absorb that production, they are obligated to satisfy at least that much of their requirements from the leased claims and to pay us a royalty on the tonnage thus produced and to pay us 7% of their net profit on the tonnage thus produced, processed and sold and if they elect to cut the production of the Sigurd plant down from 142,000 SM to 110,000, as they did, for example between '67 and '69 and to satisfy the same market out of Acme and Lovell in an amount exceeding that, then we think they're obligated to us under the requirements provision of the lease the royalty that would have accrued had they produced that at the Sigurd plant. So our claim is very narrow and is limited not just to plant capacity but indeed is limited to a figure less than plant capacity based on what they actually did produce in 1967. Now, our position would be for the future in connection with the declaratory judgment aspect of this case that they are obligated to either produce the Sigurd plant at that level that is the 1967 level so long as this historical Sigurd market has been defined has

sufficient sales in it to absorb that much or if they don't do that to pay us the royalties that they have and that is our position, Your Honor.

MR. TAYLOR: Now, if the Court please, my objection went not to what Mr. Caldwell was saying, but the lack of foundations for him having said it. If we had market-

[Tr. 409]

ing experts and if we had economic experts and if we had people who have been dealing in the gypsum industry, who could tell us how many plants had been built in the western part of the United States in the last four years, who could tell us the market impact, could tell us that the kinds of volume that they are talking about could go into that market at a profit to Sigurd, then it might be material, but this witness hasn't got the background. He doesn't even claim to have it. He's admitted on direct examination that he doesn't even know what those economic factors are. He presumed that some of his figures would be one of those factors.

Now, the objection that was made to these exhibits and his conclusions on which they are based and his assumption on which they are based is that he is not qualified to state them, those factual assumptions and if the Plaintiffs want to prosper on those theories, it's our position that they've got to find some legitimate evidence to establish those marketing factors that they are just presuming and before then I don't think lies with the Defendant to disprove anything, because all we have are speculations of a fellow who hasn't been in the market place and doesn't even claim to know what the market factors are and the whole premise of the



exhibits which he has identified here and the opinions stated are based not upon accounting principles, it's based upon economic factors at the market place of the gypsum industry that he doesn't know anything about. Now, getting to Mr. Rooker's statement, if the court would look at the at the exhibit--I think it is the one on the desk, my copy doesn't have a number--I believe it's 138.

[Tr. 410]

THE COURT: Is it 135?

MR. ROOKER: I certainly don't want to cut Mr. Taylor off, but I think he is arguing his case. He has already argued it twice and if we keep arguing it, we're going to be here all month before we finish.

MR. TAYLOR: Now, Mr. Rooker has told us and this witness has indicated how we have reduced our production. Georgia-Pacific assume this lease by assignment in 1965. At that time looking back, as shown by Exhibit 135, at the actual conduct of the parties in the operating of that plant, at no year did it even approximate the level that they are now asserting it is their legal duty to serve. Now, again, Mr. Caldwell has made myriads of business judgments in the market place which are necessary to the opinions which he has stated from which there is not one wit of evidence in this record, and I'll submit it.

THE COURT: He's told you now that what they expect under that contract. That in the event, for example, you don't produce what he has proposed, that they expect royalty at a fixed amount, which I presume would approach the capacity of that plant.

MR. ROOKER: But only, Your Honor, if there is sufficient market to absorb and that's the period Mr. Taylor is talking about for in that period prior to 1965 since the Sigurd plant was serving the whole market obviously the whole market was limited to the number of units that the plant did produce, but now in the subsequent period the market has grown at yet a shrunk figure.

MR. TAYLOR: That assumes that Georgia-Pacific and Bestwall were the only people producing Gypsum Board.

[Tr. 411]

Now, if the court please, if we had a herd of sheep and it was the only herd in the United States, they'd be pretty valuable. There have been numerous plants constructed in this very area over the period that he's been talking about, but he doesn't know anything about what affects every figure that's on that paper. Now, we assert that before he can state those kinds of opinions, he has got to know what he's talking about and I'm not talking about the example. I am talking about the basic business decision. Mr. Rooker says the market will assume it. That's question of fact and they don't have any evidence that the market will assume it.

THE COURT: Of course, they base their claim, I assume on the fact that Lovell and Acme have been supplying a tremendous amount of board to that particular market area, and that's the thing they are complaining about. He said, "Georgia-Pacific, you've taken Lovell and Acme and over supplied the market area to which we're entitled." I presume they would say that other than in 1967. They are not complaining about '67, but I'm still--I want to

sharpen these issues as best I can, because I don't intend to read all the testimony and look at every exhibit, 151, I think it is now, between now and the time I write the decision.

Now, as I said earlier in these proceedings, the thing that I am looking ahead to is a degree which will be rather definitive, most definitive wherein this company, the Defendant corporation will know exactly what their obligation is under that contract and the Trust in turn will know what they can expect under that contract. That's the thing that I am concerned about, gentlemen. Hence,

[Tr. 412]

I want to know, I want them to sharpen this issue. What are you kicking about? What are you complaining about? Well, he said, now we are complaining that they have taken the two companies owned by themselves, which they acquired at some particular time, or at least since 1965, I presume, and they have been supplying this market area from the products of those two particular plants, Acme and Lovell, and we think they are obliged under that contract with us to supply this market area with this product down here to the extent as far as this plant down here can produce. I don't believe this Trust can say, "Here you've got to enlarge that plant." There has been no suggestion of that sort, that they enlarge it so they can better serve that market to a greater extent serve them in that fashion.

MR. ROOKER: If I may, Your Honor, I would like to just focus what Your Honor is saying a little bit more, because there is an additional point overlaying, which Your Honor has accurately described as our theory

and that is that the evidence clearly shows not only from this witness, but also from Georgia-Pacific's own witnesses who were called as adverse witnesses that when Georgia-Pacific acquired the Lovell plant and doubled the capacity of its Acme plant and flooded the historical Sigurd market with products from those two plants, the bottom fell out of the market, as you will recall Mr. Hummel described it, the bottom fell out of the market for Sigurd and yet if we look at the rest of the country, we find that that did not happen, although there was a price decline and it was a much lesser price decline. It was more than 50% as much. Hence it's our position that they are also accountable to us for the

[Tr. 413]

results of the business decision they made to flood the Sigurd market and drive the price down to a point that brought Sigurd's plant operation to a zero profit level thereby depriving the trust of any proceeds at all.

MR. TAYLOR: Now, our position, if the court please, there is just no--of course there is some evidence about production figures, the things that happened, but there is no evidence on this record that the Plaintiffs have presented through Defendants' witnesses or through their own of any kind that there was any bad business decision made of any kind by Georgia-Pacific. Those are assumptions they are making. There is no evidence of that in this record. There is no cause and effect shown of any kind.

THE COURT: I am not going to assume there's been a conspiracy on the part of Georgia-Pacific, for example, to damage the

trust or anything of that sort. I do think that probably that's a matter of defense, these things here. Of course, as I've indicated here I am not an economist. I don't know much about this, but at the same time I do recognize, of course, and I think you do too, an obligation created under that contract and to what extent we can serve that market area, to what extent are you obliged to serve it with products from the Sigurd plant is a matter of, oh, many facets, I presume. I don't know, but as you indicated there may be some marketing problems, a multitude of things, which might be in some way affecting them. What they are you can submit that when you get to your evidence, and your proof in this cause. I don't know at this particular moment. The only thing I

[Tr. 414]

know is that they are complaining about-- they are suing simply because they said you did not do what you were obliged to do under the contract, what you are obliged to do, you were obliged to serve this market area with all its needs and what are its needs, it's needs would be the capacity of the plant, limited to that extent. They can't expect you, for example, I don't believe under this contract they can require that Georgia-Pacific or any other lessee or the assignee of any lessee could supply that market with more board than this plant down here can process, prepare.

MR. TAYLOR: They are asserting that claim, but again I don't think there's any evidence and there's no evidence in this record, I don't believe at this point, that the Defendant in any way has made any bad business decision that they haven't sold every pound of board from Sigurd that the

market would take.

THE COURT: I'm not contending there has been any bad business judgment in the matter, I don't know. All I know is, I'm told, from the evidence offered in this behalf that a certain quantity of plaster board was supplied in this particular market area by both Lovell and Acme. Now, what affect that had or why, I don't know. There may be a reason for it, maybe a good reason. I don't know.

MR. TAYLOR: It is our position, if the court please, that if that violated the lease agreement created any impact on the lessors or any kind, that it's their burden to prove it by competent evidence and our objections of the exhibits of this witness is that it doesn't comply as

[Tr. 415]

competent evidence.

THE COURT: They offer what I presume they believed to be the best evidence and there may be better evidence, I don't know.

MR. McCARTHY: We offered evidence on the basis of what the actual operations of these plants has been, which is the best evidence we know.

MR. ROOKER: Your Honor, one thing that I think the court should keep in mind, if the court please, is that if the argument now made by Mr. Taylor, which is really their argument of this entire case is correct, then what Georgia-Pacific can do is close the Sigurd plant, pay the Trust \$12,000 a year as a minimum payment, and forget any operation at all. Now that can't be what the contract means. It can't be. If it

doesn't mean that, then it's our position that it has to be at least what we claim it means and what this witness's exhibits show.

\* \* \* \*

[Tr. 416]

\* \* \* \*

Q. Mr. Caldwell, in addition to the two studies you have made, the evidence of which has been received in evidence by the court, have you made other studies for the purpose of corroborating or authenticating the computations made in those studies?

A. Yes, sir.

Q. I show you what has been marked for identification as Exhibit 145 and ask if that was prepared by you or under your supervision?

A. Yes, sir.

Q. If I may hand the original to the court please. Would you explain to the court, Mr. Caldwell, what Exhibit 145 represents?

A. For the years 1966 through 1970 we have presented here in the format of the lease settlement computations for the years '57 through 1964 setting forth the sales and the costs of sales and gross profit per the plant profit and loss statements and then have indicated various adjustments which follow the same type of adjustments as were

[Tr. 417]

being made in the prior year's computation coming up with a final column representing the computations of the lease rentals in accordance with the practice utilizing in computing the lease rentals prior to the time that Georgia-Pacific acquired the plants.

MR. ROOKER: Your Honor, we offer Exhibit 145 into evidence.

THE COURT: Any objection to that?

MR. TAYLOR: Yes, we object to it on the basis of the fact that it contains all kinds of assumptions that there is no evidence in this record.

THE COURT: It may be received for such probative value as it has.

\* \* \* \*

[Tr. 418]

\* \* \* \*

MR. McCARTHY: Read the title of them.

Q. The title of this Exhibit is Computation of Estimated Loss to American Gypsum Trust as a result of Acme and Lovell plants selling in markets previously served by Sigurd plant for the years ending December 31, as in-

[Tr. 419]

licated?

A. Yes, sir.

Q. What is the purpose of this computation, Mr. Caldwell?



A. The purpose of the computation is to estimate the amount of profit that the Sigurd plant lost by virtue of the Acme and Lovell selling into areas previously served by Sigurd. This particular exhibit does contemplate that the Sigurd plant capacity would not have been increased to handle the volumes referred to.

Q. Now, do you have an opinion as to whether this document combined with Exhibit 145 represents as reliable and accurate a determination of the rental owing under the terms of the lease as the former exhibits to which you have testified?

A. I do not. In this particular exhibit it is necessary to first of all rely on the premise that for example the expenditure either at Acme or at Lovell would have been made at the Sigurd plant to increase the capacity to service this type of volume and then, of course, you get into projections of necessity because you are trying to determine the profitability of sales which in fact did not exist, of necessity also it is necessary in some way to determine what the costs were and therefore predicated upon the fact that it is necessary to make assumptions of this kind in preparing the projections in my opinion it, of course, is not as reliable.

Q. Now, does Exhibit No. 147 represent a summary of Exhibits 145 and 146?

A. Yes, sir.

[Tr. 420]

Q. And do the limitations that you have just described upon the value of those

three documents, Exhibits 145, 146 and 147 taken together apply to all three of the exhibits in combination?

A. Yes, sir.

Q. Do you have an opinion as to whether the results of the study reflected by those exhibits in combination corroborate the prior studies?

A. Well, yes, I feel that they do.

MR. ROOKER: We offer exhibits 146 and 147, Your Honor.

MR. TAYLOR: Again, we object, if the court please. They are the most speculative kind of estimates for we may as well pick any kind of numbers off the calendar. They're talking about production level to twice the Sigurd capacity, it's a dream world and we object to it as having no foundation whatsoever.

MR. ROOKER: It's offered, Your Honor, only for the purpose of corroborating the other studies.

THE COURT: They will be received in evidence for what probative value they may have.

(Whereupon Plaintiffs' Exhibits 146 and 147 were duly received in evidence.)

Q. Mr. Caldwell, I show you what has been marked for identification as Exhibit 148, entitled Computation of Estimated Loss of Profit by Sigurd Plant due to Producing at less than 1967 level, for

the years ended December 31, as indicated. Was that prepared by you or under your supervision?

A. Yes, sir.

[Tr. 421]

Q. And is that another study that was undertaken for the purpose of endeavoring to corroborate [sic] the results of the other studies you testified to?

A. Yes, sir.

Q. Would you please explain the nature of your study to the court?

A. We determined the additional units of production necessary to bring the Sigurd plant to the 1967 level of production being 140,532 units. We have then applied the operating statistics from the plant profit and loss statement. We have interjected the elimination of the unit inter-company profit from the Pryor Paper Plant. We have estimated the additional tonnage royalty that would be applicable to the additional production and arrived at the amount of estimated lost profits by the Sigurd plant. This schedule also assumes that as far as the expenses other than the direct expenses related to cost of production that they would remain constant.

Q. Now is Exhibit 149 a part of the same study, Mr. Caldwell?

A. Yes, sir. This study merely measures the lost profit related to the difference between the unit price per SM for board and lathe at the Lovell plant and at the

Sigurd plant. As shown on the schedule, unit price at the Lovell plant for all three years was greater than at the Sigurd plant. We have measured the estimated profits to Sigurd predicated upon an average lower selling price, at least at a plant level than at Lovell.

Q. And is Exhibit 150 a summary of Exhibits 148 and 149?

[Tr. 422]

A. Yes, sir.

Q. Do you have an opinion as to whether Exhibits 148 and 149 and 150 taken in combination represent as accurately and a reliable determination of rentals owing under the lease as the first study that you testified to?

A. In my opinion they do not.

Q. Does the result of this study corroborate [sic] the prior studies as to result?

A. Yes, sir, in my opinion it does corroborate [sic]

MR. ROOKER: We offer Exhibits 148 and 149 and 150, if the court please.

MR. TAYLOR: We object on the same ground if the court please and move to strike the testimony of the witness with respect to those exhibits prior to the offer. Again, they just include all kinds of economic assumptions which not only is this witness incapable of stating, but are not factual.

THE COURT: They will be admitted on the same assumption as the instruments heretofore

offered.

(Whereupon, Plaintiffs' Exhibits 148, 149 and 150 were duly received in evidence.)

Q. Mr. Caldwell--

THE COURT: Let me ask him one question as concerns Exhibit 149.

MR. ROOKER: Yes, sir.

THE COURT: Referring to the first item Net Sales of Board and Lathe at Lovell plant per SM in 1968, 29.23, in '69 27.07 and in '70 24.26. Now that represents, of course the sale to the customer, or the ultimate customer,

[Tr. 423]

I take it?

THE WITNESS: No, Your Honor, that represents the unit sales price as shown on the plant profit and loss statement.

THE COURT: Oh, I see. Now at the-- covering the Sigurd plant the same items for '68, '69 and '70 would be \$26.00 for '68, \$23.83 for '69, and \$21.92 for '70. Now, does that mean, of course, that taking 1970, for example, the sale of the board at the Lovell plant was \$24.26 while at the Sigurd plant \$21.92. Distinguish those two values for me. Does that represent, for example, an inducement to buy at one as against another, is what I had in mind? If I were buying.

THE WITNESS: Yes, Your Honor, it would not only be an inducement--well, it would be an inducement, of course for the customer to buy at the lower price.

THE COURT: Sure.

THE WITNESS: But at the same time what this attempts to measure is the fact that the Lovell plant in servicing an area that was previously served by the Sigurd plant received the advantageous price.

THE COURT: I see. That's what I want to know. Thank you.

Q. Now, Mr. Caldwell, I believe you testified to and now there have been received in evidence the documents related to four separate studies that you have performed in connection with your engagement as you originally described it; is that right?

A. Yes, sir.

Q. And in addition to these four studies, have you

[Tr. 424]

made any other studies or attempted to make any other studies to verify or corroborate [sic] the results of what you have testified to be the most reliable one?

A. I have not prepared any other studies. Of course, we have examined a lot of additional underlying documents and so forth, which have not been incorporated in these particular exhibits, because of a non relationship.

Q. Mr. Caldwell, have you examined the documents that you deem to be necessary to compute the lease rental owing to the plaintiff under the terms of the lease?

A. All of the documents which are available and all of the information in relation thereto that has been provided for us.

Q. And I think, Your Honor, I only have one more question of the witness before concluding, and that is I would like you to restate for the court, Mr. Caldwell, please your opinion as to the total amount of lease rental now owing the American Gypsum Trust for the period 1965 through 1970, based upon the most reliable, accurate study that you were able to conclude and upon all the records which were available?

THE COURT: \$410,032.

A. 410,032.

\* \* \* \*

[Tr. 425]

\* \* \* \*

#### CROSS-EXAMINATION

BY MR. TAYLOR:

\* \* \* \*

Q. Mr. Caldwell, the first series of exhibits that was the subject of your testimony, which were based upon the all plants profit and loss statements which just obtained over the week-end?

A. Yes.

Q. Those exhibits are the exhibits that result in your stated opinion of \$410,000 plus?

A. That is correct.

Q. Now, the exhibits that you had prepared to present in this lawsuit as your position in this lawsuit or the position of your client were the other exhibits that have been marked and you talked to other than those?

A. Yes.

Q. And until Friday of last week you intended to submit those and stand on those?

A. Yes, sir.

Q. Now, turning to those exhibits first and ignoring the all plant computations I assume, sir, that in making those computations in determining the sales figures as re-

[Tr. 426]

flected on those various exhibits, that you take--well, let's say for the year prior to 1965 you would have taken from the various books, records and reports the sale to the customer, the sale price to the customer, less the freight cost to get there; would that be correct?

A. You're talking about years prior to 1965?

Q. Correct.



- A. There are no books and records available whatsoever, the amounts were taken from the settlement computations which were furnished by Bestwall to American Gypsum Company.
- Q. All right, sir. With respect to those documents, then the sale price reflected in those exhibits prior to 1965 represent price paid by the customer less the freight allowance between Sigurd and the customer's place of business?
- A. I would assume, Mr. Taylor, that to be the case. Of course, in the absence of books and records, it's impossible to make that determination with any degree of certainty.
- Q. But that's your assumption.
- A. However, it is my understanding that Bestwall, of course, had a direct sales distribution system through salesmen and it would be, in my opinion, that if they were not the net sales to the customer, appropriate adjustments would have probably arisen at that time.
- Q. Now, in the various sales figures for the various years you are talking about all products, is that correct?
- A. All gypsum products.
- Q. And that would include for example plaster?
- A. Yes, sir.
- Q. And in your various computations to get down to

[Tr. 427]

royalties for unit of board take into consideration all products whether they are board or not board?

A. Well, if I understand your question, Mr. Taylor, we have been concerned primarily with board and lathe, because that's by far the predominant product.

Q. But included in the revenue figures are the receipts from the sale of other products?

A. A nominal amount.

Q. And that was nominal, say, in the year 1970, for example, for plaster?

A. Well, I don't remember what it was in 1970, but I--

Q. Let me ask you this, Mr. Caldwell--

A. My recollection is that in all years products other than board and lathe are relatively immaterial.

Q. And that's been your assumption in connection with this study?

A. It's not an assumption, it's predicated upon an examination of those plant P & L's which are available.

Q. Isn't it a fact, sir, that the sale of plaster products has drastically fallen off over the past five years and progressively?

A. Are you talking about plaster products?

Q. I'm talking about plaster products.

A. Vs. Board and Lathe.

Q. I'm talking about the plaster products.

A. I would have to examine the profit and loss statements in order to answer that, Mr. Taylor, and--

\* \* \* \*

[Tr. 428]

\* \* \* \*

A. Well, it indicates here that in the year 1970 that plaster sales at the Sigurd plant was \$164,061.

Q. How about 1965, do you have that year, and '66?

A. 1969 it indicates that the plaster sales were \$152,269. It indicates that in 1968 the plaster products were \$143,185. It indicates that in 1967 plaster products were \$256,831, but you must remember that sales figure is stated on a basis different than 1968, 1969 and 1970, so it's impossible for me to answer from this profit and loss statement for the years 1968, 1969 and 1970, it appeared to me that at Sigurd there was a small increase in each year.

Q. And you don't know what the levels were prior to that date?

A. No, sir, because we do not have any financial information that would so indicate it.

Q. Do you know what happened to the plaster market say between 1962, '3 and '4 that use as a base in these various exhibits in 1967, '68, '69 and '70, where you are projecting damages.

A. I don't know, sir, because prior to 1966 we have absolutely no books and records or any other financial information of whatever nature to make such a determination.

Q. Now, Mr. Caldwell, I'd like you to listen to the question. I am not talking about the books and records of anybody, I'm asking you if you knew or if you know what happened in the market place to plaster products between 1962, '63 and '64 on the one hand and 1967, '8, '9 and '70, on the other?

[Tr. 429]

A. On the other hand I do not just from the volume figures that's stated in the profit and loss statements. I know nothing about the marketing or the sales figures prior to that time.

Q. Or the marketing problems in the industry generally with respect to those various products?

A. No, sir.

Q. Now, in the various exhibits you assume that Sigurd should have placed more board into the market and you have assumed that all of that board would have been sold at a profitable projection; is that correct?

- A. I don't completely understand your question, Mr. Taylor.
- Q. Let me withdraw it. I assume from looking at these various exhibits that your position here is that Sigurd should have sold more board than it sold?
- A. Yes, sir.
- Q. And that if it had sold that board, it would have made a profit on the board that it would sell?
- A. Yes, sir.
- Q. And that Acme and Lovell plant acquisitions were to the detriment of Sigurd?
- A. Yes, sir.
- Q. Now, sir, those are assumptions which you made on this record and these assumptions underlie these various exhibits, would that be a fair statement?
- A. When you say they are assumptions, my opinion is predicated upon the statistics as shown in the financial information available.
- Q. Now, sir, have you made any marketing studies of

[Tr. 430]

gypsum products to determine whether those assumptions are factual under the market conditions that existed in the market place over those periods of time?

- A. I have not.

MR. ROOKER: The question is improperly characterizing the testimony. He denied Mr. Taylor's previous question asking whether these were assumptions and now Mr. Taylor asked a question as if he had said yes to that question, which he didn't.

THE COURT: He can make the inquiry if he chooses. Go ahead.

Q. You haven't made any market surveys to determine whether as a matter of fact additional board could have been sold in any one of these years at any particular market at any particular profit?

A. I have not.

Q. And your opinion, as stated here today, is based solely upon the statistical information that you found in these books and records as you have described?

A. Yes, sir, it is predicated on all of the facts which have come before my purview and documents in regard to this engagement.

Q. And if as a matter of fact, sir, it would have been impossible in the light of existing market conditions to have moved that board at a profit that would make your projections inaccurate, would it not?

A. Yes, sir, however, based upon the information and the testimony in this court, that could not happen.

Q. But you don't know that and you haven't made that study as an economist or as a market analyst?

[Tr. 431]

A. No, sir.

Q. And you are not an economist and you are not a market analyst?

A. No, sir. I am not a marketing analyst.

Q. And you are not an economist?

A. I am not a professional economist.

Q. And you haven't made any particular studies of the economy of the gypsum industry as it relates to these projections other than the books and records which you have described herein?

A. That is correct, yes, sir.

Q. So for example you can't tell us at any given point of time what the competitors of Georgia-Pacific were doing in the market place?

A. No, sir.

Q. And you can't tell us of any particular time what the customers of Georgia-Pacific were doing or demanding in the market place?

A. Only as it relates to the price which was being charged the customers. I did have an opportunity to review a couple of invoices and so forth in this connection.

Q. Now, sir, I think you said that you did not know for sure, but you assumed that on a 1964 transaction where Sigurd made a sale say from the Sigurd plant to

Idaho Falls, Idaho?

A. Yes, sir.

Q. Say a sale for \$100.00?

A. Yes, sir.

Q. And where the freight costs to get from Sigurd, Utah, to Idaho Falls, Idaho is \$10.00?

[Tr. 432]

A. Yes, sir.

Q. If you had that kind of a situation and you applied the theory of accounting which you see from the settlements between the parties, would that transaction have shown as a sale for \$90 at the Sigurd plant?

A. For what period of time?

Q. 1964.

A. I have no way of making any determination of that kind, Mr. Taylor, in the absence of having any books and records.

Q. Well, I thought you told me a few minutes ago that--

A. I would assume this, that that sale would have been reported at the \$90.00. Based upon the fact that Bestwall was essentially a one product company and with a direct sales organization and therefore the ten dollars of freight would have either to be included in the sales price and taken--or taken as a deduction in the cost of sales, but in the absence of any



books and records to make such a determination would be impossible for me to state unqualifiedly that that was the situation.

Q. But you assumed it would have been?

A. Yes, sir.

Q. Now, take that same transaction in 1970, sir, and apply your general accounting theories that you are utilizing here, that sale now would not probably go directly to Idaho Falls as you've seen through the operation of the distribution centers, would that be correct?

A. Unless it were one of the so-called direct plant sales.

Q. But assuming it was a sale through Salt Lake City.

[Tr. 433]

Now, assume that that board was sold for \$100.00 the same amount of board?

A. Yes, sir.

Q. The same cost of manufacture at Sigurd?

A. Yes, sir.

Q. I assume from what I have seen here that you would not recognize either as a reduction in sales price or as a cost of goods sold any of the costs from the time that material got to Salt Lake City and between Salt Lake City and Pocatello, Idaho, or Idaho Falls, wherever it is destined?

A. That is correct.

Q. Are you aware of the fact that, sir, that there are expenses which are normally incurred in a warehousing operation?

A. Yes, sir.

Q. Are there expense in a warehousing operation that are not sales expenses?

A. I think the warehousing operating is a sales function. Of course, as related to this particular situation and the historical--

Q. You are not answering my question, Mr. Caldwell. In a warehouse-- Do you have any warehousing clients?

A. Just a warehouse?

Q. Yes.

A. I am not familiar with any right now. I can't recall.

Q. In any event, sir, are there costs in a warehouse that are not selling costs?

A. Well, when you say that they are not selling costs,

[Tr. 434]

Mr. Taylor, it's very difficult to answer because even though you may be hiring, say a warehouseman to load and unload the product, it is all encompassed within the sales function.

Q. Well, assume a warehouse, sir, doesn't make any sales at all, they just store merchandise, are there costs of that warehouse that don't relate to selling?

A. Yes.

Q. And are there costs in that warehouse that don't relate to advertising?

A. You mean costs as to the person who owns the warehouse or costs to the individual who is using the facility?

Q. I'm talking about the costs of handling the materials that are in that warehouse. There are costs in that warehouse. Would that be a fair statement?

A. Yes.

Q. And in no place in your projections here have you taken into consideration any of the costs of handling merchandise in any Georgia-Pacific warehouse?

A. No, sir.

Q. But you have taken and placed in the income figure the net price paid by the customer for that product which benefited by those services?

A. Yes, sir.

\* \* \* \*

[Tr. 435]

\* \* \* \*

Q. Mr. Caldwell, to [sic] you have a copy of Plaintiff's Exhibit 145 available which you can refer to?

A. No, sir, I don't; I believe mine has been marked.

Q. Just a moment and I will let you refer to mine.

THE COURT: Which one now?

MR. TAYLOR: 145. Now under your title of "Adjustments" you have credits and I take it from looking at your schedules that these computations are used to obtain sales price to the customer?

A. Are you looking at '66?

Q. Yes.

A. No, sir. You will note that the debits and credits are in the key (1) Elimination of joint system amounts (non-gypsum), (2) Adjustment for intercompany profit on Pryor paper purchases and the (3) is relative to changes in the vacation reserves.

Q. I see. Then would you turn over to the two pages for 1967.

A. Yes, sir.

Q. And I assume that credit figure there does represent your projection to get out to the customer?

A. Yes, sir, that's Adjustment No. 4.

Q. And as I read the schedule, that projection is

[Tr. 436]

made on the basis of the gross margin at the distribution center?

A. Yes, sir.

Q. Now, again, gives credit to the schedule for the price paid--the price paid by the in-user?

A. Yes, sir. It's a very conservative method of determination. I might explain--

Q. You have answered my question, now let me ask you another one. In that conservative determination you didn't take into consideration any of the costs of getting it there from the warehouse door, the incoming warehouse door to the end-user. I am talking about the unloading of the truck, the storing of the material, the segregation of it, the storage of it, the loading of it on the truck, the travel of it over the highway, maybe for hundreds of miles, the placing of it on the 7th story of an office building, none of those costs are included in that figure?

A. Yes, sir, as a selling function they would be contemplated within the 10% cost of sales.

Q. That is the assumption you have made which underlies everyone of these exhibits, isn't that true?

A. Yes, sir.

Q. You have treated all of the warehousing activities as selling expense, is that true?

A. Yes, sir.

Q. You have treated all the transportation from the warehouse to the customer as a selling expense, isn't that

[Tr. 437]

true?

A. Yes, sir.

Q. Alright, I take--

A. However, in regard to transportation costs, the unit sales figure as contained in the profit and loss statements of the plant, have had the freight netted out so there is not a freight factor on the unit figure as appears on the plant P&L. According to the information obtained from Mr. Foster, the cost of sales at the distribution region level includes the net sales from the plant plus the transportation charge.

Q. From the plants to the warehouse?

A. Yes, sir.

\* \* \* \*

[Tr. 438]

\* \* \* \*

A. The unit sales price figure at the plant level has had the freight excluded. This is the freight from the plant to the distribution center. Now in computing the gross margin, we have used, we have not considered the factor that the sales price to the ultimate consumer contains a built-in freight factor. We have not considered the fact that the cost of sales at the distribution regional level includes the net price at the plant level plus a factor for freight. Now in computing the percentage which we have used we have

related that gross profit to gross sales that includes a freight factor

[Tr. 439]

and, thereby, merely mathematically, the percentage of gross we have used is understated. The reason for doing that is because we had no way of isolating from the distribution region sales the built-in freight factor.

Q. But understated or not as against, referring to Exhibit 145 which is the 1967 figure?

A. Yes, sir.

Q. You did not offset against the projection based upon gross margin from the warehouse door to the end-user any costs within that warehouse or any transportation costs to get it from Salt Lake City to Idaho Falls, in our example?

A. No, sir, only as it is built in the 10% factor as sales function.

Q. And that's an assumption that you have then been directed to make by the Plaintiffs?

A. Yes, sir, that is also predicated upon this situation-under the Bestwall operation you are dealing with a company which had essentially a unitary product.

Q. How do you know that?

A. Because I have read their annual reports and also it has been the testimony in this trial that they did one non-related paper plant that was not related to gypsum products and you had a distribu-

tion system that contemplated a direct selling effort. The annual report indicates that Bestwall also had a couple of warehouses some place in the East. Then upon the acquisition of the plants by Georgia-Pacific which is a full-line production company with a

[Tr. 440]

a pre-existing method of distribution, not comparable with Bestwall. In my opinion it served a useful purpose to integrate the gypsum distribution into their method rather than the direct sales effort that was being maintained by Bestwall.

\* \* \* \*

THE COURT: Of course, I frankly haven't been able to follow the witness. The question in Court here is rather pointed and we would assume that so many units of board is made at Sigurd and transferred, of course, to the distribution division center say, at Salt Lake City, and then sold by the that division to Twin Falls or Pocatello, Idaho, where do you account for that cost incurred in moving that particular product from the distribution center at Salt Lake City to Pocatello?

A. Your Honor, in the 10% cost of sales factor which includes and contemplates selling expense and my immediate prior statement was directed toward that sort of thing. That to recognize, aside from the inclusion in the 10% factor, these expenses to which Mr. Taylor alludes is interjecting a decision on behalf of Georgia-Pacific to distribute gypsum products in that manner along with all the other products which they serve and



so, therefore, there should be no recognition given to those additional expenditures other than the historical selling cost.

[Tr. 441]

Q. And again you have treated the transportation out from the warehouse as part of that 10%?

A. Yes, sir.

Q. Then, the loading of the material in the warehouse on a truck, the movement of the truck from Salt Lake City and on to Idaho Falls, the delivery to the customer, you have treated that as a selling expense for the purposes of all of your computations?

A. Yes, sir.

Q. Now, sir, you have also, I believe, assumed a production level equivalent to 1967?

A. Yes, sir.

Q. And, that's the highest production level you have ever heard about through any records you have looked at in all the books and records and schedules that you have seen at any place at any time?

A. Yes, sir.

Q. And in making a number of your projections which figure into your overall opinion on damage, you have even projected figures at substantially above any level that the Sigurd Plant has ever produced or ever could produce and I am referring to Exhibit 146?

A. Well, when you say could have produced those figures are contemplated upon making an expenditure at the Sigurd Plant equivalent to the Lovell acquisition or the additional capacity that was made at Acme, so with those additions, of course, those volumes could readily be achieved.

[Tr. 442]

Q. Now, Mr. Caldwell, I will invite your attention, for example, to the first page of Exhibit 146, the 1970 column, the estimated lath shipments 146,586. In addition to what was actually produced in that year, would be almost double the present capacity of Sigurd. Is that true?

A. Yes, this figure with actual production would be a little more than double but something less than the total at Acme.

Q. Now I take it from what you said earlier that you did because you assumed they could have built a new plant at Sigurd or expanded Sigurd instead of buying a plant at Lovell or expanding Acme?

A. Yes, sir.

Q. Have you performed any economic studies to determine the practicability, as an economic matter, of that assumption?

A. Only as it related to the freight into those markets being served by Lovell and Acme.

Q. You haven't determined how much it would have cost to expand or to build a plant in Sigurd that would have accomplished that result?

A. No, sir.

Q. You haven't made any market survey or study to determine whether that could have been marketed during those particular years?

A. Well, in that regard, that is related to the volume which Lovell experienced, which went into a market which had previously been served by Sigurd and the same applies to the

[Tr. 443]

Acme situation so based upon those facts you would have to conclude that the market was there.

Q. And you have so concluded?

A. Yes, sir.

Q. But you haven't, aside from the statistics that you have worked upon that you testified about here, you have never performed any market studies to see if that actually was true in a market place?

A. No, sir.

\* \* \* \*

MR. TAYLOR: Oh, May I have one more question, I was looking for an exhibit. I would like to invite your attention to Exhibit 113?

A. Mr. Taylor, what does that relate to?

Q. I will let you read it as soon as I examine it? Would you read that

letter, please?

A. Would you like me to read it aloud?

Q. No, just read it to yourself?

A. Yes, sir.

Q. Now, have you ever seen that letter before?

A. Yes, sir, I believe I have.

Q. And that's the basis, is it not, of your assumption with respect to selling, advertising, and administrative expenses?

A. Well-this letter, together with what in fact

[Tr. 444]

followed in making the settlements, Mr. Taylor.

Q. And through 1970.

A. Yes, sir. There was some modification in the years 1968, '69 and '70 which we related this morning.

Q. Now, as I understand your testimony, and I want you to correct me if I am wrong because I do want to understand it, let me give you a hypothetical situation again. Assume a sale at the Sigurd Plant that goes to Salt Lake City into the warehouse and then out to an end-customer in Idaho Falls.

A. Yes, sir.

It moves from Sigurd to Salt Lake City by rail; it is stored in the warehouse there where it moves from the warehouse by truck to Idaho Falls where the material is delivered right to a work site in a building. Now it is my understanding that in making your computation you have reduced the sales price by the amount of the freight from Sigurd to the warehouse?

A. Yes, sir.

Q. So, Sigurd does not get the benefit of that. It's not considered in either income or cost?

A. No, sir.

Q. Alright. Now with respect to the cost in the warehouse, that means unloading the rail car, storing it, cataloging it, assembling it, then routing it out, loading it, moving it to the customer and any delivery service on the customer end, you have considered all of these as a selling

[Tr. 445]

advertising or administrative expense under the 10% figure?

A. Yes, sir.

Q. And you have not considered the freight for that product from the warehouse in Salt Lake City to Idaho Falls or any of the delivery charges that may have had as either a reduction of the sales price or as an expense charged against the sale?

- A. No, sir. Only as it applies to the 10%.
- Q. Only as -- you just automatically lump all of that regardless of what it costs into the cost of sales? Into the 10% figure?
- A. Yes, sir.
- Q. And it could have cost a great deal more than was received by Georgia-Pacific for performing that service as far as your studies are concerned?
- A. Well, I don't know.
- Q. Well, you just don't know, and you don't care as far as your computations are concerned?
- A. No, sir.

THE COURT: Anything on Redirect.

#### REDIRECT EXAMINATION

BY MR. ROOKER:

- Q. Mr. Caldwell, was the procedure that you have followed in making your computations as explained by you on direct examination and as explored by Mr. Taylor on cross-examination different from or the same as that followed by Georgia-Pacific itself in making its computations originally in 1965 and 1966?
- A. It was the same except in 1965 and 1966 you've

[Tr. 446]

got a or rather some unknowns as far as

the sales are concerned. As I explained earlier in 1965 we had no books and records to examine. The only thing that we have is a copy of the plant profit and loss statement which shows some \$300,000 LESS in sales than is contained in a proposed settlement from Georgia-Pacific which means somewhere they have picked up some \$300,000 in sales volume and I don't know what it is and Mr. Foster didn't know what it was either, when he testified.

Q. Mr. Caldwell, directing your attention particularly to the application of the 10% formula as you explained it to Mr. Taylor on cross-examination, was that formula applied in the same way in 1965 and 1966 by Georgia-Pacific as you have applied it in your work?

A. Yes.

Q. And was it applied in the same way in years prior that is, in 1957 to 1964?

A. Yes, sir.

THE COURT: Of course, does the witness know that it was applied in 1965, do you know that?

A. Yes, sir, we have a proposed settlement computation which has been introduced as an exhibit which so indicates.

Q. And am I correct in my understanding, Mr. Caldwell, that the 10% formula has still been followed by Georgia-Pacific for 1967, '68, '69, and '70?

A. Yes, sir, with these modifications. In 1968, 1969 and 1970 in their proposed

settlement computations they

[Tr. 447]

have segregated as between direct cost of sales and have come up with a gross margin figure and below the gross margin have indicated the general expenses, the plant expenses, and fixed costs which are line items on the plant P&L statement. They have applied the 10% to only the direct costs of sales which actually results in a lesser amount of expense than has been historically computed in that connection.

\* \* \* \*

#### RECROSS EXAMINATION

BY MR. TAYLOR:

Q. I think, sir, you told me that you didn't know for sure what happened in 1964 but you assumed that the cost of delivery from Sigurd to the end-customer would have been a reduction of sales price?

A. Well, this has nothing to do with that particular matter, Mr. Taylor.

Q. Well, don't argue with me, let's explore it. If that's your assumption. Will you assume with me, that in 1964 we had sales at the Sigurd Plant that went to Idaho Falls, Idaho.

A. Yes, sir.

Q. For \$100.00.

A. Yes, sir.

Q. And the freight cost was \$10.00. In com-



puting the royalty, the \$10.00 would be taken off the \$100.00, and Sigurd would have \$90.00 of it, would that be correct?

A. Yes, sir.

Q. Now, let's apply, let's go to 1970. In 1964, if

[Tr. 448]

freight was deducted from sales price, that would be the result, isn't that correct?

A. Yes, sir.

Q. Now, let's go to 1970 where in addition to moving the material from Sigurd to the end-user, we've still got the freight costs all the way?

A. Yes, sir.

Q. We've got also the costs of running a warehouse in between. In your computations you have not deducted the whole freight from the sales cost, have you?

A. Well, let me say this.

Q. Well, now first would you answer the question? And then if you can explain it, fine.

A. Yes, but I answered yes to the prior inquiry and I stated that in 1964 it could have happened one of two ways. I can't verify it one way or another.

Q. But I have asked these questions to assume that in 1964 the freight cost was

reduced from the sales price?

A. Alright, I will make that assumption.

Q. Now, if that assumption is correct, your accounting does not reach the same point as it did in 1964. Isn't that a fair assumption? Isn't that a fair conclusion because under your accounting procedures you do not deduct all of the freight costs from the sales price?

A. Just those freight costs that would be related from the distribution center to the purchaser.

Q. Alright, sir, in your opinion would the freight

[Tr. 449]

costs be more or less from Sigurd to Salt Lake City than from Salt Lake -- from Sigurd to Salt Lake City by rail or from Salt Lake City to Idaho Falls by truck?

A. I would have no way of knowing that.

Q. But in any event it is conceivable, isn't it, Mr. Caldwell, that a major part, in some cases, of the actual freight costs are now being handled differently under your accounting than was done in 1964? Freight costs alone?

A. Predicated upon your assumption?

Q. Predicated upon my assumption.

A. Yes.

Q. That in 1964 freight costs were reduced from the selling price?

A. Yes, sir.

\* \* \* \*

[Tr. 450]

\* \* \* \*

MR. LATIMER: I would like to refresh your Honor's recollection that on Saturday, Saturday morning or Friday afternoon, counsel for the defense sought to strike the testimony of Dr. Bell in connection with his geological testimony on the basis that under the issues of this case, it is incompetent, irrelevant and immaterial and had no place in this present trial. Your Honor, took it under advisement and indicated that you would rule later and so we are now asking for a ruling on that.

THE COURT: The motion was addressed to what part of the testimony.

MR. LATIMER: To the testimony of reserves and the information connected with his estimate of the reserves that were left there in place and some of the mining, that is that the mining was improper, that there was some high grade mining and a variety of thing, all of which are incompetent or immaterial to this case.

THE COURT: So you want me to strike that part of Dr. Bell's testimony which is the subject of the reserves, method of mining and what other matters?

MR. LATIMER: The high grade was in connection with the method of mining and the conclusions that he reached in connection

with the method he used in trying to ascertain the reserves that he contended were still the

[Tr. 451]

THE COURT: Of course, I believe I indicated that as to that particular matter there is nothing in the contract which requires that this property be mined as Dr. Bell indicated I would like to see. For that reason I felt that of course that was beyond the issues in this case; so far as the reserves are concerned, I am inclined to believe at this moment there may be some merit in reference to some degree. It's not too close I am aware of that but I am inclined to strike from the record the testimony with reference to mining procedures or methods of mining as he described them and which, of course, are not completely followed by the Defendant corporation in its operation at Sigurd. I can see little value in that particular testimony. So far as the reserves are concerned, his estimate as I remember it was a million ton in these deposits. Some question arose with reference with the holes being shot or driven into the bodies of ore for the purpose of determining the availability of the type of material they want, salt in particular, in the rock. I think I shall--

\* \* \* \*

[Tr. 461]

\* \* \* \*

THE COURT: Well, this is the attitude the Court will take with reference to reserves. We will strike the testimony with reference to the mining operations which are now employed by the Defendant corporation as against what the witness felt was good mining practices.

MR. TAYLOR: If the Court please, this might be an appropriate time to renew our motion for partial summary judgment on the requirements issue. As I read the Court's prior order it was stated that the matter could be resubmitted at the close of Plaintiffs' evidence. In the light of the evidence and I am sure the Court doesn't want us to go back and completely reargue this matter that has really been argued twice before the Court but I would invite the attention of the Court back to the setting in 1946 when this lease was executed. In the light of the record that has been developed

[Tr. 462]

by the Plaintiffs in this proceeding prior to the time they rested. Now at the time, according to the evidence that we have heard, there were four individuals who wanted to get into the gypsum business and Judge Ritter's clients had some gypsum deposits and they were surrounded, according to Dr. Bell, by other deposits of far greater magnitude and probably better quality as I recall his testimony. And those two groups sat down and started to see if they had anything in common and see if they could put together an agreement of some type. Now, the Plaintiffs did not want to get into a joint venture or partnership type relationship and, of course, had they and had the other four parties been agreeable, Judge Ritter knew how to write that kind of an agreement. They didn't write that kind of an agreement. The agreement that they did write is before and we have all read it many times but it contemplated several specific things: (1) The four individuals who wanted to get into this new business agreed to build a plant and that was no small task, but they did it; they performed that obligation. Second, they were to pay a guaranteed minimal rental. Now

again the Plaintiffs didn't want to get into a joint venture situation where they had to place their investment at risk. They wanted to negotiate the maximum possible guaranteed return, which they did, and over the course of this lease they are going to get well over a half million dollars in 1946 dollars, assuming that the plant had never been built, just in royalty figures, assuming the rock were the last, guaranteed minimum. Now in addition to that, since this ore belonged to

[Tr. 463]

the Plaintiffs, they say specifically in the agreement as part of the rental, and they used the term rental, if you mine any of that ore--get your plant built--and mine any of that ore, you pay us 15¢ per ton for the first period and then 11¢ for the next period and then they say if you are successful and we hope you are successful and these promoters thought they would be successful, they hoped they would. If you are successful and you might make a profit, then we want a piece of the action. But they weren't taking any risks. So they said we will pay -- we want, and the lessees agreed to pay 7% of the net profit and incidentally the two issues, the two issues with respect to the computation of that 7% royalty, the distribution center problem and Pryor paper problem are the two legitimate issues in this lawsuit. We think this requirements problem is the phantom that isn't an issue in this lawsuit. Now, in addition to the 7% profit, the lessees agreed to do something else. Now since there are a whole bunch of gypsum claims around that area. They demanded and the lessees agreed o.k., we're not going to mine the

Jensen claims and the other claims, we're going to take the rock out of the lease property, to the extent that if there is any requirements in that plant -- if the rock is of proper quality, we are going to take it out of that deposit. Now, Judge, we performed that obligation in every year; we built the plant; we paid the minimum royalties; we paid the royalties when they were taken out; we have paid the 7% profit on any-royalty on any profits we had and we have taken every pound of ore that has ever gone

[Tr. 464]

into that plant right out of the demised premises. Now, this whole requirements thrust of theirs is premature. Just like the requirements of the high grade and so on are premature. It isn't a part of this lawsuit. It wasn't pleaded originally as a part of this lawsuit. Now, when -- when the Plaintiffs were faced with the first motion for summary judgment, they didn't even respond to it; they came down and indicated they had rethought their case and that they were going to confine it and then they brought up this market area concept. Now that language isn't in the lease, in none of the cases that we sight in the briefs and Your Honor is well aware of it. The rule as we see it particularly when we have such a well informed and well advised scrivener of the lease is that no implication of that sort is proper and that you have got to look to the lease document and there is no obligation in that lease document to operate a plant, to develop any particular market, to maintain any particular market, to produce any particular level, what level? They didn't contemplate those things; that wasn't part of the agree-

ment and if it had been the Judge would have put it in that agreement. Now he testified here about uncertain subjective state of mind that he may have had but that was uncommunicated and it certainly isn't a part of this lease agreement. Now, the lessee agreed to do something else and this is very pertinent in our view and maybe I would like to invite the attention of the Court to this language, if I can find it, its Paragraph 2E and its down at the bottom of the page, well it's the paragraph the

[Tr. 465]

Court invited our attention to earlier, the qualifying paragraph. The lessee and the lessor covenant and agree that the net profit aforesaid shall be determined in accordance with sound accounting principles and practices in the gypsum industry and lessee and his assigns agree, now listen to this if the Court please and this is the only language in this entire lease relating to the business operations of that plant, agree that the business operations shall be carried on in a prudent and businesslike manner for all interests concerned. Now, if the Court please, that is the end of that duty and obligation. Now, we submit to you, that there is no evidence on this record that Georgia-Pacific Corporation as the assignee of this Lease has not utilized prudent, businesslike methods in the operating of that mill and we submit that as a matter of law that particular part of the Complaint should be dismissed so that we can get down to business in litigating the two issues which are in this lawsuit and really require decisions so that we can decide what accounting procedures are proper and should be followed in the computation of those



lease interests. We think that (1) the lease on its face is not susceptible to the interpretations they give it as a matter of law. If we get passed [sic] that point and there is some sort of an ambiguity the law that I have read would require its resolution against the interests of the scrivener and finally, even if we did have an obligation to operate at some level or in some area its limited by the language that we only must carry on the activity in a prudent and businesslike manner. Now listen

[Tr. 466]

to this, for all interests concerned and that means both parties. Now, again, in summary and I will close, it is our position that there is no evidence on this record that even if you were to make those assumptions that there has been any violation of that contract duty and that part of the lawsuit should be dismissed so that we do not leave to come in needlessly and without any need and present evidence of what was happening in this market to refute the numerous faulty assumptions made by Mr. Caldwell, admittedly in areas where he has no competence and I do submit it.

MR. ROOKER: If the Court please, this is the third time we have graced Your Honor's presence with this argument. I guess we've argued it backward and forwards, in and out, up and down and all around in circles, so I will try to be very brief. I think that the sum and substance of Mr. Taylor's argument is put this way: If Georgia-Pacific wants to do it they can close that plant out there. They can pay American Gypsum Trust \$12,000.00 a year and that's the end of it and I think, Your Honor, if you so hold, that's exactly what they'll do. I submit that's what they will do. I submit that

their conduct was demonstrated on the record this case out of the mouths of their witnesses shows a consistent plan and intent to subjugate the Sigurd plant into an unprofitable position to make it economically untenable for American Gypsum Trust to try to maintain its position under the present lease and to try and force American Gypsum Trust into renegotiating this Lease on terms that would be acceptable to Georgia-

[Tr. 467]

Pacific Corporation instead of living with the lease the way they agreed to do in writing when they signed the lease at the time they merged with Bestwall. Now, I would like to believe that this Court isn't going to let them do that. I think that would be contrary to the lease and I don't believe this Court will. Now, Mr. Taylor, said that this whole thing got started when four people came out here and wanted to enter the gypsum business. That's only slightly in error; they were four people who already were in the gypsum business. They were four people who worked for the United States Gypsum Company. Who was the most important one of those people, it was Sid H. Eliason and what was Sid Eliason's position. He was the Western States Sales Manager for United States Gypsum Company and Mr. Taylor can say, if he wishes, that Judge Ritter's testimony was that he had some subjective notions in his own mind about this market area but that wasn't his testimony. His testimony was and his testimony is, on this record, that he discussed that with Mr. Eliason and that it was clearly discussed and understood between the parties that the plant was going to be built to serve the Western United States market and Mr. Eliason was familiar with it by reason of his work for United States Gypsum

Company. Now, I am most amazed, if the Court please, and Mr. Taylor would say on his argument that the issue of requirements was never in this case when the Complaint was originally filed. I don't understand how he can say that if he cares to look at Count 4 of our Complaint, it's pleaded. The requirements provision is alleged and quoted in Paragraph

[Tr. 468]

20 of our Complaint and it's been in the case since the very beginning. Now, of course, we have changed our approach to many facets of this case, from time to time and I wouldn't take any exception to Mr. Taylor if he wants to take credit for the changes we have made in our theory of the case, that's of no importance at all. Certainly we have changed our approach and we have counselled with our clients and we have counselled with the accountants and gotten all of the expertise we could to bring to bear on this matter and try to present to this Court for resolving all of the issues and on the basis of that advice and on the basis of those consultations, we did make these changes. Now, we think, Your Honor, that the lease has to be heard in its entirety. You can't isolate Paragraph 2E; you can't isolate Paragraph 5 which is the requirements provisions and talk about them separately and independently. They have to be viewed as part of the integration, part of the instrument that has to be read in its entirety. What the Defendant would like the Court to do is to say that, when the lease said the net profit is to be calculated in accordance with sound accounting principles of the gypsum business industry and that the parties agree that operations will be conducted in a prudent and businesslike manner for all interests,

what that means is a prudent and businesslike manner for the business interests of Georgia-Pacific. I just invite the Court's attention to Exhibit 135 which is a recap of the rentals paid to American Gypsum Trust under this lease from 1957 to 1964 and rentals that Georgia-Pacific would like to

[Tr. 469]

pay for 1965 through 1970. In the three years preceding the merger between Georgia-Pacific and Bestwall, it shows on this exhibit and Your Honor will recall Mr. Caldwell's testimony, American Gypsum Trust received 90.25¢ for every thousand square feet of board and lath shipped out of the Sigurd Plant. In one year of Georgia-Pacific's operating in what it styles a prudent and businesslike manner for all interests, they managed to whittle that down to 51¢. In 1966 they cut it some more to 48¢ and in 1967 some more to 37¢ and for the next three years they haven't paid anything at all. Now, if that's operating in a prudent and businesslike manner for all interests concerned, then I think that provision of the lease means absolutely nothing at all.

Your Honor, we have now got our case in, we think we have advised the Court on the issues, we think the Court ought to view all of the evidence in its entirety in the light of all the pleadings, including all of the counts of the Complaint. Our judgment, if we can be free enough to advise the Court about it, is what we have to do is view the case as one where Georgia-Pacific Corporation as Mr. Ashton stated in his opening statement, this gigantic conglomerate, acquired Bestwall Gypsum Company in 1965 and then they proceeded to make a lot

of very sound and very prudent business decisions. For Whom? For Georgia-Pacific Corporation, with total disregard and we think the evidence shows with intentional violation of the rights of American Gypsum Trust under the terms of this lease. Nobody could quarrel with the proposition of the

[Tr. 470]

results for the Defendant, as argued, are good for Georgia-Pacific. We think it's equally clear that no one can quarrel with the proposition of the result they argued for violates the terms of the lease. We think it violates the requirements provision paragraph 2E in its entirety and the obligation with respect to the nature of the work to be performed upon the properties. We don't think the Court ought to permit Georgia-Pacific Corporation to close that mine.

\* \* \* \*

[Tr. 471]

\* \* \* \*

THE COURT: I will hear you at some time later on that particular question. Incidentally, I think I shall deny the Motion made by counsel for the Defendants. I think there are some material issues in fact that the Court would like to be informed on. That will be the ruling of this Court.

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[Tr. 474]

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MR. ROOKER: The second, if the Court please, is Exhibit 144 which was the second

summary statement prepared by Mr. Caldwell, which he testified to. I had thought it had

[Tr. 475]

been received but the Clerk advised me this morning that it had not. I believe these are subject to the general objection of counsel.

MR. TAYLOR: We have the various, the numerous objections based primarily upon the complete erroneous and incompetent assumptions of Mr. Caldwell.

THE COURT: Those exhibits, of course, carry with them some assumptions on the part of the scrivener who prepared them; will be received with that understanding.

MR. ROOKER: Thank you, Your Honor.

THE COURT: The Plaintiff now rests.

MR. TAYLOR: If the Court bearing in mind the admonition of the Court at the very opening of the trial with respect to the opinion statement, I will be very, very brief, and just outline what our basic theory is and the witnesses through whom we will attempt to prove those matters. First, I would like to invite the attention of the Court to one of the accounting issues in the lawsuit which is the issue with respect to paper, produced at Pryor, Oklahoma, and supplied to the Sigurd Plant. Now, the evidence that we will attempt to show will be that beginning in 1946 and continuing through 1962, paper at a purchase price was included as a cost which included a profit to the manufacturer in computing these lease payments. From 1962 through 1966, I believe, may be it was 1965, the computations were made -- pardon me, it's 1968, the computations were made in accordance with

the plaintiffs' theory and subsequent to that time they again were

[Tr. 476]

made according to the Defendant's theory. It's our position that we must look to the lease language and the controlling language is Paragraph E which we have all argued and reargued. With respect to that language our position is that the lease specifically excludes consideration of either profits or losses and, that's significant because these claim owners didn't want to be stuck with losses on any product other than those specifically enumerated; so, as we read this lease, it says profits or losses are excluded except in two categories. One is the rock from the leased premises. Now, that rock has a market value and can be sold directly from the quarry and, of course, if profits are made on that rock, it goes into the royalty. The other item is products manufactured from that rock. Now, if the Court please, there is no rock in that quarry that goes into the paper which is the issue now before the Court and our position is that as a matter of law and by the clear and unambiguous terms of this agreement that is excluded. Now profits on the end product, the wallboard, that includes gypsum, vermiculite, paper, salt, all kinds of things. The profits and the losses are to be considered in calculation of the rental, with respect to that finished products and therein lies the issues between the parties on the paper. I think that's the legitimate issue in this lawsuit which must be resolved by the court.

THE COURT: I will agree with you on that score.

MR. TAYLOR: Now with respect to the other accounting issue, the substantial evidence with respect to the 10%

[Tr. 477]

formula in our view is premature as are some of the other things Plaintiffs have been talking about. It is our position that we are not bound, that the Defendant is not bound, by the 10% formula as a matter of law; however, there is no issue as to that particular item because in each year that is involved in that lawsuit, the computation has been made under that formula. So there just isn't any issue about it in this lawsuit. If, in the future, Georgia-Pacific were to decide to use some other procedure, then at that time there may be an issue as to whether that is properly applicable. Now there is a very substantial accounting issue relating, however, to the operation of the distribution centers of Georgia-Pacific Corporation. Now we will hope to prove through the witnesses that Georgia Pacific historically has operated a system of distributing products through warehousing facilities across the United States so that they are able to deliver to a customer a package of related products. That because of economic pressures over which Georgia Pacific has no control, contemporaneously with its getting into the gypsum market, it became absolutely essential if Sigurd was to continue to operate at all that the products from Sigurd and other gypsum facilities have the benefit of those distribution centers and the accounting issue is whether or not the non-selling, the costs involving salesmen, the non-advertising, the non-general Portland Office administration expenses include all of those costs in the distribution center and between the distribution center and the



in-user. Now, as Mr. Caldwell stated yesterday,  
in

[Tr. 478]

making his basic computations of the royalty excluding all of his assumptions, if you just go back to the agreement and the production costs sales information into the records and ignore the assumptions, in computing the royalty he excluded all out-of-pocket costs even though they were not selling, administrative, or advertising from the time the product went into the distribution center until it went out to the customer. Now it is our view that that is just completely inequitable and flies directly into the express language of the agreement. The parties intended that the costs of getting that product out had to come off the money received somehow. Now, there are two ways to do it. One, is to reduce the sale price by the delivery charge and that's the way it has historically been done and that's the way we've done it. The other would be to take that cost, the actual out-of-pocket cost, and consider them as a cost of the product being manufactured and sold and then deduct those costs from the sale price but it is the position of the Defendant that those costs must be taken into consideration one way or another. They can't just be ignored and gratuitously passed on to the leaseholders, and I think that, if the Court please, is the second accounting issue. Now, the other two issues in the lawsuit, as we have argued many times before and I won't belabor that, we view as complete phantoms and not issues of fact at all in this lawsuit. We will have the various witnesses talk to the assumptions and the conclusions that came into this record over our objections but in our view they aren't

even fact issues in the lawsuit.

[Tr. 479]

We certainly did not conspire with anybody. We have meticulously adhered to the standards set forth by the parties in the lease which is that the business operations be carried on in a prudent and businesslike manner for all interests concerned and we will proceed to do this through Mr. Wilson, who ran the production facilities under both Bestwall and under Georgia Pacific through Mr. McCaskill, who was in charge for approximately ten years, I believe, of the sale and distribution of products for both companies, through Mr. Burch, who now is in charge of the distribution or the sale of products for Georgia Pacific, through independent accounting testimony independent testimony of an expert in the area of economics, testimony of an expert in the area of economic and marketing. We will also provide for the information of the Court since the problem of reserves had been allowed to remain on the record. The reserves which (1) the Defendant believed were in the ground when they made certain business decisions and (2) reserves, in fact, in the ground at this time, in the lease and then the adjoining property which are drastically different from those submitted by Mr. Bell and with that if the Court has no questions we will call Mr. Wilson.

THE COURT: I believe the witness has been heretofore sworn.

MR. TAYLOR: He has.

THE COURT: Take the stand, please.

MR. TAYLOR: Mr. Wilson, you have heretofore testified in this proceeding.

[Tr. 480]

A. Oh, yes.

Q. And I will try not to duplicate the testimony you have already given but would you tell us, sir, what your educational training was?

A. I have a degree in mining engineering from the University of Missouri at Rolla, which at the time I attended it was known as the Missouri School of Mining.

\* \* \* \*

Q. Now, during the period of time that you were employed in the various capacities for U. S. Gypsum, what was its relative standing or status as a producer and marketer

[Tr. 481]

of gypsum products?

A. By far the largest producer and seller of gypsum products.

Q. Does that remain true today?

A. That remains true today.

Q. Now, when you first became employed with Bestwall in 1958 what assignments were you given?

A. The first two assignments that I was given which was almost at the same time were two paper mill expansions. The first one was at Thoreau, Ontario, which was a paper mill owned by Bestwall Gypsum Company that we wanted to expand

our paper board producing capacity at that location. The second job that followed on the heels of that one was at Pryor, Oklahoma to expand the production capacity of Pryor, Oklahoma, which was also done by installing a new and larger paper machine at Prior, [sic] Oklahoma.

Q. Now prior to that time did Pryor manufacture paper utilized in the gypsum business?

A. That's correct.

Q. Do you remember approximately what volume?

A. I would say slightly over 100 tons a day and it equated to somewhere around 35,000 tons per year.

Q. Did that supply all the Bestwall requirements?

A. No, sir.

Q. Where did they get the rest of their paper?

A. It was purchased.

Q. Now, in the course of your employment with Bestwall,

[Tr. 482]

did you ultimately receive an assignment that turned your attention to the production of gypsum products as contrasted with paper?

A. Yes, I did. Following the Thoreau job and as I got into the Pryor, Oklahoma, assignment, I was then given some responsibilities for the operations of gypsum plants also and followed this a short time later in 1962, I was appointed as assistant to the President of Bestwall Gypsum Company and given some assignments from the standpoint of expansion and development of the business of Bestwall Gypsum Company.

Q. Now, sir, you testified earlier in this proceeding about a change of facilities at Fort Dodge, Iowa?

A. Yes, sir.

Q. Now, would you tell us when that took place?

A. That occurred beginning 1950 when a small slow-speed gypsum board machine was removed from that plant and a new machine of much larger capacity was installed.

Q. Now, that was before your employment?

A. Yes, that was before my employment.

Q. How did you find out about that, then, sir?

A. Through the records of Bestwall Gypsum Company and through conversations with people who had worked on the job.

Q. And was that part of your responsibility in planning for corporate activities?

A. Yes, to determine what had been done in the past and what information we did have concerning things that had

[Tr. 483]

been looked at before so we didn't duplicate our assignments and waste the effort in the future.

Q. Now, from 1960 to 1968, when you became employed with Bestwall, were there other developments in the expansion of production facilities?

\* \* \* \*

[Tr. 484]

\* \* \* \*

A. Beginning in 1956 the gypsum properties of Certainteed Products Company in addition to a paper mill at Pryor, Oklahoma and a gypsum, pardon me, and a paper mill at Thoreau, Ontario, were spun off from Certainteed and a separate corporation was formed that was called the Bestwall Gypsum Company. This was immediately listed on the New York Stock Exchange and on the first day that Bestwall Gypsum Company was in business there were common stockholders between Certainteed and Bestwall since the stockholders of Certainteed had simply been issued stock in Bestwall Gypsum Company. The purpose of this move was to take the strongest aspect of Certainteed's business which was the gypsum business as their other business at that time was roofing and was not a very profitable operation, but was to take the major portion and the best portion and expand this and they felt it could be done better and that financing could be obtained better by having it as a separate company, rather than

having the drag of roofing on the earnings of Bestwall Gypsum Company. So, at that time, with the properties that Bestwall had, the sales of the company were located mainly in the central part of the United States but Bestwall did not have any facilities to produce and to sell on the Eastern Seaboard. They had Sigurd, Utah, to supply

[Tr. 485]

a portion of the West Coast and were getting some board from the Union Gypsum Company but this also was such a small percentage of the total sales on the West Coast, that the overall look at that time, expansion-wise, was to not try to expand as much in the central portion of the United States because that was where the company was strongest but to go to the two coasts and enlarge their business in areas where they weren't either a factor or were a very, very minor factor in the market place. Beginning right after the spin-off, the

MR. McCARTHY: What date was the spin-off?

- Q. I think it was July of 1956. Almost concurrent with this, two people were hired by Bestwall Gypsum Company, a man by the name of Ed Cole and a man by the name of Jim Graham were hired in Nova Scotia to find a gypsum deposit on which Bestwall could build a series of plants, to find a gypsum deposit which would supply ore to a series of plants that Bestwall wanted to building on the Eastern seaboard. This started in early to mid-1958. They felt confident enough that they had drilled enough, had obtained enough leases and purchased enough property,

that they had did have a gypsum deposit which was of sufficient size to proceed with the expansion and in late 1958 Bestwall started to build its first gypsum plant under the expansion program that runs with Georgia. This was followed in rapid succession by building a plant in New Orleans, Louisiana and the third eastern seaboard plant which was built in about 1962 at Wilmington, Delaware. One other thing occurred in the midst of this that in about 1960

[Tr. 486]

the corps of engineers on the -- out of Manhattan, Kansas, on the Big Blue River finally obtained approval to build a flood-control dam on this river, which in effect flooded the property of the Bestwall Gypsum Company at Blue Rapids, Kansas. At that time Blue Rapids was simply engaged in the manufacture of plaster, mainly industrial plaster. It was necessary to relocate that plant which was done about a mile away and a board machine was installed at Blue Rapids, which gave Bestwall some additional capacity. Again in about 1960, with the three eastern seaboard plans and the quarry taken care of, it was decided to turn the attention to the West Coast then, and Jim Graham after his success at Nova Scotia was sent to Sigurd to, for the first time, really put together a factual determination of what our ore reserves were at Sigurd to help make a decision about what we did on the West Coast.

Q. Now, let me interrupt there for just a moment? Turning to the large map here entitled Gypsum Board Plants in the



U.S.A. and marked by the Clerk as Exhibit 157, would you tell me whether or not that map has been constructed under your supervision?

A. Yes, it has.

Q. And does it contain by colored mark and designation, the various gypsum plants in the United States today, whether they are opened or whether they are operating?

A. To the best of my knowledge, it does with one exception and that is there is one plant in the western part of the State of New York that is closed, that is not shown on

[Tr. 487]

that map.

Q. And the map, at the bottom contains a code indicating the designation of the color, the number of plants, and how many plants are closed at this time?

A. That's correct.

Q. We offer in evidence for the purpose of illustrating Mr. Wilson's testimony Exhibit 157.

THE COURT: Any objections.

MR. McCARTHY: No objections.

THE COURT: Exhibit 157 is received in evidence.

(Whereupon Exhibit 157  
was received in evi-  
dence by the Court).

Q. May the witness approach the map, please, Judge, to show by the pointer (1) the Bestwall plants and marketing area at the time you first testified about which was in the late 1950's and then the area after the eastern plants came into production which you just testified about?

A. In 1950 the Certainteed Products Company had a plant at Akron, New York, a plant at Grand Rapids, Michigan, a plant at Fort Dodge, Iowa, a Plant at Acme, Texas, and a plant at Sigurd, Utah, that produced gypsum wallboard. They also had a plant at Blue Rapids, Kansas, but at that time that plant produced only plasters and as I said before mainly industrial plaster. By 1956 at the time of the spin-off the same plants were in existence with the exception of a paper mill at Pryor, Oklahoma, which had been built in the early 50's, and a paper mill at Thoreau, Ontario, which is Niagara Falls

[Tr. 488]

for all intents and purposes and then they were also taking board from down at Union Gypsum Company in Phoenix, Arizona.

Q. Alright, sir, now if you would resume the--

A. Then, as I mentioned the first step was to go up really off the coast of Maine into Nova Scotia which was the likely spot to find the gypsum deposits since both National and U. S. Gypsum owned large deposits in that country. A deposit of good size was located and

the decision was made to then supply three eastern seaboard gypsum plants with rock from that plant and extend the business activities of Bestwall. The first one that was built was in southeastern Georgia on the coast at Brunswick, Georgia; the second one was built at New Orleans, Louisiana and the third plant was built at Wilmington, Delaware.

\* \* \* \*

[Tr. 489]

\* \* \* \*

Q. Would you tell about the Union Gypsum facility; how it came into existence and how it was utilized by Bestwall up to 1958?

\* \* \* \*

[Tr. 490]

\* \* \* \*

Q. Would you start with Fort Dodge because I think you related that earlier in your testimony? Would you start at that point and tell us what happened?

A. Well, in 1950 the decision was made to expand the productive capacity of Fort Dodge, Iowa, Plant by installing a bigger board machine. The old machine that was there was available and some people who had control of a gypsum deposit north of Phoenix wanted to get into the gypsum business and Certainteed sold them the machine that was removed from the plant at Fort Dodge, Iowa, and also furnished them with technical assistance to install

and start up that machine and get the plant in operation. I can't tell you the exact date that it went into operation but it went in with Certainteed having an ownership through the equipment and having an option to buy the total facility. In 1956 at the time all of this was taking place, the decision had to be made at the time of spin-off as to what you were going to do with Union Gypsum Company. At that time the Certainteed people took a long hard look at the gypsum reserves at Phoenix, Arizona, and decided that the reserves were not sufficient to warrant their taking the plant and purchasing all of the assets of that plant. From 1956 through 1958, they continued to take a little board but this was during a period of time when the gypsum business became quite good and the Union Gypsum Company at that point

[Tr. 491]

found that they could sell board to anybody they wanted to and Certainteed was having difficulty getting the amount of board that they wanted from Union Gypsum Company and the final thing was that the remaining debt was paid off and the agreement for the purchases from that plant stopped at that time.

Q. And that was some time late in 1958?

A. That's right.

Q. Now, in 1956, when you indicated with respect to the spin-off a decision had to be made, was that area at that time being supplied from the Union Gypsum Arizona Plant?

A. It was supplied, Mr. Taylor, but I can't tell you to what extent it was supplied. I don't have any information from that standpoint.

Q. Now inviting your attention to Exhibit 110 and, if the Court please, I hold out this series of exhibits and the first one is at your right on your desk. That is a marketing map, is it not, placed in evidence by the Plaintiffs indicating the area around the U. S. or around the Union Gypsum Plant in Arizona?

A. Correct.

Q. And does that fairly reflect, sir, the market being served by purchase through that plant at the time you became employed with Bestwall?

A. As I understood it these were the limits from where board from this plant was to be shipped. That it was not to be shipped outside these boundaries.

Q. How far north in California were these boundaries?

[Tr. 492]

A. From this copy I can't tell you but it looks like it would have been just barely south of San Francisco.

\* \* \* \*

Q. Yes, thank you. Commencing after the termination of the Union Gypsum contract, will you tell us what plant serviced the New Mexico, Arizona and California markets included within the lines on Exhibit 110?

- A. Well, immediately thereafter Sigurd, Utah, supplied that area.
- Q. And that continued for how long, sir?
- A. That continued up until about 1963.
- Q. And what happened in 1963?
- A. We had changes freight rate wise and cost wise at our plants to draw our marketing areas and to extend Acme further to the west and into Southern California where it was from an economic standpoint a toss-up whether you shipped from Sigurd, Utah, or from Acme, Texas, and we supplied at

[Tr. 493]

that time board into Southern California from both plants.

- Q. All right, sir, what about Arizona?
- A. That was from Acme, Texas.
- Q. The portion of New Mexico that is within the lines.
- A. All of New Mexico was also supplied by Acme.
- Q. None from Sigurd?
- A. That's right.
- Q. Now, you indicated earlier, I believe, that early in 1960 some decisions or activities with respect to the Pryor paper Plant? Would you give us that date and tell us when the expansion of that particular paper plant took place and the details with respect to it?

A. This decision was made I think in either late 1959 or early 1960 to install a new paper machine in that plant and to do this by removing the old wet-end or forming equipment of the paper machines that utilize the dryers and to continue to operate within the same building.

Q. Interrupting right there, sir, prior to that time was that paper supplied to Sigurd? If you know?

A. Yes, there was some quantity supplied but this was much less than 10% of the total requirements at Sigurd and generally speaking was specialty papers, such as sheeting and things of this sort which the purchase contract didn't call for.

Q. And where did Sigurd get the rest of its paper?

A. They got their paper from a company called Central Fibre at that time which has since become Packaging Corporation

[Tr. 494]

of America with most of the paper coming from a mill that Central Fibre owned in Denver, Colorado.

Q. Did Bestwall have any interest in that firm?

A. No, sir.

Q. Now, I interrupted you in the process of the development of that plant?

- A. Well, as I stated this decision was made and this decision was carried out and in 1961 this job was completed and the plant started to produce more paper and has produced more since that time.
- Q. Now, Mr. Wilson, when Pryor was completed, was its total production utilized by Bestwall Gypsum plants?
- A. For all practical purposes, yes.
- Q. Now, in the transition from the purchase on the outside from the independent, to the supplier from Pryor, was there any transition problem?
- A. Yes, there was a very, very major transition problem.
- Q. Will you tell us about that, please?
- A. In 1950 Certainteed Products other than a little bit of paper from Thoreau, Ontario that went to Akron, New York, and to Grand Rapids, Michigan, purchased all of their paper for Fort Dodge, for Acme and for Sigurd. They made this decision to build this paper mill at Pryor, Oklahoma, and --
- Q. By that you are referring to Bestwall?
- A. I am referring to Certainteed at that time. They were fearful as the paper business was pretty good at that

[Tr. 495]

time, that if Central Fibre found out that they were going to build a paper mill to supply this tonnage that Central Fibre would start looking for an alter-



nate sale for that product and that they could find themselves in an untenable position of not having any paper for a short period of time in which to operate the gypsum plants. So they tried to maintain some secrecy on the plant in Pryor, Oklahoma, and built it under the name of Coronado Gypsum Company. Part way through this construction, Central Fibre learned of their intention, were as angry as you might think they should have been and they decided that the only way they could continue to supply paper was if they had a ten year contract to supply a minimum quantity of paper for that ten year period, regardless of whether Certainteed completed their Pryor paper mill or not.

[Tr. 496]

\* \* \* \*

Q. Mr. Wilson, you were just in the middle of explaining a problem between the Pryor, Oklahoma, plant and the independent paper supplier. Will you continue where you left off?

MR. McCARTHY: What day do we have now?

MR. TAYLOR: Let's have the witness tell it.

A. This is in 1950-1951 in the early stages of the construction of the paper mill at Pryor, Oklahoma.

MR. McCARTHY: Prior to your employment by Bestwall Gypsum?

A. Yes, prior to my employment by Bestwall.

MR. McCARTHY: I object to the whole line of testimony as obviously and clearly hearsay.

THE COURT: He may answer.

A. As I explained, with the paper business being quite bullish at that time, they were looking for a method to get this completed without losing a source of supply of paper and they built it under this name of Coronado Gypsum Company. During the construction phases Central Fibre learned of Certain-Teed's plans to make a long story short, I guess, forced upon Certain-Teed a ten-year purchase agreement on paper in order to agree to continue to supply Certain-Teed

[Tr. 497]

until the Pryor paper mill was completed.

Q. And how was the purchase price fixed under that purchase agreement?

A. The purchase price was fixed at the time and it had an escalation clause in there which was tied--

MR. McCARTHY: I object to that as not the best evidence, it's hearsay.

THE COURT: Of course, this witness knows apparently you were close enough to the business were you not, to determine for example the matters and things pertaining to escalation, prices and things of that sort?

THE WITNESS: Yes.

THE COURT: I'll let him answer.

A. This was tied to then an escalation was tied to the published price of a container board grade that is, or that was and is still listed today in a publication that's called "Official Board Markets." And that the price of the paper that Bestwall or Certain-Teed bought would rise and fall with the quotations on this particular grade of paper.

Q. All right, sir. After the construction of the Pryor plant or the addition to it, where did the paper go from Pryor?

A. The paper went to Fort Dodge, Iowa, Acme, Texas, and Grand Rapids, Michigan, mainly. As I say, a small portion went-- and mainly speciality grades went to Sigurd, Utah.

Q. And where did Sigurd get its supply during those years?

A. From Central Fibre Company, with the majority, I

[Tr. 498]

think, coming from Denver, Colorado, and the remainder from a plant over in Hutchinson, Kansas.

Q. And was that paper supplied under that contract?

A. Yes, it was.

Q. And why was Sigurd selected as the plant to take the purchase production under that minimum purchase contract?

A. Mainly because Central Fibre insisted that one grade of paper, Grayack, come from the Denver, Colorado plant and

that the closest freight rate from Denver was Sigurd, Utah.

Q. During the last few years of that contract, sir, did anything happen in the paper market which is significant to the purchase price of paper at Sigurd under the contract?

MR. MCCARTHY: I object to that as incompetent, irrelevant and immaterial and calls for a conclusion.

THE COURT: I think I'll sustain that objection.

MR. TAYLOR: All right, sir.

Q. Now, with respect, sir, to the purchase of paper at Sigurd under that contract, was that being purchased at the time of your employment in 1958?

A. Yes, it was.

Q. Under that contract?

A. It was.

Q. And was that purchase contract under your responsibility assigned to you by Bestwall when you became employed?

A. No.

Q. In the course of your duties, sir, did you become familiar with both the market for--the market conditions for

[Tr. 499]

paper and the price of paper being paid by Sigurd to the supplier under the contract?

- A. I did, because this was necessary to make an economic determination of what you were going to do expansionwise at Pryor, Oklahoma.
- Q. Now, will you state, sir, the relationship which you observed between the price required under that contract between Sigurd and the supplier and the market price of paper from other sources at that time?
- A. The price that Bestwall Gypsum Company was paying for paper from Central Fibre that was used at Sigurd, Utah, was much in excess of a fair market price for paper, and the Trust knew that also.
- Q. All right, sir. Now, you stated earlier with reference to Exhibit 137 that I believe in about 1963 both Sigurd and Acme were marketing gypsum product into the Southern California area?
- A. That's correct.
- Q. And that was being done under your general supervision on the production site?
- A. I had the distribution map drawn.
- Q. Will you tell us, sir, what factors motivated you in the drawing of that-- after the map was drawn in determining whether a particular move went from Sigurd or from Acme?
- A. We drew the boundaries of that map based on the lowest delivered cost into any particular county in the country and this was a combination of a plant cost plus the freight into the market.

Q. Now, sir, in connection with the possible western

[Tr. 500]

expansion which you indicated Mr. Graham was involved in with ore reserves and so on, did you ever become involved in actually attempting to expand the production or marketing in the western part of the United States in early 1960?

A. Yes, sir.

Q. Will you tell us about that?

A. This was, as I say, at the time that I was assistant to the president of Bestwall. This was one of my assignments was to find us a gypsum deposit by which we could expand our business into the Southern California and also the entire west coast market and in this regard I looked at several gypsum deposits.

Q. And where were they basically?

A. In Southern California and in Nevada mainly.

Q. And did you proceed to the point of acquiring any of those particular deposits?

A. Yes, we did.

Q. Will you tell us how they were acquired and during what period of time?

A. I can't give you--I'm not sure that I can give you the exact date, but this again would be at either late 1963 or early 1964 when we took a option on a gypsum deposit that's located about

forty-five to fifty miles north of Las Vegas, Nevada.

Q. And would that be near one of the blocks on Exhibit 157 as shown?

A. In roughly that area.

Q. Was that option, sir, ever exercised?

A. Yes, it was.

Q. Was it exercised prior to or after the merger of

[Tr. 501]

Bestwall and Georgia-Pacific Corporation?

A. I am not sure that I can answer that because the period of time was so close that I'm not sure whether we exercised it a few days before or a few days after the merger.

Q. Prior to the merger did you discuss the propriety or whether or not it should be exercised with the personnel at Georgia-Pacific Corporation?

A. Yes, I did. We were reaching the end of an option period with a decision to make and when I asked Mr. Lizars, who was president of Bestwall what we should do, he said--

\* \* \* \*

Q. Now, in any event, the matter was discussed with Georgia-Pacific and the option was exercised either by Bestwall or Georgia-Pacific?

A. That's correct.

Q. And if it was exercised by Bestwall, it would have been with the consent of Georgia-Pacific; is that correct?

A. Yes.

Q. Now, what did you at that time plan to do with the deposits that you had acquired through that option?

A. This was going to be the source of supply of rock, to supply another plant in the west coast market.

Q. Had you at that time finalized what particular area would be involved in the construction of that plant?

A. Yes, sir. We looked at the rail map into Southern California and arrived at a location of Barstow, California as being a junction point on the railroad where we would

[Tr. 502]

build a plant so that you could without a great number of transfer points you could either go north into the Bay area or south into Los Angeles and San Diego.

Q. Now, was any ground acquired or other tangible steps taken to construct a plant at Barstow?

A. No, sir.

Q. Why?

A. Well, we started obtaining information on water availability, water costs, fuel costs, labor rates, so on and so forth and by the time we got to this stage we reached the conclusion that



we should shut the New Orleans plant down and this threw the entire subject of what we were going to do up in the air at that point, if we shut New Orleans down.

Q. Tell us about the New Orleans and what led to the shut down of that plant?

A. Well, I think that the answer to New Orleans was simply one that a company the size of Bestwall if you expand as rapidly as Bestwall expanded, you could perhaps make some mistakes. New Orleans was a mistake in that it was the first plant that Bestwall built under the expansion at Brunswick, Georgia, is probably run at the fastest speed of any gypsum board machine in the United States and with one machine can produce over three hundred million feet per year. It was hemmed in on the other side to the west by Acme, Texas, which I think is perhaps the lowest cost producer of gypsum in the United States. It is obvious that it's hemmed in to the south by some water and Fort Dodge, Iowa, is limited in its ability to ship to the north. After the plant got into operation and a real good look

[Tr. 503]

was taken at results, it was discovered that we could ship boards from Acme, Texas, into a New Orleans warehouse cheaper than New Orleans could put it in there themselves and so at this point we decided we could not continue to operate New Orleans.

Q. Now, how did that influence your overall expansion plans with respect to those Nevada deposits?

A. Well, when we shut New Orleans down, this immediately through Acme at its level of capacity and we also thought that perhaps we could increase our share of the market over in the Texas, Louisiana, [sic], Arkansas, Oklahoma area and that if we put all of our capacity back in the west, that we wouldn't have the ability to make more sales in the Southwest and the South there after we shut New Orleans down.

Q. Then what was the date of the shut down at New Orleans?

A. About March of 1966.

Q. Now, that was after the merger with Georgia-Pacific?

A. That's correct.

\* \* \* \*

[Tr. 505]

\* \* \* \*

Q. Mr. Wilson, I invite your attention to Exhibit 109 which has been received in evidence in this proceeding and to page or schedule 4 of that document, which is the fourth page.

A. Yes, sir.

Q. And to the last two paragraphs.

MR. ASHTON: Can I look at this exhibit or do you want it in front of you here (indicating)?

[Tr. 506]

MR. TAYLOR: That's just a copy.

MR. ASHTON: Yes, I understand.

THE COURT: Continue.

Q. And I invite your attention to the last two paragraphs of that letter.

A. Yes.

Q. Which was written by Mr. Crandall, I assume, the initials, American Gypsum Trust on the first page with some initials above the word Trustee.

A. Yes, sir.

Q. "To Bestwall Gypsum Company", and those two paragraphs on Schedule 4, the last two paragraphs that read: "Under the terms of our lease Bestwall Gypsum Company as assignee is obligated to pay as rental seven per cent of its annual net profit from the Sigurd plant operations."

MR. MCCARTHY: Will you please tell me where you're reading?

MR. TAYLOR: The last two paragraphs of Schedule 4, right here (indicating).

MR. MCCARTHY: I see.

MR. TAYLOR: All right?

Q. "Net profit from Sigurd plant operations, any realization of net profit would require a computation based upon Bestwall's actual sales and cost of sales. Moreover a matter of this computed excess charge over manufactured

costs for paper supplied to the Sigurd plant was discussed in detail with your representatives in connection with prior year's audit and it was agreed that no such excess charge should or would be used in computing the 7% participation."

A. Yes, sir.

[Tr. 507]

Q. Now, sir, did you ever have a discussion with Mr. S. L. Crandall with respect to that claimed agreement with respect to excess charges in the prior years' audit and that would be prior to 1964?

A. Yes, I did.

Q. And will you tell us when that occurred, where it occurred and who was present?

A. It occurred in Salt Lake City in Judge Ritter's chambers in a meeting with Judge Ritter and with Mr. Crandall. As I've testified sure, I am not sure of the exact time, but I think it was in early 1970.

Q. Did Mr. Crandall make a statement with respect to the language I've just quoted you?

A. Yes, he did.

Q. And will you tell us what he said?

A. It was during the course of our meeting. It was my position that we should be permitted under the terms of our agreement to charge a fair market price on paper that was shipped [sic] from Pryor, Oklahoma and used at Sigurd,

Utah. He asked me if I was aware that we had already paid them on the basis of Pryor's cost rather than a fair market value for the years of '55-'56. I answered yes, but that this was a mistake and we should not have done so.

Q. Was that '55-'56?

A. Yes.

Q. Will you continue now?

A. He said then, "Do you realize that prior to that, in the years 1962 and 1963--

Q. Now, wait a minute, a minute ago you were talking about-- Okeh, go ahead. I'm incorrect. Go ahead.

[Tr. 508]

A. He said first if I realized the payment based on Pryor's cost in 1965 and '66. I told him that I was aware of it, but that we had made a mistake due to this change of moving to the west coast. He then asked me if I was aware that when we were Bestwall Gypsum Company that we had paid them on the basis of Pryor's cost in 1962 and '63 and I answered that I did not know that and I was not aware of that and he made the statement at this time that we knew that you guys were paying too much for paper from Central Fibre and I got these guys at Ardmore to agree--

\* \* \* \*

A. He said "We knew that you were paying too much for paper due to that poor contract you had with Central Fibre and

that I got those guys in Ardmore to agree that they would give us paper at cost to make up for this.

Q. Now, did he make any statement at that time, sir, with regard to whether or not he contended that that agreement would be, that the agreement referred to in Exhibit 109 would be prospective into the future?

A. No, he did not.

Q. Now, you mentioned the move to the west coast, when did that occur?

A. We were advised in November of 1966 that the gypsum division headquarters would be relocated from Paoli, Pennsylvania, to Portland, Oregon. We started the physical move in March, around the middle of March, 1967, and it was

[Tr. 509]

completed in, oh, about September or October, when the remaining portion of the gypsum division had relocated.

Q. Now, what, if anything, happened in the Accounting Department at the time of that transfer from Pennsylvania to Portland, Oregon?

A. We unfortunately were not able to get any of the accountants who worked for Bestwall Gypsum Company to transfer from Paoli to Portland, Oregon.

Q. And that required you to do what at Portland?

A. We had to hire all new people.

- Q. Now, was there any substantial training period involved with those new personnel to acquaint them with the procedures of Georgia-Pacific Corporation in the Bestwall Division?
- A. Yes, we had many, many trying times of not knowing what we had resultwise, due to the inexperience of these people that if somebody made a mistake in transposing a figure or putting a cost against some item that should have gone some place else, these people did not have enough experience to recognize that there had to be something wrong because the number just didn't look right.
- Q. Now, I'm going to hand you, Mr. Wilson, Exhibit 57 received in this proceeding and ask you, sir to-- What's the date of that document first?
- A. May, 1965.
- Q. And does that fairly represent the organization structure of Bestwall immediately prior to the merger with Georgia-Pacific?
- A. Immediately prior?
- Q. Have I got that wrong?
- [Tr. 510]
- A. This was immediately after the merger.
- Q. That was immediately after the merger?
- A. Yes.
- Q. Would you explain the relationship of your positions with Georgia-Pacific as

shown by that exhibit and that of Mr. McCaskill?

A. I was listed as Vice-President of manufacturing and Mr. McCaskill was listed as Vice-President of marketing.

Q. And was that with respect to the entire division?

A. Yes.

Q. And would you explain what relationship in the day to day operating of your respective departments you had with Mr. McCaskill?

A. An extremely close working relationship with Alex.

Q. That's Mr. McCaskill?

A. Yes.

Q. Mr. Wilson, what type of customers are the usual consumers of the types of gypsum products manufactured at Sigurd, Utah?

A. I am sorry. Could you repeat that please?

Q. Yes. Would you tell us what kind of customers buy the gypsum products as manufactured at Sigurd, Utah?

A. There are basically two different types of customers, one would be a class that we would call a dealer and this could be a firm that would be a specialist in handling gypsum wallboard to supply the dry wall contractor or the applicator, as we call him, or this could be, of



course, a lumber yard that would also supply this quantity to people who used it.

[Tr. 511]

- Q. Now, who were the people who used it, actually utilized it?
- A. This was the other group of customers who were the end consumers of the product.
- Q. And it was used in what kind of function?
- A. On the walls of houses. I am not sure I follow your--
- Q. Okeh, in construction projects of one kind or another where buildings were constructed, would that be correct?
- A. Yes.
- Q. Now, sir, would you utilize Exhibit 157 as you need to to explain to the court the general economics of business from the time you became employed in 1958 until it was merged with Georgia-Pacific in 1965?

MR. MCCARTHY: Well, I object to that. I don't think that he is competent to testify as to general economics.

THE COURT: Oh, I think probably he was in that particular business, concerning now what the particular area we're concerned with here?

MR. TAYLOR: That's correct, sir, I'm talking now about the area that he had responsibilities for.

THE COURT: He may answer.

A. Well, the gypsum industry in the fifties following the Korean War was an extremely good business. The manufacturers and the plants that were in existence at that time were all busy. Most plants were on what we would call an allocation where they had a back log of orders and they could pick and choose what they wanted to ship and who

[Tr. 512]

they wanted to ship it to and at what time they wanted to ship it.

MR. MCCARTHY: Just a moment, Your Honor, I hate to interrupt, but this was before this witness ever got into this business, what he's testifying to, what the condition was in the fifties.

A. I got into the gypsum business in 1954.

THE COURT: That was my impression that he was engaged in the business at the time he specified. You may answer. Go on.

A. So in the latter stages of 1958, pardon me, in the 1950's, that the Bestwall Gypsum Company and most of the other manufactures [sic] were looking back at what they had experienced and saying, "Let's get ready for the soaring sixties that's going to be the greatest building boom that the nation has ever seen. We can't supply the demand and we've got to start to build some plants so that that demand can be taken care of during the 1960's."

\* \* \* \*

[Tr. 513]

\* \* \* \*

Q. Would you continue to explain that to the court please?

A. As I said that we entered the late 50's and going into 1960 with an industry that had run at a very very high

[Tr. 514]

level of capacity, an industry that was looking ahead to what was reported at that time by all of the leading experts to be the greatest housing boom that the country had ever seen and I guess we almost developed some kind of a race to see who could build plants the fastest and in what locations and Bestwall Gypsum Company, of course, building one, two, three, four plants in the very early '60's was a very good example of that.

Q. Now, sir, will you explain to the Court, what the competitors were doing in this same period of time in the western portion of the United States, say from Texas west with respect to the construction of new plant facilities and if you would proceed to the map and use the pointer and demonstrate that?

A. Well from the period of approximately say, 1960, the late 50's to the early 1960's through the time when we purchased Lovell or if you want to add to it Acme, then Acme also, through that period of time we had built out there a plant in Wyoming at Cody, Wyoming, by the Big Horn Gypsum Company; this plant by Gypsum Products of America that is now owned by us at Lovell;

- Q. Who owns the other Wyoming plant now, sir?
- A. Celotex Corporation owns it now. This plant in Florence, Colorado, that was originally built by the Pabco Company but is now owned by John-Mansville Corporation; this plant by Republic Gypsum Company in Duke, Oklahoma; our plant at Acme, Texas, or the expansion of that; two plants in the

[Tr. 515]

Albuquerque Area, one by Kaiser Gypsum, one by American Gypsum Company; two plants in Southern California by U. S. Gypsum, one at, no I am sorry let me take that back, two plants in Southern California, one by U. S. Gypsum at Sante Fe Springs which is Los Angeles, and one by National Gypsum at Long Beach, California which is also Los Angeles; one new one by Pabco in Apex, Nevada which is now owned by John-Mansville; two new plants in the Bay Area, one by the Flintco Company, the other by National Gypsum. We went from the situation where there were about 12 or 13 plants serving that area and now have about 21 plants serving that same market area.

Q. Now, sir, when you say "we" you are talking about--

A. The industry, I should say.

Q. As you proceeded from 1960-2-3-4 and were I think you indicated on the block approaching the Georgia-Pacific merger, will you explain how the market was reacting from your own experience as of that period of time, immediately prior

to the merger?

- A. Well, it took the first few years for all of this to sink in, it had to be really completed, brought on the line. The first real major change in my opinion in the marketing of gypsum came about in 1964, late 1964, just before we merged into Georgia-Pacific when the sale of gypsum products changed in the United States from one whereby plants sold f.o.b. a plant and absorbed freight with the nearest producing plant to a customer that the market changed to one of a delivered price merchandising situation and this new

[Tr. 516]

method going into existence made the market very chaotic for a period of time.

\* \* \* \*

- Q. Alright, sir, now skipping over the merger for the moment, we will come back to that, will you explain to the Court basically what happened in the industry and particularly the Western State Area from 1964 when this chaotic state existed up through say 1967, that three year period?

- A. The first real change came again in my opinion in 1964 when one of our competitors with plants both in the San Francisco market and also in the Los Angeles market decided to move away from a delivered price basis by rail cars and first deliver by truck and this was the first real change in that market.

Q. Now, up to that time from 1960 to 1964, what percentage of Sigurd deliveries to the Pacific Coast were by rail?

A. I am not sure that I can answer that on an

[Tr. 517]

opinion.

Q. Yes, would you state your opinion?

A. I would say at least 95% of it by rail.

Q. And was that on a delivered price basis?

Q. So that the freight charged from Sigurd to say San Francisco came off the purchase price as it related to Sigurd?

A. That is correct.

Q. Alright, now what next developed which in your opinion is pertinent?

A. Well, the overall, Mr. Taylor, was the rest of the competition in the industry started to scurry and find a way to meet the competition of the one competitor who had started a truck delivery system rather than a system of rail car delivery. This was the next thing that happened and the pertinent thing that I think that happened in the market place.

Q. What about gypsum prices between 1966 through 1967?

A. 1965 to 1966 showed a reduction in prices in gypsum on the West Coast. This was a particularly noticeable fact

in 1966 which was a very, very poor building year. There was a slight rebound in prices in 1967 and then a major tail-off in 1968.

Q. Now, in your opinion, was the additional produc-

MR. MCCARTHY: Now, Your Honor, I would object to all of this asking for opinions by counsel. If this witness has some facts to recite, they might be admissible but I don't think it is proper--

[Tr. 518]

THE COURT: Of course, he hasn't framed his question yet, so I don't know what he had in mind.

Q. Now, let me state this preliminary, if the Court please. Not only have the Plaintiffs placed facts in issue here, they are charging this man and everyone else in the management position in Georgia Pacific that had anything to do with gypsum of acting in bad faith and of conspiring [sic] and intentionally trying to impair or injure these lessors under this lease. Now, I think in the light of that, this man's opinions at various times are relevant to this proceeding and they have been made relevant by the Plaintiffs' charges, not by their evidence, but by their charges.

THE COURT: Any evidence addressed to that particular subject will be admitted. Go ahead.

Q. Yes, sir, now in your opinion with respect to the production that commenced at Lovell in 1967 and just beginning

and continued into 1968 and the additional production that started in what October of 1968 at Acme, would you state whether or not in your opinion that additional production into the western states market had any impact upon or contributed to the fall in the market price in 1968, which you have described?

MR. McCARTHY: I object again he is asking for his opinion on that.

MR. TAYLOR: We concede that.

THE COURT: Yes, it's merely an opinion. Go ahead.

A. It would be my judgment that this did not have any

[Tr. 519]

major or even any factor that you could really describe to causing a price decline. In the Plaintiffs' exhibits yesterday they showed that the major price decline at the Sigurd Plant took place in 1968. This was before the Acme Plant came on line. We actually added more production and put more production into the West Coast market in 1967 with an increase in prices than we did in 1968 when the prices declined and in my judgment the addition of Lovell in 1967 had no effect at all on the price decline in the West Coast in 1968 because Acme wasn't even operating.

Q. What percentage, overall percentage, of the West Coast sales would have been contributed by Lovell, Wyoming in that general period of time.



A. I have to give you an opinion.

Q. Yes.

A. Because I don't have any facts to break down a specific market. I think we can make some pretty good guesses.

MR. MCCARTHY: I would object to an opinion on that subject from this witness. He hasn't any facts, he says.

THE COURT: It would be merely an opinion that is based upon your experience, would it be, with that particular market area and those particular plants?

A. Your Honor, we know how many housing starts had taken place in these various states; we know how many housing starts are made in the entire United States through the Bureau of Mines reporting to everyone in the industry. We know how much total board is shipped so that you can come up with

[Tr. 520]

a factor of so many thousand of square feet per housing unit. Based on that the 55,000,000 feet that Lovell shipped the first year would have been less than 2% of that market.

Q. Now, sir, would you tell us what happened between 1968 when prices began to fall and 1970 with respect to the production of your competitors?

A. This dropped off appreciably with housing starts still remaining approximately the same and our business increasing, our volume increasing, our competitors

had to suffer in production.

Q. Now, did some of your competitors reduce their production to zero and actually close existing plants in that period of time?

A. Yes.

Q. We invite the Court's attention to those Pacific plants of competitors that were closed between 1968 and 1970?

A. The largest producer of gypsum in the country, U. S. Gypsum, closed a plant at Midland, California; the Fibre Board or the Pabco Company closed a plant in San Francisco Bay Area. Late last year the Kaiser Gypsum Company, which with these three major markets, closed a plant in New Mexico because it could no longer survive without some distribution division set up to merchandise its material.

Q. Now, sir, were all of those plants of competitors that were forced to close closer to the major Sigurd market area than was the Sigurd Plant.

A. The answer would be two of them were, the rail

[Tr. 521]

haul, the freight rate from the Kaiser Plant would have been approximately the same as from Sigurd.

Q. Now which two plants were closer to the major market area than was Sigurd?

A. The United States Gypsum Plant at Midland, California and the Fibreboard plant in San Francisco and I forget the third plant, Fibreboard also closed a plant in the Los Angeles area which is designated by this cross on this purple square.

Q. Now, sir, with respect to Exhibit 157, each of those closed plants are identified with a cross in the middle of the colored marker, that is correct?

A. That is correct.

Q. Now, sir, will you state to the Court your opinion as to why you were able to operate Sigurd at all during that period of time when 1, 2, 3, 4 of your competitors, three of them right in the major market area, were forced to close?

A. In my judgment the only reason was that we, through the distribution division, the distribution warehouses, were able to make truckload deliveries.

\* \* \* \*

[Tr. 522]

\* \* \* \*

Q. Mr. Wilson, would you tell us whether or not there were any basic policy changes which you encountered with respect to marketing, production, or accounting as you moved from the corporate officer for Bestwall and became a corporate officer of Georgia Pacific Corporation?

A. I think I would have to answer that. I think there were three major and basic

changes. No. 1 which was the theory of the President of our company that you run a manufacturing operation to the highest level you can run it and then find other ways to sell it. This is the most efficient and lowest cost way of operating. After you produce it, then find the way to sell it. I think this would have been the number one change that we had.

Q. Now, sir, that was a policy not followed by Bestwall, is that correct?

A. That is correct. In Bestwall we tried to maintain

[Tr. 523]

low inventories and supply the order when it came in but we certainly didn't build inventories in advance and in advance of putting pressure on our sales organization to move it out.

Q. In connection with that basic policy and in the development of quotas or as I think they have been identified as standards in the evidence, would you tell us how you proceeded to prepare the standards in the light of that policy and, if the Court please, that is Defendant's Exhibit 101 which is in the documents on your desk some place?

A. Well, the standard -- the first step in the preparation of standards consists of a simultaneous action on the part of two different groups within my general group in Portland and through our accounting group we put together an estimate of the total available operating hours that a plant should be able,

that we feel they should be able, to run in the ensuing year and we also put together an estimate of the product breakdown that that particular plant will manufacture during that year.

Q. Could that be equated with practical capacity of the plant under the existing economic and manufacturing conditions in that particular plant?

MR. McCARTHY: That is leading--

Q. It is leading and I shall rephrase it. Would you like me to rephrase it, to the Court?

THE COURT: It is leading, I am sure, but he may answer it for what value it has; as this is information--

A. The preparation of the first portion we were

[Tr. 524]

talking about the total number of days and operating hours is very simple that we figured capacity operating on 21, pardon me, on 20 eight-hour shifts per week which would be  $6\frac{2}{3}$  days per week, less the number of holidays that the plants feel they want to shut down to take care of some maintenance and so on during the year. It would be the total number of hours available. Then we take a look at what has happened to the product mix and try to equate that back with any changes that anybody knows of which could possibly be taking place in the market place and we come up with a product mix and these two figures are

given to the plants to help them develop their portion of the standard.

Q. And, sir, then does that result in a goal or a target for production at that particular plant?

A. Look, Mr. Taylor, at the same time we send that information to the plant, the plant sends to us their proposal for operating speeds on every product that they manufacture, what delay experience they are going to try and shoot for, and also what percent of perfects that they expect to attain during the year and when that is approved by my group, it's then sent back to the plant and it's simply a means, or it simply takes the mechanical application of a calculator to come up with the standard footage for the year.

Q. Do the other standards, sir, for the marketing groups then flow from the manufacturing standards?

A. Yes.

Q. Now, sir, you indicated that there were other

[ Tr. 525]

major changes, what were some of the other major changes when you went to Georgia Pacific?

A. I think the second major change and probably from the overall operating standpoint was equally as important was the change from a cost center concept of accounting in Bestwall Gypsum to a profit center concept of accounting at Georgia Pacific.

- Q. And what was the significance of that, sir?
- A. Well, the significance of that was that you placed the profit responsibility at each location as if this were a separate operating unit rather than approaching it as Bestwall did in lumping everything together as one operating unit.
- Q. Now, sir, were there any other basic policy changes with Georgia Pacific? As it relates to the distribution product?
- A. Yes, this was -- I wasn't quite sure what you meant. This was simply a means of distributing the products whereby as I told you the reason, one of the major reasons, for the merger was to take two similar products, plywood and gypsum, and put them together in a warehouse and have a more efficient means of distributing the products.
- Q. Now, did Bestwall have any warehouse facilities outside of the plant locations in the Western States?
- A. Not in the Western States.
- Q. Did Georgia Pacific have numerous warehouses throughout the Western United States at the time of the merger?
- A. They did.
- [Tr. 526]
- Q. And what types of products were they then moving generally through those warehouses at the time of the merger?

- A. The major product was plywood but they were also moving pre-finished panelling, it varied from branch to branch as to whether this was lumber, doors and various related products in the building field.
- Q. Now, sir, with respect to 1964 and periods prior thereto at least back to 1960, you have indicated that in your opinion that about 95% of the sales to the Pacific Coast went by rail. Will you tell us who your customer was during those years, up to and including the time of the merger?
- A. Our customer was a dealer who could have either been a lumber dealer, running a lumber yard, or he could have been a hardwall material dealer which would have been basically a dealer in gypsum wallboard and plaster. In a few cases we had I guess what you would refer to as wholesalers or jobbers in some markets who, in turn, sold these dealers themselves.
- Q. Now, in addition to the dealers, did you make any sales during those years to your competitors?
- A. Yes, we did.
- Q. And were those sales made in generally the same manner?
- A. No, they were not.
- Q. Will you tell us how they were made?
- A. The sales that we made to our competitors during that period of time were made on the basis of selling at f.o.b.



our plant so that this customer took the delivery of our material

[Tr. 527]

at our plant and it was his responsibility from thereon where he wanted to ship it and how he shipped it and who paid the bill, and so on.

Q. Now, sir, in 1964 if you sold products say to a dealer in Sacramento, California and that dealer then resold the product to an apartment house in Auburn, California, was Bestwall interested at all in any of the costs or the receipts in the handling of that product from Sacramento, California, to Auburn, California?

A. No, sir.

Q. Will you tell us, sir, the general relationship of the price which the dealer paid you and the price that his customer in Auburn, California, paid him?

A. The dealer paid us hopefully the list price; in some cases if he were an extremely large dealer it could possibly have been sold to him at 5% under the list price.

\* \* \* \*

[Tr. 528]

\* \* \* \*

Q. And the intent of the question was, sir, to establish a relationship of 10%, 15%, 50%, whatever it may have been between the dealer's cost and the

dealer's sales price.

THE COURT: Do you happen to know that Mr. Wilson?

A. I think between the dealer's cost and the dealer's sale price, this would vary depending upon where the material went, how far it had to go, and so on.

Q. Now, sir, would you tell us what the relationship was between the sales price to the dealer and the sale price

[Tr. 529]

to a competitor, like John-Mansville?

A. It was much less to John-Mansville.

Q. Now, why?

A. Primarily, because John-Mansville bought f.o.b. the plant and John-Mansville had to pay the freight to deliver it to their customers.

Q. Would it be fair to say that John-Mansville not only had to supply the freight but any warehousing and distribution on to its customer if it went beyond the dealer?

A. Yes, plus any selling expense they had.

Q. Now, sir, in 1964 in computing the lease royalties on a transaction like the one we have been talking about, a sale from Sigurd to Sacramento, assume that the sale price, the list price to your dealer was \$100.00. He paid you \$100.00-

A. Yes.

Q. And the freight charge was \$10.00? How was the freight treated in computing the royalty?

A. It was used as a deduction from the gross sales price and then you would have the \$90.00 of net sales.

Q. At where?

A. At the plant.

Q. Now, sir, when you established the warehouse will you tell me what changes, if any, that effected when the Sigurd sent its product from Sigurd, Utah, to the customer and whether or not the type of customer changed?

A. Well, in the beginning, right after the merger,

[Tr. 530]

as we saw from the records in 1955, not a very high percentage moved through the warehouse. What we were attempting to do at that point was to move the material into our warehouse and sell this back in part truckload quantities. To sell a lumber dealer or to a job site and we'd deliver plywood, we'd deliver gypsum, we would deliver a little premium lumber, we'd get a truckload together but each individual item on that would not constitute a truckload. This is the way we moved in the beginning.

Q. Now, in, say 1970, will you tell us roughly what percentage of the movement out of say the Sacramento Warehouse would have been in that mixed

load kind of a situation out to a user?

A. Mr. Taylor, I can't answer that question. I don't know the answer to that one. I only know how much or what percentage moves into the warehouse and what percentage moves out but I don't know the breakdown.

Q. In 1964 under the Bestwall procedures and facilities was it possible for Sigurd to market to either end-users or to retail establishments that could not take car-load lots of wallboard or other gypsum products?

A. The answer to that would have to be practically impossible. We could and did on rare occasions ship to a team track and have a dealer come by and pick up his proportion of that load and another dealer would get his proportion of the load but this was so small that you couldn't measure it really.

[Tr. 531]

Q. Now, sir, were there any factors in the mid-1960's in the California market in particular with respect to the operation of the plants of your competitors which changed the pattern of movement of wallboard?

A. Yes.

Q. Will you tell us about that?

A. Well, this major change was the opening of the California market to trucking which started in 1964 by one competitor and through 1965 and 1966 this group until practically the only deliveries

made in California today are by truck.

Q. Now, can you practically make truck deliveries out of the Sigurd Plant to the California market?

A. No, sir.

Q. Tell me, sir, in 1966 or '67, how the U. S. Gypsum Plant near San Francisco was servicing its customers in the immediate area?

MR. McCARTHY: I object to that question and to this line of interrogation. He keeps talking about -- he hasn't been shown that it's within the competence of this witness that he observe how the U. S. Gypsum Company handled their products at this particular location. There is no foundation for it.

MR. TAYLOR: If the Court please, the purpose of this testimony is to refute business assumptions made by a man admittedly incompetent to make those assumptions and the Plaintiff then presumed from those erroneous assumptions that this man had an improper motive in that market place. Now, this is the man who was in the market place and I think he's entitled

[Tr. 532]

to tell the Court what he was doing and what his competitors were doing and how that effected what he did.

THE COURT: I am going to let him answer.

A. The question was --

Q. The question was assuming the U. S. Gypsum, is that one of your major

competitors today, sir?

A. Our largest competitor.

Q. Of the Sigurd Plant in the northern California area?

A. I don't know that I can answer that. I know that

Q. Is it a competitor in the northern California area of the Sigurd Plant?

A. Yes, a major competitor.

Q. And it has a plant right in the area?

A. No, sir, it doesn't.

Q. Where is their plants?

A. In Nevada. The orange dot up in North-western Corner of Nevada.

Q. I see. Take one of the plants in the San Francisco Area which serve that market.

A. Yes, but first U. S. Gypsum at that period of time when this went trucking also couldn't supply the market so they opened a warehouse in the San Francisco market. Now, we have also major competitors in National Gypsum, which is the second biggest producer of gypsum wallboard with a plant in the San Francisco Bay Area. Kaiser Gypsum which is probably the largest producer of wallboard on the West Coast is located

[Tr. 533]

there. The Flintco Company also has a plant in the San Francisco Bay Area.

Q. Now, with respect to those plants and with respect to the U.S.G. Warehouse, how are they making deliveries to the customers?

A. Now they are making them by truck.

Q. And when did that begin?

A. In 1964.

Q. Was that a -- will you tell us how that process became involved? Was it a sudden process or a gradual one?

A. As I mentioned earlier in my testimony, this started with one competitor and as he looked like he might be successful, this was emulated by other people who also had plants in the market.

Q. And about what period of time, approximately, sir, did that convert substantially to a truck market?

A. Oh, pretty much by the end of 1966, sir, or going into 1967.

Q. Now, sir, with respect to a 1970 computation of the lease payment, say the same sale from the Sigurd Plant to your Sacramento warehouse instead of the dealer was involved and then a sale on out by the warehouse?

A. Right.

Q. Will you tell us first how the price is established at the warehouse?

A. The price is established by taking our best information concerning the dealer price in that market and reducing

[Tr. 534]

that by 5% and by a second 5%, which is the equivalent to 9.8% which we have talked about.

Q. And is that the list less 9.8% that you have heard discussed in this suit?

A. Yes.

Q. Now, how is the list price determined, how?

A. By our best information as to what the dealers are paying for gypsum wallboard.

Q. So that would be the equivalent to the price that you actually received in 1964 from the sale to the dealer?

A. Right.

Q. Now, suppose in 1970, you have a sale from Sigurd by rail, do you still have some sales by rail directly out in a rail lot which does not go into the warehouse?

A. I am sure that we do have some.

Q. When you handle a sale like that in 1970, will you tell me how that's treated with respect to the computation of the royalty?

A. The sale that goes directly from our plant by rail to a dealer?



Q. That is correct.

A. This is made on the basis of the dealer price less 9.8%.

Q. Alright, sir. Now with respect to the sale from Sigurd that goes into the warehouse and then goes to a retail dealer. What's the general relationship between the price at the warehouse and the price to the retail dealer?

[Tr. 535]

A. The price at the warehouse is generally speaking 9.8% less than the price to the dealer plus the freight to get it on to the dealer.

Q. Now, sir, assume a sale from Sigurd to the Sacramento warehouse which then goes from the Sacramento warehouse say out to Auburn, California, and it goes into a third or fourth floor of a building and is delivered into a room where it is being applied. Do you have those kinds of transactions in the warehouse?

A. Yes, we do.

Q. Will you tell us the relationship between the price at the warehouse and the price to the user on that kind of a transaction?

A. Yes, the distribution center or the branch would be selling that at the list price, the dealer list price plus the cost of transporting this board to the job site and taking it up the two, three, or four floors, wherever it might be, and stocking it into the room.

Q. Now, I am going to hand you what the Clerk has marked as Exhibit 152 and with respect to that document, sir, I invite your attention first to the line across the page and assume with me some facts as we see them below that line and I would like you to walk through the computation of net profit in 1964 and 1970 with respect to that transaction.

\* \* \* \*

[Tr. 536]

\* \* \* \*

Q. \* \* \* Have you caused that to be put together simply to demonstrate in a visual way the method in which the net profit was computed for royalty purposes in 1964 on a transaction with those assumed figures?

A. That is correct.

Q. With respect, sir, to the material above line, have you caused that to be prepared to demonstrate visually and in a simple manner the mechanics of computing the royalty as you understand the Plaintiff would have them compute it on a transaction in 1970 that went from the warehouse?

A. That is correct.

\* \* \* \*

[Tr. 537]

\* \* \* \*

Q. Now, inviting your attention to this portion of this proposed Exhibit 152

below the line, on the transaction where actual costs of the plant was \$80.00 and the delivery cost (that would be freight in 1964)?

A. Yes.

Q. Was \$10.00 and your customer paid you \$100.00?

A. Yes.

Q. Would you walk through the mechanics of computing the royalty or the net profit for the royalty on that kind of a transaction as you would have done in 1964?

A. Yes. Following right down below we have the cost of goods sold at the plant of \$80.00.

Q. I interrupt you there, sir. What items went into the cost of goods sold?

A. The out-of-pocket costs at the plant, plus the overhead that was incurred at that plant.

Q. That would not include Portland Office or Ardmore Office overhead?

A. It did not.

[Tr. 538]

Q. Alright, now would you continue.

A. Then, under the formula of 10% of the cost of goods sold, we would have had an additional \$8.00 for a total cost from the plant of \$88.00. Our sales price would have been the \$100.00 less the \$10.00 of delivery costs or freight.

for a net sales price of \$90.00 which would have resulted in a net profit of \$2.00.

Q. Now, that \$2.00 would have been utilized in the computation of the net royalty on a transaction like that in 1964, is that correct?

A. That is correct.

Q. And would you have transactions just like that in 1964?

A. Yes, we did.

Q. Now, inviting your attention to the material above the line, would you walk through that in a similar fashion showing what those figures represent and again I understand that that is your interpretation of the Plaintiffs' method of computing the royalty on the kind of a transaction you have indicated there? Is that correct?

A. Yes, that is correct. Beginning again with cost of goods sold we have the same \$80.00--

Q. Now, are the same items included in that same \$80.00 that were true in the 1964 example?

A. Yes.

Q. Now, would you continue.

[Tr. 539]

A. We again have the 10% formula for S.G.&A of 10% for a total cost of \$88.00. The end sale price again being

\$100.00 to the customer but in this particular case we are not able to exclude from that selling price our freight and delivery costs from the distribution center to the customer. We are allowed, however, to deduct the delivery costs from the plant to the warehouse which, in this case, is \$5.00 so that we then have a net sale price of \$100.00, less the \$5.00 to the warehouse for a net sale of \$95.00 or for a projected net profit of \$7.00 under their method of calculating.

Q. Now, sir, with respect to the activities in the warehouse and the activities between the warehouse and the in-user in your example, the customer, which you have assumed is \$5.00. Are there services which you do not treat as selling costs?

A. There are many.

Q. Now what items did you treat in 1964 as selling costs?

A. Calling on a customer, the expenses incurred in maintaining a salesman to call on this customer, advertising and the general office overhead that we had.

Q. I see so in the example above the line on Exhibit 152 you have excluded those kinds of expenses that were included within the 10% in 1964 and have only included those types of functions of distribution and delivery and freight which were not included within the 10%

A. That is correct.

[Tr. 540]

- Q. Now, sir, would you turn over to page 2 of Exhibit 152 and, sir, have you worked out a general assumption in connection with the plaintiffs' theory in the lawsuit as you have heard it expressed by their accountant and in the two assumptions listed under Assumption #1 have you proceeded to compute the royalty on the basis of the facts in the transaction above the line in 1970, first treating those warehouse and delivery freight charges as a reduction in the sales price and alternatively treating of them as a cost of goods sold?
- A. Yes, we have done both of these.
- Q. And would you walk through those computations, please?
- A. The first is to treat these warehouse and delivery expenses as a reduction in selling price.
- Q. Now, sir, in effect, is that similar or dissimilar to what happened in 1964?
- A. That's similar.
- Q. Alright sir.
- A. And in that particular case with a cost of goods sold of \$80.00, the 10% SG&A of \$8.00 and a sales price of \$100.00 less the \$5.00 to the warehouse and the \$5.00 from the warehouse to the customer, we have a net sale of \$90.00 or a net profit of \$2.00 which would be the same as the method of calculating in 1964.

Q. And that's the method you are utilizing today is that correct?

A. That's correct.

[Tr. 541]

Q. Mr. Wilson, will you please walk through the next computation assuming that you did not deduct that actual out-of-pocket costs from the sales price as was, in fact, done in 1964 but were to consider that as a cost of goods sold, will you walk through that for us?

A. Yes. In this particular case, we have taken the \$80.00 of costs of goods sold at the plant and added to that the \$5.00 of warehousing expense between the warehouse and the customer, adding that \$5.00 on we come to an adjusted cost of goods sold of \$85.00. Applying the 10% formula, this gives us an SG&A of \$8.50. The sales price is \$100.00 but in this case we are taking only the \$5.00 of freight from the plant to the warehouse which gives us a net sales price of \$95.00 rather than the \$90.00 in the first assumption; however, if we subtract the \$93.50 from the cost of goods and SG&A from the \$95.00 in the Second Assumption, we come out with a net profit of only \$1.50.

Q. And the third page, sir, is simply a summary of those four computations?

A. Yes, the first one is the way this actually would have been done in 1964. The second one is an example of how the American Gypsum Trust would like it computed in 1970. The third one is the method by which we have used to compute

it in 1970 and the fourth one would be what would happen if we treated these warehousing costs as a cost of goods sold rather than as a reduction in selling price.

MR. TAYLOR: I offer Exhibit 152.

[Tr. 542]

MR. ROOKER: If the Court please, we object to the exhibit on the grounds that it is obviously a contrived illustration. There is no foundation laid that the numbers on this document bear any relationship whatever to what actually happened and there is no explanation why this witness could not have prepared an illustration of what actually happened from the books as Mr. Caldwell did instead of a contrived illustration based on a purely hypothetical figure without foundation.

THE COURT: Of course, I think it's just illustrative of the method employed by the Defendant corporation in this particular instance, in determining the net profit from which the 7% should apply. I hardly know how else it could be illustrated except by some such approach as this one. For that reason I will admit the exhibit.

(Exhibit 152 thereupon admitted into evidence).

MR. TAYLOR: And if the Court please, we will, of course, present accounting evidence, economic evidence, cost studies and that sort of thing as quickly as we can get organized and arranged for the turn of those witnesses as it arrives.



Q. Now, sir, we will return, sir, to the illustration of Exhibit 152 in 1970. Is it true that the price over here of the end-user in fact fluctuates very rapidly?

A. Yes, it has.

Q. And that would depend upon whether it was carload sale or whether there were material freight or handling allowances between the warehouse and the end user.

A. That is correct.

[Tr. 543]

Q. And you are aware of the fact, are you not, that there will be offered in evidence in these proceedings some specific cost studies to demonstrate the specifics of those kinds of transactions?

A. Yes, I am.

Q. Now, sir, as you moved from Bestwall to Georgia Pacific Corporation and were faced with these three basic changes that you described in policy: (1) the flat out production (2) the cost center accounting and (3) the warehouse distribution marketing and distribution delivery concept, did you formulate then an opinion as to whether those policies would be helpful or detrimental to Sigurd as an operating unit?

A. Yes, I have.

Q. And what opinion did you form at that time?

A. In my judgment that this has been very helpful--

Q. Now wait a minute, you are not answering my question, Mr. Wilson. I am asking you to go back to 1965 and I am asking you if looking at those changes when you learned about them, whether you had an opinion at that time as to whether they would be helpful or harmful to Sigurd?

A. I am confident that they would have been helpful to Sigurd.

Q. Now, viewing with hindsight what has happened since 1965, do you have an opinion now as to whether, in fact, they are helpful or harmful for Sigurd?

A. Well, I am confident again that they have been helpful because without those policies, Sigurd would not be

[Tr. 544]

operating today.

Q. Now, I am going to invite your attention, sir, to what has been marked Exhibit 153 and I will ask you if that is simply a catalog showing a range of commodities offered to the customers through the distribution centers that you have described, combining gypsum products with other products?

A. That is correct.

Q. And we offer that for illustrative purposes if the Court?

MR. MCCARTHY: What is that?

MR. TAYLOR: This is a catalog of products sold through the distribution centers in 1970. It is dated 1971.

THE COURT: Exhibit 153 will be received.

(Whereupon Exhibit 153  
was received in evidence  
by the Court)

Q. Now, sir, with respect to that Exhibit 153, do you have customers throughout the Sigurd Market Area who deal in various types of building products including gypsum?

A. Yes.

Q. Do you have customers throughout that area who will not, as a matter of business practice, purchase straight loads of gypsum products?

A. Yes.

Q. Will you tell us how those customers are served through the warehouse system of Georgia-Pacific Corporation?

A. Well, this is the first and basic purpose of the Georgia Pacific warehouse division which is to supply the means to handle this business which nobody else in the gypsum

[Tr. 345]

business as we know it today has the ability to do and this is to congregate the wide variety of products within a warehouse and ship these back out in less than truckload quantities to the small dealers, the small lumberyards who don't want to buy a carload of plywood and who can't really afford the inventory costs and so on to maintain those inventories.

Q. Now, sir, you talked in your earlier examination last week and also with reference today in your earlier examination regarding the purchase of a plant at Lovell, Wyoming?

A. Yes.

Q. Would you tell us first how you learned of the Lovell transaction or the availability of the Lovell Plant and then tell us how you went about acquiring that plant?

A. Yes. I first learned of the availability of the Lovell Plant from the industrial representative of the Pacific Power and Light Company located in Portland, Oregon. Within their territories they serve the Lovell, Wyoming area. They were part of a group who had made some large expenditures and I think in their case it was well in excess of \$100,000 on running lines into this plant which is about nine miles off the road and installing transformers and then having the company who was building the plant run out of money and run out of financing prior to completion of the plant and they were simply trying to interest everybody in the gypsum business in going in and completing that plant and starting it up so they could get a return from the investment they had made there.

Q. After that lead did you investigate that possibility?

[Tr. 546]

A. I did.

- Q. Did you find out whether or not one of your competitors had beat you to the punch?
- A. Yes, I did.
- Q. And had they?
- A. Yes.
- Q. Which competitor?
- A. The Flintco Company.
- Q. Did you, despite that, enter into negotiations seeking to purchase that plant?
- A. We did.
- Q. And that resulted in the contract documents which are now in evidence, is that correct?
- A. That is correct.
- Q. Now, were you present in the court room when Mr. Rooker, in his argument to the Court, charged Georgia Pacific Corporation with conspiring with, what was the name of the firm from whom you bought Lovell?
- A. Gypsum Products of America.
- Q. Gypsum Products of America to do Sigurd in or to damage or do detriment to Sigurd?
- A. Yes.
- Q. Did you hear that?
- A. Yes, I did.

Q. Will you tell us, sir, whether or not you ever had any such intent?

A. I think it's such a ridiculous question; don't

[Tr. 547]

know that I should even answer but the answer is definitely no.

Q. Now, sir, in your opinion, was a purchase of the Lovell facility a benefit to or a detriment to the Sigurd operation?

A. It was a benefit.

Q. Will you tell us why?

A. It was a benefit because it strengthened our overall sales position in the western part of the United States and in strengthening that sales position it enhanced the economic position of the gypsum division which had to be an asset to the Sigurd plant.

Q. Now, when you acquired that plant, was it nearly ready for production?

A. It was about 90% ready, yes.

Q. In your opinion at that time, sir, will you state whether you had an opinion at the time as to whether or not if you did not acquire, if one of your competitors would have acquired it?

MR. MCCARTHY: That calls for a conclusion, Your Honor.

MR. TAYLOR: I am asking for an opinion at that time.

THE COURT: I think it is not a conclusion, if you know, of course, that one of your competitors would have acquired it. Do you know that?

A. Yes, Your Honor, they would have.

[Tr. 548]

Q. Now, sir, will you tell us what the effect would have been had a competitor, either the one you were negotiating with or another competitor, acquired that plant as it would effect Sigurd?

A. Well, they would have been shipping into Salt Lake City, into Boise, and into Billings, and other points in Wyoming and Montana at a lower rate than we could have done so and it would have been to a financial disadvantage to the Sigurd Plant to have that plant in the hands of a competitor rather than within Georgia Pacific.

Q. Now, sir, you also have testified about the closing of the mill at New Orleans and the eventual expanding of the Acme facility with some of that equipment. Would you tell us about that, please?

A. We had originally decided that the expansion was to take place in California and to utilize the gypsum deposits that we had acquired in Nevada. When we closed the New Orleans Plant in early 1966, this immediately gave a lot more volume to our Acme, Texas, Plant and as you can see from our '66 and '67 figures that we were at virtual capacity at the Acme Plant after we closed New Orleans. So, at

this point, we said maybe we ought to put that machine in the Acme, Texas, location so that products from that second machine can go both to California and can also be used in the Southwest as well depending upon which market is best at any given time.

Q. Now, sir, in making those projections, do you intend them to be helpful or harmful to the Sigurd operations?

[Tr. 549]

A. Helpful.

Q. Now, by hindsight, sir, do you have an opinion as to whether in fact that has been helpful or harmful to the Sigurd operation?

A. In my judgment it has been helpful. I think that this is proven by the 1967 results at Sigurd which was even by the Plaintiffs' admission a real good year at the Sigurd Plant. If the market price had remained where it was in California and it will get back there sometime, that the Sigurd operation will be a good one and our move will, I am sure, turn out to be proven to be the best move that we could have made.

Q. Now, I think one of counsel, probably Mr. McCarthy, in one of the statements on this record indicated that by way of argument that there should have been a movement of that equipment up to Sigurd. Did you seriously consider that possibility back in 1968 when you decided to expand Acme in 1967 whenever it was?



A. It was in 1967 and being quite frank, no, we did not even consider moving that to Sigurd.

Q. Why not?

A. There were several considerations, the first consideration was the gypsum reserve position at the Sigurd Plant and in our opinion we did not want to cut those reserves in half by doubling the capacity at the Sigurd Plant.

Q. Why?

A. Well, Sigurd is important to our marketing operation. It's our best means of getting into the Intermountain

[Tr. 550]

Area and into the San Francisco Bay Area in Northern California. We wanted to maintain this plant in operation just as long as we can maintain it and by doing that we are going to increase our return on the investment that we have at Sigurd more than we would if we had installed the second machine there.

Q. Alright, sir, you said there were several reasons and you have mentioned one.

A. Well,--

Q. Are there any others?

A. A second reason, of course, would have been that the equipment at New Orleans would have needed extension modifications to have been used at Sigurd. At

New Orleans this equipment was built and designed to operate on natural gas, both the kettles and the board dryers. We don't have natural gas at Sigurd and we operate with coal-fired boilers and this would have meant extensive modification to the equipment. I think that anybody who has been to the Sigurd Plant would recognize the tremendous furnace moving task that would have to take place for Sigurd to get another board machine in on that property.

Q. Now, I invite your attention, sir, to a document marked by the Clerk as exhibit 155 and I will ask you if that is the actual cost of moving the machine from New Orleans to Acme and installing it according to your books and records?

A. To the best of my knowledge it is.

Q. It was prepared from your books and records at your direction, is that correct?

[Tr. 551]

A. Yes, it is.

MR. TAYLOR: We offer it in evidence.

MR. MCCARTHY: Well, I think it is immaterial; we have made this suggestion about it.

THE COURT: I am going to admit it, Exhibit 155.

(Whereupon Exhibit 155 was admitted into evidence by the Court).

Q. Now, sir, would you tell us, in your opinion, how much more it would have cost to move that machinery to Sigurd even assuming that the economics would have justified it?

A. In my judgment it would have been somewhere between 1.8 and 2 million dollars additional to have relocated that equipment in Sigurd, Utah.

Q. Now, sir, there are some projections that were received in evidence by the accountant which would require if production reached those levels to build a much, much larger plant? Is that correct?

A. That is correct.

Q. Have you seen those projections?

A. Yes.

Q. Has your firm during the last few years actually built a plant so that you have some experience in knowing what it would cost to build a plant?

A. Yes, we have.

Q. I will show what has been marked as Exhibit 154 and I will ask you if those are figures taken or that you caused to have taken from your books and records showing the

[Tr. 552]

actual cost of that plant?

A. Yes, to the best of my knowledge.

MR. TAYLOR: We offer Exhibit 154.

MR. MCCARTHY: I think it is immaterial to the case.

THE COURT: I will admit it for such probative value as it may have.

(Whereupon Exhibit 154 was admitted into evidence by the Court)

Q. Now, sir, in your opinion would it cost that amount of money to construct a new plant at Sigurd, Utah, if again the economics were to justify it and your firm decided to build a new plant at Sigurd, Utah?

A. No, I don't believe it would cost that much.

Q. In your opinion how much would it have cost?

A. In my opinion it would be 20% to 25% less than that amount.

Q. Now, if the Court please, for convenience of the Court and counsel, we have had marked as Exhibit 156 a reduced copy of Exhibit 157 and we would offer it at this time simply for convenience?

THE COURT: Is this 157 on the board or easel? This is a reproduction of 157.

MR. TAYLOR: That's correct. It contains nothing additional unless we have inadvertently done it. The only purpose is to be a convenient letter-size copy of the big exhibit.