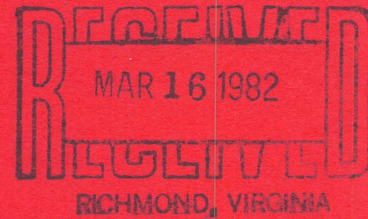


226VA527

CLERK
SUPREME COURT OF VIRGINIA



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 811279

NORFOLK & WESTERN RAILWAY COMPANY

Appellant

v.

DONALD F. BAKER

Appellee

JOINT APPENDIX

T. C. Bowen, Jr.
Attorney at Law
P. O. Box 191
Tazewell, VA 24651

Counsel for Appellant

Hugh P. Cline
Cline, McAfee & Adkins
1022 Park Avenue, NW
Norton, Virginia 24273

Counsel for Appellee

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Filed in the Clerk's Office the 29th day of October, 19 79

Wait Tax \$ 25.00
Fee 1.00
Deposit 30.00
Total Paid \$ 56.00

Teste:

Rhea J. Moore Jr.
Luzie B. Hackworth

Clerk

D. C.

MOTION FOR JUDGMENT

TO: THE HONORABLE JUDGES OF SAID COURT:

Plaintiff respectfully represents unto your Honors as follows:

1. On or before November 17, 1978, the defendant Norfolk and Western Railway Company (hereinafter N & W), delivered to a railway siding in the eastern part of the Town of Richlands, Tazewell County, Virginia, a railway car of the type commonly called "boxcars." This car was loaded with bags of flour which had been purchased by the Tazewell Farm Bureau, Inc., a retail business in Richlands, Virginia operating under the name of Richlands Farm Bureau. Said car was designated as car number RBWX 60312 of Burlington Northern. Plaintiff believes, and alleges, that said car was the property of defendant and under its sole control and use.

2. Plaintiff believes, and alleges, that N & W was the initial, intermediate and delivering carrier of the aforesaid flour.


3. At the aforesaid time and place, the plaintiff was an employee of the Richlands Farm Bureau whose duties included the unloading of goods consigned to his employer from railway cars. Plaintiff was lawfully engaged in the unloading of said car at the aforesaid time and place.

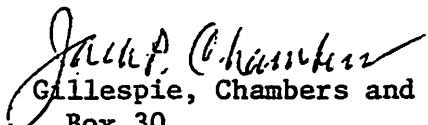
4. At the aforesaid time and place, and before, the defendant owed the plaintiff the duty of exercising ordinary care to furnish a car in such condition that it could be unloaded with reasonable safety, and the duty of inspecting any such car to determine whether it was reasonably safe for unloading and to repair or give warning of any dangerous condition discoverable by inspection.

5. At the aforesaid time and place, and before, the defendant breached the aforesaid duties and did in fact furnish an old car with a defective mechanism for opening and closing the door thereon. As plaintiff was assisting in the closing of the door upon said car, it fell from the car and toppled onto the plaintiff causing him severe and painful injuries. The defendant's breach of duties owed plaintiff as set forth above constitute negligence which was the sole proximate cause of the accident and plaintiff's injuries.

6. The defendant's negligence as aforesaid proximately caused the plaintiff to suffer severe, permanent and disabling injuries about his body, primarily his back and lower limbs, caused the plaintiff to suffer physical pain and mental anguish which continue into the future, and caused the plaintiff to sustain expenses for medical and hospital services, drugs and medical equipment which continue into the future.

WHEREFORE, plaintiff asks that he be granted judgment against the defendant for One Hundred Eighteen Thousand and no/100 Dollars (\$118,000.00) together with interest thereon from November 24, 1978 and his costs herein expended.


Donald F. Baker


Gillespie, Chambers and Combs
Box 30
Tazewell, VA 24651
Counsel for Plaintiff

Nov 20

1979

Term:

11 11 1

GROUND S OF DEFENSE

The defendant, Norfolk and Western Railway Company, by counsel, files this its grounds of defense to the motion for judgment filed against it in this action.

1. Defendant admits that it delivered a boxcar to the siding in Richlands, Tazewell County, Virginia, consigned to Richlands Farm Bureau. That said boxcar was furnished by Burlington Northern, Inc. to Gooch Mill, Lincoln, Nebraska, the shipper and received by defendant from Burlington Northern, Chicago, Illinois, November 13, 1978, and delivered by defendant to the siding in Richlands, Virginia on November 17, 1978. Defendant denies that said car was its property or that it was under its sole control and use, but it was received from a connecting carrier and delivered by defendant to said siding.

2. Defendant admits that it was the delivering carrier of said boxcar but denies that it was the initial or intermediate carrier.

3. Defendant admits the allegations contained in Paragraph 3 of the motion for judgment.

4. Defendant denies the allegations contained in Paragraph 4 of the motion for judgment but alleges that as the delivering carrier, defendant was under a duty to exercise reasonable care in discovering defects in cars and to give consignee notice of any defective conditions which are discoverable by a reasonable inspection.

5. Defendant denies that it breached any duty owing by it to plaintiff. Defendant alleges that said boxcar door was a plug type door with track at top and bottom. That said door when shut does not extend beyond the frame of the car. That when the door is opened the same is supported by two bars on cants extending from the tracks at the top and bottom and the door moves laterally to the side of the car and then is slid on the tracks to expose the door opening. That plaintiff and employees of Tazewell Farm Bureau removed the seal on the car door and the door opened easily by manual operation and removed a load of flour from the boxcar, at which time they closed the door manually without any trouble. That plaintiff and employees of Tazewell Farm Bureau returned a second time to open the door; and when it became jammed, they pushed the car door with the truck which may or may not have caused the tracks at the top of the door to give way from the boxcar when the door was being closed the second time.

Even if door was in a defective condition when received by defendant such condition was concealed and latent and could not be discovered by defendant by any reasonable inspection prior to delivering the boxcar to the siding.

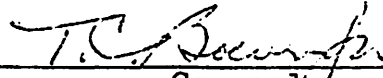
6. Defendant denies that it was guilty of any negligence which proximately caused plaintiff's injuries and is not liable to plaintiff for the amount alleged in the motion for judgment or for any other sum whatever.

7. Defendant is not advised as to the allegations of injury and damage to plaintiff and therefore calls for strict proof of the same.

8. All allegations contained in the motion for judgment which are not expressly admitted herein are denied.

NORFOLK AND WESTERN RAILWAY
COMPANY


By


Counsel

T. C. BOWEN, JR., P. C.
Box 191
Tazewell, Virginia
Counsel for Defendant

CERTIFICATE

The undersigned does certify that he mailed a
copy of the foregoing grounds of defense to Jack P. Chambers,
Gillespie, Chambers and Combs, Box 30, Tazewell, Virginia
24651, this 19th day of November, 1979.


Counsel

INSTRUCTION 3 - A

The Court instructs the jury that Norfolk and Western Railroad owed a duty to Donald Baker, who was unloading the freight car in question, to provide a freight car with no defective or insecure equipment.

If N & W failed to perform this duty, then it was negligent.

Refused as offered
2/19/51
R.L.L.

INSTRUCTION NO. 3-B

The Court instructs the jury that Norfolk and Western Railroad owed a duty to Donald Baker, who was unloading the freight car in question, to provide a freight car with no defective or insecure equipment.

If you believe by a preponderance of the evidence that N & W failed to perform this duty, then it was negligent; and if you further believe that such negligence was the sole proximate cause of the plaintiff's injuries, then you shall find your verdict in favor of the plaintiff.

Baker Refused
2/17/81
R.L.P.

INSTRUCTION 1

Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The issues in this case are:

- (1) Was the defendant negligent?
- (2) If he was negligent, was his negligence a proximate cause of the accident?

On these issues the plaintiff has the burden of proof.

- (3) Was the plaintiff negligent?
- (4) If he was negligent, was his negligence a proximate cause of the accident?

On these issues the defendant has the burden of proof.

- (5) If the plaintiff is entitled to recover, what is the amount of his damages?

On this issue the plaintiff has the burden of proof.

Your decision on these issues must be governed by the instructions that follow.

*Given
2/17/81
R.L.P.*

INSTRUCTION NO. 2

A railroad that is the delivering carrier owes a duty to an employee of the company who unloads a freight car to use ordinary care to inspect the car to discover any fairly obvious defect in the car's construction or state of repair, and a duty to repair or give warning of any dangerous condition discoverable by the inspection.

If a railroad fails to perform any or all of these duties, then it is negligent.

*Given
2/17/91
R.L.P.*

INSTRUCTION 3

A proximate cause of an accident, injury, or damage is the cause which in natural and continuous sequence produces the accident, injury, or damage. It is a cause without which the accident, injury, or damage would not have occurred.

Brown
2/17/81
R.L.P.

INSTRUCTION 4

You shall find your verdict for the plaintiff if he has proved by the greater weight of the evidence that:

- (1) the defendant was negligent; and that
- (2) the defendant's negligence was the sole proximate cause of the plaintiff's accident and damages.

You shall find your verdict for the defendant if:

- (1) the plaintiff failed to prove either or both of the two elements above; or if
- (2) the defendant has proved by the greater weight of the evidence that the plaintiff was contributorily negligent and that his contributory negligence was a proximate cause of the accident.

*Given
2/17/81
R.L.P.*

INSTRUCTION 5

When the defendant claims contributory negligence as a defense, he has the burden of proving by the greater weight of the evidence that the plaintiff was negligent and that this negligence was a proximate cause of the plaintiff's injuries. Contributory negligence may be shown by the defendant's evidence or by the plaintiff's evidence.

Prum
2/17/81
R.L.P.

INSTRUCTION to

Negligence is the failure to use ordinary care. Ordinary care is the care a reasonable person would have used under the circumstances of this case.

Given
2/17/81
R.L.P.

INSTRUCTION NO. 7

If you find your verdict for the plaintiff, then in determining the damages to which he is entitled, you may consider any of the following which you believe by the greater weight of the evidence was caused by the negligence of the defendant:

- (1) any bodily injuries he sustained and their effect on his health according to their degree and probable duration;
- (2) any physical pain and mental anguish he suffered in the past;
- (3) any inconvenience caused in the past and any that probably will be caused in the future;
- (4) any medical expenses incurred in the past;
- (5) any earnings he lost because he was unable to work at his calling;

Your verdict should be for such sum as will fully and fairly compensate the plaintiff for the damages sustained as a result of the defendant's negligence.

Given
2/17/81
R.L.P.

INSTRUCTION 8

When a party has the burden of proof on an issue, then he must prove that issue by the greater weight of all the evidence. This is sometimes called the preponderance of the evidence. It is that evidence which you find more convincing. The testimony of one witness whom you believe can be the greater weight of the evidence.

Brien
2/17/81
L.F.P.

INSTRUCTION NO. A

The Court instructs the jury that the defendant, Norfolk and Western Railway, as delivering carrier, owed a duty to plaintiff to make a reasonable inspection of the car to ascertain if it was reasonably safe for unloading and to repair or give warning of any dangerous condition in the car discoverable by such an inspection.

Such reasonable inspection must be an inspection thereof sufficiently thorough to ascertain whether there is any fairly obvious defect in its construction or state of repair which constitutes a likely source of danger and if you believe that the defendant, Norfolk and Western Railway Company, did make such an inspection, and that no obvious defect was apparent, or if you believe that had defendant, Norfolk and Western Railway Company, made such a reasonable inspection, no such defect would have been ascertained, then the Norfolk and Western Railway Company is not guilty of any negligence which proximately caused the accident and you shall find a verdict for the defendant.

Brum
2/17/81
R.L.P.

INSTRUCTION NO. B

The Court instructs the jury that the mere fact that there has been an accident, does not of itself entitle the plaintiff to recover against defendant, Norfolk and Western. In order to recover against the defendant, Norfolk and Western, the jury must believe from a preponderance of the evidence that the defendant, Norfolk and Western, was guilty of negligence and that any such negligence was a proximate cause of the accident.

And if the jury are uncertain as to whether any such negligence on the part of Norfolk and Western has been thus proven by the evidence, or if you believe that it is just as probable that Norfolk and Western was not guilty of any such negligence as it is that it was, then your verdict shall be in favor of defendant, Norfolk and Western.

Brian
2/17/81
R.L.P.

INSTRUCTION NO. 6

The Court instructs the jury that a verdict must not be based upon surmise, conjecture or sympathy for any of the parties, but must be based solely upon the evidence and the instructions of the Court.

Deen
2/17/41
R.L.P.

DONALD F. BAKER

Plaintiff

v.

NORFOLK & WESTERN RAILWAY COMPANY

Defendant

We, the jury, on the issues joined, find in favor of the plaintiff, Donald F. Baker, and fix his daamges at \$ One
Hundred and Eighteen Thousand.

Otis E. Kinder

Foreman

DONALD F. BAKER

Plaintiff

v.

NORFOLK & WESTERN RAILWAY COMPANY

Defendant

We, the jury, on the issue joined, find in favor of the defendant.

Foreman

T. C. Bowen, Jr.
Counsel

MOTION

Defendant moves the Court to set aside the verdict of the jury for the following reasons:

1. The verdict is not supported by the evidence and is contrary to the evidence.

2. Defendant was not allowed to show that Plaintiff suffered no loss of earnings occasioned by the accident and instructed the jury to consider loss of earnings as an item for damages.

NORFOLK AND WESTERN RAILWAY COMPANY

By *T. C. Bowen, Jr.*
Counsel

T. C. Bowen, Jr.
T. C. Bowen, Jr., P.C.
Box 191
Tazewell, Virginia 24651
Counsel for Defendant

CERTIFICATE

I, T. C. Bowen, Jr., hereby certify that I have this 13th day of March, 1981, mailed a true copy of the foregoing Motion to Cline, McAfee & Adkins, Attorneys at Law, Professional Arts Building, Norton, Virginia 24273, Counsel of Record for Plaintiff.

T. C. Bowen, Jr.
020

FINAL ORDER

On the 17th day of February, 1981, the parties in the above styled action, by counsel, announced to the Court that they were ready for trial. A Jury of seven persons, Willie A. Buchanan, Gregory McClanahan, E. R. Hughes III, Otis Elbert Kinder, Virginia Abel Owens, Ella Ann Brewster and Ritta Nelson Whitt, was called and sworn to well and truly try, and a true verdict render upon the issues joined between the Plaintiff and the Defendant.

Prior to the presentation of evidence, upon motion of Plaintiff, the Court ordered that Defendant would not be allowed to produce any evidence that Plaintiff did not suffer any loss of earnings occasioned by the accident, pursuant to Code Section 8.01-35 to which ruling of the Court, Defendant duly excepted.

After opening statements by Counsel for Plaintiff and Defendant, Plaintiff presented his evidence and at the conclusion thereof, the Defendant moved the Court to strike Plaintiff's evidence and enter judgment for the Defendant, which motion was overruled to which ruling of the Court, the Defendant duly excepted.

The Defendant then presented evidence and at the conclusion thereof, renewed its former motion which was overruled, and the Defendant duly excepted to the Court's ruling.

Plaintiff and Defendant submitted instructions to the Court and the Court indicated its intention to give Instructions 1 through 8 and A through C. The Defendant objected to the Court including Paragraph No. 5 in Instruction No. 7 for the Jury to consider any earnings lost by the Defendant because he was unable to work because Defendant had admitted in Discovery depositions that he had lost no earnings and had received in addition thereto

Workman's Compensation, which objection was overruled by the Court, to which ruling the Defendant duly excepted.

After hearing the instructions of the Court and the argument of Counsel for the parties, the Jury retired to its room to consider its verdict and after deliberation, returned and rendered the following verdict:

"We, the Jury, on the issues joined find in favor of the Plaintiff, Donald F. Baker, and fix his damages at \$118,000. Otis E. Kinder, Foreman."

Upon receiving the verdict, the Court discharged the Jury from further consideration of this case.

After the Jury was discharged, the Defendant moved the Court to set aside the verdict and to enter judgment in favor of Defendant and request the time within which to file written grounds in support of said motion.

Thereupon, the Court granted the Defendant leave to file in writing its grounds in support of said motion and directed that Defendant file such grounds and brief in support of said motion, if any, by March 15, 1981.

On the 23rd day of April, 1981, the parties appeared before the Court and the Court heard argument on the motion to set aside the verdict and the Court, having considered said motion and the brief filed in support thereof, is of the opinion that said motion should be overruled.

It is, therefore, considered and ordered by the Court that the motion of Defendant to set aside the verdict of the Jury in this case be, and the same hereby is, overruled and it is further ordered that Plaintiff recover of and from the Defendant the sum of \$118,000 pursuant to the verdict of the Jury, to which ruling of the Court the Defendant duly excepted.

The Defendant indicated to the Court its intention to appeal to the Supreme Court and moved the Court to suspend the execution of said judgment and to fix and determine the amount of an appeal bond pursuant to Section 8.01-676 of the Code of Virginia and Plaintiff, by Counsel, indicated to the Court that a nominal bond would be sufficient. It is ordered that execution on said judgment be, and the same hereby is, suspended, so long as petitioner timely prosecutes the appeal and thereafter so long as the matter is under consideration by the Supreme Court, provided the Defendant or someone for it shall file an appeal bond in the Clerk's Office of this Court within 30 days from the date of this order, in the penalty of \$1,000 conditioned as set forth in said Code section.

Thereupon, Defendant advised the Court that a transcript of the evidence introduced at the trial had been filed in the Clerk's Office in this suit on April 2, 1981, for consideration by the Court of the aforesaid motion to set aside the verdict of the Jury and moved the Court that said transcript be made a part of the record, it is therefore, ordered that said transcript be, and the same is hereby, made a part of the record.

Enter this Order this 4th day of
May, 1981.

Robert L. Powell
Judge

Carol E. McAfee
Counsel for Plaintiff

T. C. Bowers, Jr.
Counsel for Defendant

ASSIGNMENTS OF ERROR

A. The court erred in denying the motion of N & W to strike the evidence and to set aside the verdict of the jury because the evidence was insufficient to show, as a matter of law, that N & W was guilty of negligence, or that the negligence, if any, was a proximate cause of the accident.

B. The court erred in not allowing N & W to show that Baker had no loss of earnings and in granting instruction No. 7, section 5 directing the jury to consider Baker's loss of earnings in determining damages because of Code Section 8.01-35. (T:117).

811279

pull 8/19

32-6832
CLERK
SUPREME COURT OF VIRGINIA

DONALD F. BAKER

PLAINTIFF 1981

VERSUS

RICHMOND, VIRGINIA

NORFOLK AND WESTERN RAILWAY CO. ✓
%JOHN S. SHANNON, REGISTERED AGENT
8 NORTH JEFFERSON STREET
ROANOKE, VIRGINIA 24011

DEFENDANT

VIRGINIA:

IN THE CIRCUIT COURT OF TAZEWELL COUNTY

APPEARANCES:

HUGH P. CLINE, ESQUIRE
1022 Park Avenue, S. W.
Norton, Virginia 24273
(Counsel for the Plaintiff)

T. C. BOWEN, JR.
P. O. Box 191
Tazewell, Virginia 24651
(Counsel for the Defendant)

DISCOVERY DEPOSITION OF JUNE 17th, 1980.

Received from Notary Public and filed
in the Clerk's Office.

9-24-1980
Susie P. Backus
Deputy Clerk

2	<u>WITNESS</u>	<u>EXAMINATION BY:</u>	<u>PAGES</u>
3	Arnold T. Pennington	Hugh P. Cline	3 - 27
4	R. L. Austin	Hugh P. Cline	28 - 48
5		T. C. Bowen, Jr.	48 - 49
6		Hugh P. Cline	49
7	Claude H. Reynolds	T. C. Bowen, Jr.	49 - 60
8		Hugh P. Cline	60 - 63
9	Larry Wayne Sparks	T. C. Bowen, Jr.	63 - 79
10	Arnold T. Pennington	Hugh P. Cline	79 - 82
11			
12	CERTIFICATION		83
13			
14	<u>EXHIBITS:</u>		
15	1	Letter dated November	5
16		20, 1979, with seven	
		pages attached.	
17	2	Record of Movement	12
18	3	Photograph of Car Door	34
19	4	Photograph of Car Door	34
20	5	Inspection Sheet	43
21			
22			
23			
24			
25			

2

MR. BOWEN: That's all.

3

REDIRECT EXAMINATION

4

By Mr. Cline:

5

Q. That would not interfere with the
sliding of it, would it?

6

7

A. No, sir, it would not.

8

MR. CLINE: That's all.

9

FURTHER THE DEPONENT SAITH NOT.

10

/s/ R. L. Austin

11

12

Herald L. McCall
NOTARY PUBLIC

13

14

The proceedings recessed at 11:50 A.M.

15

The proceedings resumed at 1:13 P.M.

16

CLAUDE H. REYNOLDS

17

having first been duly sworn, was

18

examined and deposed as follows:

19

DIRECT EXAMINATION

20

By Mr. Bowen:

21

Q. Please state your name, age, and
address?

22

23

A. Claude H. Reynolds, Raven, Virginia,
Box 411.

24

25

Q. Thank you. And, how old are you?

2

A. Twenty.

3

4

5

Q. Were you working with the Richlands Farm Bureau, when Don Baker was hurt unloading a boxcar that had flour in it?

6

A. Yes.

7

Q. Were you with him at the time?

8

A. Yes.

9

Q. On that occasion, who else was with you?

10

A. Larry Sparks, myself, and Don Baker.

11

12

Q. Did the three of you go to unload that boxcar of flour?

13

14

A. Yes. Not to unload the whole thing, we went to get a load.

15

Q. Did you go down in a truck?

16

A. Yes, sir.

17

18

Q. And, how many truck loads would it take to unload a boxcar?

19

A. About three or four, I'd say.

20

21

Q. Uh huh. Was it a pretty good size truck?

22

A. Yes.

23

24

Q. Do you know what kind of a truck it might have been?

25

A. No, not for sure. It was a Ford or

2

Chevrolet, one of them, they use to haul feed down

3

from Tazewell, at the Farm Bureau down here at

4

Richlands.

5

Q. Do you know how many tons it might

6

hold, or something like that?

7

A. No, not for sure.

8

Q. Pretty good size truck?

9

A. Yes.

10

Q. The three of you arrived at the boxcar,

11

do you remember whether or not the seal was still on

12

the boxcar, or not?

13

A. I believe the seal, best as I can

14

remember, I believe the seal was on it. I believe...

15

I don't know for sure.

16

Q. Was the seal removed prior to opening

17

the car, is that the usual procedure?

18

A. Yeah. If it wasn't on there the

19

second time, then we removed it the first time...

20

the first load, because we made two trips down

21

there. That was on the second trip when the accident

22

happened.

23

Q. The first time that you opened the

24

boxcar, did you have any trouble opening the car?

25

A. No.

2

Q. Did you get a load of flour unloaded,
and into the truck?

3

4

A. Yes.

5

Q. Did you close the car door?

6

A. Yes. After we got the first load, we
closed the car door.

7

8

Q. Did it have any trouble closing the
door?

9

10

A. No.

11

Q. Now, did you bring that load of flour
on up to the Farm Bureau?

12

13

A. Yes.

14

Q. And unloaded it?

15

A. Yes.

16

Q. Did you go back for a second load of
flour?

17

18

A. Yes, we went back for the second load.

19

Q. Now, did you have any trouble with the
car door the second time?

20

21

A. Yes, we couldn't...we had to crowbar
and everything trying to move that handle around to
get it opened, but we couldn't do no good. We couldn't
get it opened.

22

23

24

25

Q. How was it opened the second time?

811279

VIRGINIA:

IN THE CIRCUIT COURT OF TAZEWELL COUNTY

DONALD F. BAKER,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY
COMPANY,

Defendant.

The above-styled case came on to be heard
before the HONORABLE ROBERT L. POWELL, Judge of the
Circuit Court for Tazewell County, Virginia, at 9:52 a. m.

APPEARANCES:

On Behalf of the Plaintiff:

CARL McAFEE, ESQUIRE
Norton, Virginia, and

HUGH P. CLINE, ESQUIRE
Norton, Virginia

On Behalf of the Defendant:

T. C. BOWEN, JR., ESQUIRE
Tazewell, Virginia

Extract of the Proceedings of Trial of February
17th, 1981.

Received from Notary Public and filed
in the Clerk's Office.

APR. 2 1981 19

[Signature] Clerk

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
----------------	---------------	--------------	-----------------	----------------

Arnold T. Pennington	3			
Donald F. Baker	10	30	48 52	51
Willian R. Yost	64	67	86	
R. L. Austin	87	93	108	111
Claude H. Reynolds	113	(By Deposition)		
Arnold T. Pennington	114			

MOTION

Strike	56 (Bowen)	58 (McAfee)	62 (Bowen)	63 (Court)
Strike	115 (Bowen)	116 (McAfee)		117 (Court)

The following is an extract of the proceedings of trial, before the Honorable Robert L. Powell, Judge of the Circuit Court of Tazewell County, Virginia, and a Jury of 7.

P R O C E E D I N G S

(9:52 a. m.)

THE COURT REPORTER WAS DULY SWORN.

THEREUPON came

ARNOLD T. PENNINGTON

called as an adverse witness on behalf of the Plaintiff, who, having been first duly sworn according to law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McAFEE:

Q. Would you state your full name?

A. Arnold T. Pennington.

Q. With whom are you employed?

A. Norfolk and Western Railway Company.

Q. And, in what capacity?

A. I'm a Claim Agent.

Q. Mr. Pennington, did you take the three photographs, or were they taken under your supervision, that we've been referring here to?

A. Yes, I took them.

Q. When did you take them?

2

A. I believe it was the day following the accident, or just a day or so following the accident.

3

4

Q. Had the car been moved, or had anything been done to the car when you examined it?

5

6

A. The car had not been moved.

7

Q. Well, let's identify them. Let me show you one, and see if you can identify that one?

8

9

A. Yes, this is the position the car was in when I took the picture.

10

11

MR. McAFEE: Could we have that marked as Plaintiff's Exhibit 1, Your Honor?

12

THE COURT: Have you seen these photographs?

13

MR. BOWEN: Yes, sir.

14

Q. I'll show you another one, and ask if you can identify it? Is that the car in question?

15

16

A. Yes, sir.

17

Q. Did you take the picture?

18

A. Yes, I did.

19

Q. And, was that the day of, or the day after the accident?

20

21

A. It was the day following the accident, I believe. I don't recall right now what day I did take those pictures.

22

23

MR. McAFEE: Could we have that marked as Plaintiff's Exhibit 2.

24

25

(Exhibit's were marked.)

A. This is a picture of the opposite side of the car, with the door intact.

Q. Alright, that's the opposite side?

A. Yes.

Q. Did you likewise take that?

A. Yes, I did.

MR. McAFEE: I'd like to have that marked Plaintiff's Exhibit 3, Your Honor.

(Exhibit was marked.)

Q. Do you know where the door was located, at the time when you arrived on the scene?

A. Yes. The door was laying on the ground, on the outside, or the position it fell in, and it had been moved - I understand - in order...

Q. Did you ever see it, in its position, as it rested after it fell from the car?

A. No, I did not.

Q. Do you have a picture of the door?

A. I have a picture of the upper side of it, but due to the weight of it I couldn't lift it and get a picture of the bars, or the control mechanism.

Q. Was any changes or alterations done to the car, at the time you took those pictures?

A. Not to my knowledge.

Q. Is the Norfolk and Western Railroad, a company - a common carrier?

2

A. Yes, sir.

3

Q. And, have you made a check on the background of this particular car, where it originated from?

4

5

A. No, sir, I did not make that check.

6

Q. Do you know whether or not it was transported on N & W Rail Equipment?

7

A. Yes, it was, to Richlands.

8

Q. And, it was on N & W Property, I believe, where it was side tracked?

9

10

A. Yes, it's known as the old Richlands Station Siding, I believe they call it.

11

12

Q. And, it was on N & W Property?

13

A. Yes, sir.

14

Q. And, to your knowledge, as an employee of the N & W, is it engaged in interstate commerce?

15

16

A. Yes, sir.

17

Q. And, are you familiar with the Safety Appliance Act?

18

A. Somewhat. Not thoroughly.

19

Q. What was the weight of the door, Mr. Pennington?

20

21

A. I didn't have the door weighed myself, but the estimated weights I got was from eight to sixteen hundred pounds.

22

23

24

Q. I believe you were present when some depositions were taken, were you not?

25

2

A. Yes, sir.

3

4

Q. I'll show you an Exhibit, which was attached as Austin Exhibit 5, and ask you if you recognize that Exhibit?

5

6

A. Yes, sir.

7

Q. What is that?

8

A. This is our equipment inspection report, made by Motive Power people.

9

10

Q. Is that part of the records, of the file at Norfolk and Western Railroad?

11

A. Yes, it would be.

12

13

MR. McAFEE: Your Honor, we'd like to move that into evidence as Plaintiff's Exhibit 4, and also move for the introduction of Plaintiff's Exhibits 1, 2, and 3, at this time.

14

15

MR. BOWEN: No objection.

16

17

THE COURT: Alright. Let the Court Reporter mark that.

18

(Exhibit's were marked.)

19

20

Q. I'll show you also an exhibit...I'll show you also a part of the Exhibit's of - I guess that's your Exhibit Number 2, and ask you if you can identify that?

21

22

23

A. Yes, it's a record of movement, of the cars.

24

Q. Alright. This particular car?

25

A. I suppose, its got this particular car

2

number on it.

3

Q. You've attached it as an exhibit to your deposition, didn't you Mr. Pennington?

4

5

A. Yes, but I didn't prepare this myself.

6

Q. Is that a record of the Railroad?

7

A. Yes, sir, it's an N & W Record.

8

Q. Okay. Can you tell us then, when N & W Railroad - according to your records - picked up this particular car?

9

10

A. Well, it was received on 11/13, at 2 a. m., according to this.

11

12

Q. Okay. Your Honor, we'd like to have that attached as Plaintiff's Exhibit Number 5.

13

14

MR. BOWEN: No objection.

15

(Exhibit was marked.)

16

Q. I gather, that you did not get to the scene on the date that this occurred?

17

18

A. No, sir, I did not.

19

Q. You arrived the next day?

20

A. I believe it was the next day.

21

Q. And, I noticed on one of those exhibits, that Mr. A. B. Sayers was a Car Repairman. Do you know Mr. Sayers?

22

23

A. I don't know him personally, but he..I believe he works out of the Bluefield Office.

24

25

Q. How about Mr. J. W. Gilliam, is he an

2

employee of the Railroad?

3

A. Yes, sir.

4

Q. How about Mr. C. K. Robinson?

5

A. Yes, sir, he's General Manager...General
Car Foreman.

6

7

Q. Did you do an inspection of the car your-
self?

8

9

A. No, sir, I did not, other than take the
pictures.

10

11

12

13

Q. Looking at Plaintiff's Exhibit 1, could
you tell me what nomenclature, or how you describe
the rollers - as I call them - at the bottom of the
track there, what do you call those?

14

15

A. Those are rollers. I suppose the car door
rolls in a track at the bottom, and at the top.

16

17

Q. Were those roller intact, when you arrived?

A. Yes, sir. These two are shown in the
picture.

18

19

Q. Does this particular car...or did it have
a sill near the door where it was opened?

20

21

A. Do you mean a door sill, or step?

Q. Step sill?

22

23

A. Nothing but these two steps here, shown
right here.

24

Q. Did it have a handrail?

25

A. Yes, it did.

2

3

4

5

6

7

8

9

10

11

12

13

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15

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19

20

21

22

23

24

25

Q. Did it have a platform, or ...Well, did it have a platform adjacent to where the sill and the handrail was? I mean, where the grab iron was?

A. No, sir. To my knowledge they always back the trucks up against those doors, and carry the stuff from the car out onto the trucks.

Q. Not what they always did - What I want to know is, did it have a platform, or...

A. No, it didn't. Did not have a platform.
MR. McAFEE: That's all. That's all we have for him, Your Honor.

MR. BOWEN: No examination, at this time.

(Witness returned to
the Counsel table.)

THEREUPON came

DONALD F. BAKER

called as a witness on behalf of the Plaintiff, who, having been first duly sworn according to law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McAFEE:

Q. Would you state your full name, please?

A. Donald F. Baker.

Q. Your age?

A. Thirty-eight.

Q. Are you married, single, or what is your status?

2 A. Married. I have three children.

3 Q. How long have you been a resident of
4 Tazewell County?

5 A. Approximately ten years.

6 Q. Okay, when did you move here?

7 A. September of '71.

8 Q. And, what is your occupation at the present
9 time?

10 A. I'm currently the store manager at the
11 Richlands Farm Bureau.

12 Q. When you first came to Tazewell County,
13 what was your job?

14 A. A trainee - Management Trainee.

15 Q. Of who?

16 A. Tazewell Farm Bureau, Incorporated.

17 Q. What did you do there as a Trainee?

18 A. I traveled from store to store.

19 Q. And, do you live in Tazewell, or Richlands?

20 A. I live here in Tazewell.

21 Q. Was your wife a native of this county?

22 A. She was born in this area, Yes.

23 Q. Where were you living, prior to coming to
24 Tazewell County?

25 A. Zearing, Iowa.

Q. And, what did you do there?

A. I was the manager of a lumber and ready mix

2

operation.

3

Q. Did you have any prior experience in loading, or unloading railroad cars?

4

5

A. My experience was back a few years, Yes. I started young..

6

7

Q. What were your duties on November the 17th, 1978, at the Farm Store?

8

9

A. We had to unload a load of flour.

10

Q. How did you become aware, that the flour was in the area?

11

12

A. I received a phone call from A. B. Sayers, Junior, about 9 o'clock - I guess - that the car was docked in the yard, ready to unload.

13

14

Q. What did you do then?

15

A. As soon as I found out the fees were paid, we went.

16

17

Q. How did you pay the fees?

18

A. It was paid out of Tazewell?

19

Q. Pardon?

20

A. They were paid out of Tazewell.

21

Q. I mean, how were they paid, and to whom were they paid?

22

A. They are paid to a local bank.

23

Q. Well...

24

THE COURT: Mr. Baker, let me ask that you speak a little louder, so the Jury can be sure to get

25

2

all of your statement.

3

Q. Who were they paid to?

4

A. It's a Sight Draft to a local bank. So it would have been to Tazewell National, I assume.

5

6

Q. Did you take care of that?

7

A. It was taken care of, here in Tazewell.

8

Q. Alright, and then what did you do?

9

A. I took my crew down to get a load of flour.

10

Q. Well, did you know where the car was?

11

A. It was on their siding, in their lot.

12

Q. Well, did you see or talk to Mr. Sayers

after you got to the track siding?

13

A. No, I did not.

14

Q. Did you go directly to the car?

15

A. Went directly to the car.

16

Q. Well, describe this particular car, if you

would?

17

A. This car was a green, plug-type railroad

18

car.

19

Q. Alright. What did you do...Well, did it

20

have any steps, or sills?

21

A. The steps, Yes, we had...There were two

22

steps. There was a handrail on it, there was no dock,

23

there was...

24

Q. Did it have a runningboard, or platform

25

there?

2

A. No.

3

Q. Could you move the door from standing on the sill, and holding the grab iron?

4

5

A. No.

6

Q. How...What physical requirements did you have to undergo to get that door opened in the first place?

7

8

A. When I said the car opened easy, the three of us were able to put our bodies against it and move it.

9

10

11

Q. But, where were you standing?

12

13

A. We were standing on the ground. The three of us grabbing hold of whatever we could.

14

15

Q. Alright, but were you able to...did you have any work area, or platform up in the area, level with the floor of the car?

16

17

A. There was nothing.

18

Q. What means, or manner did you use to open it then?

19

20

A. The three of us put our bodies against it, the first time we opened it.

21

Q. And, then what happened?

22

23

A. We received...We put five or six ton of flour on the car, we closed up the door in reverse manner.

24

25

Q. Did you have any difficulty closing the

2

door?

3

A. Same encounter as opening.

4

Q. What encounter did you have?

5

A. The three of us put our bodies against it.

6

Q. Was it easy, hard, or what?

7

A. It was...None of them are easy.

8

Q. Then what occurred?

9

A. We took a load of flour back, unloaded it, and came back for the second load.

10

Q. What occurred then?

11

A. We tried to open the door; it was hung up.

12

It was a spot on it, or...or something. We tried for several minutes to put the door back in, pull it back out - hopefully we would get by this spot on the track.

13

14

Q. Where were you doing all of this?

15

A. Off the ground.

16

Q. Okay. Were you able then..

17

A. We couldn't get anything to budge.

18

Q. Were you able to get upon the side of the

19

car to work with the door?

20

A. Never could, No.

21

Q. Why not?

22

A. The truck was too high to work off of, and

23

there was no dock, there was nothing on the car. Our hands were tied. We had to work off the ground.

24

25

Q. What do you mean, "there was no dock" on

2

the car?

3

A. I said, there was no work area.

4

Q. On the car?

5

A. On the car.

6

Q. What did you do then?

7

A. We put the truck up against it; moved it, as I said, six, eight, ten inches - a short distance; got by the rough spot on the track; we proceeded to open the car door, with the same degree of difficulty as before, and we took another load of flour out. On the reverse then, we brought the car door back to its face spot, and as the boys moved the door back into the hole, it came off the top.

14

Q. Were you...Where were you standing when they were doing this?

15

A. I was standing, maybe a yard back from the car, right behind them.

17

Q. What occurred then?

18

A. I hollered and my boys scattered to each side, and I guess I went backwards and caught the door.

20

21

Q. When you say you " caught the door", how did you catch it?

22

A. I don't know. I ended up underneath it.

23

Q. What happened then?

24

25

A. I had the door about that far off the ground. I was sitting on the ground - the door was on

2 my back - and my knees were tucked up against my chest.
3 And, my two boys - I don't know how they did it - but,
4 they lifted the door, or at least they held its height,
5 and I scooted out the side.

6 Q. I'll show you a photograph, and ask you if
7 you can recognize that?

8 A. This is a photograph taken by the Clinch
9 Valley..or the Richlands News Press Photographer, in
10 Richlands.

11 Q. Well, is it a true and accurate portrayal
12 of the scene there - while you were still there?

13 A. It's true and accurate, Yes.

14 Q. Does it show the door?

15 A. It shows the door; it shows the steps, which
16 are slightly bent back; and, it shows the bottom rail;
17 It shows the condition of the top control mechanism.

18 MR. McAFEE: Your Honor, we'd move for its
19 introduction into the record as Plaintiff's Exhibit 6.

20 MR. BOWEN: I'd like to make an objection
21 to that, Your Honor, outside the hearing of the Jury.

22 THE COURT: Alright. The Jury has been in
23 the box here for about an hour, so let's let them have
24 a little break. You may stand aside.

25 (Whereupon, the Court
was in session, out of
the presence of the Jury,
at 11:12 a. m.)

2 MR. BOWEN: Your Honor, I object to the
3 introduction of the picture, on the grounds that it
4 shows the Plaintiff being loaded into the ambulance,
5 and it's introduced to elicit sympathy of the Jury.
6 We have pictures of the boxcar, and a door like that.

7 MR. McAFEE: Your Honor, I'm not trying
8 to elicit any sympathy at all. As a matter of fact,
9 that photograph is quite revealing in two or three
10 things, Your Honor.

11 Number One, it shows and displays the con-
12 dition of the roller at the top, which my client is
13 preparing to testify, as was worn, was in a certain
14 defective condition. More importantly, Your Honor,
15 if you'd examine Plaintiff's Exhibit 1...Plaintiff's
16 Exhibit - and, I don't have any objection if you want
17 to cut my client out of there, on the stretcher. The
18 purpose of it is, Your Honor, to show that someone has
19 done some alterations to this particular car, from the
20 day this photograph was taken until immediately after
21 the accident occurred. In that Plaintiff's Exhibit 1,
22 which was taken by Mr. Pennington, shows and reveals
23 that there are two runners, or rollers at the bottom.
24 If you examine that photograph, Your Honor, there is
25 one roller at the bottom. It is our position - If I
could approach the Bench, I could show Your Honor what
I'm talking about a little bit better, I believe.

2 The rollers that I've made reference to
3 are at the very bottom of Plaintiff's Exhibit 1, which
4 this picture reveals one, and two rollers. If you'll
5 notice Plaintiff's Exhibit 5, there is one roller on
6 there, one roller missing, and it also displays with
7 a great deal of accuracy, Your Honor, the condition of
8 the top of this door. And, I've got about six or
9 seven photographs over there of my client in the scene,
10 but this is the most accurate...I'll be glad to show,
11 Your Honor. I certainly...this...

12 THE COURT: Let me see if you have anyother
13 pictures. I'm a little concerned..

14 MR. McAFEE: Your Honor, I don't mind
15 cutting him out of there, if there's someway to do it.
16 But, unfortunately he's in everyone I've got, and I
17 tried to take the one that is the least revealing. But,
18 this is the only photograph that shows the rollers at
19 the bottom of the car, and also is the only photograph
20 that I can portray correctly and accurately the condi-
21 tion of the top of the car. I mean, the Jury has seen
22 my client here, he wasn't...

23 MR. CLINE: No blood there.

24 MR. McAFEE: Irrespective of...what somebody
25 on the stretcher amounts to. Certainly, it is not a
26 case of eliciting sympathy.

27 THE COURT: The Court's concern is, that

2 these pictures were made for the press, and this is
3 what you generally get. Is there some way, that we
4 can blot out...I see the matter of what you want to
5 show, as far as the condition of the door, and the
6 condition of the car.

7 MR. McAFEE: I don't object to blocking
8 it out.

9 MR. BOWEN: Why don't you cut it into.

10 MR. McAFEE: As long as you don't cut.

11 (Whereupon, the Court went
12 off the record, at 11:22
13 a. m.)

14 (Whereupon the Court resumed
15 at 11:27 a. m.)

16 THE COURT: Sheriff, let's bring the Jury
17 out.

18 BY MR. McAFEE:

19 Q. Don, I want to show you Plaintiff's Exhibit
20 6, after we've done a little surgery on it there, to
21 see if that truly portrays a portion of the car door,
22 and a portion of the railroad car which you were unload-
23 ing?

24 A. This is the car. This is the car door, as
25 it appeared at the accident scene.

Q. Were you there at the scene - I mean, any
length of time after the door fell on you?

2

A. I was there for forty-five minutes, waiting for the rescue squad, so I...

3

4

Q. Would you have an opportunity to look at the top of the door, as well as the area from which the door fell?

5

6

7

A. I did a number of things during that forty-five minutes.

8

9

Q. Well, come up here and show the Jury what examination you made of the door, and what your examination revealed?

10

11

A. (Witness approached the Jury.) I was right here. I was in plain view of both the door opening and the top mechanism. The top mechanism - I don't know if you can see it in this photograph, or not, is a long arm, flat on one side...

12

13

14

15

16

Q. What do you mean, "flat on one side"?

17

A. They were more worn down.

18

Q. What do you mean, "worn down"?

19

A. It looks like a mushroom, and the top of a mushroom.

20

21

Q. How about this arm here - the one below your thumb?

22

A. This arm? They were both in the same state of repair.

23

24

Q. Now examining...What do you call this, the track - I guess the door was running on. Describe that

25

2

for the Jury, if you will?

3

4

A. Okay. The bottom track has the mechanism - the bottom end of the mechanism...two wheels, rides in that track there.

5

6

Q. Alright, after the door fell how many of those wheels were still on the track?

7

8

A. There was just one on the track.

9

10

11

Q. I'll show you Plaintiff's Exhibit 2, which is a photograph taken the following day, and ask you if you can see and visualize how many rollers are on the track there?

12

13

THE COURT: Turn it around so all the Jurors can see.

14

15

A. There is...you see two, in everyone of these photos.

16

17

Q. Was this step damaged when the door fell?

18

19

A. No, it was not.

20

21

Q. What was its condition when you were there - Initially, when you first came there?

22

23

A. The condition of the step?

24

25

Q. Yes.

A. It was just bent in.

Q. Bent in?

A. Right.

Q. Now was there any platform above..

A. There was no platform - No.

2

Q. Was there any area to work, after you got on the sill there, to stand and work with the door?

3

4

A. No. And, when you opened that door, that came out; that door actually extended itself the thickness of the door, plus the clearance outside the car. So you would be working, maybe six to ten inches away from the car.

5

6

7

8

9

10

11

Q. I believe you can have a seat. To what degree would you say, in your opinion, that those rollers at the top of door - I call them - What do you call them?

12

13

A. I...Top rollers - closing mechanism.

14

15

Q. To what extent were they worn?

16

17

A. They were top worn. They were worn back to what I call the peg, or the rod.

18

19

20

Q. State if you did any damage to the rod, that controls the opening of the door, when you pushed it back?

21

22

23

A. No, I did not.

24

25

Q. Did your truck touch the rods in anyway?

A. The truck did not touch the rods.

Q. Was it.. Could the three of you manipulate and open the door, by just physical strength when you came back the second time?

A. The second time, No. We spent probably twenty, twenty-five minutes trying to get it opened.

Q. Alright. Now this was on Norfolk and Western Railway Property?

A. This is correct.

Q. And, you were in the process of unloading the cargo?

A. This is correct.

Q. Now after this door fell on you what happened - just tell us what happened? Where did you go, what happened?

A. How did I get out from underneath the car?

Q. Yes.

A. I was seated underneath the car door.

Q. Was it on top of you, beside of you...

A. The door was sitting on those two handles, on one end, and right on my neck on the other end. My legs were pulled up underneath me - fetal position, if that's what you want to call it.

Q. How did you get out?

A. These two guys that were with me - And, understand now, that whatever thickness is here, the car door was twenty-four, maybe inches off of the ground, and they held it. I hoped...maybe they lifted it, but at least they held it until I could scoot out the side.

Q. And, then what did you do?

A. I stayed there immobile.

Q. And, how were you removed?

2

A. They ran across the street to the News Press.

3

Q. Well...But, how were you taken from the scene?

4

5

A. Okay. I was taken by ambulance, and they used the back board, whatever, a metal carrier.

6

7

Q. Where did they take you?

8

9

A. They took me to Mattie Williams Hospital. I was seen there by Doctor Khuri, who did a series of x-rays. They were read, and he assured me that I was not injured and sent me home.

10

11

Q. Did you go home?

12

13

A. I had two people put me in my pickup, and one guy drove me home, and then they helped me to bed.

14

Q. What happened next?

15

16

A. I kept looking for the next time I could take my pill. I was in a soft bed - assuming that I did not have an injury. I stayed awake allnight. The next morning Doctor Tolosa made a housecall.

17

18

Q. Why? Why did he make a housecall?

19

A. I couldn't walk anymore.

20

Q. What do you mean you couldn't walk? Describe..

21

A. I couldn't get out of bed. I was immobile from the waist down.

22

23

Q. What...Were you having any numbness, pain, or what?

24

25

A. They were just numb. You just couldn't...

2 couldn't do anything with it.

3 Q. What happened then?

4 A. We summonsed the x-rays from Richlands. At
5 about seven, Saturday evening they decided to put me in
6 the hospital, and I did have some...

7 Q. Which hospital this time?

8 A. Tazewell Community.

9 Q. Did you, in fact, go to the hospital?

10 A. The rescue squad came and picked me up.

11 Q. Well, did they admit you to the hospital.

12 A. Yes, they admitted me to the hospital.

13 Q. Under whose care then?

14 A. Doctor Tolosa's.

15 Q. And, how long did you remain?

16 A. I stayed there I think thirteen days.

17 Q. What did they do to you, or for you?

18 A. Basically, I was put under Doctor Litz's
19 care, who is an Orthopedic Surgeon, and he just tran-
20 quilized me and gave me medication to keep me quiet, and
21 we waited for about thirteen days - I guess.

22 Q. Did you undergo any traction?

23 A. I was under traction for about twelve hours
24 after getting to the hospital.

25 Q. What happened after you were discharged from
Tazewell Community then?

A. After I...I went into convalescence. They

2

wanted me to walk, to exercise, et cetera. I spent probably two months on a very short schedule, of trying to get around. I had a walker.

3

4

5

Q. Then what?

6

7

A. Ultimately, about the first of May they referred me to Doctor Jane. I asked them to refer me to..

8

9

Q. Who referred you?

10

A. I asked Doctor Litz to refer me to a neurosurgeon, which he did.

11

Q. Who was that, now?

12

A. Doctor Jane, at Charlottesville.

13

Q. Did you see him?

14

A. I saw him on the first part of May...the middle of May.

15

Q. What occurred after that?

16

A. He put me in the hospital.

17

Q. Which hospital?

18

A. University of Virginia.

19

Q. Okay, and then what occurred?

20

A. They ran several days of tests, and concluded that I had a pinched nerve in my lower back.

21

22

Q. What occurred after that?

23

A. Since I had what you could describe as "Drop Foot", he recommended surgery.

24

25

Q. Did you undergo surgery?

2

A. I underwent surgery.

3

Q. Do you remember when you underwent surgery?

4

A. I believe it was the sixteenth of May..
somewhere.

5

6

Q. How many days had you been there before
they operated on you?

7

A. I believe five.

8

9

Q. And, how many days did you remain after
surgery?

10

11

A. The balance...I think I was there fifteen
days.

12

13

Q. Did you see Doctor Jane any after you were
discharged?

14

15

16

A. I saw Doctor Jane on the eleventh of July,
and he was happy with my progress, and invited me back
if I wanted another operation, to call him in ten days
or two weeks, or something.

17

18

19

Q. Is that the last time you've seen him?

A. That's the last time I've seen Doctor Jane.

20

21

Q. When did you return to work?

A. The twelfth of July.

22

23

Q. And, you've been working since?

A. I've been working ever since.

24

25

Q. Describe your condition, insofar as your
ability to perform certain tasks, or duties - not neces-
sarily work, but anywhere, as compared to before your

2

injury?

3

A. Physically, prior to this injury I was able to lift, I could...I didn't do it actively or competitively, but I could handle most anything around the farm store; my hobbies included carpentry. I bought an older home I had been working on for a couple of years.

8

Q. Compare yourself now, to then?

9

A. Now I don't lift at all. I've not lifted more than twenty-five pounds, I guess, in the last two and a half years.

10

11

12

Q. Okay.

13

A. My carpentry is down to piddling on a half hour basis. I can't do anything except substitute.

14

15

MR. McAFEE: Your Honor, I believe we have stipulated the medical bills. I wish I could get them in at this time.

16

17

Ladies and Gentlemen, by agreement of counsel, the parties have agreed that Mr. Baker had the following medical bills related to his injury, which is:

18

19

20

21

1. Mattie Williams \$219.00

22

2. University of Virginia Hospital

23

for fifteen days hospitalization 3,174.00

24

3. Doctor Tolosa 201.00

25

4. Doctor Litz 129.00

5. Tazewell Community, thirteen days \$1,660.00

6. Doctor Jane 2,308.70

That is to a Clinic. Total of 7,692.70

What was your monthly income, while you were working at the Farm Bureau.

A. It was approximately twelve hundred.

Q. Is that take home, or after..

A. That was take home.

MR. BOWEN: What did he say, I didn't hear

him?

A. Take home.

MR. BOWEN: Twelve hundred dollars?

MR. McAFEE: Take home.

MR. BOWEN: Of what, a month?

A. Per month.

MR. McAFEE: That's all, Your Honor.

CROSS EXAMINATION

BY MR. BOWEN:

Q. How long have you been the store manager in

Richlands, Mr. Baker?

A. I believe this is my seventh year.

Q. And, you were in charge of the store, as

well as unloading the boxcars, and soforth?

A. I'm in charge of the total operation of the

store.

Q. Now when you went down to unload this boxcar,

2

was there a seal on the boxcar?

3

A. Yes, there was.

4

Q. Was that seal removed?

5

A. Excuse me?

6

Q. Was the seal removed?

7

A. Prior to my being there, or what? I removed.

8

Q. Was the seal removed?

9

A. I removed the seal, Yes, sir.

10

Q. Who was with you?

11

A. Larry Sparks and Claude Reynolds.

12

Q. They work for the Tazewell Farm Bureau?

13

A. At the Richlands Store, Yes.

14

Q. They were employee's under your supervision?

15

A. This is correct.

16

Q. How did you open the door?

17

A. Which time?

18

Q. The first time, to the boxcar?

19

A. The three of us grabbed a hold of the door

20

and pushed.

21

Q. Did you back the truck up to the door of

22

the boxcar?

23

A. After the door was open, is that what you're asking?

24

Q. Do you do it at anytime?

25

A. Yes.

Q. Well, when did you back the truck up to

2 the door of the boxcar?

3 A. After the door was opened.

4 Q. You opened the door - Did you open the
5 door from the ground?

6 A. This is correct.

7 Q. Do you remember who took hold of the opera-
8 ting bars and opened them back?

9 A. (Witness nodded in the negative.) No, two
10 of the three of us did.

11 Q. Did the door come forward, out from the
12 boxcar?

13 A. This is correct.

14 Q. And, you all pushed it to the side?

15 A. Pushed it to the side. Some pushed, some
16 pulled.

17 Q. Did you have any difficulty with the door
18 the first time?

19 A. Difficulty - was it hard opening, or was..
20 We didn't touch it and it glided. We all had to grab
21 a hold and pull the best we could to open the door.
22 But, this is standard, this is an easy door to open.

23 Q. Well, was it any harder to open the first
24 time, then boxcar doors are usually hard to open?

25 A. Generally, No.

Q. Not much difference, one way or the other?

A. Not much difference.

2

Q. And, you took a load of flour out of the car - out of the boxcar?

3

4

A. This is correct.

5

6

7

Q. To do that, do you push the truck up against the boxcar opening, or do you have a piece of wood there, or what...How do you get the flour from the boxcar into the truck?

8

9

A. The first load you throw in.

10

11

Q. Sir?

A. The first load you throw in.

12

13

Q. The first load you do what?

A. You just throw the flour in.

14

15

Q. Just throw it in?

A. Catch it.

16

17

Q. Well, was there anything between the backend of the truck and the boxcar?

A. No.

18

19

Q. The truck is backed up just against the boxcar?

A. It's backed up to the boxcar, Yes.

20

21

Q. Did you spill any of that flour the first time?

22

23

A. I don't understand? Did we break any flour?

Q. Did you break any, or did any spill out?

24

25

A. There's always broken flour in the car.

Q. There's always broken flour. So you...Was

there broken flour in this car?

A. There always is. I don't know if there was, on the first load, or not.

Q. Well, do you know whether or not any of that flour got into the door - operation of the door - where the door goes back into that plug?

A. I wouldn't see how it could. There's cardboard...There's two thicknesses of cardboard on the walls, and one on the floor, and then it's sectioned in there in cardboard. I don't quite see what you're asking.

Q. I noticed something white around the door. In Plaintiff's Exhibit Number 2, there seems to be white around the bottom right of the door opening. Do you know what that is?

A. Appears to be flour - to me.

Q. Looks like flour?

A. Uh huh.

Q. Do you know what this here is, on the ground; it looks like there is something white there on the ground?

A. I'd say that's flour, too.

Q. You'd say that's flour, too.

A. If it doesn't belong to this sun there, it's probably flour.

Q. Well, this is the same opening that the

2 door would go back into?

3 A. Yes, that's correct.

4 Q. Now when you loaded the boxcar, or loaded
5 the first load of flour from the boxcar, did you put
6 the door back into the hole just like it was originally
7 closed?

8 A. That is correct.

9 Q. You turned the operating handles?

10 A. That's correct.

11 Q. And, you went back to the Farm Bureau, and
12 unloaded that load of flour?

13 A. That's correct.

14 Q. And, came back the second time; and the
15 second time was the time that you couldn't get the door
16 opened?

17 A. This is correct.

18 Q. And, you took the truck and put the truck
19 against the door?

20 A. This is correct.

21 Q. What part of the truck did you put against
22 the door?

23 A. I think it was a piece of wood, but I don't
24 know for certain, if it weren't it was the bumper.

25 Q. Now you remember in Discovery Depositions,
testifying in my office as to how this happened?

A. I was there.

2

3

4

Q. Do you remember stating, that you took the bumper of the truck, and you pushed the edge of the door with the bumper of the truck?

5

A. Okay.

6

Q. Is that the way it happened, or..

7

A. I think we used a piece of wood, but we opened the door with some exterior force, Yes.

8

9

Q. Did you use anything to open the door with the first time?

10

A. No, sir.

11

12

Q. Do you carry a crowbar, or anything with you to manipulate a door when you're having problems?

13

14

15

A. We always carry a crowbar, but - for the seals - but all I had was an eighteen inch crowbar, and it's a little difficult on that type of door.

16

Q. You didn't use a crowbar on this door?

17

A. You weren't able to.

18

Q. Why not?

19

20

21

22

23

24

A. Well, eighteen inches is...and, when you divide eighteen inches, take twelve off of it - six inches isn't much of a lever. It would be kind of defeatish. Where you have the thickness of your door out, and then you have to get your crowbar in the other part of the door, so you've lost twice the thickness of the door. So your leverage is gone.

25

Q. Was the door in the completely closed position

2

when you had trouble the second time?

3

A. No, the door came to the flush sidewall position.

4

5

Q. In otherwords, you had opened up the operating bars, and it had come out of the hole?

6

A. (Witness nodded in the affirmative.)

7

8

Q. And, it was ready to slide sideways, but you couldn't slide it sideways?

9

A. That's correct.

10

11

Q. And, that's when you pushed it with the truck, six, eight, or ten inches?

12

A. That's correct.

13

14

Q. And, you loaded up the second load of flour, is that right?

15

A. That's correct.

16

17

Q. And, as I understood it, the three of you were pushing the door back to the closed position, on the second time, when the door fell?

18

19

A. The door was opposite the hole, and we were putting the door back into the car.

20

21

Q. You were pulling those operating levers, which pull it back into the car?

22

A. That's correct.

23

24

Q. And, that's when it broke from the top. Did it fall like that?

25

A. It fell, just like that.

1

2

Q. Fell from the top?

3

A. Yes, sir.

4

Q. Do you know...Did the top side hit you first?

5

A. That's all that hit me.

6

Q. Just the top side?

7

A. Just the last two foot of the door. Is that what you're asking?

9

Q. Well, you saw it fall from the top, and come towards you?

10

11

A. (Witness nodded in the affirmative.)

12

Q. It fell out from the car?

13

A. That's correct.

14

Q. Do you know when it came loose from the bottom?

15

A. I don't have any idea. It came loose - the operators were straight away from the car, because they came right down and stuck in the ground.

16

17

18

Q. Now you say this car had no platform on it?

19

A. That's correct.

20

Q. How big of a platform comes on these cars?

21

A. Excuse me?

22

Q. How big of a platform comes on these cars?

23

A. Generally none.

24

Q. Generally none? So you're not used to working from a platform?

25

2

A. Not when I unload flour, No.

3

Q. And, you say that you observed that the rollers were worn, on the top of the door?

4

5

A. I had quite a lengthy...I had forty-five minutes to look over everything, while I was there, and they were very badly worn - as illustrated by some of these pictures.

6

7

8

Q. Did you tell anybody, that they were worn?

9

A. Excuse me?

10

11

Q. Did you tell anybody, that those...that, that top was worn?

12

13

A. That door had already hit me, and I was laying on the ground. I wasn't too worried about it.

14

15

Q. Well, you've never mentioned this before, in any of your testimony had you?

16

A. Nobody ever asked me.

17

18

Q. So it has just come to you, today, that the worn condition of the ...of the top of the door caused this?

19

20

A. No, I doubt that, Mr. Bowen. I've had a good opportunity to look...

21

22

Q. You've never volunteered it before, have you?

23

A. As I said, Nobody asked me.

24

25

Q. And, you say you looked at the rod and you didn't see any damage to the rod - to the operating rod

2

of the door?

3

A. I don't understand what you're saying?

4

Q. Well, you testified awhile ago, that there

5

was no damage to the rod of the door, the operating rod

6

that opens and closes the door?

7

A. I didn't say..

8

Q. Was it bent? Did you see where it was bent?

9

A. I didn't see it.

10

Q. Do you know whether it was bent, or whether
it was not bent?

11

A. I don't have any idea.

12

Q. You don't have any idea, whether it was or

13

was not?

14

A. The door looked alright to me.

15

Q. Sir?

16

A. The rod looked alright to me - Yes.

17

MR. BOWEN: Do you have the small photo-
graphs? (Speaking to the Judge.) (Obtained from the
Court, and presented to the witness.)

18

19

You were out here at this end of the door?

20

A. That is correct.

21

THE COURT: Can you state for the record,
what you're pointing to?

22

23

Q. He stated, that he was out here. From this

24

end of the door, that was next to the ground...that was

25

on the ground. So you could see the edge of the door,

2

that was against the ground, is that correct?

3

A. That's correct.

4

Q. And, these are the two ends on the top of the door, that hold it into the top of the door, is that correct?

5

6

A. That's correct.

7

8

Q. One seems to be sticking back towards the vertical, and the other seems to be sticking at another angle - over this way - is that correct?

9

10

A. That's correct.

11

Q. Could you see that from where you were?

12

A. Yeah. I was only six feet away.

13

Q. But, you were at this side of the door, were you not?

14

15

A. This point of the door is only six inches off the ground, and my...even laying on my side, is going to be twelve - fourteen inches, is that what you're asking? This is protruding up halfway above the door. This thing here, inch and a half, two inches above the door, is that what you're asking?

16

17

18

19

20

Q. Yes, and you're over here on this side of the door?

21

22

A. That's correct.

23

MR. McAFEE: Your Honor, I think the record should reflect, that at the time the picture was taken that was where he was.

24

25

2 Q. Now on the second occasion, did you say
3 that you were going to get the door opened? Did you
4 get in the truck and tell the other boys, that you
5 were going to open that door with the truck?

6 A. Yes, I did.

7 Q. And, how did you back the truck up to the
8 door? Were you driving the truck?

9 A. Yes, sir.

10 Q. Tell the Jury how you did that?

11 A. Well, you've got to pull along side, on
12 the blind side, and maneuver as close to parallel as
13 you can to the car.

14 Q. How long is that truck?

15 A. I would say, probably two hundred inch
16 wheelbase, or maybe two hundred and ten.

17 Q. So you were pushing backwards with the
18 righthand back of the truck, against the door?

19 A. This is correct.

20 Q. Now how close to the boxcar was the front end
21 of the truck?

22 A. Within a foot.

23 Q. Within a foot. So it was pushing that
24 door, at a slight angle towards the boxcar?

25 A. A few degrees.

Q. Now you say you went back to work on July
the 4th?

1

2

A. July the 12th.

3

Q. Sir?

4

A. July the 12th.

5

Q. July the 12th. Was that your first day of work after the accident?

6

7

A. I had done the books, at home, for some time, and I had been in the store once or twice in my walker. I had been in the store once or twice with my cane, and spent a couple of hours.

8

9

10

Q. And, since July the 15th...or the 12th...

11

15th...which was it you said, excuse me?

12

13

A. I think it was the 12th. The first working day after I got back from Doctor Jane's Office.

14

15

Q. And, you've worked there as the store manager, since that date?

16

A. This is correct.

17

Q. How much do you haul on that truck, Mr. Baker?

18

A. That's licensed to haul about six ton.

19

20

Q. And, how many years have you been in charge of unloading boxcars with plug-type doors?

21

22

A. Are you asking how many years of experience I have?

23

Q. Yes.

24

25

A. It's either 1950, or 1951 I unloaded my first one. I was only seven, eight or nine years old.

2

I had my own lumber and Ready mix plant when I was
twenty years old, and prior to that I was dispatcher
for a Ready mix outfit.

3

4

5

Q. You had plug-type doors then?

6

A. You had all kinds of doors.

7

8

Q. Did you ever open those doors from the
backend of a truck, when you didn't have a platform?

9

10

A. This is a surprise to me, because a chain
and a piece of wood, and a bumper are standard proce-
dures.

11

Q. Standard procedures?

12

A. Gooch's probably even has a wench, I don't
know.

13

14

Q. Isn't it exactly what you call...use a
crowbar upon it, so that you could have something that
you know how much power you're putting on that door?

15

16

A. How much power does it take to move a good
door six inches is my point...the point you're asking
about.

17

18

Q. It takes exactly how much it takes to move
it; just depends on what's holding it, doesn't it? And,
a truck will move right much, will it not?

19

20

21

A. If it's used properly it will, Yeah.

22

Q. You had the truck in reverse?

23

A. (Witness nodded in the affirmative.)

24

Q. Do you know how far off the ground the

25

2

bottom of that boxcar door is?

3

A. I would say, it's somewhere in the neighborhood of twenty-eight to thirty inches.

4

5

Q. Twenty-eight or thirty inches - Like that?

6

A. Maybe thirty-six. Probably thirty-six.

7

Q. Did you ever walk up to a boxcar door to look in it?

8

9

A. That siding there is a little bit odd, it was below the truck chassis. We had to use a ramp to get in the car, to get out of the car.

10

11

Q. I thought you said you didn't use anything, awhile ago?

12

13

A. You asked me about how I loaded the first load of flour, and I said there's no way to put a ramp or anything - the flour is right up against the door.

14

15

Q. I see.

16

A. You load it by hand.

17

Q. Did you use a ramp the second time?

18

A. Yeah.

19

Q. And, the ramp went up to...

20

A. To the truck.

21

Q. To the truck. How far up?

22

A. I don't know; it would require somebody to push on it.

23

24

Q. Well, do you all pick up these bags of flour, or do you put them in a roller - buggy, and pull them

25

2 into the truck?

3 A. At the Farm Bureau you use a two-wheeled
4 feed cart; it's a little...to load much of anything.

5 Q. How many bags of flour do you put onto that
6 feed cart?

7 A. Into the cart?

8 Q. Uh huh.

9 A. Probably fifteen - I don't know.

10 Q. How much does a bag of flour weigh?

11 A. Twenty-five pounds.

12 Q. Twenty-five pounds. You would have three
13 or four hundred pounds on the cart to push up there?

14 A. (Witness nodded in the affirmative.)

15 Q. One or two people do that, or how many
16 people did it take to push that up the ramp?

17 A. Since there were three of us, one pulled
18 and two pushed.

19 Q. How far off the ground is the bumper of
20 your truck?

21 A. Those trucks, I believe, are forty-two
22 inches - I don't just remember.

23 Q. High enough to go against the door?

24 A. I don't understand?

25 Q. The boxcar door...The bumper on the backend
of the truck, was it high enough to touch the boxcar
door when you pushed it to open it?

2

A. Oh, Yeah.

3

4

5

Q. Well, did you become exasperated, after trying to open that door for twenty to twenty-five minutes?

6

7

8

A. I'd say, when it's eighty degrees outside, and you're already perspiring, I would say it's easy to become frustrated with something...

9

10

Q. Eighty degrees in November?

11

12

A. Whatever it was we were sweating. I didn't have to put a coat on.

13

14

15

Q. Did you say something about, you were going to get that door to open with the truck?

A. I don't really know. I said, I'm going to have to open this car door. I'm going to put the truck up against it. This is standard.

16

17

18

Q. Had you tried to open it with anything else?

19

20

A. I didn't have anything else. We were just going to move it, that little bit of a distance.

21

22

23

Q. And, when you can't push one you push it with a truck, is that the way you open it?

24

25

A. Yes.

MR. BOWEN: That's all.

REDIRECT EXAMINATION

BY MR. McAFEE:

Q. Mr. Baker, what required you..What was wrong, that required you to have to use the truck?

2

A. Something...There was a flat spot - I'll call it a flat spot. We couldn't get the door by it. We couldn't budge it by a certain spot.

3

4

5

Q. Were you able to get up, to work on the door any?

6

7

A. Certainly not.

8

Q. Why?

9

A. The top of the door is fourteen, sixteen feet away.

10

11

Q. And, were you able...Was there anything on the sides of the car to aid or assist you in getting to the door?

12

13

A. No, sir.

14

Q. No, sir, what?

15

A. There was nothing there to aid me.

16

17

Q. In your opinion, did this door give any indication, that it was either insecure, or in its position?

18

MR. BOWEN: Objection.

19

THE COURT: Sustained.

20

21

Q. State whether or not, in your opinion, there was...after the door fell, if you observed any defects - noticeable defects - in any parts of the door?

22

23

MR. BOWEN: Objection, as to his opinion.

24

THE COURT: Sustained. He stated what he

25

saw.

2

Q. Tell me again, what you saw?

3

4

5

6

7

8

9

10

A. As I laid there, I had clear vision of the top of the door. I did inspect - visually inspect - the top of the door, because I laid there...this is the first time in thirty years I get hurt, and I wondered what in the world happened. So I looked over there, and there it is. The rollers are flat. I don't know how much tolerance, or how much slop there is in the upper track, but the rollers are flat, and I can see that, and it's documented.

11

12

Q. Alright. Now how far did you move the door with the truck?

13

14

A. Something like that. (Indicating approximately six inches.)

15

16

17

Q. About how many inches it that?

A. Six to ten inches.

18

19

20

21

Q. Then how did you move the door all the way back?

A. The same way we opened it the first time.

Q. How's that?

A. All three of us got a hold of it, and grunted a lot.

22

23

24

25

Q. Did you open it then?

A. Right.

Q. Then after you loaded the flour in, did you move the door back in its position to lock it - to put

1
2 it back into its locked position?

3 A. We moved it back to the position, and as
4 we put the door..

5 Q. Plug it?

6 A. When we went to plug it the thing fell out.

7 Q. How do you plug it?

8 A. Actually, what it amounts to is you...

9 Q. Can you show the Jury, with this Plaintiff's
10 Exhibit 3 - Can you come up here just a minute, although
11 this is the other side - can you demonstrate from this
12 photograph how you plug that door back?

13 A. The top of the door here is built like an
14 "L". This thing here is the length of the depth of
15 the car door, that goes into the car. So this was
16 actually here. When we went to put it back into posi-
17 tion here, which would allow the door to go back in,
18 it fell out.

19 Q. What were you doing though, to try to get
20 it back in position?

21 A. We were moving these arms, in this position
22 here.

23 Q. In the position as shown in the photograph?

24 A. Uh huh, that's all.

25 Q. And, it fell from the top?

A. It fell, right from the top.

MR. McAFEE: That's all, Your Honor.

2

MR. McAFEE: Your Honor, we have a couple
of medical reports to read, and we Rest.

3

4

Do you want me to read them now?

5

MR. BOWEN: One second. I want to see
whether I have any questions.

6

7

THE COURT: I was going to ask Mr. Bowen.
Mr. Bowen may not be through...with cross examining.

8

RECROSS EXAMINATION

9

BY MR. BOWEN:

10

11

12

Q. You say as you were standing there you
saw the top come towards you - of the door - as it
fell?

13

14

A. I saw the top move, and I hollered at my
men. They went that way, and the door came this way.

15

16

17

18

Q. Now did I understand you awhile ago to say,
that you could see that come out of the top; that you
could see that eccentric, or piece that goes sideways
that holds it in the top, that you could see it come
out?

19

20

21

A. Mr. Bowen, that whole operation didn't last
but two or three seconds. I did not see anything, other
than that door coming at me.

22

23

24

25

Q. You don't know what made it come out?

A. I was back peddling to fast, Yes, sir.

Q. You don't really know what happened, except
that it came loose from the top?

2

A. It came loose from the top - square.

3

4

Q. Well, I understood you to say, that you saw it come out of the thing that holds the top, but you didn't see that. You just saw it come towards you?

5

6

A. (Witness nodded in the affirmative.)

7

Q. I just want to get your statement, I don't want to mix you up.

8

A. Yes.

9

MR. BOWEN: That's all.

10

REDIRECT EXAMINATION

11

BY MR. McAFEE:

12

Q. What holds it at the top?

13

14

A. I don't know how they design these cars, but there's two things: Number One, it runs in a track; and, Number Two, it has an overshield that secures it.

15

16

MR. McAFEE: That's all. Come around.

17

(Witness returned to the Counsel Table.)

18

19

MR. McAFEE: These reports are about three pages. They're not very long.

20

21

THE COURT: Go ahead and read those, and we'll take a break for lunch.

22

23

MR. McAFEE: This is Doctor Edward Litz.

24

This 36 year old male dates an injury to November of '78 when he was pinned by a railroad car door. He

25

1
2 THE COURT: I take it, that since you
3 agreed to read the reports there was no cross examination
4 on those.

5 So we will take a break for lunch at this time.

6 Ladies and Gentlemen, come back at 1:20 and
7 we'll be ready to resume. Do not discuss this case with
8 anyone while you are out, nor permit anyone to discuss
9 the case with you, and come back at 1:20.

10 (Whereupon, the Court
11 recessed at 12:20 p. m.)

12 (Whereupon, the Court
13 resumed at 1:32 p. m.)

14 THE COURT: Mr. Bowen, you indicated
15 that you had a Motion you would like to make, during the
16 lunch hour.

17 MR. BOWEN: Yes, sir. I had a reference
18 to two cases I wanted to give you - If I can find them.

19 Your Honor, on behalf of the Defendant we'd
20 like to move to Strike the Evidence. The evidence does
21 not show any negligence of the Defendant, which proxi-
22 mately caused the accident. There are two cases in
23 Virginia, that concern this type of door - or certainly
24 door accidents. There is a Norfolk and Western versus
25 Chrisman, 219 Virginia, 184, which was decided by the
Supreme Court of Virginia in 1978. And, in that case
the Court said, that there has to be some proximate cause
between the negligence of the Defendant and the accident.

2 which is, of course, a long standing rule of evidence.

3 Now the delivering carrier has a duty to make a
4 reasonable inspection to see that the box car is reason-
5 ably safe to unload. Now this case shows, that had the
6 Norfolk and Western gone in there and opened the door
7 and closed the door, that nothing would have happened.
8 If there was no defect that can be discovered, it's
9 immaterial whether the inspection was made or not. It's
10 the failure to inspect that must be the cause of the
11 accident.

12 Here we have the Plaintiff pushing the door with
13 a truck, after the first time that it acted properly.
14 And, there is no way that the Norfolk and Western could
15 be expected to find a defect in that door of a box car
16 belonging to another carrier, that the Plaintiff, him-
17 self, did not find in taking out that first load of
18 flour - Opening the door and closing the door, every-
19 thing worked satisfactoryily and usually.

20 Now the Safety Appliance Act, which is in 45
21 United States Code, Section 1 and thereafter, gives
22 you what constitutes safety appliances. But, there is
23 nothing there that designates, that you have to have
24 a runningboard. Even if it did, this box car was deliver-
25 ed by another railway company, and it would be their duty
and not the duty of the Defendant, Norfolk and Western.
Under the Virginia Law it is the duty of the delivering

2 carrier to make a reasonable inspection to see that
3 there is nothing hazardous. The case said, that the
4 type of inspection was to determine any fairly obvious
5 defect. Now they are not responsible for latent defects,
6 or concealed damage, that would be something for the
7 initial carrier. And, there is no evidence here, that
8 any inspection would have disclosed any malfunction with
9 that door, or that the failure to make that inspection
10 was the proximate cause of this accident.

11 I think there is plenty of evidence here to con-
12 clude, that the Plaintiff brought this upon himself by
13 placing the bumper of that heavy truck against the car
14 door and pushing it, when it was bound and couldn't be
15 moved by three people.

16 So we respectfully say that the Plaintiff is guilty
17 of contributory negligence; that there is no negligence
18 shown on behalf of the Defendant; and, that the Defen-
19 dant could not have ascertained any malfunction of that
20 car by any reasonable inspection that it could have made.
21 And, we respectfully submit that the evidence should be
22 struck.

23 MR. McAFEE: If your Honor please. I
24 gather from the comments of counsel that they do not
25 contend, that the Federal Safety Appliance Act is appli-
cable in this case, and I'm sure the reason being is,
that there is an abundance of cases which hold that the

2 Safety Appliance Act does, in fact, cover Mr. Baker in
3 this undertaking. More particularly, there is a very
4 recent case in which an individual had gotten onto a
5 coal car for the purpose of performing an inspection..
6 not an inspection, but sampling the coal. And, as a
7 result of a defect in the safety appliances on the car
8 suffered an injury. And, it is concluded that he falls
9 within those class of people in which the Safety Appliance
10 Act was passed and adopted.

11 And, in referring to footnotes and decisions under
12 Section 45, Section 1, there is an abundance of cases
13 setting forth why the Safety Appliance Act was passed.
14 For instance, there are several cases - both State and
15 Federal cases - in which the Safety Appliance Act covers
16 those individuals: For instance, when there is a defect
17 in a piece of equipment owned and operated by the rail-
18 road. It is my position, Your Honor, that Mr. Bowen is
19 inaccurate and incorrect when he says that the N & W had
20 no duty to inspect. Now that may very well be the
21 Common Law duty; however, Your Honor, there are cases
22 covered under the footnotes of the Safety Appliance Act,
23 which holds to the contrary; and, which in substance say,
24 that the delivering carrier...anytime that he gets one
25 of its cars on its track, and takes and assumes the respon-
sibility, that that car, irrespective of the ownership
of it, irrespective of the originating carrier is like-

2

wise covered by the act.

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Now, Your Honor, it is our position that insofar as this case is concerned, that the N & W certainly - or at least there is a jury question involved, as to a violation of Section 45...Correction, Title 45, Section 11, which states among other things, and refers to sill-steps, hand brakes, ladders, runningboards, hand holds, et cetera. Without...And paraphrasing that, because some of it has to do with the date of the enactment, the section says, in substance:

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It shall be unlawful for any common carrier to haul, or permit to be hauled, or used on its line any car subject to this particular section when it is not equipped as follows: All cars must be equipped with secure sill steps, efficient hand brakes. All cars requiring secure ladders and secure runningboards shall be equipped with such ladders and runningboards. And, all cars having ladders shall be equipped with secure hand holds.

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And, I don't know whether Your Honor looked at the inspection report of the N & W, but you will note that the inspection found, that this car did not have runningboards on it. Also, Your Honor, it is our position that the Norfolk and Western Railroad is in violation of the Safety Appliance Act, Title 45, Section 14, which states as follows:

2 Except that within the limits specified in
3 the preceding section of this act - which is Section 13 -
4 the movement of a car with defective, or insecure equip-
5 ment may be made without incurring the penalty provided
6 under the statutes - referring to Section 13 - but, shall
7 in all other respects be unlawful.

8 In otherwords, the Statute reads, that if the
9 N & W permits, authorizes, or whatever, the movement of
10 any car on its railroad in a defective or insecure
11 manner they are guilty of negligence. Also, Your Honor,
12 the cases say that these duties are mandatory; that it
13 is an absolute duty.

14 I gather that what the Norfolk and Western
15 is contending here, that their only duty here was to
16 inspect. Your Honor, that's not what the law says and
17 a violation of the Safety Appliance Act constitutes
18 negligence, per se, without further. And, it is our
19 position here, that this was a defective door; it was a
20 car absent a runningboard. Also, it is our position here
21 that the sills, or the sill that was put on this car
22 along with the grab iron was certainly inadequate, and
23 was insecure. And, as a result of which we contend,
24 that there was a violation of the Safety Appliance Act,
25 and as such they were negligent. And, we further submit
that the defective door which did become ajar ultimately
caused the injury to Mr. Baker.

whether this accident happened, or didn't happen. The Plaintiff could have well been standing on the runningboard and could have been hurt just as badly as he was hurt. There is no negligence, that is the proximate cause of the accident. Certainly, you can't say that the act requires certain things when it doesn't say that; it says just, all cars requiring runningboards. There is nothing in there that says, these type of cars shall be equipped with runningboards. And, there is no evidence that a runningboard would have affected this accident one way or the other. So it's not the proximate cause of the accident, and it's not Norfolk and Western's car. They had to accept this car in the condition, and they had the obligation to make a reasonable inspection for obvious defects - fairly obvious defects. They are not responsible for latent, patent defects that may or may not have been there. There is nothing in the evidence to show whether this thing was caused by concealed damage, or latent, or whether or not it was obvious at all. Nobody saw it. And, we respectfully submit that the evidence should be struck.

THE COURT: I think, that in viewing the evidence, at this stage I'll have to overrule the Motion to Strike the evidence.

MR. BOWEN: Alright, sir.

THE COURT: We have enough evidence here

2 to raise a jury question as to whether or not the rail-
3 road exercised ordinary care to inspect, and this would
4 be a jury question rather than a question of law.

5 MR. BOWEN: Alright, we object.

6 THE COURT: Objection is overruled.

7 MR. BOWEN: We wish to show our objection
8 to the Court's Ruling.

9 Mr. Yost.

10 THE COURT: Let's get the jury out first.

11 (Whereupon, the Jury was
12 returned to the Courtroom.)

13 THEREUPON came

14 WILLIAM F. YOST

15 called as a witness on behalf of the Defendant, who
16 having been first duly sworn according to law, was
17 examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. BOWEN:

20 Q. State your name, age, and address?

21 A. William Fred Yost, 41 years of age, 501
22 Edgewood, Bluefield, Virginia.

23 Q. What do you do?

24 A. I'm a road brakeman for N & W Railroad.

25 Q. How long have you worked for N & W?

A. Ten years.

Q. What has been your duty during that period

2

of time?

3

A. Road Brakeman and Road Conductor.

4

Q. How long have you been a Brakeman?

5

A. Ten years.

6

Q. Were you a part of the Norfolk and Western force, that set off a car in Richlands on November the 17th, 1978?

8

A. Yes, sir.

9

Q. Were you the brakeman on that force?

10

A. Yes, sir.

11

Q. Do you remember whether or not you spotted a car on the siding to be unloaded by the Richlands Farm Bureau?

13

14

A. Yes, sir, that car would have went on the station siding at Richlands.

15

16

Q. That's the station siding?

17

A. Right.

17

Q. Is that where they unload?

18

A. Yes, sir, on a stub track.

19

Q. Now tell the jury what your duties are in spotting a car to be unloaded?

20

21

A. Well, my duty is to set the car at a given place, that - like say, the Farm Bureau at Richlands, or wherever will have a place to where they can get a vehicle or what have you to it, to get it unloaded, and to make sure that the car is anchored well, and the hand brake is

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23

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sufficiently tied to where the car cannot be moved other than by locomotive power, and to see that the car is in good condition and has no defects before leaving it there, otherwise - if it has - we don't leave it.

3

4

5

6

Q. Did you observe this car on that occasion?

7

A. Yes, I did.

8

Q. Which side of the car did you observe?

9

A. Both sides.

10

Q. Did you see whether or not the seals were on this car?

11

12

A. Under the operating rules of the railroad, if the seal is not on the car I can't leave it there. I have to take that car back to its original terminal.

13

14

15

Q. So that's part of your duties, as part of your observation to see that the car is in good condition?

16

17

A. Yes, it is.

18

Q. Did you have occasion to observe the doors on each side of the car?

19

20

A. I did.

21

Q. What was the condition of those doors?

22

A. Well, the doors were in flush, closed completely. You have a locking device in the center of the door which locks it, and it has to be all the way in, completely locked, before the seal is put on the

23

24

25

2 door. And, there was no defects to the door, on either
3 side of the car when I placed it, or I couldn't - under
4 our operating rules we can't, no way leave a car sitting
5 or standing on the spur track if there is anytype of
6 defect; not only with the doors, but the brake. And,
7 the car - you know - has to be stationary, where it
8 can't be moved. And, if there is anytype of defect we
9 can't leave it.

10 Q. And, you made that inspection before that
11 car was left on that occasion?

12 A. Yes, I sure did.

13 Q. Is that the car that was inspected...Is that
14 a picture of the car that was inspected?

15 A. Yes, sir.

16 MR. BOWEN: You may cross examine.

17 CROSS EXAMINATION

18 BY MR. McAFEE:

19 Q. Now, Mr. Yost, you say that this inspection
20 that you speak of took place on November the 17th, '78?

21 A. Yes, sir

22 Q. And, you were a road brakeman?

23 A. Yes.

24 Q. What time did you go to work that day?

25 A. That day - That particular day?

Q. (Counsel nodded in the affirmative.)

A. I could not say, because I was on a Clinch

2

Valley pool job which you have seven or eight different jobs, and they go at different times.

3

4

Q. You mean, that you're telling the Court and jury that you can remember specifically inspecting this car, that you have been shown a photograph of, but you can't tell me what time you went to work that day?

5

6

7

MR. BOWEN: That's my copy, that is not in evidence.

8

9

A. I can.

10

11

Q. Could you tell me what time you got off work that day?

12

A. No, sir, I can't.

13

14

Q. Can you tell me what time you performed the inspection?

15

16

17

18

19

A. No, because you have...from your initial terminal to your final destination - If you're familiar with railroad work - you may have a delay here at Tazewell on a siding waiting on an East bound, West bound traffic; this will happen all the way to Norton. There is no way that I can give you a definite time.

20

21

Q. Well, have you ever talked to Mr. Pennington over here about the fact that you inspected this car?

22

23

24

A. When Mr. Pennington gave me a subpoena to sign last Thursday, and told me that the car was in question.

25

Q. When is the first time that you told anybody

2

for the Norfolk and Western Railroad, that you inspected this car?

3

4

A. Thursday, last week. But, that is a normal procedure with every car that I set off, and anyother employee of the N & W Railroad.

5

6

7

Q. Are you saying, that you don't remember specifically this car?

8

A. No, sir.

9

Q. You do, or don't?

10

A. I said, I did remember the car.

11

Q. Did you remember the number on the car?

12

A. No, sir. I just read the number on the car.

13

Q. What is the number on the car?

14

A. 103 - Something. 10382.

15

Q. Well do you remember it now?

16

A. I just read it.

17

Q. Do you know what it is?

18

A. The number on the car?

19

Q. Yes.

20

A. No, I don't. I don't think the number of the car is in question here.

21

Q. Do you remember what railroad the car came from?

22

23

A. I got it in Bluefield. I got the car in Bluefield, on our N & W Rail Line.

24

25

Q. How many cars did you pick up in Bluefield

2

that day?

3

A. Well, I'd say maybe we had two tracks of cars to different destinations, to Bluefield and Norton.

4

5

Q. Pardon? How many?

6

A. I don't know. Do you want a definite number?

7

Q. Yes.

8

A. I don't know.

9

Q. Can you give me an approximate number?

10

A. Normally on a through job you'll have anywhere from eighty to a hundred and thirty cars.

11

Q. Well, do you know whose name was on the side of this car?

12

13

A. (Nodded in the negative.) Whose name - I don't know, individual or company?

14

15

Q. What company name was on it? What was printed on the side of it?

16

A. I can't say definitely.

17

Q. What color was it?

18

A. I don't know.

19

Q. You don't know. Did you check the hand brakes on this car?

20

21

A. I most certainly did.

22

Q. Did you climb upon it?

23

A. Climb upon it?

24

Q. Yes.

25

A. Hand brake?

2

Q. Yes.

3

A. To secure it I'm sure I did.

4

Q. Do you remember climbing upon it?

5

A. Sure do.

6

Q. What is a "sill"?

7

A. That is a...the little metal seal that is put...

8

Q. S-I-L-L. Not seal, but sill?

9

A. You've got a center sill and then you've got a...What type of sill are you speaking of?

10

11

Q. What kind was on this car?

12

A. There was a seal on the door, if this is the seal that you're speaking of, S - E - A - L.

13

14

Q. I'm talking about an "S-I-L-L", sill. Do you know what it is?

15

A. We have a center sill, underneath the car.

16

Q. Do you have steps on this car?

17

A. Should have about two steps going up to the door, to where you unload it, and it should have steps going up to your brake wheel.

18

19

Q. Do you have a runningboard?

20

21

A. Some box cars have a low runningboard where your brake is at, some have a ladder.

22

23

Q. Which one did this have?

24

A. I can't...I don't know.

25

Q. Would it have a runningboard by the door

26

2

where you opened it?

3

A. A runningboard by the door?

4

Q. Or platform, where you can get up where the door is?

5

A. No, it should have three steps...two steps.

6

Q. Anything else? How many steps on each end?

7

A. On each end of the car, or each end of the...

8

Q. On each end of the car?

9

THE COURT: Could I see that other photograph?

10

11

A. Up to the bottom of the car, or all the way to the top of the car?

12

13

Q. Could you get all the way up to the top of the car, on this particular car?

14

15

A. Now I can't say.

16

Q. Did you get upon top of the car?

17

A. I'm not allowed to get on top of the car, that's against the company rules. I can go up to the brake, but you don't ever get on top of the car.

18

19

Q. Who is allowed to get on top of the car?

20

A. To get on top? I'm not. That's as far as I go; that's as far as I know.

21

22

Q. Do you know who, in the railroad, can get on top of it?

23

24

A. No, I don't.

25

Q. Well, who inspects the top of the car?

2

A. Who inspects the top?

3

Q. Yes. You inspected it?

4

A. Visual inspection of the car is what I do.

5

Q. Well did you inspect the top of it?

6

A. I'm not allowed on top of the car. I might fall off the top.

7

Q. Your answer is, that you didn't inspect the top of it?

8

9

A. No, sir.

10

Q. Do you specifically remember dropping this car on that side track?

11

12

A. I never drop a car, since I've been with the railroad company. I spot it by motive power.

13

14

Q. What do you call it...What did you have to do with putting the car on the side track?

15

16

A. Well at this specific place you have a high stand switch, and a pipe connected D-Rail, which keeps your cars from rolling out. I'd say, maybe thirty feet back from your D-Rail you have another switch and you have two, little short stub tracks - One runs to the North, and one runs to the South. The North track is the one that we would spot that on.

17

18

19

20

21

22

Q. Well who pushed that car in there?

23

A. The engineer pushed it in there.

24

Q. Did you have anything to do with pushing it in?

25

2

A. No, sir.

3

Q. Well did you first become aware that the car was there? What did you do?

4

5

A. That the car was at the specific place that it was left, or in the train?

6

7

Q. No, where it was left?

8

9

A. Where it was left I had to walk over and cut the car off, and then go down to the switch, throw the switch, bring the car in, make sure the brake was secured.

10

11

Q. What I'm asking you, Mr. Yost, how did you bring that car in, when you cut it loose?

12

A. By motive power.

13

Q. Locomotive power?

14

A. Right.

15

Q. And, were you in contact with the engineer?

16

A. Most certainly.

17

Q. And, did you tell him when to stop pushing?

18

A. When he had it in the clear.

19

Q. Then what did you do when he had it in the clear?

20

A. Then I made sure that the hand brake was tied securely, to where the car wouldn't move, and cut it off and came back to my train.

22

23

Q. Anything else?

24

A. No, sir.

25

Q. When did you walk around the car?

2

A. Walked around the car before I cut it off.

3

Q. Did you walk around the locomotive too?

4

A. When you set a car in it's always the end car.

5

Q. I understand.

6

A. When you make a set off it's the end car, whether you're going East or West.

8

Q. Okay.

9

A. And, you go from say your North side, walk around your car and give the visual inspection, then you come back to the North side, tie your...secure your brake, then cut your air loose and detach it from the train.

13

14

Q. Mr. Yost, I gather that while this locomotive was pushing that car in there you were on the side of it?

15

A. (Nodded in the affirmative.)

16

Q. Is that right?

17

A. (Nodded in the affirmative.)

18

Q. Is that right, or is that wrong?

19

A. I'd say I was.

20

Q. Do you remember being on it?

21

A. There is not much way...it's about seven or eight car lengths from that main line switch, I'd be riding that car in there.

22

23

24

Q. Do you remember being on this car, on the 17th day of November, 19...

25

2

A. I would have been on the car.

3

Q. Do you remember being on the car?

4

A. Yes, sir.

5

Q. You do? You specifically remember being on it?

6

A. Rule 103-B states, that I will be on the end of that car anytime that it's shoving.

7

Q. Are you telling the Court and jury what you're supposed to do, or what you remember doing?

8

9

A. If I set that car in there I was on the rear of it protecting it.

10

11

Q. That's what you're supposed to do?

12

A. That's exactly what I done. When I set a car in, that's exactly what I do.

13

14

Q. Did you check the top of the car at all?

15

A. No, sir.

16

Q. You didn't look up at the top of it?

17

A. Yes, I looked at it.

18

Q. What did you see?

19

A. There is a bottom and a top to it, to look at. I saw that the door was in flush and that the... you've got a turning apparatus right in the center of the door, and if it's not all the way in they don't put the seal on the car to where it will be moved out of the initial terminal. And, if that seal is broken at anytime you cannot leave that car there, it has to go on.

20

21

22

23

24

Q. Mr. Yost, when did you learn for the first

25

2

time, that the car you say you inspected on the 17th day of November, 1978; that the door had fallen off and hurt this man here?

3

4

A. Thursday of last week.

5

6

Q. What date last week did you first learn about this case?

7

8

A. Today is the 17th, go back to...it would be last Thursday.

9

Q. This past Thursday?

10

A. This past Thursday.

11

12

Q. How did you become aware of the fact, who told you that this car, that you inspected on the 17th; that the door had fallen off?

13

14

A. Mr. Pennington.

15

Q. That's the first knowledge you had of it?

16

A. That's the first knowledge.

17

Q. Have you discussed it with anybody, before Mr. Pennington talked to you?

18

A. No, sir.

19

Q. Nobody, at all?

20

A. (Nodded in the negative.)

21

Q. How did it come about that Mr. Pennington knew, that you had inspected this car?

22

23

A. I just told you, sir, the procedure; that any car that you set off to be unloaded by people other than railroad personnel, that the car has to be inspected

24

25

2

or you cannot set it off and leave it there.

3

Q. Did Mr. Pennington come up to you and say, Listen, did you inspect this car? How did it come about?

4

5

A. Well I was working over at North Tazewell on a shifter, and he came over and says, I have a subpoena for you to sign to be in Court next Tuesday. And, I said, "What is it about?" And, he said, Over an accident in Richlands, over a box car.

6

7

8

9

10

Q. Okay. Is that the first knowledge that you had, anything about it?

11

A. It is.

12

Q. Did he show you these pictures, at that time?

13

A. No, sir.

14

Q. Did he tell you anything about how it happened?

15

16

A. He said, that the door had fell off was all he said. Other than that he didn't say anything else.

17

18

Q. And, you have never talked to him, or made any statements, or anything about that until Thursday last, when you were subpoenaed?

19

20

A. That's exactly right.

21

22

Q. Mr. Yost, I'm going to show you a statement dated December the 30th, 1980, and ask you if you did not make a statement to Mr. Pennington and sign it; that is a copy of your supposed statement?

23

24

25

MR. BOWEN: Let me show him the original

2 statement. This statement was gotten at your request,
3 Mr. McAfee. I'd like to see that the original statement
4 is in his hands, and not a typewritten piece of paper.

5 A. I recall that letter that you sent to me, now.
6 I sure do.

7 Q. Now wait just a minute. Let me ask you a
8 question. You previously said, that Thursday of last
9 week was the first time that you had any knowledge about
10 this?

11 A. You asked me if that was the first time I
12 had talked to anyone about this.

13 Q. When you made that statement didn't you talk
14 to Mr. Pennington, on December the 30th, 1980?

15 A. Yes, sir. But, I had forgotten...I had
16 forgotten about this letter he sent me.

17 Q. Is that a letter you have there, Mr. Yost?

18 A. This statement?

19 Q. Yes?

20 A. The one you gave me was a...

21 Q. What do you have in your hand then?

22 A. This is a statement.

23 Q. Whose writing is it?

24 A. It's my signature.

25 Q. Whose writing is it?

A. This writing?

Q. Yes?

2

A. It is Mr. Pennington's.

3

Q. Weren't you present when Mr. Pennington wrote that?

4

5

A. I said, I had forgotten...I had forgot completely...completely forgotten...

6

7

Q. Could it be then, Mr. Yost, that you completely forgot about what happened on November the 17th, 1978?

8

9

A. No, because I know how my work procedures are. There is no way...

10

Q. "No way" what?

11

A. There is no way that I would leave a car in the siding, that wasn't safe to be worked in.

12

13

Q. Well do cars have to have platforms, and runningboards on them?

14

15

A. On the front of the car.

16

Q. Did this one have it?

17

A. I can't answer that, I don't know. I don't know.

18

19

Q. Did the sills, or steps on the car have to be in good condition? You know what the steps are, don't you - Do they have to be in good condition?

20

21

A. They do.

22

Q. Were the sills and steps on this car in good condition?

23

24

A. I can't say.

25

Q. You know what a grab iron is, don't you?

2

A. Sure do.

3

Q. Was the grab iron on this car bent?

4

A. I don't know.

5

Q. You do know, that where you have a step in and around the car, that you have to have a runningboard or platform don't you? Are you familiar with that?

7

A. Well now on a box car you do, but...

8

Q. Was this a box car?

9

A. Yes.

10

Q. Did it have such an apparatus on it?

11

A. I just told you, I can't remember that. I don't know whether it did or not.

12

13

Q. You don't remember one way or the other, is that right?

14

A. No, sir, I don't.

15

Q. How many cars did you inspect that day?

16

17

A. Well if we made anyother single set offs we would, you know, inspect it. That particular day, that's just like asking me how many I inspected yesterday, I can't remember how many cars we set off at different places.

18

19

20

21

Q. Do you know whether or not all cars having ladders should have hand holds, grab irons on the roof at the top of such...ladders and hand holds...I mean, ladders..

22

23

24

25

A. They should have one on top, Yes.

2

Q. Did it have one here?

3

A. I don't know.

4

5

Q. For the record suppose you read to the jury that statement, that you made on December the 30th, 1980 to Mr. Pennington.

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

A. "My name is W. F. Yost, age 41, and I am employed as road brakeman. I have worked for N & W about ten years. On November 17th, 1978 I was working as head brakeman on Train 2PBN, in charge of conductor JMR Defruce, with engineer Bernard L. McBride. Jerry W. Bowman was rear brakeman on this date. When cars are set off at Richlands, Virginia they are usually set off by the head end as the rear of train would be down in Richlands some distance away. I recall cutting a box car out for the siding where the old station was located, as this was about the last job I worked on the valley. I don't recall anything wrong with the car and I could see...And if there had been anything visibly wrong we wouldn't have left it. As I now recall the car was sealed, which indicated that it was alright. I was the only member of the crew close enough to the car to notice if anything was wrong, and I didn't see anything wrong with it.

23

I have read this statement and it is true.

24

Q. Whose signature is it?

25

A. William F. Yost.

2

Q. Who witnessed it?

3

A. Pennington.

4

Q. What is the date of this statement?

5

A. December 30th, 1980.

6

Q. And, where did you give this statement?

7

Where were you when you gave this statement, and signed it to Mr. Pennington?

8

A. I was at home.

9

Q. He came to your house, is that right?

10

A. No, sir.

11

Q. Where did he come to?

12

A. He mailed it to me.

13

Q. What did you do, read it?

14

A. Didn't you mail it? (Speaking to Mr. Pennington.) You mailed it, didn't you?

15

THE COURT: Just answer.

16

Q. Did he mail it to you?

17

A. (Nodded in the affirmative.)

18

Q. What did you do when you got it?

19

A. I read it and signed it, and sent it back.

20

Q. Where was it that you told him all of those

21

things?

22

A. Where was what?

23

Q. The statement is dated December the 30th,

24

1980. If he mailed the statement to you, Mr. Yost, when did you talk to him about it?

25

2

A. Last Thursday.

3

Q. Well before you made that statement, and before you signed it didn't you talk to him?

4

5

A. No, sir.

6

Q. How did he know what to put in the statement?

7

A. That's because that is normal procedure with the railroad company. You just don't set cars anywhere, that are not in condition to be set off.

9

10

Q. Mr. Yost, what I want to know is the date on that statement is December the 30th, 1980, and you said Mr. Pennington mailed it to you?

11

12

A. Yes, sir.

13

Q. You got it in the mail?

14

A. (Nodded in the affirmative.)

15

Q. Are you saying, that before you got that statement in the mail that you never talked to Mr. Pennington before?

16

17

A. Not about this, No, sir.

18

Q. Well did Mr. Pennington witness the statement?

19

A. Yes, sir.

20

Q. Was it signed by Mr. Pennington when you got it in the mail?

21

22

A. I don't recall whether it was signed or not.

23

Q. Are you saying, Mr. Yost, that you just happened to get this statement in the mail, and never talked to Mr. Pennington before about this accident, or

24

25

2 incident, and signed it and mailed it back? Is that
3 what you're telling the Court and jury?

4 A. I'm saying, that I know how our procedures
5 are, and that I know if it's not safe I'm not going to
6 have anything to do with it.

7 Q. Well what I want to know is, Mr. Yost, is
8 one thing. You're telling the Court and jury, that you
9 got this statement in the mail?

10 A. That's right.

11 Q. From Mr. Pennington, is that right?

12 A. That's exactly right.

13 Q. And, before you got this in the mail, that
14 you had never talked to Mr. Pennington before?

15 A. No, sir. This is just what I signed.

16 Q. In otherwords, you had no idea in the world
17 why you were getting this letter?

18 A. The letter tells me, what's there.

19 Q. Well how did Mr. Pennington happen to know,
20 for instance, that you were working with conductor JRM
21 Defruce - how did he know that?

22 A. They keep a record of everyday you work.

23 Q. Did you tell him that you worked with Mr.
24 Defruce?

25 A. They have a record of this, everyday that
you work. The railroad company, they keep a permanent
record of it.

Q. Well I'm not going to beat the issue anymore, but are you - just for one time. If you don't understand what I'm asking, please tell me. Are you saying today, under oath, that you have never talked to Mr. Pennington about this incident, or accident before Thursday of last week?

A. Not that I recall.

Q. That's all.

MR. McAFEE: Your Honor, we want to introduce this as Mr. Yost's Exhibit Number 1, I guess, and have it introduced.

(Plaintiff's Exhibit 7
was marked.)

REDIRECT EXAMINATION

BY MR. BOWEN:

Q. Mr. Yost, do you remember Mr. Pennington calling you over the telephone and asking you about...

MR. McAFEE: That's cross examination.

Q. I'm trying to refresh his memory, Your Honor.

MR. McAFEE: That's his witness.

THE COURT: Overruled.

Q. Do you remember Mr. Pennington calling you on the telephone about this accident, and asking you about what happened?

A. I'm trying to think, Mr. Bowen. Are you talking prior to...

2

Q. Prior to your signing this statement?

3

A. I swear, I can't remember.

4

Q. You don't remember talking to Mr. Pennington over the telephone?

5

A. (Nodded in the negative.)

6

MR. CLINE: He said he didn't.

7

MR. BOWEN: I'm just asking to be sure.

8

THE COURT: He said, he couldn't remember.

9

Q. You didn't have any contact with Mr. Pennington, prior to receiving this in the mail?

10

11

A. Other than this statement and him serving a subpoena last week, No, I don't.

12

13

MR. BOWEN: Alright, sir. That's all.

14

MR. McAFEE: That's all.

15

(Witness withdrew from the Courtroom.)

16

THEREUPON came

17

R. L. AUSTIN

18

called as a witness on behalf of the Defendant, who, having been first duly sworn according to law, was examined and testified as follows:

19

20

DIRECT EXAMINATION

21

BY MR. BOWEN:

22

23

Q. Please state your name, age, and address.

24

A. R. L. Austin, age 52, 1700 Whitethorn Extension, Bluefield, West Virginia.

25

2

Q. What do you do?

3

A. I'm a master mechanic for the Norfolk and Western Railway.

4

5

Q. How long have you worked for the Norfolk and Western?

6

A. 32 years.

7

Q. How long have you been a master mechanic?

8

A. Since August, 1976.

9

Q. What did you do before that?

10

A. I was the general foreman at Williamson, West Virginia.

11

12

Q. On November 17th, 1978, did you go to Richlands to inspect a box car that had been involved in an accident?

13

14

A. Yes, I did.

15

Q. Who made that inspection with you?

16

A. To the best of my memory it was Mr. C. K.

17

Robinson, a foreman at Bluefield, and a car man by the name of Sayers.

18

19

Q. We have some pictures that have been introduced into evidence today, and I'd like for you to examine those pictures, and let you advise the Court and jury whether or not those pictures are pictures of the box car, and the door, that you inspected on that occasion?

20

21

22

23

24

A. (Witness did as directed.) Yes, this is the

25

2

box car that I inspected at Richlands, Virginia.

3

Q. Now what did you do as part of your inspection?

4

A. In conjunction with these other employees, which was just mentioned, we inspected the car for defects.

5

6

7

Q. There has been put in evidence the report of the inspection of a freight car, and it is signed by C. K. Robinson, A. B. Sayers, Sr., J. W. Gilliam.

8

9

Do you have the original?

10

MR. McAFEE: No, the Judge has it.

11

12

Q. This has been introduced as Plaintiff's Exhibit Number 4. I'd like for you to look at that inspection report, and see whether or not you agree with what is stated on the report?

13

14

A. (Witness looking at the Exhibit.) Yes, I do.

15

16

Q. Is that correctly stated, the findings of that report?

17

A. To the best of my knowledge, Yes, sir.

18

19

Q. Tell the jury what type of inspection you made with the other gentlemen there, on that occasion?

20

21

A. Well a general inspection of the car was made for all safety appliances, which include hand holds, sill steps, hand brakes, doors, wheels, and the general condition of the car was inspected to find out its general condition.

22

23

24

25

Q. Did you find anything wrong with the door, or

2

with the car?

3

A. Well on arriving at Richlands the first thing we observed was the door lying on the ground, and it had one operating rod bent. And, I have to believe the rod was bent when the door was dislodged from the car and struck the ground.

7

Q. Whereabouts was that rod bent?

8

A. It would be at the top of the door.

9

Q. Could you mark, on Exhibit 3, where you observed the rod being bent?

10

11

A. This would be the opposite side of the car, wouldn't it?

12

13

Q. That's the opposite door, Yes.

14

A. By the car being turned and being the opposite side...Which would be the West end of this car?

15

MR. McAFEE: Now, Your Honor, I object.

16

17

Q. Just mark that door, as if that were the door that was in place, that fell.

18

A. At the time?

19

Q. Yes, sir.

20

A. In that general area, right there.

21

Q. You've marked the right-hand top of the operating bar, is that right?

22

23

A. That is correct, Yes, sir.

24

Q. Now that operating bar has a crook on the end of it, an eccentric, is that what you call it?

25

2

A. That is correct, Yes, sir.

3

4

5

Q. And, I believe that is what pulls the door out away from the box car when you open up the operating handles, or the operating bars is that - Am I speaking correctly?

6

7

8

9

A. That is almost correct. That is what pulls the car away after you release it and turn the handle, that brings the door away from the door opening so that it can be slid open.

10

11

Q. Now what holds this eccentric up to the top of the door, where you found that it was bent?

12

13

14

15

16

A. That is a rod, and you have a guide at the top of the door, that the rod goes up in - in this manner here. This is your rod and then you've got your guide, and then there is a roller around this rod, that allows the door to roll back and forth. But, the guide at the top of the door is what holds the door in place.

17

18

Q. Have you worked on doors of this kind from time to time?

19

A. Yes, sir.

20

21

Q. What would cause a door of this kind to malfunction?

22

23

24

A. In my opinion it's abuse, by either fork trucks, motorized vehicles, or someother method of forcing the door.

25

Q. Was the operating end of the rod bent, or

2

was it the eccentric part that was bent?

3

A. It was approximately the last, or the top eight to ten inches of the operating rod, itself.

4

5

Q. Now what would that do to a door with a bent operating rod at the top?

6

7

A. It would allow it to become disengaged from the guide at the top of the door.

8

9

Q. And, what would bend the end of an operating rod of that kind?

10

A. It would be an undue force of sometype.

11

Q. After an operating rod is bent in that manner, would the operating rod be hard to open, to operate?

12

13

A. In my opinion it would, Yes, sir.

14

Q. Did you find anything else wrong with the door mechanism?

15

A. No, sir, I did not.

16

17

Q. Did you find anything else wrong with the box car, except what is noted on this inspection that is in evidence?

18

19

A. No, sir, I did not.

20

Q. Have you repaired doors where the operating rods have been bent in that fashion?

21

22

A. Yes, sir, we have.

23

Q. How is that done?

24

A. Either by heating and straightening, or renewing the rod.

25

2

Q. Do you know what was done with the door, in this case?

3

4

A. Yes, sir. The door..after the accident, the door was loaded in the box car, and the box car was sent to its home shop.

5

6

Q. That was not a Norfolk and Western Car?

7

A. No, sir, it was not.

8

9

Q. I believe that car came from out West, somewhere?

10

A. I don't have that information.

11

MR. BOWEN: You may cross examine.

12

CROSS EXAMINATION

13

BY MR. McAFEE:

14

Q. Mr. Austin, I believe right in the very beginning you said it was your opinion, that the rod was bent, on this particular door - was caused when the door fell off; that's your opinion isn't it?

15

16

17

A. I believe I said that, or by undue force.

18

I'm not...

19

Q. I believe you said, that the rod got bent when the door fell off. Didn't you say that?

20

21

A. I don't remember whether I said that, or falling off and undue force.

22

23

Q. Your Honor, I'd like the Court Reporter to read it back?

24

25

THE COURT: The jury will recall the

2

evidence.

3

Q. What is it then, Mr. Austin? Which one is it now?

4

5

A. It could have been either one. But, in my opinion the door was forced in some manner, and the rod was bent when it struck the ground.

6

7

Q. The door was forced in some manner, but the rod was bent when it hit the ground?

8

9

A. Probably. I wasn't there. I could not state definitely.

10

11

Q. Is it true...

12

A. ...What bent the rod.

13

14

Q. Could I refresh your memory, when you gave a deposition here, and you were asked this question: If you knew what caused this door to come loose and fall? And, your answer on about four different occasions was, that you didn't know. Didn't you say that under oath before?

15

16

17

18

A. I don't recall exactly what I did say in the deposition, that has been some months ago.

19

20

Q. Well on page 43 of your deposition, I'll ask you if you did not make the following answers to these questions Mr. Cline asked you:

21

22

23

Mr. Austin, did you tell Mr. Pennington that you did not know, or was not sure as to what caused the door to fall off? And, your answer, That's correct.

24

25

Next page. Question. At this time you're not sure what caused the door to fall off? And, your answer, That's correct.

Same page, line 12. Do you know of any inspections that were made by any personnel of the N & W of this car, prior to this accident? No sir, I do not.

Did you make those answers to those questions?

A. Yes. But...But, I believe somewhere in there, that the question about being forced...by sometype of vehicle, or something. I believe that same question is also in there.

Q. Forced...

MR. BOWEN: Your Honor, I want the entire evidence read into the record. If he's just going to take it out of context, one question at a time...

MR. McAFEE: Your Honor, all I want to show is that the man is saying one thing today, and he said something inconsistent prior to it; that's all I'm asking.

MR. BOWEN: He hasn't said that.

Q. Do you know what caused it to come off?

A. No, sir, I was not there when the door hit the ground.

Q. Okay. You don't know then, do you?

A. That's what I said.

Q. Then it is your opinion, that the rod was

2

bent when it hit the ground?

3

A. I'll not change my testimony. It was either bent by an undue force, or when it struck the ground.

4

5

Q. And, you're saying an undue force or struck the ground?

6

A. That is correct.

7

8

Q. Okay. Do you have the Exhibit there, in which you said you agreed with the inspection? Could you refer to it a minute.

9

10

My copy doesn't show, but if you could skip down to the part, Your attention should be given to parts of car involved in the personal injury. Do you see that written in there?

11

12

13

A. Yes, sir.

14

15

Q. Now the next line. What is the words written into that column over there, that is blocked out? Right here.

16

17

A. That should be couplers and attachments, I believe is the way..

18

19

Q. Couplers and attachments?

20

A. I believe that is what goes in there.

21

Q. How many couplers would you have on this car?

22

A. Two.

23

Q. Is this a box car?

24

A. It is.

25

Q. Now skipping down to the next block, what is

2

that? Where it says, "Kind - Universal"?

3

A. That would be the hand brake.

4

Q. You've got grease or foreign substance, "None"?

5

A. That is correct.

6

Q. What was the length of the brake chain?

7

A. I do not know.

8

Q. Did you measure it?

9

A. No, sir.

10

Q. Who did?

11

A. No one.

12

Q. How do you know that it was the proper length?

13

A. When you set the brake you look to your foundation brake rigging to see if it's all in proper perspective.

14

Q. It says, "Proper length"?

15

A. Uh huh.

16

Q. Did you check the length?

17

A. Not by inches and feet, but by sight.

18

Q. Okay. Skipping on down to the next block,

19

what is that?

20

A. I don't recall whether that is brake shaft, or brake staff.

21

Q. You've got opposite that, "None"?

22

A. Correct.

23

Q. What does that mean?

24

A. If that was to be brake staff, that would

25

2

mean the car was not equipped with one.

3

Q. What is the next block?

4

A. Air brakes.

5

Q. What type is an "A B"?

6

A. AB is for airbrake, and that is the mechanical designation for that particular air brake valve, that is on the car.

8

Q. It says, "last cleaned and oiled, place OC."

9

What is that?

10

A. That would be the shop, that last done the

11

work.

12

Q. What shop was that?

13

A. Well, if you look out in the next column it

14

says, "BN". I would have no way of knowing what shop "OC" was on the Burlington Northern Railroad.

15

Q. Well, you've got a date there don't you?

16

A. Correct.

17

Q. What date do you have?

18

A. 12/75.

19

Q. How did you get that date?

20

A. That is stenciled on the car, near the air

21

brake equipment.

22

Q. Alright. Now what is the next column there?

23

A. I believe that is brake platform.

24

Q. Where was the brake platform located on this

25

car, on the B end? Tell the Court and the jury what the

2

"B-end" is?

3

A. The B-end of the car is where the hand brake is located.

4

5

Q. What is the other end?

6

A. The other end is the A-end.

7

Q. What is on the "A-end"? Brake, no brake?

8

A. There is no brake on the A-end of the car; that is the reason the term "A" and "B" is used, to designate the brake end of the car.

9

10

Q. Alright. Which way, as you were looking into ...Maybe I can do it better with a picture. Looking at Plaintiff's Exhibit 1, and looking directly into this picture, which end is the "A-end", and which is the "B-end"?

11

12

13

14

15

A. Well looking from this photograph I wouldn't attempt to absolutely identify it, but being a car person this should be the "B-end" of the car.

16

17

18

Q. Would you put...I think you're pointing to this end here, as being the "B-end", is that correct?

19

20

21

A. I say, it should be. But, not being able to see the brakes of the car I'm not able to identify it.

22

23

Q. You were out there and conducted an inspection. Which end was it on?

24

A. By that photograph I cannot tell you.

25

Q. Well not from the photograph, but you were

2

out there, you inspected the brakes, you looked at it,
which end was it on?

3

4

A. I do not remember.

5

Q. Skipping down to the next column beyond that,
what do you have?

6

7

A. Where was we at, brake platform...Grab irons,
hand holds, stirrups, and soforth.

8

Q. Did you check the grab irons?

9

A. Yes, we did.

10

Q. Is the stirrup sometimes referred to as a

11

sill?

12

A. Sill step.

13

Q. Sill step?

14

A. That is correct.

15

Q. What is a sill step?

16

A. That is a step attached to the side sill of
the car, which is a means of climbing the side of the
car.

17

18

Q. The sill step means, that you put a step on
the side of the car and then you can climb up it?

19

A. That is correct.

20

Q. What other type of steps do you have, besides
sill steps on a car?

21

22

A. As referred to, the sill step and the brake
step.

23

24

Q. Okay. Did this car have sill steps on it?

25

2

A. Yes, sir.

3

Q. Where were they located?

4

A. On this particular car they were located on the sides of the car, and I believe this particular car had them in the middle, at the door opening.

5

6

Q. Had a sill step there?

7

A. That is correct.

8

Q. Are you familiar with the Safety Appliance Act?

9

A. Yes, sir.

10

Q. Are you familiar with the requirements, insofar as sill steps are concerned on box cars?

11

12

A. Well I believe I am.

13

Q. What is required where you have a sill step on the side of a car?

14

15

A. Hand holds above them.

16

Q. Where to? How far up?

17

A. Exactly the foot and inches I couldn't give it to you, but they usually go approximately three to four feet above the side of the car.

18

19

Q. Do they go all the way to the roof, to the top?

20

21

A. There may be a few cars left that they do, but most of them do not. The runningboards have been removed from virtually all box cars, and ladders do not extend to the top of the car.

22

23

24

25

Q. Runningboards have been removed?

2

A. That is correct.

3

Q. A runningboard is what, now?

4

A. That is a walk-way on the top of the car.

5

Q. Did this car have a runningboard?

6

A. No, sir, it was not equipped with a runningboard.

7

Q. Are you familiar with the requirements of a runningboard on box cars?

9

A. I certainly am.

10

Q. Are they required?

11

A. They are not.

12

Q. Never?

13

A. Not on any car offered in interchange.

14

Q. What do you mean, "offered in interchange"?

15

A. That moves over the railroad carrying revenue. Cars on interchange from railroad to another.

16

Q. They are not required?

17

A. That is correct.

18

Q. Was this car used in interchange?

19

A. It was.

20

Q. Are you sure of that?

21

A. I'm sure of that.

22

Q. Did you inspect the top of this car?

23

A. No, sir, I did not.

24

Q. How did you determine the roof was in good condition?

25

2 A. From inside the box car.

3 Q. You made no visual inspection for the top?

4 A. I did not climb and walk over the top of
5 the car, No, sir.

6 Q. Couldn't get up there, could you?

7 A. That is correct.

8 Q. So you really don't know if there was some
9 damage to the top?

10 A. From ground level, and from box car floor
11 level I observed no damage.

12 Q. My question to you, Mr. Austin, having not
13 seen the top you couldn't tell whether or not there was
14 any damage to the top of this car at all, could you?
15 For instance, you couldn't tell the Court and the jury
16 whether or not there had been some damage up there at
17 the top of this car could you?

18 A. In my opinion I could, Yes, sir. I can
19 stand in this...

20 Q. Did you look at it?

21 A. I can stand on this floor and look at that
22 ceiling and tell you whether there is damage up there
23 or not.

24 Q. Can you stand on this floor and look up at
25 the ceiling, and see what is up on top of it?

26 A. No, sir.

27 Q. Were you able to see what was on top of this

2

car?

3

A. I did not get on top of the car, No.

4

Q. So you don't know what the condition of the top was, one way or the other do you?

5

A. In my opinion it was in good condition.

6

Q. Did you see it?

7

8

A. Because all this roof consists of is a piece of tin, or galvanized metal, and there is nothing there to conceal or to hide it.

9

10

Q. And, there is nothing else on top except galvanized tin?

11

12

A. That is correct.

13

14

Q. What holds up the door there, then? What is this made of - As I'm pointing to the beam supporting the door? Is that galvanized tin, too?

15

16

A. No, sir, this area in here is metal, probably angle iron.

17

18

19

20

21

22

23

24

25

Q. I want you to look at this Plaintiff's Exhibit Number 1 very carefully, very carefully; particularly as to the door; and, particularly as to the condition that you found the car in when you went out there, at 1:45 on November the 17th, and answer me this question.. or answer the Court and jury, rather, if the car that you saw out there at 1:45 on November the 17th, if it was in the same condition when you got out there as shown in that photograph?

2

A. No, the door is missing.

3

Q. Besides that. Was the door missing when you got out there?

4

5

A. No, sir.

6

Q. The door was up?

7

A. No, sir, the door was lying on the ground, right in front of the opening here.

8

9

10

11

Q. Other than the fact, that the door was lying on the ground in front of it, is the car - otherwise - exactly how you found it, when you got out there on November the 17th - As shown in that picture?

12

13

14

A. (Witness examining photograph.) I believe it to be, but this photograph was taken sometime after I left there.

15

16

17

Q. You think it was...Well I'm not asking you when the photograph was taken. I'm just asking you if you found this railroad box car in this condition, when you arrived there at 1:45 on November the 17th?

18

19

A. To the best of my knowledge, that is the way the car looked.

20

21

Q. Did you all do anything to the car while you were out there?

22

A. No, sir. Absolutely nothing.

23

24

25

Q. What do you call these little things, here on the bottom - And, I'm pointing to an apparatus about center ways on the door. What are those?

2

A. Bottom door rollers.

3

Q. Were the bottom door rollers on there when you got out there?

4

A. I do not know.

5

Q. Well, did you look to see if the bottom rollers were on the door?

7

A. Well I do not know whether the door rollers were there at the time I looked at the car, or not.

8

9

Q. Should they have been?

10

A. There was no particular reason for them to be there. By the door falling off, that could have pulled them off with it.

12

13

Q. Well, were they off or on?

14

A. I don't know.

15

Q. How many door rollers did this car have, before the door fell off?

16

A. Normally they have two.

17

18

Q. Well, was the door still out there when you got there?

19

A. It was.

20

Q. Well, did you inspect the door?

21

A. I did.

22

Q. Did you inspect all the doors?

23

A. I did.

24

Q. Did you inspect the rollers?

25

A. If the rollers were there I inspected them.

2

Q. Well where were they if they were there?

3

A. I don't remember.

4

Q. Do you remember checking the rollers?

5

A. Not specifically, No.

6

Q. Well if you had a defective roller there, or you didn't have a roller on it, would it cause the door to fall?

8

A. Had a roller been missing, it could have contributed to it.

10

Q. Well if a roller was defective, would it contribute to it?

11

12

A. That depends on the degree of the defect.

13

Q. Were the rollers defective on this car?

14

A. I do not know.

15

Q. You don't remember, or didn't see it?

16

A. I do not know.

17

Q. Let me show you Plaintiff's Exhibit 6, which has been introduced as a photograph taken immediately after this door fell, and ask you how many rollers you see in that picture?

18

19

20

A. (Looking at the photograph) As of right now I see one.

21

22

Q. Did you put one back on the car?

23

A. The day we made the inspection no N & W employee, in the mechanical department, done anything to the car. And, this roller here is in a much more

24

25

2

leaning position, than the ones that are here.

3

Q. I realize that, but how did it get that way,
Mr. Austin?

4

5

A. I do not know.

6

7

Q. So you really can't say, whether or not this
door had one roller on it, two rollers on it, or whether
they were defective or not can you?

8

9

A. The rollers in particular, as per se..each
roller individually, I cannot.

10

Q. Because you did not look at them?

11

A. I looked at the door in general.

12

13

Q. But, you don't know whether or not there were
two rollers on this car door before it fell, one roller,
two rollers, or the condition of it do you?

14

15

A. Not by specific, No.

16

MR. McAFEE: That's all.

17

REDIRECT EXAMINATION

18

BY MR. BOWEN:

19

20

21

Q. Mr. Austin, I refer you to page 33 of your
discovery deposition, and Mr. Cline was questioning you
and his question is: "Could you tell what caused the
bend, where it become bent? Could you tell?" Answer:
"It appeared to have had undue pressure put against it..

22

23

24

25

MR. CLINE: Read the rest of it, Mr. Bowen -
Come on! Is that what the deposition says, Mr. Bowen.
Now get it all together.

2

MR. McAFEE: "In what manner. I can't say."

3

MR. CLINE: "In what manner. I can't say."

4

A. That's right.

5

THE COURT: Let's...One at a time. Read his answer.

6

Q. The question: "Could you tell what caused the bend, where it become bent? Could you tell?"

7

8

Answer: "It appeared to have had undue pressure put

9

against it." Question: "In what manner?" "That I can't say."

10

11

Is that what you're testifying to today?

12

A. That is correct, Yes, sir.

13

Q. Now does the platform have anything to do with opening the door...the side door?

14

15

MR. McAFEE: Your Honor, the platform speaks for itself, whether or not its got anything to do with it or not; it's certainly...

16

17

MR. BOWEN: He can explain where the platform on the door is, and what it is used for.

18

19

THE COURT: Overruled.

20

Q. Go ahead, sir. Answer the question.

21

A. Would you repeat the question, please?

22

Q. Does the platform have anything to do with opening or closing the door, when a man gets up there to open or close the door? Does he use the platform?

23

24

A. No, sir. There is no platform around a car ..

25

2

door.

3

Q. Does a sill have anything to do with opening or closing the car door?

4

5

A. No, sir.

6

Q. Does the runningboard have anything to do with opening or closing the car door?

7

A. No, sir.

8

9

Q. Does the condition of the top of the car, the roof of the car have anything to do with whether or not the door would be hard or easy to open?

10

11

A. Not the roof, No, sir.

12

13

Q. I believe you stated awhile ago, that this undue force...Do you know what causes undue force on a door?

14

15

A. Well in my experience with railroad cars, and railroad doors it's normally trucks, cranes, fork-lifts, motorized equipment.

16

17

Q. How many people does it take to open or close one of those doors?

18

19

A. Normally, one person should be able to open and close the door under normal conditions.

20

21

Q. Is it advisable, at anytime, to take any motorized equipment and push a door that is frozen tight, or won't move?

22

23

A. No, sir, it's not advisable.

24

25

Q. Could that well bend the operating bar, the rod?

2

A. It could, Yes, sir.

3

Q. And, if that rod was bent could that have caused the door to fall from the top?

4

5

A. Yes, sir, it could have.

6

MR. BOWEN: That's all, sir.

7

RECROSS EXAMINATION

8

BY MR. McAFEE:

9

Q. Mr. Austin, as I understand it you are a master mechanic, and as such I'm sure you've taken cars out of service haven't you, in the past?

10

11

A. Many.

12

Q. Tell the Court and the jury what you mean when you take a car out of service?

13

14

A. Well the term referred to is, "bad order in the car". It's taken out of service, it's taken to a shop area, and eventually to a shop track to be repaired to bring it back to Norfolk and Western, and Federal standards.

15

16

17

18

Q. Now you say, that a normal door operating without any defects, one person can open it is that right?

19

20

21

A. That is correct. One normal human.

22

Q. Without any undue exertion?

23

A. Undue exertion, that is correct.

24

Q. What do you do, Mr. Austin, when you find a door on a box car, that it takes more than one person

25

2

to open, and it is difficult to open, What do you do to that car?

3

4

A. Normally it's bad ordered.

5

Q. Tell us what a "bad order" is now?

6

A. It's when a car does not function properly, and it is sent to the shop for repairs.

7

8

Q. Isn't it true, Mr. Austin, that if the Norfolk and Western Railroad had detected that this car door was difficult to open, and required three men to work it, that you would have taken it out of service?

9

10

A. Had that been detected?

11

Q. Yes.

12

A. That is correct. Right.

13

Q. And, isn't it also true, that if it had been detected with...What did you call those little things on the bottom down here - These right here?

14

15

A. Bottom door rollers.

16

Q. If it had been detected with one bottom door roller, you would have taken it out of service?

17

18

A. That is correct. If it had been an unsafe condition.

19

20

Q. Well is, or is it not an unsafe condition to have one bottom roller?

21

22

A. That is correct.

23

MR. McAFEE: That's all.

24

MR. BOWEN: That's all, sir.

25

2 THE COURT: You may stand aside.

3 (Witness withdrew from
4 the Courtroom.)

5 THE COURT: Alright, we'll take about a
6 ten minute break and let the jury have a stretch.

7 (Whereupon, the Court was
8 in Recess at 3:00 p. m.)

9 (Whereupon, the Court
10 resumed at 3:15 p. m.)

11 THE COURT: Gentlemen, are you about
12 ready to proceed?

13 MR. McAFEE: Yes, sir.

14 MR. BOWEN: Yes, sir.

15 THE COURT: Is it alright to call the
16 jury out?

17 (Whereupon, the Jury
18 returned to the Courtroom.)

19 MR. BOWEN: Your Honor, Counsel has
20 agreed that we would read the deposition of Claude H.
21 Reynolds, the discovery deposition. There is three and
22 a half pages. And, this is not all of his deposition,
23 but this is the pertinent part, and we've agreed that I
24 could read this in evidence. Is that right, sir?

25 MR. CLINE: Yes, sir.

(Whereupon, the discovery
deposition of Claude H.

Reynolds was read into
the evidence, beginning
at the question:

"Please state your name, age, and address?"

To the question "Did you have any trouble closing the
door?" Answer: "No."

MR. BOWEN: Mr. Pennington, would you please
take the stand.

THEREUPON came

ARNOLD T. PENNINGTON

recalled as a witness on behalf of the Defendant, who,
having previously testified, was examined and testified
as follows:

DIRECT EXAMINATION

BY MR. BOWEN:

Q. Mr. Pennington, I believe you have testified
before in this case?

A. Yes, sir.

Q. Do you remember how the statement was gotten
from Mr. Yost, the brakeman, who has testified in this
case?

A. Yes.

MR. McAFEE: Your Honor, that is an
effort to impeach his own witness, who he called. I
didn't call him.

THE COURT: I'll sustain the objection.

1

2

MR.. BOWEN: That's all.

3

MR. McAFEE: No questions.

4

MR. BOWEN: We Rest, Your Honor. I'd like to make another Motion before the Court.

5

THE COURT: Do you have any rebuttal?

6

MR. McAFEE: No, sir.

7

THE COURT: Ladies and Gentlemen, if we'd known it would have been this close we could have waited out here just a little longer and finished the evidence. But, you've heard the evidence now, and we'll let you stand back in your room while we consider the instructions.

12

13

(Whereupon, the Jury was returned to the Jury room.)

14

THE COURT: Alright, sir.

15

16

MR. BOWEN: Your Honor, I'd like to renew the Motion to Strike the evidence, at this time, and for the Court to direct a verdict for the Defendant. Without going into detail there is no negligence that has been proven, that has contributed to the causing of this accident on behalf of Norfolk and Western.

19

20

21

It is shown, that any defect - if it was present in this door - could not have been found by a reasonable inspection; that the door operated as usual the first time and was closed the first time; and, that there was no negligence shown on behalf of the Defendant,

22

23

24

25

2

and nothing shown, that it has caused this accident.

3

MR. McAFEE: Your Honor...Do you want

4

to hear from me?

5

If your Honor, please: Again, it is

6

our position, that not only has the Plaintiff submitted sufficient evidence to submit to the Jury, on the Common Law duty owed by the delivering carrier - If an inspection was performed I think it's almost incredible.

9

Second of all, I think by Mr. Austin's own

10

admission, that by virtue of a defective door - whatever

11

it may be - that a car would be taken out of service.

12

That, Your Honor, is covered under - as I previously

13

pointed out - Section 14 of the Safety Appliance Act.

14

And, certainly at this point in time anyway, we submit

15

that there is certainly an issue that the jury could

16

pass upon.

17

Number One, of the Common Law duty owed.

18

Number Two, that the railroad is guilty of

19

negligence, per se, in violation of the Safety Appliance Act.

20

THE COURT: Anything else?

21

MR. BOWEN: No.

22

THE COURT: Gentlemen, looking at the

23

first headnote in N & W against Chrisman, 219 Va. 184,

24

I think it sums up the duties that rest on the respec-

25

tive parties. And, this one sentence is the basis for

2 my prior ruling, and the ruling that I would adhere to
3 now; it's the delivering carrier...The Defendant owed
4 to the employee's of the consignee's the duty to exer-
5 cise ordinary care to inspect the car to determine if
6 it was reasonably safe for unloading, and to repair or
7 give warning of any dangerous condition discovered by
8 the inspection. The inspection should be sufficiently
9 thorough to determine whether there was any fairly
10 obvious defect in the car's construction or state of
11 repair."

12 So I think this leaves the question up
13 to the Jury to determine. So I will Overrule the Motion
14 at this point.

15 Alright; let's go in and do the instruc-
16 tions.

17 MR. BOWEN: Your Honor, at the proper
18 time I would like to get in your first Ruling. I don't
19 know when we want to put that in?

20 THE COURT: Alright, if you want to now,
21 before we get into the instructions.

22 MR. BOWEN: At the beginning of this
23 case, in Chamber's, it was brought to the Judge's atten-
24 tion, that the evidence would be; that the Plaintiff,
25 Donald Baker, had not suffered any loss in earnings;
that he received his entire salary from the date of the
accident to the date that he returned to work; and, the

2 Court Ruled at that time, that the Plaintiff's could
3 show that the Plaintiff had been off from work, and
4 could show what he had been making. But, that the
5 Defendant's could not bring out in evidence the fact,
6 that the Plaintiff had been paid his ordinary salary,
7 and had not received any diminution in wages, because
8 of Section 8.01-35 of the Code, which states, that:

9 "That any reimbursement made by a third
10 party cannot be shown in evidence."

11 And, on behalf of the Defendant, Railway
12 Company, we would like to show our objection to the
13 Ruling of the Court.

14 THE COURT: Alright, sir.

15 MR. McAFEE: Your Honor, could I get into
16 the record, since we were off the record in there; but,
17 I think in light of his objection I think the record
18 should reflect, that Mr. Baker has been put on notice of
19 a Subrogation Claim of Six Thousand Dollars plus, for
20 Workmen's Compensation Benefits he received. And, to
21 further follow the proposition that Mr. Bowen adheres to
22 would preclude, in substance, those Subrogation Rights
23 and certainly would be to the prejudice of Mr. Baker.

24 I just want it in the record, that we
25 are on Notice of Six Thousand Dollars worth of Subro-
gation Rights.

(Whereupon, the Court

2 you arrived at your verdict?

3 FOREMAN: Yes, sir.

4 CLERK: We, the Jury on the issues
5 joined find in favor of the Plaintiff, Donald F. Baker,
6 and fix his damages at One Hundred Eighteen Thousand
7 Dollars. Otis E. Kinder, Foreman.

8 THE COURT: Is this your verdict,
9 Ladies and Gentlemen? So say you all?

10 (Juror's responded in
11 the affirmative.)

12 THE COURT: Alright, thank you for your
13 consideration of this case. You are excused today. I
14 told the juror's not to come back until Wednesday, but
15 I notice on my book, that we might have a case that
16 might be for a jury on Tuesday. So standby for Tuesday,
17 and I'll have Mr. Moore to check this out tomorrow, to
18 see if we have a jury. Keep next Tuesday open, and
19 you'll be notified if not. And, if you will come back
20 on Wednesday.

21 I thank you for your consideration.

22 MR. BOWEN: Your Honor, I would like to
23 make a Motion.

24 THE COURT: Alright.

25 MR. BOWEN: Your Honor, the Defendant
Moves to set aside the verdict of the Jury, as not being
supported by the evidence, and for other grounds to be

2

assigned. I would like the Court to set a date, and
file a brief to have the Court consider.

3

4

THE COURT: Alright, sir. How much
time do you need?

5

6

MR. BOWEN: I'm not really sure. I've
got a pretty tight schedule. I'd have to look at my
calendar, but I think my schedule for the next three
weeks is just about full. I don't know what...

7

8

9

MR. McAFEE: What about four weeks?

10

THE COURT: Thirty (30) days?

11

MR. BOWEN: That would be fine.

12

THE COURT: That's more than the Court
usually allows, but if there is no objection to that.

13

14

MR. McAFEE: No, sir. I'm just glad I
didn't get that instruction. Could we just get a date,
certain?

15

16

THE COURT: Just file them by March
the 16th. I won't be here, but I won't have to be,
because they'll have an opportunity to reply.

17

18

19

MR. BOWEN: That's alright.

20

MR. CLINE: I'd like to have a date for
argument?

21

22

THE COURT: We're having a Grand Jury
come in on the 19th, and I'll have time that day.

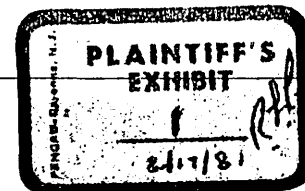
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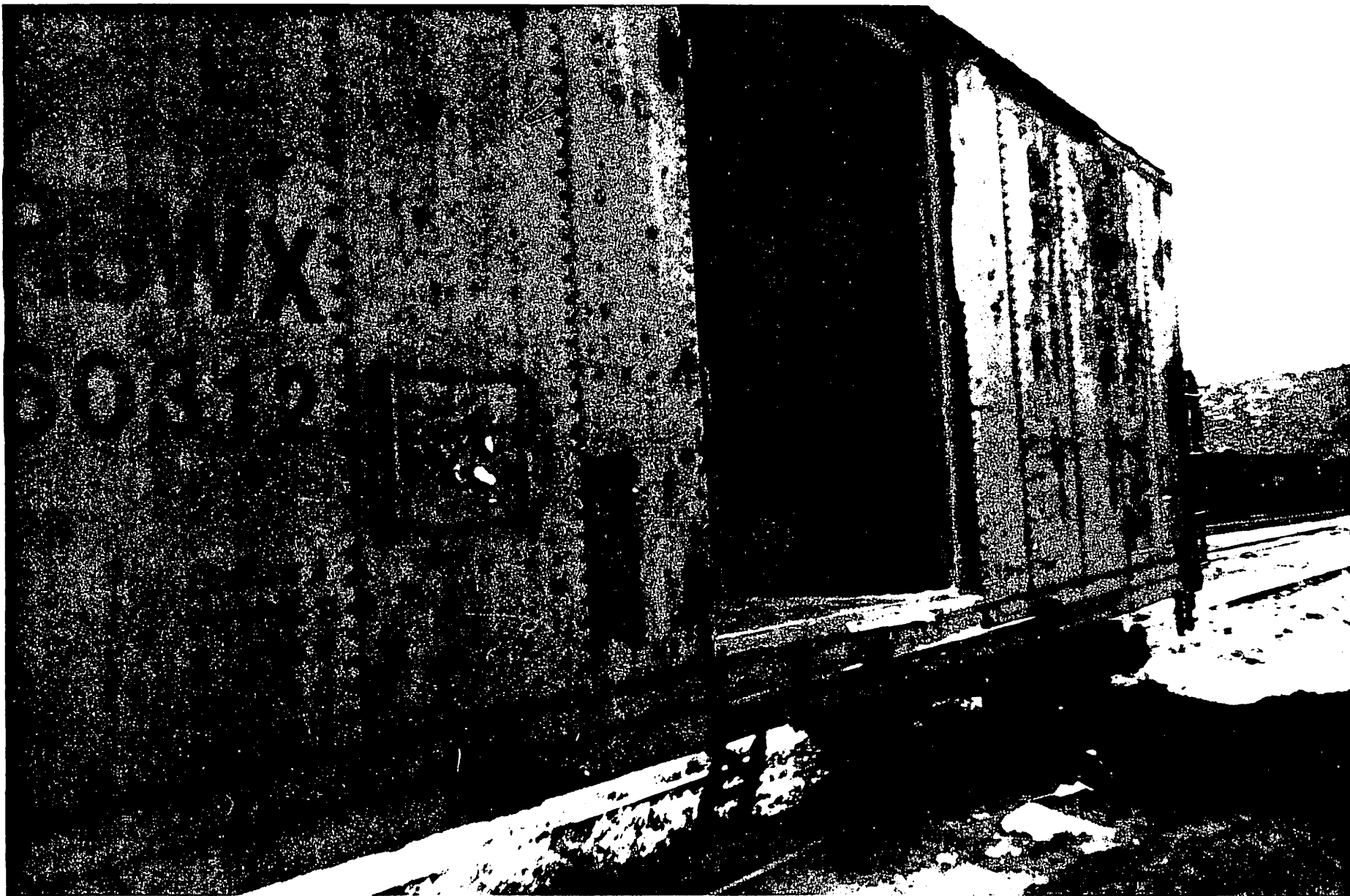
24

(Whereupon, Counsel held
a discussion and agreed

25

147

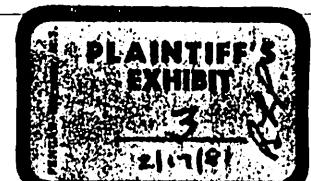
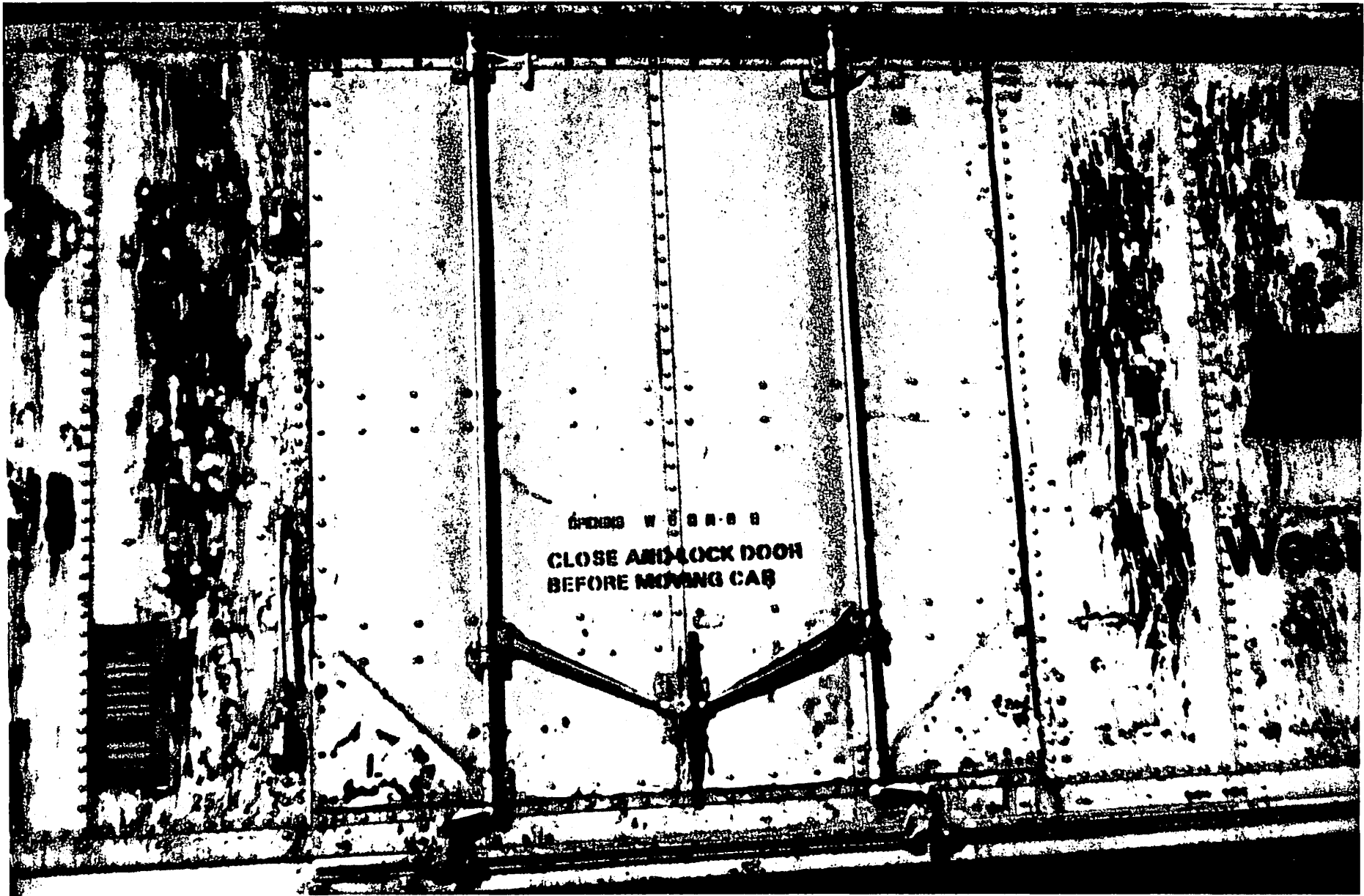




PLAINTIFF'S
EXHIBIT
2
2/17/81

R.H.

149



INSPECTION OF FREIGHT CAR IN CONNECTION WITH PERSONAL INJURY

MP-504
REV. 1/73

Donald Baker

Employee of Tazewell
Farm Bureau

at: Richlands, Virginia (PLACE) on the 17th day of November 19 78 at 11:30 A.M. (TIME)

als RBWX Number 60312 Kind Box - RB

at Richlands, Virginia (PLACE) on November 17, 1978 (DATE) at 1:45 P.M. (TIME)

Attention should be given to parts of car involved in the personal injury:

ERS	NAME, STYLE & HEIGHT OF COUPLER	"A" END	NAME	TYPE	HEIGHT	"B" END	NAME	TYPE	HEIGHT
			National	BE60AHT	31"		National	BE60AHT	32"
0	IF DEFECTIVE, EXPLAIN FULLY								
	No defects								
MENTS	(MEASUREMENT OF LATERAL PLAY)								
	a 2" B 2"								
VD	KIND	TYPE	LOCATION		CONDITION				
	Universal	Non Spin	B End		Good				
KES	RESULT OF TESTS BY SETTING & RELEASING:								
	(GREASE OR FOREIGN SUBSTANCE)								
	None								
									BRAKE CHAIN PROPER LENGTH
									<input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO
KE	TYPE & CONDITION								
	None								
R	TYPE		CONDITION						
	AB		Good						
KES	LAST CLEANED AND OILED		PLACE		RAILROAD		DATE		
			OC		BN		12-75		
KE	KIND		DIMENSIONS		LOCATION				
	Metal		29" x 9-3/4"		B End				
ORM	CONDITION								
	Good								
ERS, RONS, IOLDS, TEPS, IRUPS	WAS EACH TESTED		CONDITION (DESCRIBE DEFECT FULLY—INCLUDE CONDITION OF CAR BODY AT ATTACHMENT)						
	<input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO		All in good condition						
IF & KING RD	<input type="checkbox"/> WOOD		CONDITION (IF DEFECTIVE—DESCRIBE FULLY)						
	<input checked="" type="checkbox"/> METAL		Roof in good condition						
IS &	<input checked="" type="checkbox"/> SIDE/ <input type="checkbox"/> ROOF/ <input type="checkbox"/> TRAP/ <input type="checkbox"/> END		CONDITION						
			Right side door operating rod bent						
MENTS									

I, undersigned, have read the above statement and find it true and complete: GEL BRT GWG FHM JMC RLA PJM-2

INSPECTORS:

Ch Robinson General Foreman-Car 55 35
(SIGNATURE) (OCCUPATION) (AGE) (YEARS OF SERVICE)

A.B. Sayers Sr. Car Repairer 54 27
(SIGNATURE) (OCCUPATION) (AGE) (YEARS OF SERVICE)

SS: J. W. William Occupation Gen Foreman



Record of Movement

FILE B-10224

DATE March 13, 1979

CAR R Bux 60312

WAYBILL DATE _____

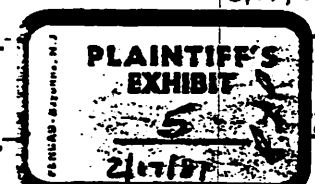
FROM November 12, 1978

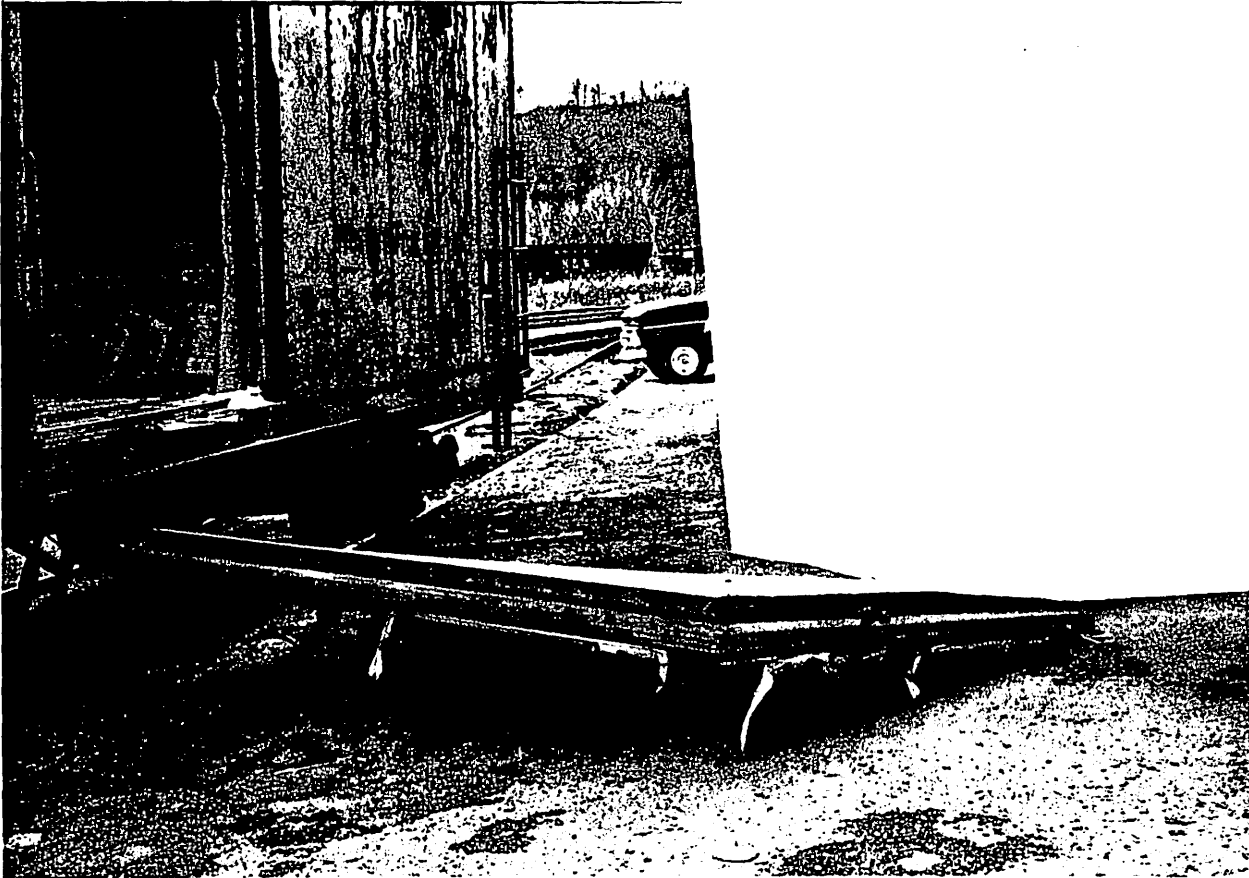
TO November 19, 1978

	TRAIN	DATE	TIME		TRAIN	DATE	TIME
RECEIVED FROM			M	RECEIVED FROM	BN	11/13	2 A M
DEP. KANSAS CITY			M	DEP.	McGregor 20P78	11/13	10 ⁵⁵ M
DEP. E. ST. LOUIS			M	ARR.	Fort Wayne	-	7 ³⁰ P M
DEP. MADISON			M	DEP.	-	11/14	9 ¹⁰ A M
DEP. CHICAGO			M	ARR.	Bellevue	-	1 ³⁵ A M
ARR. DECATUR			M	DEP.	-	-	1 ⁴² A M
DEP. DECATUR			M	ARR.	Portsmouth	-	9 ¹⁰ A M
ARR. FRANKFORT			M	DEP.	-	4P 74	11/15 5 ³⁰ A M
DEP. FRANKFORT			M	ARR.	L. Chamier	-	10 ⁵⁰ A M
ARR. CHICAGO			M	DEP.	-	4P 84	11/15 1 ⁰⁵ P M
ARR. PERU			M	ARR.	Bluefield	-	11/15 2 ³⁰ P M
DEP. PERU			M	DEP.	-	5J PBN	11/16 10 ⁰⁰ P M
ARR. FORT WAYNE			M	ARR.	Big Creek	-	11/17 12 ³⁵ A M
DEP. FORT WAYNE			M	DEP.			M
ARR. DETROIT			M	ARR.			M
ARR. BELLEVUE			M	DEP.			M
DEP. BELLEVUE			M	ARR.			M
ARR. BUFFALO			M	DEP.			M
DELIVERED TO			M	ARR.			M
				DELIVERED TO			

REMARKS: _____

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Bluffville, W. Va.

December 30, 1980

My name is W. F. Yost, age 41, and I am employed as road brakeman. I have worked for N&W about ten years and live at 501 Edgewood Road, Bluffville, Virginia.

On November 17, 1978, I was working as head brakeman on Train 208X, in charge of Conductor J. M. R. DeFruce with Engineer Bernard L. McBride. Jerry W. Bowman was rear brakeman on this date. When cars are set off at Richlands, Va. they are usually set off by the headend as the rear of train would be down in Richlands some distance away. I recall cutting a boxcar out for the siding where the old station was located as this was about the last job I worked on the Valley. I don't recall anything wrong with the car that I could see and if there had been anything visibly wrong we wouldn't have left it. As I now recall the car was sealed which indicated it was all right.

I was the only member of the crew close enough to the car to notice if anything was wrong and I didn't see anything wrong with it.

I have read this statement and it is true.

Witness: William F. Yost ✓

A. J. Pennington

