

8328

CONDITIONAL SALE AGREEMENT

MAY 17 1976 - 11 45 AM

~~INTERSTATE COMMERCE COMMISSION~~

This Conditional Sale Agreement is made on 14 between FMC Corporation, a Delaware corporation (hereinafter called "Builder"), the Louisiana Midland Railway Company and the Fonda Johnstown & Gloversville Railroad (which railroads hereinafter will be called jointly the "Railroads"), Harvey Industries, Inc., a Delaware corporation and Harvey Enterprises, a sole proprietorship.

WHEREAS, Railroads desire to purchase from Builder and Builder desires to sell to Railroad 25 boxcars (hereinafter called the "Equipment");

WHEREAS, the parties anticipate the Builder's rights under this agreement will be assigned to FMC Finance Corporation, a Delaware corporation (hereinafter called the "Assignee"); and

WHEREAS, immediately after accepting delivery of the Equipment, Railroads will sell it to Harvey Industries, Inc. and Harvey Enterprises (hereinafter collectively called "Harvey");

NOW THEREFORE, the parties agree:

1. Definitions. The term Builder whenever used in this agreement means, both before and after any assignment of its rights, the manufacturer of the Equipment. The term Vendor whenever used in this agreement means, before any such assignment, the Builder and, after any such assignment, both any assignee or assignees for the time being of such particular assigned rights regarding such rights, and also any assignor regarding any rights hereunder that are retained or excluded from any assignment. The term Vendee means the Railroads before the sale of Equipment to

Harvey; and shall mean Harvey after any such sale. The Prime Rate shall mean for any calendar month during the term of this agreement, the announced lowest rate charged by the Continental Illinois National Bank and Trust Co. of Chicago, Illinois, as of the first day of that calendar month.

2. Construction and Sale. Builder will construct the Equipment, which shall be twenty-five (25) 50' 6" 70-ton capacity general service, single sheath, boxcars, numbered CAGY 19100 through CAGY 19124 inclusive. Builder will sell and deliver to Vendee and Vendee will purchase from Builder, accept delivery and pay for the Equipment. The design, quality and component parts of each unit of Equipment shall conform at delivery to all Department of Transportation and Interstate Commerce Commission requirements and specifications and to all standards recommended by the Association of American Railroads reasonably interpreted as being applicable to equipment of the character of such units. The Equipment will meet Builder's Specification number 17771, dated March 1976, revised April 13, 1976.

3. Inspection and Delivery. Builder will begin construction of the Equipment promptly and will begin delivery as soon as practicable. Builder will deliver the Equipment F.O.B. Builder's plant, Portland, Oregon.

During construction the Equipment will be subject to inspection and approval by the authorized inspectors of the Vendee. Builder will grant the inspectors reasonable access to its plant. Upon delivery of each unit, Vendee will assume the risk of any loss or damage to or destruction of such unit.

4. Purchase Price and Payment. The price per unit of Equipment shall be \$27,761.84, plus 50% of any charges reasonably incurred by Builder for switching and storage of Equipment after May 6, 1976. The total price for the Equipment shall be \$694,046.10. Subject to the terms and conditions of this agreement, Vendee hereby acknowledges itself to be indebted to Vendor in the amount of, and hereby promises to pay in cash to the Vendor at a place designated by the Vendor, the purchase price of the Equipment as follows:

- a. Vendee has already paid \$400,000, receipt of which is hereby acknowledged by Vendor.
- b. Plus 50% of any charges reasonably incurred by Builder for switching and storage of Equipment after May 6, 1976.
- c. On or before May 1977, \$294,046.10 (hereinafter called the "Conditional Sale Indebtedness") together with interest at the rate of 5-1/2% per annum greater than the Prime Rate, compounded monthly, on the Conditional Sale Indebtedness or on as much thereof as from time to time remains unpaid.

Vendee may prepay the Conditional Sale Indebtedness or any part thereof at any time without incurring any penalty. All payments made by Vendee shall be applied first to the interest payable hereunder and then to the Conditional Sale Indebtedness.

If Builder assigns to Assignee the right to receive the payments to be made by Vendee, Vendee will make such payments to Assignee.

5. Taxes. Vendee will pay all local, state, federal, or foreign taxes [other than net income, gross receipts (except gross receipts taxes in the nature of or in lieu of sales or use taxes), excess profits, and similar taxes] or license fees, assessments, charges, fines or penalties hereafter levied or imposed upon or in connection with or measured by, this agreement or any sale, use, payment, shipment, delivery or transfer of title under the terms hereof. Vendee will keep the Equipment free and clear of all such impositions which might in any way affect the title of the Vendor.

6. Maintenance: Compliance with Laws and Rules. Vendee will cause the Equipment to be maintained in good order and repair at its own expense. Vendee will comply in all respects with all laws of the jurisdictions in which its operations involving the Equipment may extend, with the interchange rules of the Association of American Railroads and with all lawful rules of the Department of Transportation, Interstate Commerce Commission, and any other legislative, executive, administrative, or judicial body exercising any power or jurisdiction over the Equipment. If any such laws or rules require the alteration of any part on any unit of the Equipment, Vendee will conform therewith at its own expense.

7. Indemnities. Vendee will indemnify, protect, and hold harmless the Vendor from and against all losses, damages, injuries, liabilities, claims, and demands whatsoever, regardless of the cause, and expenses in connection therewith, including counsel fees, arising out of the retention by Vendee of a security interest in the Equipment or the use or operation thereof by Vendor, except any losses, damages, injuries, liabilities, claims, and demands arising out of any tort, breach of warranty, or failure to perform any covenant hereunder by Builder. This covenant of indemnity shall continue in effect notwithstanding full payment of all sums due under this agreement, or the satisfaction, discharge, or termination of this agreement in any manner whatsoever.

8. Builder's Warranty. Builder warrants the Equipment will be built in accordance with the requirements, specifications, and standards set forth in Article 2 and, except in cases of articles and materials specified by Vendee and not manufactured by Builder, warrants the Equipment to be free from defects in material and workmanship under normal use and service. The liability of Builder under this warranty shall be limited, as Builder may elect: (i) to repair of the defect at Builder's plant at Portland, Oregon; or (ii) to replacement of the defective part; or (iii) to the cost of repair or replacement according to the Association of American Railroads Code of Rules Governing Condition of and Repairs to Freight and Passenger Cars with Interchange of Traffic. The foregoing warranty of Builder shall begin at the time of delivery of a unit of

Equipment under this Agreement and terminate one year after such delivery. This warranty is in lieu of all other warranties expressed or implied on the part of the Builder. Builder neither assumes nor authorizes any person to assume for it any other warranty liability in connection with the construction and delivery of the Equipment.

Neither the inspection provided in Article 3 nor any examination nor acceptance of any units of the Equipment as provided in Article 3 shall be deemed a waiver or a modification by the Vendee of any rights under this Article 8.

9. Assignments. All rights of Builder under this agreement may be assigned by Builder and reassigned by any assignee at any time. No assignment shall subject any assignee to, or relieve Builder from, any obligations of the Builder to construct and deliver the Equipment or to respond to its warranties contained in Article 8 or relieve Vendee of any of its obligations to Vendor under Article 7.

The Railroad and Harvey represent, for the purpose of assurance to Assignee and for the purposes of inducing Assignee to take such assignment, that in the event of any assignment by Builder, the rights of Assignee to the entire unpaid portion of the purchase price, together with interest thereon, shall not be subject to any defense, set-off, counterclaim, or recoupment whatsoever arising out of any breach of any obligation of Builder.

10. Defaults and Remedies. Any of the following events shall constitute an event of default under this Agreement:

- a. Failure to pay in full the Conditional Sale Indebtedness and the interest thereon or any other sum payable by Vendee hereunder as provided in this Agreement within five (5) days after the payment thereof shall be due; or

- b. Failure to observe and perform any other covenant or agreement to be observed or performed by Vendee hereunder which failure continues for thirty (30) days after written notice of such failure is given to Vendee by Vendor;
- c. Institution of bankruptcy, reorganization, arrangement, insolvency, or liquidation proceedings, or other proceedings for relief under any bankruptcy law or similar law for the relief of debtors, against Vendee which are not dismissed within sixty (60) days after such institution;
- d. Appointment of a trustee or receiver for Vendee for the substantial part of its property and not discharged within sixty (60) days after appointment;
- e. Vendee becomes insolvent or admits in writing its inability to pay its debts as they mature, or makes an assignment for the benefit of creditors or applies or consents to the appointment of a trustee or receiver for it or a major part of its property.

Vendee shall promptly notify Vendor of any event which has come to its attention which constitutes or with the giving of notice or the lapse of time or both would constitute an event of default under this Agreement.

At any time during which an event of default has occurred and is continuing, Vendor may, at its option, exercise any one or more of the following remedies:

- a. Declare the entire unpaid Conditional Sale Indebtedness together with interest thereon to be immediately due and payable without further demand and cause any lease of the Equipment then in effect to be immediately terminated. Upon such declaration, Vendor shall be entitled to recover judgment for the

entire unpaid balance of the Conditional Sale Indebtedness with interest thereon and expenses in connection therewith (including attorneys' fees), and to collect such judgment out of any assets of Vendee wherever situated;

- b. Take immediate possession of the Equipment or any one or more units thereof without liability to return to Vendee any sums theretofore paid and free from all claims whatsoever, and remove the Equipment from possession and use of Vendee or any other person. For such purpose, Vendor may enter upon the premises of Vendee or other premises where the Equipment may be located and may use and employ in connection with such removal any supplies, services, aids and any available trackage or other facilities of Vendee. If Vendor shall designate a reasonable point or points for the delivery of the Equipment to Vendor, Vendee shall at its own expense and risk, forthwith in the usual manner cause the Equipment to be moved to and assembled at such location and shall there deliver the Equipment to Vendor; and upon request by Vendor, Vendee shall furnish for a period not to exceed 150 days, without charge or rent for storage, the necessary facilities at any point or points reasonably selected by Vendor to store the Equipment until it has been disposed of by Vendor. The agreements set forth in this subparagraph (b) are of the essence of this Agreement, and upon application to any court having equity jurisdiction, Vendor shall be entitled to a decree of specific performance of such provisions. Vendee hereby expressly waives any and all claims against Vendor for damages of what-

soever nature in connection with any retaking of any unit of the Equipment in a reasonable manner;

- c. Vendor may elect to retain the Equipment in satisfaction of the unpaid Conditional Sale Indebtedness and interest thereon and dispose of the Equipment as Vendor shall deem best. Vendor shall give Vendee written notice of its election to retain the Equipment at least thirty (30) days prior to any disposal of the Equipment by Vendor;
- d. Vendor may at its election and upon reasonable notice to Vendee, with or without retaking possession of the Equipment, sell the Equipment or any one or more units thereof in one lot or in separate lots without the necessity of gathering at the place of sale the property to be sold free from any and all claims of Vendee at public or private sale, provided that if Vendee shall tender full payment of the total unpaid Conditional Sale Indebtedness together with interest thereon and expenses incurred by Vendor in arranging for such sale (including reasonable attorneys' fees) the possession of and title to the Equipment shall pass to Vendee. Vendor may purchase at any such sale or sales. The proceeds of any such sale or other disposition, less the attorneys' fees and any other expenses incurred by Vendor in retaking possession of, removing, storing, holding, preparing for sale and selling or otherwise disposing of the Equipment, shall be credited on the amount due to Vendor under the provisions of this Agreement;
- e. Vendor may exercise such one or more other rights it may have at law or in equity or otherwise to enforce its rights hereunder.

Railroad will pay all reasonable expenses, including attorneys' fees, incurred by Builder in enforcing its remedies under this Agreement.

If after applying all sums of money realized by Vendor under the remedies herein provided, there shall remain any amount due it under the provisions of this Agreement, Vendee shall pay the amount of such deficiency to Vendor upon demand, and if Vendee shall fail to pay such deficiency, Vendor may bring suit therefore and shall be entitled to recover a judgment therefore against Vendee. If after applying the aforesaid all sums realized by Vendor, there shall remain a surplus in the possession of Vendor, such surplus shall be paid to Vendee or to such person as may be entitled thereto.

Every remedy specified herein shall be in addition to every other remedy now or hereafter existing at law or in equity. Every remedy may be exercised at any time and simultaneously and as often and in such order as the Builder may deem expedient. All powers and remedies shall be cumulative. The exercise of one shall not be a waiver of the right to exercise the right of any other. Acceptance of any payment after it shall have become due will not alter or affect the Railroad's obligations or the Builder's rights with respect to any subsequent payments.

11. Recording. Vendee will cause this agreement, any assignments hereof, and any amendments or supplements hereto to be filed and recorded with the Interstate Commerce Commission in accordance with section 20c of the Interstate Commerce Act. Railroad and Harvey will from time to time do and perform any other act and will execute, acknowledge, deliver, file, register, deposit and record any and all further instruments required by law or reasonably requested by the Builder or Assignee for

the purpose of proper protection to the satisfaction of the Builder or Assignee, of its title to the Equipment. Vendee will promptly furnish to Vendor certificates or other evidence of filing, registering, depositing, and recording such documents.

12. Insurance. Vendee will maintain physical damage, fire, and extended cover insurance with a reliable insurance company to the full insurable value of the Equipment. The extent of such coverage shall not be less than the unpaid purchase price. Upon demand, Vendee will furnish Vendor with a copy of such insurance policies or a certificate of such insurance.

Such insurance shall name as an additional insured and loss payee Vendor and shall provide that it cannot be canceled except upon thirty (30) days prior written notice to Vendor.

13. Contingencies. Vendor shall not be liable to Vendee for any loss or damage suffered as a result of Builder's failure to deliver or delay in delivering the Equipment where such failure or delay is caused by fire, flood, natural disaster, labor trouble (including strikes, slow-downs, or walk-outs), war, riot, civil disorder, embargo, government regulations or restrictions of any kind, expropriation of plant by federal or state authority, interruption of or delay in transportation, power failure, inability to obtain materials or supplies, accident, explosion, act of God, or other causes of like or different character beyond the Builder's control.

14. Disclaimer of Consequential Damages. VENDOR SHALL NOT BE LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT. CONSEQUENTIAL DAMAGES SHALL INCLUDE LOSS OF USE,

INCOME, OR PROFIT, OR ANY OTHER ECONOMIC LOSS AND LOSS FROM PHYSICAL DAMAGE TO PROPERTY (INCLUDING PROPERTY HANDLED OR PROCESSED IN THE EQUIPMENT).

15. Possession and Use. Vendee, so long as an event of default shall not have occurred and be continuing hereunder, shall be entitled to the use and possession of the Equipment, subject to all the terms and conditions of this Agreement. Vendee shall not permit any unit of the Equipment to be used in any service involving the regular operation and maintenance thereof outside the continental United States.

16. Notice. Any notice to the parties designated below shall be deemed to be properly served if delivered or mailed as follows:

a. To Builder at:

4760 Northwest Front Avenue
Box 3616
Portland, Oregon 97208

b. To Railroads at:

Louisiana Midland Railway Company
P. O. Box 110
Jena, Louisiana 71342

Fonda Johnstown & Gloversville Railroad
One Railroad Avenue
Gloversville, New York

c. To Assignee at:

200 East Randolph Drive
Chicago, Illinois 60615

d. To Harvey at:

P. O. Box 110
Jena, Louisiana 71342

or to any other address furnished in writing by one party to the other parties.

17. Security Interest. Vendor shall retain a security interest in the Equipment until Vendee shall have made all its payments and shall have performed all its other agreements herein. The retention of a security interest is solely to secure performance of Vendee's obligations under this Agreement. Beneficial ownership of the Equipment shall remain in the Vendee. Any parts installed on and additions and replacements made to any unit of Equipment shall constitute accessions to the Equipment and so shall be subject to the terms and conditions of this agreement and be included in the term Equipment.

When Vendor shall have been paid the full Conditional Sale Indebtedness, together with interest and all other payments provided herein, and all Vendee's obligations shall have been performed, absolute right to possession of, title to, and property in the Equipment shall vest in the Vendee without further transfer or action by Vendor. At such time Vendor shall at the request and expense of Vendee execute to Vendee a bill of sale for the Equipment as is, where is, and without any warranty except that the Equipment is free from all liens and encumbrances created by Vendor.

18. Execution. This agreement may be executed in any number of counterparts and such counterparts together shall constitute one in the same contract.

IN WITNESS WHEREOF, the parties have hereby executed this instrument.

[Corporate Seal]

FMC CORPORATION

By

Daniel C. Smith
Daniel C. Smith
Vice President

Attest:

Robert L. Day
Robert L. Day
Assistant Secretary

and sealed on behalf of said corporation by authority of its board of directors and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

(Notarial Seal)

Notary Public

My commission expires:

STATE OF *MISSISSIPPI*)
COUNTY OF *LOWNDES*) ss.:

On the *14th* day of *MAY*, 1976, before me personally appeared *CRAIG E. BURROUGHS*, to me personally known, who, being by me duly sworn, says that he is the President of Louisiana Midland Railroad, that the seal affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its board of directors, and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

(Notarial Seal)

Morphy H. Dale
Notary Public

My Commission expires: *Nov. 13, 1979*

STATE OF *NEW YORK*)
COUNTY OF *FULTON*) ss.:

On the *17th* day of *Nov*, 1976, before me personally appeared *WALTER RICH*, to me personally known, who, being by me duly sworn, says that he is the President of Fonda, Johnstown & Gloversville Railroad, that the seal affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its board of directors, and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

(Notarial Seal)

Edward J. Hall
Notary Public

My Commission expires:

March 30, 1978

STATE OF *NEW YORK*)
COUNTY OF *NEW YORK*) ss.:

On the *11* day of *May*, 1976, before me personally appeared Harvey Polly, to me personally known, who, being by me duly sworn, says that he is the President of Harvey Industries, Inc., that the seal affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its board of directors, and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

(Notarial Seal)

My Commission expires:

STATE OF *NEW YORK*)
COUNTY OF *NEW YORK*) ss.:

On the *11* day of *May*, 1976 before me personally appeared Harvey Polly, to me known to be the person described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

(Notarial Seal)

My Commission expires:

Irvin Koffman
Notarial Seal

IRVIN KOFFMAN
Notary Public, State of New York
No. 31-8376300
Qualified in New York County
Commission Expires March 30, 1977

Irvin Koffman
Notarial Seal

IRVIN KOFFMAN
Notary Public, State of New York
No. 31-8376300
Qualified in New York County
Commission Expires March 30, 1977