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Record No. 5724

**In the
Supreme Court of Appeals of Virginia
at Richmond**

SOUTHERN RAILWAY COMPANY

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF ALBEMARLE COUNTY

RULE 5:12 BRIEFS.

§5. **NUMBER OF COPIES.** Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. **SIZE AND TYPE.** Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

This case p
to be held

You will be

Print names

AT RICHMOND

...is definitely as to the date.

Counsel on front cover of briefs.

Howard G. Turner, Clerk

Record No. 5724

VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 3rd day of September, 1963.

SOUTHERN RAILWAY COMPANY, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

From the Circuit Court of Albemarle County
Lyttleton Waddell, Judge

Upon the petition of Southern Railway Company a writ of error and supersedeas is awarded it by one of the Justices of the Supreme Court of Appeals on September 3, 1963, to a judgment rendered by the Circuit Court of Albemarle County on the 13th day of June, 1963, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor; upon the petitioner, or some one for it, entering into bond with sufficient surety before the clerk of the said circuit court in the penalty of one thousand dollars, with condition as the law directs.

RECORD

* * * * *

page 1]

WARRANT OF ARREST**COMMONWEALTH OF VIRGINIA, COUNTY OF ALBEMARLE, to-wit:**

To the Sheriff of the County of Albemarle or any Police Officer

Whereas, J. D. Thomas, Forest Warden of said County, has this day made complaint and information on oath before me JOHN G. YANCEY, J. P. of said County, that Southern Railway Co. in the said County, on the 3rd day of December, 1962, did unlawfully fail to clean and keep clean the right of way of said Railway of weeds, grass and decayed timber in violation of Section 56-426, Code of Virginia of 1950 and supplements thereto in violation of the laws of the Commonwealth of Virginia:

These are therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend and bring before the Judge of said County, the body (bodies) of the above accused to answer said complaint and to be further dealt with according to law. You are also directed to summon the following witnesses to appear before said Judge at the hearing of said case on the 11th day of December, 1962.

Given under my hand and seal this 3rd day of December, 1962.

JOHN G. YANCEY, V. P. (Seal)
Name and Title of Issuing Officer

OFFICER'S RETURN

Executed within the County of Albemarle, Virginia, on the 4 day of Dec., 1962; by producing the body of..... before.....of the County for the purpose of executing bond for his appearance before the Judge of said County; or by summoning the said J. F. Hampton Trainmaster Southern Railway Co. for his appearance before the Judge on the 11 day of December, 1962; or by delivering the body of said.....to the Jailor of said County at the jailhouse thereof.

W. R. CREBBS, Dep. Sheriff

JUDGMENT

Upon examination of the within charge this 11 day of Dec., 1962, the above named defendant is guilty and adjudged to pay a fine of \$500 and costs and to serve a term in jail ofmonthsdays.

The above named defendant is certified to the Circuit Court of the County of Albemarle, Virginia, for action by the next ensuing Grand Jury thereof.

STUART F. HEAD, Judge

* * * * *

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* * * * *

DEMURRER

Southern Railway Company, by counsel, says that the warrants charging violations of Section 56-426 of the Code of Virginia, as amended, on December 3, 1962, January 15, 1963 and February 1, 1963, are insufficient in law on the ground that the aforesaid statute is unconstitutional as being in violation of the Fourteenth Amendment of the United States Constitution and Sections Six, Eleven and Fifty-eight of the Virginia Constitution.

**SOUTHERN RAILWAY COMPANY
BY H. MERRILL PASCO
Of Counsel**

* * * * *

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**EIGHTH JUDICIAL CIRCUIT
Lyttelton Waddell, Judge
Charlottesville, Virginia
May 22, 1963**

**Thomas B. Gay, Esquire
Division Counsel
Southern Railway System
Electric Building
Richmond, Virginia**

Downing L. Smith, Esquire
Commonwealth's Attorney
County Office Building
Charlottesville, Virginia

Re: Commonwealth vs. Southern Rwy. Co.

Gentlemen:

Applying the general principle that legislation should not be declared unconstitutional unless it is plainly so, the demurrer in this case will be overruled.

I am also of the opinion that the previous conviction in another county is not a bar to the prosecution in Albemarle County. However, it does seem to me that the subsequent warrants in Albemarle County are for the same offense prosecuted in the first warrant; that is, the overall failure of the company to comply throughout the county rather than any specific violation.

Very truly yours,

LYTTELTON WADDELL

cc: Frederick T. Gray, Esquire
Attorney at Law
American Building
Richmond, Virginia

Joseph L. Richmond, Esquire
Attorney at Law
Court Square
Charlottesville, Virginia

LW:c

page 8]

At A Circuit Court held for The County of Albemarle on the 13th day of June, 1963.

* * * * *

On this the 13th day of June 1963, came the Commonwealth of Virginia, by her attorney and the defendant, The Southern Railway Co. by its attorneys who pled not guilty to the charges in said warrants.

The Court's reporter having been duly sworn.

The said Southern Railway Co. by its attorneys and with consent of the attorney for the Commonwealth elected and requested that all matters of both law and fact be wholly submitted to the Court for hearing and determination without the intervention of a jury.

Thereupon, with consent of the said attorney for the Commonwealth and by leave of court herein entered of record, the Court proceeding upon the aforesaid plea to hear and determine this case, which consists of three appeal warrants, without the intervention of a jury and having fully heard the evidence but before considering of its judgment the parties were given time to submit briefs.

The briefs having been filed and further argued, the Court, after hearing all the evidence and arguments, now having fully considered of its judgment finds the defendant, the Southern Railway Co. guilty as charged in the warrant
page 9] issued Dec. 3rd 1962 the demurrer being overruled, also the plea of former conviction in the County Court of another county, the Court fixes the punishment with a five hundred (\$500.00) dollar fine for violating Section 56-426 as charged in said warrant issued Dec. 3rd 1962.

The two additional warrants dated *Feb*y 11th 1963 are dismissed, because they are the same offense prosecuted in said warrant issued Dec 3rd 1962.

In accordance with the judgment of the Court it is ORDERED that the Commonwealth recover of and have judgment against the Southern Railway Co. in the sum of Five Hundred (\$500.00) Dollars together with her costs about this case expended.

The defendant, the Southern Railway Co. by its attorneys having indicated its intention of applying to the Supreme Court of Appeals or Virginia for an appeal from and supersedeas to the judgment of this Court herein pronounced, it is further ordered that execution of the aforesaid judgment be and the same is hereby suspended for a period of sixty (60) days from this date in order to allow time within which the said defendant may prepare his appeal.

Enter L.W.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

TO: Eva W. Maupin, Clerk

Supreme Court of Appeals of Virginia

Circuit Court of Albemarle County
Charlottesville, Virginia

The defendant, Southern Railway Company, by its attorneys, hereby gives notice pursuant to Section 4, Rule 5:1 of the Rules of the Supreme Court of Appeals of Virginia, of its appeal from so much of the judgment entered in the above case on June 13, 1963 as overrules the Demurrer of the defendant and finds the defendant guilty as charged in the warrant issued December 3, 1962.

Further, pursuant to such Rule, the defendant assigns the following errors:

The court erred in overruling the defendant's Demurrer which raised the issue of the constitutionality of Section 56-426 of the Code of Virginia because such section violates the due process clause of the Fourteenth Amendment of the United States Constitution and of Section 11 of the Virginia Constitution in that:

(a) it is so vague and uncertain in its terms that it does not adequately inform the defendant of what must be done to avoid criminal prosecution; and
page 11] (b) it bears no substantial relation to public safety since (i) it requires the area of the right of way which is beyond the danger from fire to be cleared and (ii) the expense of clearing the right of way is prohibitive in comparison to the benefit achieved.

SOUTHERN RAILWAY COMPANY
H. MERRILL PASCO
Of Counsel

Filed this 25 day of June 1963

EVA W. MAUPIN, Clerk

* * * * *

page 1]

TRIAL PROCEEDINGS

March 27, 1963

Charlottesville, Virginia

Before

HONORABLE LYTTLETON WADDELL, JUDGE

Appearances:

DOWNING L. SMITH, ESQ.
Commonwealth's Attorney
FREDERICK T. GRAY, ESQ.
Special Counsel
Attorneys for the Commonwealth

THOMAS B. GAY, ESQ.
H. MERRILL PASCO, ESQ.
RODERICK D. SINCLAIR, ESQ.
JOSEPH W. RICHMOND, ESQ.
Attorneys for the Defendant

page 2] (The trial of this case was convened at 9:40
a. m., March 27, 1963.)

(The reporter was sworn.)

The Court: Gentlemen, what is to be the procedure this morning? Are we to consider first the question of the pleas with respect to former jeopardy?

Mr. Smith: If Your Honor please, I understood that at the last hearing of this matter that was held, that pleas would be filed, which have been filed, one with reference to plea of former conviction and one is a demurrer. I assume from the statement before the Court at the last hearing that this hearing is to be concerned solely with those two pleas.

The Court: In what order do you wish to take the matter up?

Mr. Smith: Your Honor, in view of the nature of the pleadings, this the plaintiff's motion, so it is up to him, I would think.

Mr. Pasco: If Your Honor please, these are appeals from convictions in the County Court, which we are entitled to try de novo in this court.

The Court: Certainly.

page 3] Mr. Pasco: I thought at least the Commonwealth would make up a record of the condition of the right of way on which it bases the warrant. We stated at the earlier trial that we did not contend that we had cleaned the right of way.

The Court: If your demurrer is sustained, there would be

no necessity for going into the facts, would there?

Mr. Pasco: Well —

The Court: If the ordinance is invalid, I do not see that there is anything to go into, so far as the facts are concerned. It seems to me that that question has to be decided first.

Mr. Pasco: We thought the demurrer would be heard at the end of the record, because we think there are certain factual aspects in a case for trial de novo where there are no pleadings on which to argue the demurrer.

The Court: Possibly so.

Mr. Pasco: It is different from a demurrer in a civil case where you have a pleading that you are testing the legality of.

The Court: I can see that. All right, then, we will go ahead with the facts. Proceed with the facts, Mr. Smith. The Court will consider the legal matters at the end.

Mr. Smith: This raises the question, Your Honor: We have three warrants; shall we present the facts
page 4] with reference to the first one, the second one, or the third one, or all three?

The Court: All three.

Mr. Smith: All right, sir.

The Court: Gentlemen, let's see if there is really much question about the facts in the case.

Mr. Smith: None whatsoever, so far as the Commonwealth is concerned.

The Court: It is admitted by the Southern that they have failed to keep the "right of way clear and free from weeds, grass, and decayed timber, which from their nature and condition are combustible material, liable to take and communicate fire from passing trains to abutting or adjacent property" as a matter of fact?

Mr. Pasco: No, we do not concede that. We contend that we cannot determine what there is to do.

The Court: Let's proceed.

Mr. Smith: If Your Honor please, for purposes of the record, it is my understanding that the defendant has been arraigned on a warrant dated December 3 and has pled not guilty to a violation of Section 56-426, this warrant having been tried on December 11, in the Albemarle County Court, and appeal from that noted to this Court. Now I likewise
page 5] understand that the defendant has been arraigned and pled not guilty to a warrant charging that on January 15, 1963, the defendant failed to keep its right of way clear in accordance with the section mentioned before, and was tried on February 11 and found guilty in the Albemarle County Court, and appealed therefrom. I like-

Julian D. Thomas

wise assume that the defendant has been arraigned and has pled not guilty to the warrant which is dated February 1, 1963, tried in Albemarle County Court on February 15, 1963, which the defendant was found guilty and noted an appeal therefrom.

These three warrants are, as I understand it, now in the process of being heard.

The Court: I assume the defendant has no objection to hearing all three together?

Mr. Pasco: No, sir.

EVIDENCE ADDUCED IN BEHALF OF THE
COMMONWEALTH

JULIAN D. THOMAS

was sworn in behalf of the Commonwealth and testified as follows:

DIRECT EXAMINATION

By Mr. Smith:

Q. Would you please state your name and position?

A. Julian D. Thomas; Chief Forest Warden for Albermarle County.

page 6] Q. Mr. Thomas, on December 3 — I have a copy of the warrant here that I hand you and ask you whether you swore this warrant out under oath?

A. Yes, sir.

Q. Would you, for the record, state the date on which that was done?

The Court: The record shows that, Mr. Smith. The warrant is part of the record.

Mr. Smith: This will be referred to as Warrant No. 1, which is dated December 3.

By Mr. Smith:

Q. Let me get all three of them, so the evidence will be the same. On February 11, did you swear out a warrant against —

The Court: Mr. Smith, these are part of the record. You do not have to make the warrants a part of the record, they are already a part of the record.

Mr. Smith: I want to be sure that the record is complete,

Julian D. Thomas

Your Honor.

The Court: Mr. Smith, the warrant is upon the record.

By Mr. Smith:

Q. All three warrants were obtained by you?

A. Yes, sir.

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Q. As of December 3, the date of the first warrant, would you relate, please, to the Court, what the condition of the Southern Railway right of way in Albemarle County was with reference to combustible material along its right of way as provided in the statute?

A. I had inspected the right of way several days prior to the issuing of this warrant and found that no cleaning had been done from the Orange County line to the Nelson County line, with the exception of what the trains had set out two or three spots. It contained high broom-sedge, other dry and inflammable weeds and grasses and honeysuckles all along this right of way on both — on most of the right of way on both sides.

Q. Mr. Thomas, subsequent to December 3, I believe, and subsequent to January 15 and February 1, did you make an examination of some of the right of way of the Southern Railway track?

A. That was prior to the last two warrants you are referring to?

Q. Subsequent to the last two warrants.

A. Yes, I did.

Mr. Smith: Just before you go on, I want to show these to these gentlemen and introduce them.

page 8] Mr. Pasco: If Your Honor please, these pictures bear dates, but do not coincide with the day on which the railroad is charged in any one of the three warrants, and we therefore think they are irrelevant.

The Court: I think it would be necessary that the testimony show that the conditions were the same. The mere fact that the pictures were taken on a different date, I do not think is material.

Mr. Smith: I am going to ask that the Court mark these so they can be objected to.

(The photographs were received in evidence as Commonwealth's Exhibits 1, 2, 3 and 4, respectively.)

Julian D. Thomas

By Mr. Smith:

Q. Mr. Thomas, I hand you a piece of paper which has pictures on it and has been marked Commonwealth Exhibit 1 and ask you if you can identify those pictures and relate what is shown in those pictures and then, if you can, state to the Court whether that was the condition of the right of way on the dates of the warrants, which I believe were December 3, January 15, and February 1.

A. These pictures were taken along the right of way. I am standing in the picture holding a cardboard showing the date and the milepost between which these pictures were taken; and this is the condition of the right of way at page 9] that time.

Q. At the time of the dates of the warrants?

A. Yes, sir, the dates of the warrants.

Q. These are in Albemarle County?

A. These are in Albemarle County, yes, sir.

Q. Now, I hand you a picture marked Commonwealth Exhibit 2 and ask you if you can identify and state what is shown therein?

A. Yes, I can identify this. I am also in this picture, dated March 7, between milepost 105 and 106. It is very high, dry broom-sedge.

Q. Was that the condition as of December 3, the dates of the warrants, I guess?

A. Yes sir.

Q. I hand you another picture designated Commonwealth Exhibit 3 and ask you if you can identify that and what it shows therein?

A. This also shows me holding the board, March 7, between milepost 101 and 102. This is just a little ways north of Gilbert Station on the Southern in Albemarle County and that shows very high, dry broom-sedge along the right of way.

Q. I hand you another picture designated Commonwealth Exhibit 4 and ask you if you can identify that and state what it shows there?

page 10] A. Yes, that is on the same date, March 7, between milepost 104 and 105, with me holding the board in the high broom-sedge.

Mr. Smith: Mr. Pasco?

Mr. Gay: We have no questions.

(Witness stood aside.)

George Dean

Mr. Smith: We have more witnesses which will be cumulative on that unless we will use them in rebuttal. They will just testify to the same thing. We would like to call Mr. George Dean.

GEORGE DEAN

was sworn in behalf of the Commonwealth, and testified as follows:

DIRECT EXAMINATION

By Mr. Smith:

Q. You are Mr. George Dean?

A. That is correct.

Q. What is your position, please?

A. I am State Forester of Virginia, head of the Virginia Division of Forestry, Department of Conservation and Development.

Q. How long have you held that position?

A. I have been State Forester since August, 1944.

Q. Mr. Dean, what I want to show you are the Commonwealth Exhibits 1, 2, 3 and 4. I ask you to examine those and then I want to ask you this question: From your observations of the material contained or observed along the right of ways, do you observe weeds, grass, decayed timber, or any other material which, from their nature and condition are combustible material liable to take and communicate fire from passing trains to abutting or adjacent property?

Mr. Gay: Do I understand that counsel is directing the witness' attention to these photographs so as to state whether from them the language quoted from the statute is observable? Is that what you mean to say? Or the right of way generally?

Mr. Smith: From these pictures of the material contained. The purpose of the question is to put it squarely in the teeth of the statute.

The Court: That is all right. Go ahead.

By Mr. Smith:

Q. (Continuing) Go ahead, Mr. Dean. The Judge said to go ahead and answer the question.

A. From what I observed on these photographs and my knowledge of this type of material, from having personally inspected a considerable por-

George Dean

tion of this right of way, based on years of experience, I would say that very definitely this material is readily flammable, would catch fire readily, and spread fire to the adjacent property owners on those days when the humidity is low, the sun is bright, and may do so with or without a breeze.

Mr. Smith: Thank you very much. Mr. Pasco may have some questions for you.

Mr. Gay: I would like to call the Court's attention, if Your Honor please, to counsel's quotation of the statute. I am sure it was inadvertent when he interposed one or two words in it that I do not think appear in the statute. If the question is read, I believe that will support my statement. I am sure it was inadvertent.

We have no questions of this witness.

The Court: All right, sir.

(Witness stood aside.)

Mr. Smith: Your Honor, I think these are the facts. We have a number of corroborating witnesses, but I see no purpose of putting them on, unless the fact is disputed. Thank you.

The Court: All right, gentlemen, I understand that the Commonwealth rests.

Mr. Pasco: If Your Honor please, now that the testimony of the plaintiff's case of violation is in, we have something to which the demurrer will apply, in light of the general language of the statute. If Your Honor would be willing, we would like to argue the demurrer at this time.

The Court: You have asked to go ahead and compete the evidence. Let's complete the evidence and then we will argue the matters of law — unless you wish to make a motion to strike, which, of course, you have a right to make.

Mr. Pasco: No, sir, I have felt that since we were on appeal de novo, and the statute says it would be tried without pleading, there wasn't anything for the demurrer to go to until we had an affirmative case, but we can go ahead.

The Court: If I overrule your demurrer, then you want to put on some more evidence in connection with that, won't you?

Mr. Pasco: Yes, sir.

The Court: No reason to do that. Let's get it all in.

Mr. Pasco: First, I would like to submit a certified copy of the conviction of the Southern Railway

John D. Kidd

page 14] Company in Amherst County on December 15, 1962, in support of our plea of former jeopardy, which has been filed. This has been authenticated under the statute, I believe, but I have not shown it to counsel.

Mr. Smith: If Your Honor please, we have no objection, of course, to the admissibility, but we have objection to the introduction of it as not being relevant to the matter.

The Court: All right, it will be admitted.

Mr. Pasco: I ask Your Honor to mark this as the Railway's first exhibit.

The Court: All right.

(The certified copy of the Amherst County conviction on December 15, 1962, was received in evidence as Defendant Exhibit No. 1.)

Mr. Pasco: Call Mr. Kidd, please.

page 15] EVIDENCE ADDUCED IN BEHALF
OF THE DEFENDANT

JOHN D. KIDD

was sworn in behalf of the defendant and testified as follows:

DIRECT EXAMINATION

By Mr. Pasco:

Q. State your name and occupation, please.

A. John D. Kidd; Assistant Chief Engineer of Lines East, Southern Railway Company; Charlotte, North Carolina.

Q. Do you reside in Charlotte?

A. I do, sir.

Q. What generally are your responsibilities of Assistant Chief Engineer East of the Southern Railway Company?

A. My responsibilities are construction, maintenance, and engineering, as pertains to the railroad.

Q. Does that include the lines for the Railway in Virginia?

A. It includes the lines of the Railway in Virginia except the Southwestern section.

Q. What lines do you refer to when you mention the Southwestern Virginia?

A. That is the line from Bristol over to Appalachia to St. Charles, Virginia.

John D. Kidd

Q. Under whose jurisdiction does that come?
page 16] A. That comes under R. B. Midkiff, Chief Engineer of Central Lines, at Knoxville.

Q. Is that referred to as the Appalachian section?

A. The Appalachian Sector of the Knoxville Division.

Q. Mr. Kidd, will you state your familiarity with the widths of the right of way of the Southern Railway in Virginia under your jurisdiction?

A. Yes, sir. My familiarity with the rights of way in the State of Virginia are based on property maps or right-of-way maps in our office.

Q. Do you know from what information those property maps were prepared?

A. They were prepared and captioned "Evaluation Maps," and are recognized by the Interstate Commerce Commission.

Q. Do you know from what information they were prepared?

A. They were prepared originally from field surveys over a period of years, I believe, from about 1910 to 1916, somewhere in that neighborhood.

Q. Mr. Kidd, at my request, have you prepared a table showing the widths of the right of way for Southern Railway in Virginia under your jurisdiction?

A. I have, yes, sir.

Q. Do you have a copy of it with you?
page 17] A. I have a copy of it, yes, sir.

Q. Do you have an extra copy?

A. Yes, sir, I do have. I do not have an extra copy of the Appalachian Section.

Q. You do not prepare that one?

A. I did not prepare that one.

Mr. Pasco: This is the one and I will ask him to identify it.

Mr. Smith: If Your Honor please, in connection with the introduction of this evidence, we have no objection to the introduction, but we do object, Your Honor, to the relevancy of this. I do not see that it has any relevancy whatsoever in connection with the prosecution in Albemarle County as to the widths of right of ways in other parts of the state. Perhaps Albemarle, but certainly not other parts of the state.

Mr. Pasco: If Your Honor please, this witness will identify this exhibit as showing the widths of the right of way by mile-posts in Virginia, including Albemarle County, and we think it is probative evidence to show the unequal application of

John D. Kidd

this statute to the Southern Railway and we expect to show comparable figures for other railroads in Virginia. The exhibit shows that the right of way varies substantially. The exhibit speaks for itself on that ground.

The statute itself says it shall clear the right of way, and we submit it as proof of that the right of way may refer to insofar as —

The Court: I would have to see the exhibit, I think, to pass on it.

Mr. Smith: I have no objection to that.

The Court: Let's see it.

I think it is irrelevant, but since they can put it in for the record anyway, go ahead.

Mr. Smith: Maybe the Commonwealth should except. I never have an opportunity to do that.

The Court: I do not know what good it will do.

By Mr. Pasco:

Q. Mr. Kidd, I hand you a copy of the tabulation that you produced pursuant to my last question, and I ask you to tell us just briefly what that tabulation is and how you prepared it.

A. The tabulation was prepared from the evaluation maps or property maps of right of way and based on the full width of the right of way, eliminating that portion occupied by the tracks and the area occupied by the tracks —

Q. Just a second, Mr. Kidd. I do not believe you heard my question. I am referring only to the document which I have just handed you, which is a copy that you have just handed me, and I asked you what that showed. I do not believe there are any area figures on there.

A. Well, the document you gave me and which I had prepared under my direction shows the widths of the right of way between mileposts.

Q. And what rights of way does it include?

A. I don't quite understand that question, sir.

The Court: Hasn't he covered that? It includes all except Appalachia.

Mr. Pasco: Yes, sir.

By Mr. Pasco:

Q. Mr. Kidd, I understand the document that I now hand you includes the width of right of way by mileposts in Vir-

John D. Kidd

ginia, except the Appalachia Sector; is that correct?

A. That is correct, sir.

Mr. Pasco: If Your Honor please, we would like to have this marked as the Railway's second exhibit.

(The tabulation of widths of rights of way for sections of the main, "F," "B," "D" lines was received in evidence as Defendant Exhibit No. 2.)

By Mr. Pasco:

Q. Mr. Kidd, at our request, have you under-
page 20] taken to have computed the acreage covered by
the rights of way on this exhibit?

A. I have, sir.

Q. Will you tell us what the results were of your computation?

A. The results of my computations are, or rather is, on the exhibit 5,964 acres. That covers the exhibit that I prepared, that was prepared under my direction.

Q. That does not include the acreage in the Appalachia Division?

A. It does not, sir.

Q. And does the figure you have just given include all of the acreage in the rights of way, or is there any part excluded?

A. The parts through cities is excluded.

Mr. Gray: Excuse me. Would you give me the figure again, sir?

The Witness: 5,964.66 acres.

By Mr. Pasco:

Q. Does this figure include the area on which the track rests?

A. It does not, sir.

Q. How wide is that?

A. We deducted from the total width of the
page 21] right of way 8 feet on a single track; on multiple
tracks, we added 14 more feet on that. In other
words, a strip occupied by one track would be 16 feet, occupied by two tracks would be plus 14 feet, or 30 feet.

Q. And the figure 5,964 acres is the area exclusive of the trackage area that you have just described within the limits of the right of way on your exhibit; is that correct?

A. That is correct, with the exception of through cities.

John D. Kidd

Q. I would like to ask whether you included in that last exhibit the area of tracks owned by the company connecting with industrial tracks?

A. That area was not figured.

Mr. Pasco: I believe that is all now.

CROSS EXAMINATION

By Mr. Gray:

Q. Mr. Kidd, I am sorry that I am a little slow in following you on it, but would you tell me again what this 5,964.66 acres is?

A. It is the area of right of way.

Q. Owned by the Southern Railroad?

A. Owned by the Southern Railway on lines east in the State of Virginia, which does not include the page 22] Bristol-to-St. Charles line.

Q. Does lines east include the main line from Alexandria to the North Carolina state line?

A. Yes, sir.

By The Court:

Q. I understood that you excluded such things as yards, rights of way through cities, and things of that kind.

A. Well, Your Honor, it would not always exclude yards, because there is some area in some track that is outside cities.

By Mr. Gray:

Q. Do you have a copy of Exhibit No. 2 there?

A. Yes, sir.

Q. Would you look on page 5, please, sir, and tell me what is meant by the last line on that page, that says a total area of the right of way is 3,155,090 acres?

A. That is square feet and not acres. That is an error that was made.

Q. That is square feet, and not acres?

A. Square feet and not acres.

Q. Now I understand that. But this exhibit then, instead of containing the word "acres," should contain the words "square feet?"

A. That is correct.

page 23] Q. I understand you better now.

A. I'm sorry that the error was there.

Stanley E. Levy

Mr. Gray: I have no other questions.

Mr. Pasco: That is all.

If Your Honor please, could we have the witness correct the original on the point that he has just clarified?

The Court: It shows on the face of it that it is square feet. All you have to do is divide.

Mr. Pasco: The word "acres" is there, and it should not be. His oral testimony gave it "acres." The word "acres" should be changed to "square feet."

The Court: Oh, yes. All right.

Mr. Pasco: I would like to have the witness correct it so it will be accurate.

RE-DIRECT EXAMINATION

By Mr. Pasco:

Q. Mr. Kidd, before you stand down, will you correct this original exhibit?

A. All right.

Mr. Pasco: That is all.

(Witness stood aside.)

STANLEY E. LEVY

was sworn in behalf of the defendant and testified as follows:

DIRECT EXAMINATION

By Mr. Pasco:

Q. Will you state your name and residence and occupation, please?

A. Stanley E. Levy; Knoxville, Tennessee; Assistant Engineer, Southern Railway, office at Knoxville.

Q. Mr. Levy, are the maps of the Southern Railway lines in Southwestern Virginia maintained in your office?

A. Yes, sir.

Q. Are the evaluation maps of the Interstate Railroad contained in your office?

A. Yes, sir.

Q. Have you, at my request, prepared a table showing the width of right of way of the Southern Railway in Southwest Virginia?

A. Yes, sir.

Stanley E. Levy

Q. And of the interstate Railroad?

A. Yes, sir.

Q. Do you have more than one copy of it?

A. I have one copy.

Q. What does this table show, Mr. Levy?

A. This table shows the widths of right of ways
page 25] by mileposts on these lines in the Appalachian
Sector of the Knoxville Division.

Q. What does the second page show?

A. *This* second page shows the widths of right of way by
mileposts for Interstate Railroad.

Q. What is the relation between the Interstate Railroad
and the Southern Railway Company?

A. The Southern owns the Interstate Railroad.

Q. Is it a separate corporation?

A. It is a separate corporation.

Mr. Pasco: If Your Honor please, we would like to have
this exhibit as the Southern's next exhibit.

Mr. Smith: Same objection for the same reasons.

(A table of width of right of way in Virginia, Interstate
Railroad, was received in evidence as Defendant Exhibit No.
3.)

By Mr. Pasco:

Q. Mr. Levy, at my request, have you computed the acreage
of the Southern Railway right of way in Southwest Virginia
which it owns and exclusive of the part *unused* by the tracks?

A. Yes, sir.

Q. What is that acreage?

A. Well, the portion unused by the track in
page 26] total is 1,231.8. That is the total for both the Ap-
palachia Sector and the Interstate Railroad.

Q. What is the part for the Southern Railway?

A. For the Southern Railway, 810.6 acres; Interstate, 421.2
acres.

(A table of width of right of way in Virginia, Appalachia
Sector, Knoxville Division, was received in evidence as De-
fendant Exhibit No. 4.)

Q. Mr. Levy, you heard Mr. Kidd testify before you, did
you?

Stanley E. Levy

A. Yes, sir.

Q. Have you included in your figures any of the lines included in his table?

A. No, sir.

Q. They are separate rights of way entirely?

A. Yes, sir.

Mr. Pasco: That is all.

Mr. Gray: No questions.

(Witness stood aside.)

Mr. Pasco: If Your Honor please, pursuant to page 27] agreement of counsel, I would like to submit a letter from the Chief Engineer of the Richmond, Fredericksburg and Potomac Railroad Company, setting forth the length by miles of right of way of various widths of the R. F. & P. and a similar one for the Seaboard Air Line Railway Company, which I ask be marked as the Railway's next two exhibits.

The Court: That will be Exhibits 5 and 6.

(A letter dated March 26, 1963, from the R. F. & P. Railroad Company was received in evidence as Defendant Exhibit No. 5.)

(A letter dated March 26, 1963, from the Seaboard Air Line Railway Company was received in evidence as Defendant Exhibit No. 6.)

Mr. Gray: If Your Honor please, the agreement was to the formality of the proof, and we object for the reasons previously stated.

The Court: Yes, sir.

Mr. Pasco: If Your Honor please, we would like to submit a tabulation showing the same information for the Atlantic Coast Line Railroad, which the counsel agrees need not be proved further. It was prepared by the Chief Engineer of the railroad and sent to us in a letter, and we page 28] have lifted it out of the letter, because the rest of the letter was not material.

The Court: All right.

(A copy of a table from the Atlantic Coast Line Railroad's letter was received in evidence as Defendant Exhibit No. 7.)

Winthrop B. Small

Mr. Pasco: I would like to call Mr. Small, please.

WINTHROP B. SMALL

was sworn and testified in behalf of the defendant as follows:

DIRECT EXAMINATION

By Mr. Pasco:

Q. Will you state your name and residence and occupation, please?

A. Winthrop P. Small; office manager, Norfolk and Western Railway Company; Roanoke, Virginia.

Q. Mr. Small, does the Norfolk and Western maintain evaluation maps, showing the width of its rights of way in Virginia?

A. Yes, sir.

Q. Are those maintained in your office?

A. Yes.

page 29] Q. Can you tell us how they were prepared?

A. Prepared from field survey right of way plats and information of that nature.

Q. Mr. Small, at our request, have you prepared a tabulation showing the widths of the rights of way of the Norfolk and Western Railway Company in Virginia?

A. I have prepared a list at your request showing the minimum and the maximum widths of the right of way in the State of Virginia.

Q. How many miles of railroad line does the Norfolk and Western have in Virginia?

A. Now, on this tabulation I have shown 1,285.68 miles of main line and 289.91 miles of branch lines. Now this does not include mileage through terminals, large yards, and so forth.

Q. It includes all others?

A. Yes, sir.

Q. Owned by the Norfolk and Western directly?

A. Yes, sir.

Mr. Pasco: If Your Honor please, we would like to ask that this be marked as the Railway's next exhibit.

The Court: Exhibit 8.

page 30] (The tabulation of the Norfolk and Western Railway Company right of way in Virginia was received in evidence as Defendant's Exhibit No. 8.)

C. E. McRee

By Mr. Pasco:

Q. Mr. Small, are the evaluation maps showing the rights of way of Chesapeake & Western and Norfolk, Franklin & Danville Railway Companies in your office?

A. Yes, sir.

Q. Those companies are owned by the Norfolk and Western?

A. Yes, sir, and we have the evaluation maps in our office.

Q. How many miles of right of way does the Norfolk, Franklin & Danville have?

A. 180.11 miles.

Q. What is the maximum width of its right of way?

A. 100 feet.

Q. And the minimum width?

A. 50 feet.

Q. And would you give us the same information with respect to the Chesapeake & Western Railway?

A. Yes, sir. That is 54 miles and has a minimum of 40 feet, maximum of 100 feet.

page 31] Q. Is the Norfolk, Franklin & Danville Railway the old Atlantic and Danville Railway?

A. Yes, sir, it is.

Mr. Pasco: Any questions?

Mr. Gray: No questions.

(Witness stood aside.)

Mr. Pasco: I would like to call Mr. McRee.

C. E. McREE

was sworn and testified in behalf of the defendant as follows:

DIRECT EXAMINATION

By Mr. Pasco:

Q. Will you please state your name, residence and occupation, sir?

A. C. E. McRee; Columbus Construction Company, Columbus, Georgia.

Q. What sort of construction work does the Columbus Construction Company do?

A. All types of heavy construction, railroad work, grading, clearing, fire pipework, bridges and all types.

C. E. McRee

Q. Do you do work for other concerns than railway companies?

page 32] A. Yes.

Q. What has been the general experience of your company?

A. We have worked quite a bit for the Southern, quite a bit for the Atlantic, Georgia, Gulf, Mobile and Ohio, and some for the Seaboard.

Q. Do you do work for concerns other than railroads?

A. Oh, yes.

Q. What type of work?

A. All highway work, Corps of Engineers, private.

Q. How many states do you operate in, Mr. McRee?

A. Eleven.

Q. Will you tell us briefly what work you have done in Virginia?

A. Yes. We have built all of the bridges on the bypass for Harrisonburg over here; we had work on the Richmond-Petersburg Turnpike; we are just finishing a job at Fairfax County.

Q. Did those jobs involve clearing land as well as construction?

A. On these particular jobs, we did not have clearing on those jobs.

Q. Have you done clearing work in Virginia?

page 33] A. Oh, yes. Yes, we are just finishing up a job on the Southern, in Atlanta.

Q. Have you done any clearing work in Virginia?

A. Other than structures, like bridges and things of that kind.

Q. You did some work in Richmond, I believe, on the Richmond yards?

A. Oh, yes, we did. We cleared the Richmond yards.

Q. Are you familiar with the rights of way of the Southern Railway Company in Virginia?

A. Yes.

Q. Have you examined portions of them recently?

A. Yes, a couple days ago.

Q. Are you familiar with the right of way of the Harrisonburg-Manassas line, generally?

A. We made a tour of it on three different divisions and we are familiar with it up in the Northern part and also in the Western part.

C. E. McRee

Q. Western part of the state?

A. Western part of the state, yes.

Q. Mr. McRee, are you familiar with the statute that is involved in this case, concerning the requirement of the rail-ways to clear their rights of way?

A. Yes, I have read that.

Q. Have you, at our request, considered what
page 34] should be done in, your opinion, to comply with that statute?

Mr. Smith: Your Honor, isn't this a question that calls for a conclusion which is usually the province of the jury?

The Court: It may be a conclusion which is in the province of the Court, but in any event, I do not think this witness can testify as to —

Mr. Pasco: If Your Honor please, we have qualified him as a construction expert.

The Court: You may vouch it for the record. Go ahead.

Mr. Pasco: No, sir, I would rather rephrase the question.

By Mr. Pasco:

Q. Have you made a computation of what it would cost to clear the rights of way of the Southern Railway Company in Virginia of weeds, grass, and decayed timber?

A. Yes, I have.

Q. And would you first describe how you would undertake that work?

A. We figured this on the basis that we would cut all grass and weeds, leave an inch or inch and a half of this grass to keep the bank stable so it wouldn't be erosion. We included
the cutting of all small brush, leaving the trees,
page 35] piling and burning on the right of way and piles.

Q. Have you considered removing the grass down to the level of the dirt?

A. No, I haven't.

Q. Why not?

A. Because of erosion. In fact, I think the price of any-thing like that — you would have considerable wash, most of it would have hand work on the slopes, cuts, which the cost would be prohibitive.

Q. When would you undertake this work that you have just described, to clear the right of way of weeds or grass and decayed timber?

A. The way I interpret it, work would have to be done be-

C. E. McRee

tween August and November.

Q. Why is that?

A. The grass would be green until August. After November, there would be frost and fire would be hazardous and it would be combustion.

Q. Have you made an estimate of the cost of the clearing of the right of way in Virginia in the manner in which you have outlined during the period of time that you have just referred to?

A. Yes.

Q. Would you tell us what that figure is and page 36] explain how you arrived at it?

A. We estimated that the labor would be \$167.29 an acre on the basis that I have just described. We estimate that dozers can handle approximately 20 percent of the right of way. We estimated that one laborer could clear approximately 400 square feet per hour, which would give 261 labor hours per acre. Your operators for your tractors, mechanics, foremen, and labor for piling and burning — this is for the one crew, not for the entire job — would be \$167.29 labor cost per acre. Equipment would be \$56.66 per acre. Tools and supplies, \$8.35 per acre. With a total cost of \$232.30 10 percent overhead, 12 percent profit, \$286.19 per acre.

Q. How did you compute the cost of equipment? Can you explain that to us?

A. We depreciate equipment in 10,000 hours. We add back the interest and insurance on equipment when it is purchased. In this case, a D-6 is about \$22,000 with a cost over 10,000 hours would be \$26,000. Base that on 10,000 hours at \$2.60 an hour. Repairs, which is on the tractors a hundred percent, which is \$2.60 an hour, plus your fuel, \$1.50 an hour, oil and grease at 50 cents.

The truck for transportation, \$1.50; repairs, 25 cents; fuel, 30, cables, 30 cents, cutting edge is 30; chain saws, \$1.00 each; repairs, 50 cents; gas and oil 30.

page 37] That is the way that the equipment and its cost was computed.

Q. And that gives you a total of —

A. \$56.66.

Q. Per acre?

A. Per acre.

Q. Did you compute this originally on a per-acre basis or larger unit?

A. We used a larger unit.

C. E. McRee

Q. What unit did you use?

A. We used a 3-acre unit, because we felt that would utilize the complete use of the D6 tractors to break it down into the labor on that, which we came up with \$501.87 on 3 acres and divided by 3 came to \$167.29.

Q. That is the labor per acre?

A. Labor per acre.

Q. What wage rate did you use in computing this?

A. \$1.25 on labor.

Q. Mr. McRee, have you undertaken to extend these costs to cover the acres of the right of way for the Southern Railway Company only in Virginia that would have to be cleared?

A. Yes, I have.

Q. What acreage did you use?

A. We used 6,775.26 acres.

page 38] Q. What did you come up with as a total cost?

A. A total cost of \$1,937,011.65.

Q. Would that be an annual recurring cost, in your opinion?

A. I would say 60 percent of it would be annual. On the first time, you would cut out all of your small trees and small bushes, which growth would be only a year, so it would reduce it some.

Q. Mr. McRee, other than burning the right of way, do you know of any cheaper way to clear the right of way?

A. No, I don't.

Q. Would you be willing to do it any cheaper than this?

A. This would be the price that if we were going to bid on it, we would use, yes, sir. We figured as if we were going to do it.

Q. You have been reading from an estimate there. Did you prepare that estimate?

A. Yes, I did.

Mr. Pasco: I am going to ask him to introduce that. If Your Honor please, we would like to have this tabulation of costs from which the witness has just testified, marked as the Railway's next exhibit.

Mr. Gray: Your Honor, we object on two grounds:

page 39] First, that we do not think that this has been sufficiently established as sufficiently material to any issues in this case; and, number two, that the railroad has far better evidence than this. They have at times and places, actually cleared rights of way, so they have actual costs and not someone else's guess.

C. E. McRee

The Court: I think probably on the relevancy, the objection is well taken, but I will rule, as I have in the other cases. They have got to vouch it for the record anyway, gentlemen. I do not think it is relevant, but I will let it come on in.

Mr. Gray: If Your Honor please, if you would prefer, if we let it be that we have a running objection to all of this evidence, and save time.

The Court: They want to make a record, and it does not make any difference whether I rule. It just saves time to let it go ahead.

(The McRee cost estimate was received in evidence as Defendant's Exhibit No. 9.)

By Mr. Pasco:

Q. In preparing this estimate, Mr. McRee, have you given consideration to the various types of terrain over which the railway runs in Virginia?

page 40] A. Yes.

Q. Have you found that you would have to clear all parts of the right of way?

A. Practically clear all of it, to get it to the right width on some slopes, some cuts — well, most slopes and cuts would all be hand-worked. We only figured that equipment could handle possibly 20 percent of it on the outer edges of the right of way. And then in places, where you have terrain, ditches and such as that kind, you would still have a lot of hand work.

Q. Could you give us an estimate of roughly what it would cost to clean the right of way down to the level of the dirt and not leave the inch and a half of grass you talked about?

A. Well, it would be considerable. You would have to blade it off. You would have to grub it on the slopes and cuts and then you would have a matter of disposing of it with dirt in it, which, if you had to dispose of it, you would have to haul it off or either leave it on the right of way until such time as it would completely decompose and rot.

Q. It would become combustible before it would rot, would it not?

A. Yes, it would. It would be quite expensive. I would say more than \$1,000 an acre if you were going to do
page 41] it that way.

Q. From your experience in construction work in highway and road work, can you tell us what would be the

C. E. McRee

effect on the right of way and roadbed of the Southern Railway if its right of way were cleared of all grass and weeds?

A. Well —

The Court: He has already told us that, Mr. Pasco. He told us that it would cause erosion.

Mr. Pasco: I did not recall, Your Honor, that he had.

The Court: Let's go ahead.

Mr. Pasco: That is all. Thank you.

The Court: Do you have any questions?

Mr. Gray: Yes, sir.

CROSS EXAMINATION

By Mr. Gray:

Q. Mr. McRee, how many acres of this railroad right of way did you examine in making your estimate?

A. Well, I wouldn't know exactly how many acres, but we are quite familiar with it. We do a lot of work and look at a lot of work over the entire Southern Railroad system. We are quite familiar with it.

Q. Have you done any clearing work for them?

page 42] A. Yes, we have just completed a job for the Atlanta —

Q. In Virginia?

A. No, not in Virginia since about a year ago, a year and a half ago. That was in Richmond.

Q. That was in the railroad yard?

A. Yes.

Q. Not on the right of way, as I understand it?

A. Well, it was on the right of way down the tracks, yes, in the yard.

Q. Did you examine the lines in Southwest Virginia?

A. In Southwest Virginia? Yes.

By The Court:

Q. Have you ever done any work of this kind?

A. Yes.

Q. I do not mean clearing to build or anything of that kind, have you ever done any work keeping railroad rights of way clear under the statute?

A. No. Just only one particular job.

The Court: All right.

C. E. McRee

By Mr. Gray:

Q. Did you examine the right of way in Southwest Virginia?

A. No. We went down—we have been through Bristol. That is where you are talking about, down in that area?
page 43] Q. Yes. For the purpose of making this estimate, did you examine the right of way in Southwest Virginia?

A. Not for Bristol, down in that section, no.

Q. How many miles of right of way in Virginia did you examine for the purpose of making this estimate? I am not talking about your general familiarity, now, we are talking about a bid which is right down to a penny basis. How many miles of right of way did you examine for the purpose of making this estimate?

A. Oh, I would say we examined a hundred miles of it.

Q. Hundred miles of right of way? Where was it? What hundred miles?

A. Oh, we were on the eastern — east of Richmond. We came down to — let's see, what division you call this right south of here? — and then came on up into the Washington Division.

Q. How did you make this trip?

A. By car, like we do on any other job we bid on. We go in and consult. We bid highway work, we go along parallel it, turn in everywhere we can and take a look at the right of way.

Q. So that you think that you saw a hundred miles of tracks; is that right?

A. Well, I don't know that I saw a hundred
page 44] miles of track, but over a distance of a hundred miles, we do.

Q. Over a distance of a hundred miles you saw intermittent spots of the track; is that what you say?

A. Oh, I would say we saw quite a bit of it.

Q. What percentage of the acreage, of the total acreage, would have timber on it large enough to require the use of a chain saw?

A. Well, you have got quite a few trees that would be in your way of clearing. You would get rid of them. You would be able to cut your costs on other years in the future and get them out of the way.

Q. What percentage of the acreage contains trees which would require the use of a chain saw?

A. Well, it would depend on what size you want to use the chain saw on.

C. E. McRee

Q. You made the statement. What percentage of the acreage contains trees?

A. We said we figured 80 percent of it would be handcleared with only 20 percent that we would be able to use dozers; and when we hand-clear, we use chain saws in that hand-clearing, bush axes —

Q. Are you able to answer, sir, as to what percentage of the acreage has trees on it which would require the use of a chain saw?

page 45] The Court: Answer the question if you can.

A. I cannot answer that.

By Mr. Gray:

Q. You cannot answer it?

A. No, sir.

Q. With respect to Albemarle County, did you examine the line into Albermarle County?

A. I didn't know from county line to county line, if we passed through it, I don't know that. But we made a considerable trip through and I am sure we did, if we passed through the Albemarle County line.

Q. You don't have a figure for what it would cost to clear the right of way in Albemarle County?

A. No more than an average of what would be this that I gave you, no.

Q. Is the terrain in Albemarle County average terrain, or does it vary from other counties?

A. Well, I would say that you have got mountains, you have got swamps, woods and open fields. Now that, I say, I am not just familiar with what that is.

Q. Does the character of the terrain make a substantial difference in the cost of clearing?

A. Certainly.

Q. Would the cost in Southwest Virginia be
page 46] greater than on the average in Eastern Virginia, or not?

A. I wouldn't think so, because of your swamps, very low country in the east, and the mountains in the west, it would be very little difference in the cost of it, I would say.

Q. Do you think the cost would be about the same?

A. Possibly.

C. E. McRee

Q. How long a time did you spend in preparing this estimate?

A. We will get enough information on it, quite a —

Q. Sir?

A. We will get quite a bit of information on it all of the time we were looking at it.

Q. What time was that?

A. We were taking information on it for a couple of days.

Mr. Gray: No further questions.

RE-DIRECT EXAMINATION

By Mr. Pasco:

Q. Mr. McRee, you went from Richmond down toward West Point inspecting the line; is that correct?

A. Right.

Q. You went from Richmond down to Keysville?

page 47]

A. Right.

Q. You came over to Gretna?

A. Right.

Q. Came up to Charlottesville?

A. Right.

Q. And went north of Charlottesville?

A. Yes.

Q. Have you seen the company's right of way in recent years up in the Harrisonburg area?

A. Oh, yes.

Q. Have you seen the company's right of way in recent years in the Bristol area?

A. Yes, I have.

Q. The clearing that you did in Richmond for the yard, was that yard property at the time that you cleared it?

A. Was it?

Q. Was the yard property at the time you cleared it, occupied with any railroad facilities at the time that you cleared it?

A. Oh, yes, it was a railroad facility, there was lines through there, and I cleared out from the lines.

Q. You cleared adjacent to the line?

A. Yes, sir.

Q. On what kind of property?

page 48]

A. It was swampy.

Q. Heavily overgrown?

William H. Chisholm

A. Yes, sir.

Q. And about what size acreage would you estimate that was?

A. I don't remember the acreage, but I do remember that we had a price on there approximately \$2,000 an acre for clearing that. That was that heavy.

Q. And you were paid for that work that you did?

A. Yes, sir.

Mr. Pasco: That is all.

(Witness stood aside.)

Mr. Pasco: Mr. Chisholm.

WILLIAM H. CHISHOLM

was sworn in behalf of the defendant and testified as follows:

DIRECT EXAMINATION

By Mr. Pasco:

Q. Will you state your name and residence, please?

A. William H. Chisholm; Charlottesville, Virginia.

Q. What is your business, Mr. Chisholm?

page 49] A. I am in the grading and paving business.

Q. Have you ever done any land-clearing work in your experience?

A. Yes, sir.

Q. Are you familiar with the line of the Southern Railway in Charlottesville and north of here?

A. Yes, sir. I worked for the Southern Railway from Orange to Rockfish doing rock scaling and ledge cutting, which necessitated getting up on the slopes, the cut slopes and the filled slopes.

Q. Are you familiar with the line north of Orange?

A. I am familiar with it somewhat up next to *Centerville* and the Fairfax area. I had to walk over approximately 5 miles of it, trying to locate sidings for the new interstate project up in north Virginia.

Q. And south of Charlottesville, your familiarity goes to Rockfish, you say?

A. Yes, sir.

Q. And beyond Rockfish?

A. About 5 miles beyond Rockfish.

William H. Chisholm

Q. Have you, Mr. Chisholm, at our request, prepared an estimate of what it would cost to clear the right of way, with which you are familiar, from weeds, grass, and decayed timber?

page 50] A. Yes, sir.

Q. What sort of estimate have you made?

A. I made an estimate on the use of tractors, laborers, trucks and tools only on an hourly basis. I used it on the basis of using two tractors, 20 laborers, 2 foremen, 2 trucks, and, of course, the tools, axes, ropes, rakes and whatever you need. And in my estimate I would only remove the grass or decayed timber down to within 2 inches of the ground. My cost per acre, including the insurance and profit, amounted to \$312 per acre.

Q. \$312 per acre?

A. Yes, sir.

Q. How many acres would your crew of 20 with 2 pieces of equipment clear per day?

A. Approximately 2½ to 3 acres. And of that, the tractors, I figure, would probably get 25 percent at the most.

Q. You mentioned the profit a moment ago; what percentage do you apply for profit?

A. 20 percent; 10 cost — 10 on the insurance and 10 on the profit.

Q. 10 on the profit?

A. Yes, sir.

Q. What labor rate do you use?

A. I used \$1.75 an hour for laborers and \$3 an hour for the foremen.

Q. Why is it that your crew of 20 men could not clear more than 3 acres a day?

A. Because of the steep cuts and the steep fills. You have just got such adverse working conditions that some of the slopes and some of the cuts you would have to put pins on top of the cut areas, to hang men over the cliff in order to get the grass off of it. That is the procedure that I had to go through with just to get loose rocks off the cut areas.

Mr. Pasco: That is all. Thank you.

CROSS EXAMINATION

By Mr. Smith:

Q. Mr. Chisholm, could you suggest to the Court any cheap-

William H. Chisholm

er way to remove this inflammable material?

A. I would say that burning would be cheaper than having to handle it, cutting it and then removing it. It is so much lost motion when you have to handle the materials two or three times. You are going to get up there and cut it to slope, then you have to pull it down, then you have to pile it and burn it, and then you have got to work the pile.

Q. Wouldn't it be cheaper just to take a gang of men and burn it?

A. I haven't had experience of burning land
page 52] to clear it.

Q. You know the section foreman for the Southern Railway, Mr. Samuel Patton, I believe his name is?

A. I don't recall him, no, sir. I may have met him.

Q. Did you have any conversation with any of the maintenance or repair men for the Southern Railway?

A. I had talked with Mr. Radford, and I talked with Mr. Goodman when he was here, only the cutting and scaling of the slopes.

Q. Not the question of clearing the right of way?

A. I have not talked to Mr. Radford about clearing the right of way.

Q. Has he ever mentioned to you the fact that he could take a crew of two or three men and clear as much as a mile a day, burn a mile a day?

A. I have not discussed it with him.

Q. Do you know whether that is possible?

A. Ask the question again. I didn't quite understand it. What was the method you spoke of, taking two or three men and doing it?

Q. Burning. Take a track foreman and a crew of, say, three, or it would be better to say, take three to five men?
page 53] A. I doubt it.

Q. And burn the right of way and be able to clear as much as a mile in one day?

A. Well, it depends on the width.

Q. Well, we have the width, I think, in the Southern Railway.

A. He would not average a mile a day.

Q. How about a half a mile?

A. Your Honor, I don't think I am qualified to answer that.

The Court: All right.

Mr. Smith: Thank you.

Jack E. Green

(Witness stood aside.)

Mr. Pasco: Mr. Green.

JACK E. GREEN

was sworn and testified in behalf of the defendant as follows:

DIRECT EXAMINATION

By Mr. Pasco:

Q. Will you state your name and residence and occupation, please?

page 54] A. Jack E. Green; Alexandria, Virginia; Division Engineer, Washington and Richmond Division, Southern Railway Company.

Q. What are your responsibilities as Division Engineer, Mr. Green?

A. I am responsible for the maintenance of the tracks and structures on the right of way on the Eastern Division.

Q. What line of road is included in the two divisions that you are responsible for?

A. Main line between Alexandria, Virginia, and the Monroe, Virginia; the line between Manassas, Virginia, and Harrisonburg, Virginia; between Calverton, Virginia, and Warrenton, Virginia; line between Danville, Virginia, and West Point, Virginia; the line between Keysville, Virginia and the Virginia-North Carolina State Line towards Durham.

Q. How long have you worked for the railroad, Mr. Green?

A. I have been employed for seventeen years.

Q. Are you familiar with the rights of way of any other portion of the company's line other than the ones that you have just mentioned?

A. Well, I have worked in North Carolina, South Carolina, Georgia, Mississippi, Tennessee, Louisiana — I believe that is about all.

page 55] Q. Does the responsibility for clearing the rights of way of weeds, grass and decayed timber come under your jurisdiction?

A. That is one of my responsibilities, yes.

Q. One of your responsibilities?

A. Yes, sir.

Q. Have you been undertaking to discharge that responsibility this year on the lines for which you are responsible?

A. I have.

Jack E. Green

Q. Of what work forces have you worked, and when have you worked them?

A. We started a force on the Richmond Division November 2, 1962.

Q. How big a force?

A. A foreman and four men. That force has been continuously on clearing the right of way on the days that it was possible to clear it, by burning.

Q. They worked exclusively on the Richmond Division?

A. They have been exclusively on the Richmond Division, yes, sir.

Q. When you started in November, did you have any trouble clearing the right of way?

A. We found in November that the right of way, by clearing by burning, would not clear properly, according to page 56] the Forestry rules.

Q. Why not?

A. In that it was too wet or too green or something to burn.

Q. What force have you had on the Washington Division in clearing the right of way?

A. I don't have that date. We started in December.

Q. I asked you what forces you had?

A. A foreman and four men.

Q. Approximately when did they start to work?

A. That was started in the month of December, the first period of December.

Q. First period of December?

A. Yes, sir.

Q. Describe what that work force has done since that time?

A. Due to weather conditions, they have done very little. We have gone over the right of way from Monroe, Virginia, to just north of Charlottesville, with the exception of about 10 percent of Nelson County.

Q. Have these men had any other assignment on days when they could burn?

A. Not to my knowledge.

Q. They work under your supervision?

page 57] A. They work under the — well, under the direct supervision of the track supervisor. I have the general supervision of the two divisions.

Q. Do you still have these two work forces engaged in the right of way clearing?

A. Yes, sir.

Q. How long did it take one of these work crews on the

Jack E. Green

average to clear a mile of right of way, from your experience?

A. Well, the clearing we are doing today, what we are doing, the foreman and four men will clear approximately one mile on one side per day; and of that, we are clearing, I would say, roughly 60 percent of what we cover we burn.

Q. Mr. Green, at our request have you undertaken to list the various types of vegetation that you have personally observed growing on the rights of way for which you are responsible in Virginia?

A. Yes, sir.

Q. Will you tell us what those items are?

A. I can read them off. I don't remember them. Golden rods, wild roses, black-eyed Susans, blackberries, blueberries, dandelions, honeysuckle, blue grass, orchard grass, crab grass, Bermuda grass, broom-sedge, wild clover, morning glories, ragweed, milkweed, lespedeza, sericea, kudzu, beg-
page 58] garlice, cattail, *cokleburns*, nut grass, wild onions, and most any other types of weeds or grasses that grow along adjoining properties.

Q. Is most of this type of vegetation killed by the heavy frost each year in this area?

A. Yes.

Q. How often do you go up and down the line of the road that you are responsible for, Mr. Green?

A. I am continuously on some portion of the railroad right of way.

Q. What is your experience in dealing with trespassers or hunters and other non-railway people on the right of way?

A. Well, it is very seldom that I make a trip over the railroad right of way that I don't see some trespassers or hunters along my road.

Q. When you worked in North Carolina, were the rights of way cleared down there?

A. We did not clear the rights of way in North Carolina by burning or clearing operations, no, sir.

Q. How would you compare the condition of those rights of way to those in Virginia?

A. Well, it has been my observation that the rights of way in North Carolina do not have as much combusti-
page 59] ble material in the effect of broom-sedge and stuff, because by not burning it they have more of an undergrowth, small growth, that keeps out the broom-sedge and these quick grasses. That is just my personal observation.

Jack E. Green

Q. On your division, do you use any weed killer?

A. Yes, sir, I do.

Q. For what purpose and to what extent do you use it?

A. The purpose of the weed killer is to control the vegetation or undesirable vegetation from getting into the ballast section and fouling the drainage and causing a bad track condition.

Q. To what width do you apply the weed killer?

A. That is approximately 10 to 12 feet from the center line of the track. 10 or 12 feet from the center line of the track.

Q. Approximately how far is it from the center line to the end of the ballast, on the average?

A. Approximately 8 feet.

Q. So you would have about 4 feet beyond the ballast on each side, roughly, with the weed killer?

A. Yes, sir.

Q. Is that applied throughout the division each year?

A. Applied throughout the Southern Railway
page 60] Company, yes, sir, over the entire division.

Q. And do you have any brush control operations by chemicals?

A. Yes, sir, we do.

Q. What is that?

A. For brush control we use a chemical spray, which is an industrial brush killer, or a pellet form for controlling the growth next to the track, that is, wood growth, and for controlling it under and around the communication and signal lines.

Q. Do you do any seeding along your right of way?

A. Yes, sir, we do.

Q. What seeding?

A. Each year where we use the brush killer, as we refer to it, we seed the area with sericea, to try to get a growth to control erosion.

Q. Sericea is a grass, is it not?

A. Sericea is a grass.

Q. Is the sericea killed by the frost each year back to the roots?

A. Yes, sir.

Q. Mr. Green, could you estimate from your experience in the last few years approximately what portion of each of the winter months you can burn, because of weather conditions?

page 61] A. Would you ask the question again?

Jack E. Green

Q. I say, from your experience in the last few years, could you estimate what portion of each of the winter months you had been able to burn your right of way, either percentage-wise or days, whichever you could suggest?

A. Any estimates I would make would be purely a guess on my part.

Q. I would not want you to guess.

A. I couldn't estimate it. I know this winter there had been very little time that you could burn the right of way.

Q. Would you say that you had been able to burn 50 percent of the time this winter?

A. We have not been able to burn 50 percent of the time, I do know that, but what percentage we have been able to burn, I could not say, no, sir.

Mr. Pasco: That is all. Thank you. Answer these gentlemen's questions.

CROSS EXAMINATION

By Mr. Gray:

Q. Mr. Green, how far is it from Monroe to a point just north of Charlottesville, where you said you had been burning from Monroe to a point just north of Charlottesville? Is that what you said?

A. That is true.

Q. How many miles, lineal miles is that?

A. Charlottesville is the 112 milepost. The end of the Washington Division is the 166.6-mile point.

Q. The end of the Washington Division is at Monroe; is that true?

A. That is true.

Q. So it is 44.6 miles?

A. Yes, sir, from Charlottesville.

Q. 54.6?

A. 54.6.

Q. And I believe you say that it was a part of Nelson County that you had not burned?

A. There is a little portion of Nelson County, I believe, from about Rockfish station, somewhere in the vicinity of Rockfish station, up to the Nelson County-Albemarle County state line.

Q. That you have not worked on?

A. That I have not worked on.

Jack E. Green

Q. What mileage would be involved there?

A. Somewhere in the vicinity of the 131 milepost to approximately the 134 or —35 milepost.

Q. So that we are talking about 3 miles?
page 63] A. 3 or 4 miles.

Q. 3 or 4 miles?

A. Yes, sir.

Q. Could you tell me exactly when in December this crew began working?

A. Started burning on the Washington Division on December 10, 1962.

Q. When did they finish their operations to just north of Charlottesville?

A. They are just north of Charlottesville now.

Q. As of right now?

A. Yes.

Q. They have covered that roughly 50 miles on both sides of the track?

A. They have not burned all of the right of way over that 50 miles, no, sir.

Q. Well, they have concluded their operations over that 50 miles on both sides of the track?

A. Yes, sir, both sides except for where the second main line has been abandoned in the area between the 132 milepost to the 144.3 milepost; from the 153.3 milepost to the 160.7 milepost.

Q. What are these exceptions that we are talking about now?

page 64] A. That is the one side was not burned.

Q. One side was not burned between these mileposts that you are talking about now? That just covered one side?

A. One side.

Q. What is the cost of the one foreman and four laborers? What is the hourly cost of the one foreman and four laborers?

A. The foreman's rate is \$2.64 per hour. A laborer's rate is \$2.20½ an hour. That is the hourly rate.

Mr. Gray: No further questions.

RE-DIRECT EXAMINATION

By Mr. Pasco:

Q. Mr. Green, have you been in the practice of consulting

H. D. Thomerson

the Forest Department about what parts of the right of way they are interested in having burned?

A. That has been more the practice of the track supervisor than myself.

Q. Does that explain why some portion of it was skipped over by your work crew?

A. That is true, yes, sir. Just the wooded areas.

Q. What?

A. The wooded areas, or that would lead to woodland.

Mr. Pasco: That is all. Thank you.

(Witness stood aside.)

page 65] Mr. Pasco: Call Mr. H. D. Thomerson, please.

H. D. THOMERSON

was sworn and testified in behalf of the defendant as follows:

DIRECT EXAMINATION

Mr. Pasco: If Your Honor please, before I examine this witness, I would like to state, subject to objection to relevancy, we have stipulated with counsel that the states of North and South Carolina, Georgia, and Tennessee, do not have statutes similar to the one involved in this case.

The Court: All right, sir.

Mr. Pasco: They, of course, reserve the right to object for relevancy.

By Mr. Pasco:

Q. Would you state your name, residence and occupation, please?

A. My name is H. D. Thomerson; I live at Falls Church, Virginia; and I am employed by the Southern Railway Company as Assistant Chief Claim Agent.

Q. How long have you worked for the Railway Company?

A. Fifteen years.

Q. Have you had any experience other than in
page 66] the Claims Department?

A. In railroading?

Q. For the railroad, yes, sir, in the fifteen years.

A. No, sir, all of my experience has been in the Claims Department.

H. D. Thomerson

Q. Have you had any railroad experience prior to your service with the Southern?

A. No, sir.

Q. What area does your responsibility as Assistant Chief Claim Agent involve?

A. Primarily, the State of Virginia and then such other areas as may be assigned to me by the Chief Claim Agent.

Q. Is there maintained in your office a record of fire claims paid in Virginia?

A. Yes, sir.

Q. What are those figures?

A. For a period of five years, 1958 through 1961, we have paid in the State of Virginia a total of 44 claims.

Q. Could you give us the number by years for those years?

page 67] A. Yes, sir. During the year 1958, we paid a total of 10 claims. Do you want the cost?

Q. No.

A. During the year 1959, we paid a total of 12; in 1960, 9; 1961, 8; and in 1962, 5; for the total of 44.

Q. Can you tell us what part of those claims were attributable to efforts to clear the right of way by burning?

A. Yes, sir.

Q. How many?

A. In 1958, we had one claim as a result of burning right of ways; in 1959, we had 7; in 1960, 5; in 1961, 4; and in 1962, 1, for a total of 18.

Q. Do you maintain in your office the record of the suppression costs for fires in Virginia paid by the company?

A. Yes, sir.

Q. What has been the company's experience for the years that we have been considering on suppression costs?

A. *Suppression* costs for the years 1958 through 1962, by years, in 1958, we paid 8; in 1959, 30; in 1960, 9; in 1961, 25; and in 1962, a total of 24. For the five-year period there is a grand total of 88.

Q. Can you tell us from your review of the records what part of those suppression costs arose out of attempts to clear the right of way by burning?

page 68] A. Yes, sir. In 1958, one; 1959, 8; 1960, 4; 1961, 4; and in 1962, a total of 2. That makes a grand total of 19 for the five-year period.

Q. It is true, is it not, that the same fire might give rise to a claim and a suppression cost?

H. D. Thomerson

A. Yes, sir. I would say that in 95 percent of the instances where we have a fire claim, we would also pay a suppression cost. But the opposite is not true. We pay many suppression costs where we do not pay a claim, because in many instances the fire may get into some area that there is really no appreciable damage and therefore we are not presented a claim for that fire.

Q. My point is of the 18 fires that gave rise to claims that resulted from burning the right of way and the 19 suppression costs for the same reason, in 95 percent of the instances I understand it would be the same fire?

A. Yes, sir.

Q. Do you maintain in your office the records of the warrants issued against the company for failure to clear its right of way?

A. Yes, sir.

Q. Would you tell us how many warrants have been issued the company in 1962?

A. Yes, sir. 18 during 1962.

page 69] Q. Have you prepared a statement showing the counties involved?

A. Yes, sir.

Mr. Gray: Could I inquire the purpose of this? We might not object, and then again, I might object very seriously.

The Court: I do not quite see the purpose, either.

Mr. Pasco: If Your Honor please, the purpose of this line of testimony is to show in the light of fact that the endorsement of this law has been the responsibility of the State Forestry Department under the statute, that it is being used exclusively to protect the State forests, and the railway's right of way has been used as a fire line for that purpose, if for no other purpose, and this is part of the proof of that.

The Court: I do not see the relevancy of it.

Mr. Gray: I object to it.

The Court: Objection sustained. You may vouch it for the record.

Mr. Pasco: I ask Your Honor to mark this as the Railway's tendered exhibit No. 1.

The Court: I will endorse it 1-I.

(The tabulation of county warrants was marked
page 70] Defendant's Exhibit 1-I for identification only.)

H. D. Thomerson

By Mr. Paseo:

Q. I notice the names on the right side of this exhibit that you have just introduced. Will you tell us what those names are?

A. Reading each one?

Q. No, just who they are and what.

A. They are Fire Wardens of the State of Virginia.

Q. And why are they related to these various warrants?

A. They are the people who swore out the warrants.

Q. During your experience in the Claims Department, do you know of any warrants in violation of this statute in Virginia that have not been sworn out by the Forestry Department?

A. None to my knowledge during the past five years.

Q. Would any warrants instituted by any other party come to your attention?

A. Yes, sir.

Q. Now are fire claims paid in North and South Carolina, Georgia, and Tennessee maintained in the record of your office?

A. Yes, sir, they are.

Q. Will you tell the number of fire claims paid page 71] in North Carolina during the five years that we have been dealing with?

A. Yes, sir. Fire claims paid by the Southern Railway Company in 1958 through 1962 in the State of North Carolina was 23; the State of South Carolina, 34; the State of Georgia, 16; and the State of Tennessee, 10.

Q. Would you give us the comparable figures for fire suppression claims paid in those states during those years?

A. Fire suppression costs paid by the Southern Railway Company in 1958 through 1962 in the State of North Carolina was 11; in South Carolina, none; in Georgia, none; in the State of Tennessee, one.

Q. Can you tell us the number of miles of railroad the company has in Virginia?

A. Yes, sir, in the State of Virginia, we have a total of 810 main line miles and a total of 1,387 including main lines and industrial tracks.

Q. If you can, would you give us the same figures for the other four states?

A. Yes, sir. In the State of North Carolina, we have 1,576 miles of main line track and 2,453 miles of main line and industrial tracks. In the State of Georgia, we have 1,258 main

H. D. Thomerson

line miles and 2,075 main line and industrial
page 72] tracks. In the State of Tennessee, we have 838
main line miles and 1,870 main line and industrial
tracks.

Q. Would you give us South Carolina?

A. South Carolina, 1,120 main line tracks and 1,692 miles of
main line and industrial tracks.

Mr. Pasco: You may examine the witness.

CROSS EXAMINATION

By Mr. Gray:

Q. Mr. Thomerson, going back to your number of fire claims
over the period of the last five years, would you very quickly
run down the numbers that you gave for the years?

A. Yes, sir. Are you speaking now of just the State of
Virginia?

Q. Yes, sir, number of fire claims paid in the State of Vir-
ginia.

A. Yes, sir. 1958, 10; 1959, 12; 1960, 9; 1961, 8; 1962, 5.

Q. Your total was 44; is that right?

A. Yes, sir.

Q. All right, sir. When do you pay a fire claim, Mr. Thomer-
son?

A. When you agree on settlement with the party who has
been damaged.

page 73] Q. If you don't agree on a settlement, what
happens?

A. It goes into suit sometimes. Sometimes there is nothing
done.

Q. How many times in 1958 did you have fires that you did
not agree with the landowner?

A. We had no suits during those five-year periods, sir.

Q. Did you have cases in which there were claims presented
but you did not agree and still no suit happened?

A. Not to my knowledge, no, sir.

Q. In any of those five years?

A. Now let me say this: These are fire claims and it is
possible that you might have a little fire where you didn't
pay anything; but I would say, though, that this is very, very
rare.

Q. When you agree with the landowner, you have agreed
that he has been damaged by fire?

H. D. Thomerson

A. Yes, sir.

Q. Which originated on your right of way?

A. Yes, sir.

Q. Now when do you pay a suppression cost?

A. Sir, we pay 99 percent of all suppression costs. During the last five years —

Q. Excuse me now.

page 74] A. — during the last five years we have refused to pay one suppression cost. But I would like to add this. While we do make an investigation of each one of those instances where we are presented with a fire suppression bill from the State of Virginia, we pay many of them in the spirit of cooperation. Certainly, the information that they send to us does not satisfy us that it occurred as a result of our operations, but we do pay them in the spirit of cooperation. And only one in that five years; and the facts were so glaring in that case that I could not justify to my management to pay it, and therefore it was declined.

Q. In the cases in which you have paid the suppression costs, some of these are instances where you are satisfied that the fires started on your right of way; is that correct?

A. Yes, sir; oh, yes, sir, some of them are.

Q. And some of them you pay just in the spirit of cooperation?

A. Yes, sir.

Q. These claims are presented, you say, by the State of Virginia?

A. Yes, sir.

Q. Does the Southern operate in any states other than the five which you have —

page 75] A. Oh, yes, we operate in thirteen states.

Mr. Gray: No further questions.

(Witness stood aside.)

The Court: Gentlemen, suppose we take a ten-minute recess at this time.

(Recess)

The Court: All right, gentlemen, let's go ahead.

Mr. Pasco: Mr. Sayers.

R. P. Sayers

R. P. SAYERS

was sworn and testified in behalf of the defendant as follows:

DIRECT EXAMINATION

-By Mr. Pasco:

Q. Will you state your name and residence and occupation, please?

A. R. P. Sayers; I live at Vinton, Virginia and am employed as a District Claim Adjuster by the Norfolk and Western.

Q. What area of the Norfolk and Western line is under your jurisdiction?

page 76] A. The entire system.

Q. Do you have the responsibility for payment of fire claims and suppression costs?

A. Yes, sir.

Q. Could you tell us the number of fires that you had in Virginia in the last five years as a result of burning the rights of way?

A. I had 29.

Q. Will you give them to us, by years?

A. In 1958, there were 2; in 1959, 8; 1960, 8; 1961, 7; 1962, 4.

Q. How many fires have you had during these four years of all kinds on a right of way?

A. We had a total of 324.

Q. Give us those by year, if you will.

A. 1958, there were 49; 1959, 49; 1960, 74; 1961, 52; 1962, 100.

Q. Does the Norfolk and Western run lines of road into North Carolina?

A. Yes, sir.

Q. About how many miles, roughly?

A. Well, I would say around a hundred, 125 miles.

Q. What has been your experience with fire claims in North Carolina in the last five years?

page 77] A. We didn't have any.

Q. You what?

A. We didn't have any.

Q. The total that you gave before-of 49 for 1958, and 48 for '59, were those claims or fires?

A. No, sir, they were the number of fires.

Q. The number of fires?

A. Yes, sir.

Q. Can you tell us the number of fire claims that have been

R. P. Sayers

made against the Norfolk & Western in these last five years in Virginia?

A. Yes, sir. In 1958, there were 17; 1959, 25; 1960, 26; 1961, 12; and 1962, 32, for a total of 112.

Q. What has been your experience during those five years in the payment of fire suppression claims in Virginia?

A. Well, during the year '58, we paid 18; in 1959, 32; 1960, 38; 1961, 28; 1962, 61, for a total of 177.

Q. What was your fire suppression experience in North Carolina?

A. We didn't have any claims for suppression in North Carolina.

Mr. Pasco: That is all. Thank you. You may answer these gentlemen's questions.

page 78]

CROSS EXAMINATION

By Mr. Gray:

Q. Mr. Sayers, when you gave your figures with respect to the fire claims in Virginia that totaled 112, were these claims that you paid?

A. Yes, sir.

Q. Could you tell me, sir, when does the Norfolk and Western pay a fire claim?

A. Well, they pay fire claims when a claim is submitted by a property owner — under certain conditions, of course, but we pay most of them.

Q. What are the certain conditions?

A. Well, I can recall that we have had one or two that they claimed of railroad origin and our investigation developed that it wasn't of railroad origin, and we refused to pay those.

Q. So that the ones that you paid are the ones that you determined to have been fires from railroad origin; is that right?

A. No, sir.

Q. What are the one or two that you didn't pay, but determined that they weren't?

A. In the majority of cases, the claims are paid on a compromise basis. In other words, the claimant, the
page 79] property owner, will file a claim and rather than to contest it maybe in court, why we compromise it.

Q. Of the 112 claims paid in this five-year period, did you

R. P. Sayers

determine any of them to have been originated on the railroad right of way from the operation of the railroad?

A. I didn't make an investigation to determine that.

Q. You paid 112 claims without investigating?

A. No, sir, I didn't say that. We paid 112 claims, but I don't say that the investigation determined they were of railroad origin.

Q. When do you pay the claim, Mr. Sayers, and when don't you pay it? That is what I want to know.

A. If it is obviously not a railroad fire and our investigation indicates that, we decline to pay them.

Q. Otherwise, you compromise?

A. That is right.

Q. When do you pay the suppression cost?

A. Well, as a rule, when they are filed.

Q. You pay them just whenever they are claimed?

A. The claims are generally filed with the same claim agent of the railroad. We refer to the Division Superintendent and ask for his recommendation, and as a result, his recommendation is that we pay the claim.

Q. Do you know what his instructions are with
page 80] respect to when he does recommend payment and when he does not recommend payment?

A. No, sir.

Q. You do not know what the basis of his decision is?

A. No, sir. But, as a rule, he says his investigation determines that the work called for on the report was performed and he recommended payment.

Q. Could you offer any suggestion as to why there were considerably more fires in 1962 than there were in prior years?

A. No, sir.

Q. You could not?

A. No, sir.

By The Court:

Q. When did you take over The Virginian?

A. We took over December, 1959.

Q. So these figures largely came along then and there is no increase on account of that?

A. Well, let's see. We took it over the latter part of December, '59, and in '60 it increased by 6, and then in '61, of course, it went back 4 less than it was in '59. Then in '62, of course 61. So I don't know that the taking over of The Virginian actually increased it, according to these

R. P. Sayers

page 81] figures.

Mr. Gray: I have no other questions.

By The Court:

Q. Does the Norfolk and Western undertake to keep its right of way clean in accordance with the statute?

A. I can't answer that, sir. That is an operating matter of which I have nothing to do with.

Q. I did not ask you whether you had anything to do with it, I asked you whether you had any knowledge of it. Don't you know whether they do or not?

A. Yes, sir, they make an effort to clear the right of way.

The Court: That is what I want to know. All right.

RE-DIRECT EXAMINATION

By Mr. Pasco:

Q. To what extent is this effort accomplished? Do you know?

A. No, sir, I don't.

Q. You see the rights of way in your travels, don't you?

A. I don't travel. I am an office man.

Q. Are any warrants issued against the Norfolk
page 82] and Western for violating this statute?

A. Yes, sir.

Q. Do they come to your office?

A. Yes, sir.

Q. Who institutes those warrants?

A. State Forestry Service, local Fire Warden.

Q. Have you had any warrants not instigated by the Forestry Department, to your knowledge?

A. Not that I know of, no, sir.

Mr. Pasco: That is all.

Mr. Gray: No further questions.

(Witness stood aside.)

Mr. Pasco: Your Honor, that is our last witness. I would like to submit as our final exhibit a statement of policy by the Virginia Department of Conservation and Economic Development, Division of Forestry, with respect to the clearing of

Dallas Wilfong

railroad rights of way, certified by the Secretary of the Board.
The Court: All right, sir.

(The certified statement of policy by the Virginia Department of Conservation and Economic Development, page 83] Division of Forestry, was received in evidence as Defendant's Exhibit No. 10.)

Mr. Pasco: Finally, rather than recalling Mr. McRee, I would like to ask counsel if we could stipulate that he is president of the Columbus Construction Company. The record does not show his connection with it.

Mr. Gray: I will make a bargain with you. I will stipulate that if you will stipulate with me that the work crews we talked about do not work on Sunday.

Mr. Pasco: I will have to find out first. Do they work on Sundays?

Mr. Gray: The cleaning crews that are cleaning the right of way.

Mr. Green: Do they work when?

Mr. Pasco: Sundays.

Mr. Green: No, sir.

Mr. Pasco: That is a deal then.

Mr. Gray: All right, sir.

Mr. Pasco: That concludes the defendant's case.

Mr. Gray: Judge, could we have a few minutes to consider our position?

The Court: Yes, sir.

(Intermission)

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REBUTTAL

Mr. Gray: Call Mr. Dallas Wilfong, please.

DALLAS WILFONG

was sworn and testified in behalf of the Commonwealth in rebuttal as follows:

DIRECT EXAMINATION

By Mr. Gray:

Q. Mr. Wilfong, will you state your name and residence

Dallas Wilfong

and occupation, please?

A. My name is Dallas Wilfong; I am District Forester for 16 counties, Division of Forestry; and my address is Charlottesville.

Q. How long have you been employed with the Forestry Service in Virginia?

A. Fifteen and a half years.

Q. Would you describe, briefly, some of your duties in this connection?

A. My duties are very varied in work in the technical field of forestry and other work, and also in forest fire control, and enforcing the forest fire laws and the forest fire suppression work.

Q. Have you had training in forest fire control and suppression?

page 85] A. Yes, sir.

Q. Do you teach in this field at all?

A. Well, yes, all our new employees and everything must be indoctrinated and trained in this work.

Q. Have you made any investigation or study with respect to how forest fires might be prevented along the rights of way of the railroads?

A. Yes. It is my opinion and knowledge that without the inflammable material adjacent to the right of ways that we would have less forest fires along the railroads.

Mr. Gay: I submit, if Your Honor please, the answer is not responsive to the question.

The Court: Objection overruled.

By Mr. Gray:

Q. Have you given any consideration to any method about which — first, when you speak of inflammable materials, Mr. Wilfong, what are you referring to?

A. I am referring to common broom-sedge, it is called, andropogon is the scientific name of it, and many of the grasses of varied specie, hen grasses and so forth, and other varied dry grasses in the dormant season. Honeysuckel and other wood fuel that would be possible to burn.

Q. In connection with your work in suppression of forest fires, do you have occasion to build fire lines to prevent the spreading of fires?

A. Yes, sir.

Q. Do you actually undertake this work yourself or have

Dallas Wilfong

crews that help you and assist you in doing that?

A. Yes, sir. That is our method of controlling forest fires is 70 to 80 percent is done by building fire lines instead of the use of water in forest fires.

Q. How would you relate the efforts that you make with respect to the suppression of forest fires to the efforts that could be made to remove an inflammable material from railroad rights of way?

A. Our methods used in suppressing forest fires I would compare very similar to the methods that the railroads use to clear and clean their rights of ways by burning.

Q. Have you made any estimate of cost as to what it would cost to clear a railroad right of way, using this method?

A. Yes, I did.

Q. First, will you describe what method you would use?

A. I would use a method of that we would use in our forest fire control work, by constructing a line on the edge of the right of ways; or, if the right of way was a prohibitive distance, I would say 40 or 50 feet back from the
page 87] track, which may be normally where the fences
are, by building fire lines by use of small tractors with a small blade with a fire plow attachment on the rear of the tractor, and the use of hand labor with hand tools, and then by building this fire line and burning the fire line from the fire line back towards the tracks.

Q. Let's see if I understand what you are saying. You would go out from the railroad track and build a fire break; is that what you would think of it?

A. Fire break.

Q. Some distance from the track and then burn the flammable material between the fire break and the track; is that what you are saying?

A. That is right.

Q. And have you made any estimate of what the cost would be, in order to do this?

A. Yes. Mr. Thomas and I made that estimate a while ago, just with our experience in forest fire suppression work.

Q. Mr. Wilfong, is this paper which I hand you the figures which you have compiled as to the cost of clearing right of way under the method that you have described?

A. Yes, it is.

Q. Would you tell me, sir, what total you have arrived at
for a mile of track, clearance of a mile of right
page 88] of way?

Dallas Wilfong

A. \$44.31.

Q. Does that cover one side or both sides of the track?

A. This is speaking of a mile on one side.

Q. Mile on one side of the track. Now would you tell us the figures which go to make up your total, please, sir? Tell us how you arrived at these figures.

A. Yes, sir. I am speaking of the small John Deere tractor, or some similar tractor to that, as a maximum of \$10 per hour. This is with the blade and power plow attachments. And I am speaking of 8 men used in the crew along with the driver of the tractor, which comes in the \$10-an-hour figure, at a \$1.25 per hour rate. The total hand equipment involved here would be rakes, which cost approximately \$3 apiece, a couple of water cans, which are roughly approximately \$20 apiece; \$72 worth of equipment. I figured that a tractor per day would be \$80. 8 men at \$10 per day would be \$80. Total \$160. And even depreciating the equipment in Albemarle County, \$1.13 per mile would be wiped off on the hand tools. And figuring it would be a profit of 10 percent, it makes it a per day, \$177.24. And figuring 4 miles per day.

Mr. Gray: I would like to have this, Your Honor received as Commonwealth's next exhibit.

page 89] (The Wilfong estimate was received in evidence as Commonwealth's Exhibit No. 5.)

Mr. Gray: No further questions.

CROSS EXAMINATION

By Mr. Gray:

Q. I notice this estimate which you have filed as Exhibit Wilfong contemplates the clearance of the right of way from what you speak of as fence to fence in the county.

Do you know what the width of the company's right of way is through the county?

A. I have been on most of the greater percentage of the track of the Southern Railway in Albemarle County and on a large portion of it there are fences and I live personally in an area that there are a fence there and I am assuming that is the Southern Railway's right of way boundaries.

Q. In figuring out the hourly rate of the clearance operation,

Dallas Wilfong

obviously, it must have some relation to the width of the right of way fence to fence.

A. Yes, my experience in Albemarle is that the width of the right of way is not too wide; and where it was fences, between there and the track is where they had cleared it before, and they have tried to clear the fire breaks
page 90] there and I am speaking on the same basis.

Q. In other words, you are relating your estimate as pertaining to this exhibit solely to the right of way conditions as you know them in Albemarle County?

A. I am speaking in Albemarle County on this estimate. Right many others would be a lot less.

Q. And many others would be a lot more?

A. Some would be slightly more in my experience from that I have worked in from Washington to Lynchburg. Don't think any of them would be over 10 percent more.

Q. What percentage of the time or of the area covered by the clearance do you figure you could use a tractor? What percentage would you be required to use solely hand labor?

A. From my knowledge of Albemarle County, I would believe that I could use a tractor on approximately 60 percent of the county. In other counties, I could use it more and some possibly less. But where I cannot use a tractor, I could use hand labor.

Q. I understood you to say that your idea as to how the company could effectively comply with the statute would be to dig a fire lane along its right of way and clear that back to the tracks by burning?

A. By burning, sir.

Q. Where would you put this fire lane that you
page 91] would dig? Would you put it right on a fence line or between a fence line and what is occupied by tracks? If not, where, between those two points?

A. Well, I would certainly have to stay on the company property.

Q. Of course, I understand that.

A. And inside of the fence toward the railroad tracks.

Q. If there is no fence there to indicate the width of the right of way, where would you put it?

A. Well, I would have to put it on company property.

Q. Regardless?

A. I would have to be shown where the company property was and I would have to put it on company property.

Q. Suppose the right of way at that particular point was

Dallas Wilfong

200 feet wide, instead of what might be considered for the purposes of my question or your estimate, 100 feet wide? Where could you dig your line there?

A. If I was doing the work as a contractor, let's say, for the company, I would put it where the flammable material was, so I could eliminate the flammable material, where some of these areas go back in the pasture, or something like that, I wouldn't even construct a fire line.

Q. Why do you say that?

page 92] A. Well, where the railroads join onto green pasture fields or land under cultivation, it is not necessary for you to even have the fire material on the right of way. It is not even necessary to have anything in that area, so far as we are concerned.

Now what the law says, I don't interpret, but it is not necessary, because there is no danger of forest fires spreading into the forest line through green pasture fields or cultivated land.

Q. As a District Forester, I take it you are junior in your relation to the Forestry Service to the Forester, Mr. Dean?

A. Yes. We don't go by seniority, but he is my superior.

Q. And these Fire Wardens are subject to your jurisdiction?

A. In 16 counties, the Chief Forest Wardens of those counties are.

Q. Are you familiar with either of the three warrants that are involved in this case?

A. I haven't personally seen them. I am familiar with them, knowing that Mr. Thomas was instructed to have the warrants issued.

Q. By you?

page 93] A. By me.

Q. Relating that answer to the one that you just gave a moment ago in which I understood you to say that your Forest Department was concerned only with the burning of right of way where it was necessary to protect state forests —

A. Private forest land and State forest land, if involved. State forest land and private forest land is different. Privately owned and State ownership, I would clarify that point.

Q. Are you relating your answers then to both or just to the State?

A. Well, it could happen to both if the State owned the land along the right of way, sir. But most of the land is privately owned.

Dallas Wilfong

Q. Well, you tried to protect the forest area?

A. Tried to protect the forest area.

Q. And you are not concerned with the compliance with the statute then, as to areas where there is no fire hazard to timberland along the right of way?

A. If the fire cannot get into the forest land. My immediate concern is for the production of the forest land.

Q. Then you don't have any warrants sworn out in connection with failure to burn along the right of way where a fire hazard is not likely to arise to adjacent forests; is that true?

A. I believe the warrant is sworn out as to the condition of the right of way in Albemarle County.

Mr. Gay: Would you please read him the question?

(The following question was read:)

“Q. Then you don't have any warrants sworn out in connection with failure to burn along the right of way where a fire hazard is not likely to arise to adjacent forests; is that true?”

A. My answer was that the warrant was for Albemarle County.

The Court: I do not think the answer is responsive to the question. The question is you are not concerned if there is a fire hazard to something other than a forest? I think that is the interpretation of the question, isn't it, Mr. Gay?

Mr. Gay: I think you used the word “forest,” did you not, Your Honor?

The Court: Yes.

Mr. Gay: Yes, that is the interpretation of my question. That is what I have tried to have the witness understand and answer.

page 95] But read the question.

(The pending question was again read.)

Mr. Smith: I object to that question. It seems to me that it is loaded, kind of.

Mr. Gay: No, it isn't.

Dallas Wilfong

The Court: Objection is overruled. Go ahead and answer the question.

The Witness: I still don't understand the question, Your Honor.

The Court: I think you have answered the question.

Mr. Gray: May I speak to it?

The Court: Yes, sir.

Mr. Gray: I think the witness has answered that he does not swear a warrant out for failure to maintain the right of way at a specific point, he swears out a warrant for failure to maintain the right of way in Albemarle County, the whole county.

Mr. Gay: I think the witness is better able to say what he understands than counsel.

The Court: Yes, the witness will answer the question.

A. The warrant is —

page 96] By Mr. Gay:

Q. I am not asking you about these specific warrants at all, sir, I am asking you for the general policy of your Forestry Department in doing what you conceive the law requires you to do.

A. Well, we do not swear out a warrant for any specific feet of track, if that is what you are saying, our warrants are for the county condition until the county is complied with as a whole.

Q. You said a moment ago, that your responsibility had to do with the protection of the forest along the rights of way; you did not think it was necessary to burn or otherwise clear the right of way at points except where a hazard would arise to the forests; is that correct?

A. And we know the plowed fields will not burn.

Q. Will you answer that question, please, sir, yes or no?

A. I am not, in my opinion — we are interested in protecting the forest lands.

Mr. Gay: Will you read that, Mr. Lee?

(The following question was read:)

“Q. You said a moment ago, that your responsibility had to do with the protection of the forest along
page 97] the rights of way; you did not think it was neces-

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sary to burn or otherwise clear the right of way at points except where a hazard would arise to the forests; is that correct?

"A. And we know the plowed fields will not burn.

"Q. Will you answer that question, please, sir, yes or no?

"A. I am not, in my opinion — we are interested in protecting the forest lands."

By Mr. Gay:

Q. I will give you one more chance to answer this question.

The Court: I think he has answered the question. You may phrase a new question, Mr. Gay. I understand what he means. He does not swear out warrants for particular miles of track or particular hundred feet of track, he swears out warrants because, in his opinion, they have not complied with the county. His interest, as I understand it, is in protecting the forests.

The Witness: The law says, Judge —

The Court: That is all right. Wait until another question is asked.

That is the way I interpreted the answer. Is
page 98] there anything further you want to ask, Mr. Gay?

By Mr. Gay:

Q. What counties are in your jurisdiction?

A. I have 16 counties. I can name them off if you so desire?

Q. Suppose you do.

A. Loudoun, Fairfax, Prince William, Stafford, Culpeper, Fauquier, Rappahannock, Madison, Greene, Orange, Spotsylvania, Louisa, Fluvanna, Albemarle, Nelson and Amherst.

Did anybody add those up?

Mr. Gray: Yes, sir, 16.

By Mr. Gay:

Q. Are there any of these counties in which, in your opinion, no fire hazard would arise to adjacent timberlands through failure to clear the right of way?

A. Some counties do not have a railroad in them.

Q. I am speaking now of only about those in which a railroad is operating and with respect to which some duty might arise.

A. Are you speaking of the Southern now?

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Q. Yes, sir.

A. All counties have hazardous areas adjacent to the railroads where forest land adjoins the right of way.

Q. When you say "hazardous," you mean
page 99] where timberlands adjoin the right of way?

A. That is right.

Q. If the company were to burn that portion of the right of way in a particular county passing through or adjacent to what you might call forest areas, would that, in your interpretation of the statute, constitute a compliance from the standpoint of Forestry?

A. If they burned the right of way adjacent to, or other areas that could lead to, forest land, that would satisfy my portion of it.

Q. That alone?

A. Yes, unless I was so instructed otherwise.

Q. Are you familiar with the Manassas and the Harrisonburg line of the Southern Railroad?

A. Yes, I am familiar with it. One goes out of Manassas, I believe, to Strasburg.

Q. When were you last up there?

A. I think it was approximately 10 days ago, in that area, approximately.

Q. Did you view the right of way up there for the purpose of making this estimate?

A. No, sir. I was thinking specifically of Albemarle County when I made that estimate.

Q. When did you make up this computation?

page 100] A. Today.

Q. During the recess?

A. No, sir, it was before the recess.

Q. Are you familiar with the line that runs up from Calverton to Warrenton?

A. Yes, sir.

Q. When were you last up there?

A. I was in Warrenton Monday.

Q. Do you think going to Warrenton would give you an idea of Calverton-Warrenton line?

A. Not just going to Warrenton, no, sir.

Q. What did you do at that time to give you any information about the right of way conditions on the Calverton-Warrenton Division?

A. I didn't go there for that purpose, I just crossed the line.

Q. Is it fair to say that this estimate has not been prepared

Dallas Wilfong

with any real relation to the conditions on any other part of the Southern Railway right of way, except here in Albemarle County?

A. It would be cheaper to do that area up there at Calverton and Warrenton. I am very familiar with that piece of track.

Q. Are you familiar with what is known as the page 101] Danville-Richmond-West Point Division?

A. To the best of my knowledge, that is not in my district.

A. That is true.

Q. Your division runs down to how far on Washington?

A. James River at Lynchburg, Amherst County, through Amherst to the James.

Q. And you are not familiar, are you, from that point down to the North Carolina line?

A. Not as familiar as I am with the area I work.

Q. Do you know anything about the nature of the rights of way of the company out in Southwest Virginia on the Bristol Division?

A. Only by flying over the country many years ago.

Q. Many years ago?

A. Yes.

Q. Are you familiar with the right of way on the Keyserville Division that runs down to the North Carolina state line?

A. No more than passing acquaintance.

Q. How can you say then, sir, that these estimates or this estimate which you have made and was filed would be typical of what you say should be done among other areas
page 102] in the state when you have just said what you did about your lack of familiarity with these other lines?

A. Sir, I believe I had Albemarle County mentioned at the top of that. I am speaking of that as Albemarle County.

Q. But I asked you and you said that you thought it would be cheaper to do it on other sections of the right of way.

A. Other sections. As you mentioned, the Calverton-Warrenton line, it would be cheaper, sir. I am familiar with that section of the line. The reason I based these figures here, you asked me — maybe I didn't fully answer your question, but was of my knowledge and experience with forestry fire work, which is what we call line construction and normally burning out the line between the lines and assisting in the fire. That is the basis for that.

Dallas Wilfong

Q. Do these local Forest Wardens report to you and obtain instructions from you before they issue a warrant with respect to the condition of the right of way in this particular county and your jurisdiction?

A. They either are issued instructions from myself or my assistant in forest fire control.

Q. What do they report to you on the basis of which they receive a positive or negative direction to issue a warrant?

page 103] A. It makes a long story, but each year we ask the railroads in the early fall to clean their right of ways. And then our men have personal contacts and a certain number of letters are written. And if no effort is being made by the railroad companies to clear the right of ways and we have a dormant season and normally after two or three months pass no effort is made, most of the men in the areas where we do have railroads are instructed to take some action to *fulfil* their job as under the statute.

Q. What I asked you was, what, if any, reports they make to you as to conditions on the rights of way in your jurisdiction in the light of which you give them instructions to issue a warrant or not?

A. In most cases, sir, it is that the railroads have not done any work whatsoever to eliminate the hazardous conditions along the right of way.

Q. And that relates, I take it, to the existence of weeds, grass, or decayed timber?

A. Yes, the combustible fuels.

Q. Do you consider the issuance of a warrant justified for other matter that you consider combustible on the right of way that has not been removed?

A. Do I understand if there is material that will not burn on the right of way?

page 104] Q. No, will burn. In other words, do you issue these warrants where there is material other than grass, weeds, or decayed timber, which, in your opinion, is combustible?

A. Again, the warrant is secured not for any specific section of a specific 100-foot area.

Q. I am not talking about area, I am talking about the type of stuff that you consider —

The Court: Mr. Gay, let him finish his question. He states that it is not issued by any specific area, so I think the answer

Dallas Wilfong

to your question is no, he does not issue it for any specific material.

Mr. Gay: I beg your pardon? I did not understand Your Honor to say —

The Court: He said it is not issued for any specific area and obviously, it is not for any specific material, if that is the case. It is issued for the county as a whole. The witness has already answered the question.

By Mr. Gay:

Q. I would like to ask you one other question. If there were no fence indicating the width of the right of way at a particular point on the right of way and you determined by inquiry that the width of the right of way at that point was, say, 200 or 300 feet in width, where would you put this
page 105] ditch to provide a fire line from which point back to the right of way you said you burned over?

Mr. Gray: I think he has answered that question, Your Honor.

Mr. Gay: I do not think so.

The Court: I think he has answered it. You have asked it once before and I thought he answered it. He said it would have to be on the railroad property.

By Mr. Gay:

Q. If you say it ought to be on the railroad property, and I think the Judge has correctly quoted a former answer to one of my questions, is it your contention as the Forest Warden responsible to require the railroad to burn it back 2-, 3- or 400 feet?

A. No, sir, it isn't.

Q. Just where, in your judgment as Fire Warden, assuming the right of way is more than 100 feet, to illustrate, would you build this fire line and burn over back to the track area?

A. Are we speaking about a horizontal distance or slope distance?

Q. Horizontal distance.

A. Normally, I think I would do it between from the edge of the ballast on the side of the track we are speaking
page 106] of 50 to 75 feet.

Q. 50 to 75 feet. And you think that would be a sufficient compliance with the statute?

A. From the edge of the ballast back to the flammable material.

Dallas Wilfong

Q. In your judgment as a Fire Warden, any area that was a part of our right of way beyond that distance would not have to be burned or otherwise cleared, to comply with the statute?

A. No, sir. We haven't insisted on that.

Q. In other words, in your conception of the safety factor involved, you would think that was an adequate compliance?

A. Yes, sir.

Q. You are familiar with the language of the statute, are you not?

A. Yes, sir.

Q. Each of these warrants has language saying that the company "had failed and refused to keep its right of way free and clear from weeds, grass and decayed timber." Could you define for the Court what "weeds" are?

Mr. Gray: If Your Honor please, I don't think that is a proper question to ask the witness.

The Court: The Court knows what weeds are. You are asking for a construction of the statute. I can page 107] construe the statute, Mr. Gay, I think.

Mr. Gay: The purpose of my question, Your Honor —

The Court: You may except, sir, and vouch it for the record, if you wish.

Mr. Gay: We will except, if Your Honor please. I should like to ask him the same question as to what he construes "decayed timber" to be. Would Your Honor make a same or similar ruling to that, or may I ask him the question?

The Court: You, of course, may ask and vouch it for the record, Mr. Gay, if you wish to do so. It is not for the witness to construe the statute.

Mr. Gay: I would like to have the record show that I asked the witness.

The Court: You may have him answer.

By Mr. Gay:

Q. When does timber become decayed?

A. I would have to have the dictionary to get the definition of "decayed" to be specific.

Q. Did you consult a dictionary before you had these warrants sworn out?

The Court: Now, Mr. Gay, we are taking time. He

Hunter H. Garth

quoted the statute and that is all. Let's do not
page 108] take time.

Mr. Gay: If Your Honor please —

The Court: You may except and vouch anything that you wish for the record. I am asking you to save time. He issued the warrant. He did not have the warrant issued, Mr. Thomas had the warrant issued on his instructions. He quoted the language of the statute in the warrant, that is all.

Mr. Gay: I am sure Your Honor appreciates that one of the principal bases of our defense in this case is the ambiguity of the language of the statute.

The Court: Absolutely, and that is for me to determine, not for this witness to determine.

Mr. Gay: Very well, Your Honor.

The Witness: Do I answer?

The Court: No, sir, unless he wishes to vouch it for the record. He has a right to do that if he wishes to do so.

Mr. Gay: In view of Your Honor's ruling, we will not insist on it any further, Your Honor.

Mr. Gray: No further questions.

(Witness stood aside.)

page 109] The Court: Gentlemen, we will adjourn until ten minutes past two.

(Whereupon, at 1:08 p. m., a recess was taken for lunch, to reconvene at 2:10 p. m.)

AFTERNOON SESSION

Met, pursuant to noon recess, at 2:10 p. m., March 27, 1963.

The Court: Proceed, gentlemen.

Mr. Gray: Call Mr. Garth.

HUNTER H. GARTH

was sworn and testified in behalf of the Commonwealth in rebuttal as follows:

DIRECT EXAMINATION

By Mr. Gray:

Hunter H. Garth

Q. State your full name, your address and your occupation, please.

A. Hunter H. Garth; I live here in Charlottesville; and I am Chief of Forest Protection for the State of Virginia, working out of the State Forester's office.

Q. How long have you been employed by the Virginia Forestry Service?

A. Since 1931.

Q. Where have you worked in various capacities throughout the state?

A. I worked in Albemarle County as Chief Forest Warden from '31 to '33, and from — to '34 — and in '34 I was appointed District Forester to the Farmville office. In 1944, I was brought back to Charlottesville in the position that I have now.

Q. Mr. Garth, approximately how many acres of land in Virginia are considered to be forest lands, by your department?

A. In privately-owned land that the Division of Forestry protects is a little over 14 million acres. It is something over a million acres in the National Forest and something over a million acres in the State Park, Shenandoah Park.

Mr. Gay: What was the last figure?

The Witness: I think it is something over a million acres in the Shenandoah Park.

Mr. Gay: That is the National Park?

The Witness: National Park.

page 111] Mr. Gay: Didn't you give something as the State?

The Witness: Well, I meant the Shenandoah Park, federal park.

By Mr. Gray:

Q. How does that relate to the total land acreage in the state?

A. There is something over 25 million acres, total land acres, in the state.

Q. Were you in the courtroom this morning when Mr. Wilfong testified?

A. I was.

Q. Did you hear his testimony as to a method which he would suggest as being feasible to be employed by railroads in fire prevention efforts along their rights of way?

Hunter H. Garth

A. I did, yes.

Q. What familiarity do you have with conditions on railroad rights of way throughout the state, if any?

A. In my position, I have inspected the railroads in most of the counties in the state at the various times.

Q. Would you tell the Court your opinion as to the feasibility of the method which Mr. Wilfong has described, both in relation to Albemarle County and to the state generally?

A. I think the method that Mr. Wilfong out-
page 112] lined to do it is the most practical way I could think of.

Q. Do you think, if you are intending this as an answer to the County of Albemarle — or does this apply to the state generally?

A. I would apply it to the state in general.

Q. In other words, you are saying that this is a feasible method of performance under the statute throughout the state, in your opinion?

A. Yes.

Mr. Gray: Your witness.

CROSS EXAMINATION

By Mr. Gay:

Q. Would you repeat for the record what you consider to be this feasible method that I understood Mr. Wilfong to recommend?

A. Yes. Where practical, I would use a small tractor with a fire plow or bulldozer blade; and where that is not practical, I would use the fire rakes, that is, for that purpose of raking a fire line. I would do that by hand and then burn out from there back to the track.

Q. Do you concur in his opinion as to the distances that these fire ditches should be constructed on the right of way to provide adequate protection against fire for the forest?

page 113] A. In general, yes, I think — I would want to look at a specific area if I was going to do it. I wouldn't like to sit here and put a definite figure on it.

Q. How long did you say you have been in the Forestry Service?

A. Since 1931.

Q. Were you ever a Forest Warden?

Hunter H. Garth

A. Yes.

Q. Did you ever sue out a warrant for violation for the statute?

A. I would hate to answer that question, because it has been pretty near thirty years back, it has been 27 years anyway, since I was County Warden, and I just had the one county and I wouldn't like to answer the question.

Mr. Gay: I would like to ask this question subject to Your Honor's ruling, if I may, and have the witness answer it for the purpose of the record.

The Court: Certainly.

By Mr. Gay:

Q. What would you consider to be a "weed" that, if left on the right of way, would produce a fire hazard for forest areas?

A. I would consider a weed a wooden subject larger than a grass and smaller than a shrub.

page 114] Q. What would you consider in the same connection "decayed timber?"

A. I would consider decayed timber as a log that — or maybe a standing tree, but most ordinarily it would be a log that had decayed to a point where it was thoroughly disintegrated.

Q. When will it become flammable, in your opinion?

A. That would depend upon the humidity of the day. Now, if it is very dry, like it was Monday, it would inflame much quicker than it would today. That is a question that I am not capable of answering. When it is dry and the humidity is very low, it will catch readily.

Q. In other words, material might be flammable at one time and not so at other times, depending on atmospheric and other conditions?

A. That is right.

Q. Would the same reasoning apply to weeds?

A. Yes.

Q. At what season of the year would you think one would have to remove this type of material in order to prevent the spread of fires?

A. Generally, from the time that the grass dries after the first frost and after the leaves have fallen and cured just a little bit. That would depend upon the season
page 115] of the year and the fall.

Hunter H. Garth

Q. So you could not really figure any arbitrary date in respect to which any one, even as expert as he might be, could say just when these conditions would occur, could you?

A. No definite date, no.

Q. It would vary more or less substantially or unsubstantially, according to the location in the state, the Northern part or the Southern part, wouldn't it?

A. To some extent.

Q. And the seasons of each year would affect it, would it not? If you had a real dry season, you would have one time to deal with it and if you had a continuing wet season you would have another time to deal with it?

A. That is right. It depends upon the weather — I mean, the moisture in the substance.

Q. Were you in the courtroom this morning when Mr. Green listed the various types of vegetation found along Southern Railway's right of way?

A. I was.

Q. Could you say from your recollection of what you heard him say whether you regarded all or substantially all of those items as weeds?

A. Before I answer that, I would like to have page 116] the names of those weeds brought out again because I can't remember just what ones he had.

Q. He enumerated rose bushes, wild roses — do you call that a weed?

A. I would call it more of a vine than a weed.

Q. How about honeysuckle?

A. I think that is classified as a vine.

Q. Not a weed?

A. To my knowledge, no.

Q. Would you consider goldenrod a weed?

A. For the purpose of starting a fire, I would say yes.

Q. Would a black-eyed Susan be a weed?

A. I wouldn't know how that would have been classified.

Q. How about a blackberry bush?

A. I have always heard them called blackberry vines.

Q. Does that answer mean to imply that you do not consider them as a weed?

A. Well. I said I have heard them called all the time as a blackberry vine.

Q. Is broom-sedge a weed?

Hunter H. Garth

A. I would classify that as a grass, rather than
page 117] a weed.

Q. How about morning glories?

A. I think that is a running vine.

Q. And not a weed?

A. I would say it is a vine.

Mr. Gay: That is all. Thank you.

RE-DIRECT EXAMINATION

By Mr. Gray:

Q. Mr. Garth, just one further question, please. Do you think, sir, that on a given day, any given day, at any given spot along any railroad in the State of Virginia, you could determine what steps needed to be taken and know what distance from the track those steps need to be taken in order to prevent there existing a condition which is liable to transmit fire from a passing train to adjoining landowners?

Mr. Pasco: Just a second. If Your Honor please, we object to that question, since it does not relate to what the duty imposed on this railroad is by the statute. We are not required to move all combustible material, but only three narrowly-defined items. It seems to me his opinion is something else that is irrelevant in this case.

The Court: I think the question is too broad.
page 118] It should relate to the language of the statute.

By Mr. Gray:

Q. Mr. Garth, I will modify my question to the extent to ask you could you determine what steps need to be taken and for what distance from the track they would have to be taken, in order to prevent there existing a condition by which there existed on the right of way weeds, grasses and decayed timbers which are liable to transmit fire to adjoining landowners?

A. I think I could, yes.

Q. You think that you could do so?

A. Yes.

RE-CROSS EXAMINATION

By Mr. Gay:

Q. If you say you could, how could you?

Julian D. Thomas

A. By observing what was there on the ground. We have been asked many times by the railroad to go out with the men to inspect the road, to see if, in our opinion, it was cleaned to a satisfactory condition.

Q. Your answer is then, as I understand it, generally to the effect that by inspecting the right of way at any point in the state, at any time of the fall season or other time of the year, you could determine then and there whether
page 119] there existed weeds, grass, or decayed timber of such a combustible nature as would likely transmit fires; is that your answer?

A. That is right, yes.

Mr. Gay: That is all, sir.

(Witness stood aside.)

Mr. Gray: Mr. Thomas.

JULIAN D. THOMAS,

having been previously sworn, was recalled in behalf of the Commonwealth and testified in rebuttal as follows:

DIRECT EXAMINATION

By Mr. Smith:

Q. Mr. Thomas, are you acquainted with a Mr. Samuel Patton, a section foreman for the Southern Railway Company?

A. I have seen him several times out here on the right of way burning the right of way.

Q. Where did you see him?

A. Near Arrowhead.

Q. On March 4, 1963, did you have occasion to see him on that day?

A. Yes, sir.

page 120] Q. And this was where?

A. About a quarter of a mile this side of Arrowhead Station.

Q. Is that in Albemarle County?

A. That is in Albemarle County, yes, sir.

Q. At that time, did you have a conversation with him with reference to clearing of the Southern Railway right of way?

A. Yes, sir.

Julian D. Thomas

Q. Would you relate to the Court, please, what that conversation was?

Mr. Gay: Just a moment, please. I would like to object to any answer that the witness may be prepared to make to this question, unless it has been first established that he did so in the scope of his expressed or implied authority by the company as to any such declaration.

The Court: I think the objection is well taken. Does the section foreman have the authority to make admission for the company?

Mr. Smith: He is, as we understood it, Your Honor, the section foreman who is in charge of at least three other persons, or four persons, in the crew and their specific and page 121] special duty is burning the track, which is of course, one of the issues that is properly before this Court.

The Court: All right. Now just a moment. I do not think he has the authority to admit for the company. I understand this is not introduced on the question of guilt or innocence, but on the question of constitutionality of the statute.

Mr. Smith: Yes, sir.

The Court: I will let you vouch it for the record.

Mr. Smith: Thank you, sir. This, as Your Honor has indicated, is for that purpose and in rebuttal, too.

The Court: I do not think he has authority to admit, but you may vouch it for the record, on the question of constitutionality or not.

Mr. Smith: That is the very purpose of it.

By Mr. Smith:

Q. (Continuing) I believe it has been stated that he was the section foreman. How many people did he have in his crew:

A. He had three. He said he had four men allotted to him, but he only had three to use. One of them was taken by some other official to ride with him and he never got to use but three of them.

page 122] Q. In that conversation with him, did he relate the progress that he was making in clearing the right of way under the statute?

A. I asked him — was talking to him about how long it would take him to clean up the right of way in Albemarle County, and I asked him how much he could do in one day, and he told me with those three men he was burning both sides

Julian D. Thomas

of the right of way for a mile. That was an average day's work, about a mile.

Q. Did he indicate to you as to what the rate of pay and what the crew's rate of pay was?

A. He told me exactly what it was, but right now I couldn't tell you the penny. It was about \$16 and a few cents for a laborers, and \$19, I think, and some few cents, for himself.

Q. Mr. Thomas, one other matter. There has been introduced into evidence as a rebuttal exhibit on behalf of the Commonwealth, an estimate of the cost of removing inflammable material from rights of ways, which I believe was signed by you and Mr. Wilfong. Mr. Wilfong has already testified to that. Did you hear Mr. Wilfong testify with reference to that estimate?

A. Yes.

Q. Did you assist him in preparing that estimate?
page 123] A. Yes, I helped him prepare it.

Q. According to your knowledge and experience, is that an accurate estimate?

A. I think it is, yes, sir.

Mr. Smith: Thank you, sir. These gentlemen want to ask you some questions.

Mr. Gay: Might I have that estimate exhibit, if Your Honor please?

CROSS EXAMINATION

By Mr. Gay:

Q. When did you and Mr. Wilfong make up this estimate, Mr. Thomas?

A. This morning.

Q. After you came into the courthouse?

A. Yes, sir.

Q. It says eight men at \$10 a day for these men; is that the labor cost you are including?

A. Yes, sir.

Q. \$10 a day. What do you figure that would be an hour?

A. \$1.25.

Q. \$1.25 an hour?

A. Yes, sir.

page 124] Q. Do you happen to know whether, assuming that this estimate relates to burning costs, com-

Julian D. Thomas

pany employee labor can be paid at that rate under the union's contract?

A. I am sure they can't be paid at that rate under the union contract, or that is what I have been told by section foremen.

Q. Haven't you also been told that that is the only type of clearance, that is, burning, that could be done under the contract, and if outside, or a different form, burning would be the only kind that would be employed by outside labor?

A. I don't believe I understand that question.

Q. In other words, if some other means were employed to clear the right of way, other than burning, haven't you been told that outside labor could be employed to perform that type of clearance, whereas to use the company force by burning it would be bound by the labor contract rate applicable to their employees?

A. Yes. It can be cleared other ways besides burning it.

Q. Does that answer assume the employment of outside laborers?

A. Yes, that is what we were figuring on, the minimum wage rate.

page 125] Q. At \$1.25 an hour?

A. Yes.

Q. What do you mean in this estimate by estimating the cost to clear the right of way "fence to fence" in Albemarle County?

A. Most of the right of way in Albemarle County is bound on both sides by a net wire fence. Some places the farmers are no longer pasturing it, but there is a remnant of a fence there.

Q. You just assume, because you saw a fence there, that it was on the proper line, didn't you?

A. Yes, I guess that is right.

Q. It might have been 300 feet wide when the fence was at a 100 feet wide?

A. That could be true, yes.

Q. So on your theory of compliance, you might have a different problem if the Court should construe the statute applying to the whole right of way, rather than that part which you saw fenced?

A. Repeat that.

Mr. Gay: Would you read that question?

(The pending question was read.)

George Dean

A. That is possibly true.

page 126] Q. Do you have sufficient knowledge as to where the fence line was on either side of the right of way in Albemarle County to state to the Court the distance of the area between the two fences?

A. That area varies. I have never measured it with a steel tape. Some places it is possible that it is 50 feet and some 75, maybe 100 in some places. I know it varies.

Q. Can you make a flat estimate then, which would apply to an irregular area of the land such as you now are talking about?

A. No, I wouldn't make any flat estimate because it varies from place to place there. I couldn't make any average as to what it would be.

Q. If it does, as you indicated it might, vary in width, then the acreage which a given crew could clear or mileage that a given crew could clear in a day would vary considerably, would it not?

A. Yes, it would, because there are some miles in the county that wouldn't have to be cleared at all.

Q. Why do you say that?

A. Because they are on the side of a highway and places that would not have to be burned.

Q. It might be along a farmer's land that did not have any timber growing on it, might it not?

page 127] A. Or by a green field. As far as protecting the woodland is concerned, that is what we are mostly interested in, is protecting the woodland.

Mr. Gay: All right. That is all. Thank you, sir.

Mr. Gray: That is all.

(Witness stood aside.)

Mr. Gray: Call Mr. Dean.

GEORGE DEAN,

having been previously sworn, was recalled in behalf of the Commonwealth and testified in rebuttal as follows:

DIRECT EXAMINATION

By Mr. Gray:

George Dean

Q. State your name, address and occupation, sir.

A. George —

Q. You have already testified to that, I am sorry. You have been over it once.

You have previously testified today and have been sworn; is that correct?

A. That is correct.

page 128] Q. Mr. Dean, I believe you were asked this morning how long you have been a State Forester. How long have you been in the Forestry Service in Virginia?

A. Since the first day of January, 1929.

Q. As State Forester, are there kept in your office certain statistics, records, concerning the numbers of forest fires in Virginia?

A. Yes; the law requires that the Forest Warden submit those forms through to our office, where they are processed and paid, yes.

Q. And along with those, or on this form as a part of the form, does the Forest Warden indicate the cause of the fire?

A. Yes, sir.

Q. Have you prepared a chart showing the number of forest fires in Virginia by calendar years, showing them broken down as to cause, since 1953?

A. Yes. Based on those fire reports which are submitted, we prepared annually — well, currently, and ultimately annually, a table showing the number of fires by causes.

Mr. Gay: If Your Honor please, I want to object to so much of this statement as attributes certain numbers of fires to railroads. I do not think that they can convict the
page 129] railroad of setting those fires without some kind of proof.

The Court: It is not a question of conviction of the railroad, this is not introduced for the purpose of guilt or innocence, as I understand it, but on the constitutional question.

Mr. Gay: But it attributes to the railroad a certain number of fires each year.

The Court: I think on constitutional questions that statistics, to the extent that they may be accurate — of course, you may cross-examine with respect to his knowledge of the matter — would be relevant.

Mr. Gay: We note an exception, if Your Honor please.

The Court: Certainly.

George Dean

By Mr. Gray:

Q. I hand you this and ask you if this is the exhibit which you prepared, Mr. Dean?

A. Yes, this is prepared from records in my office by our clerical force as taken from the records existing in the State Forester's office.

Mr. Gray: We offer this, Your Honor, as Commonwealth's Exhibit 6.

(The statistical data on fires as tabulated was received in evidence as Commonwealth's Exhibit No. 6.)

page 130] By Mr. Gray:

Q. Have you prepared from similar sources and similar type — have you prepared a similar table relating solely to the Southern Railroad?

A. Yes.

Q. Is this the table?

A. Yes, this is the one that was prepared from the records in the — official records in the State Forester's office.

Mr. Gray: We offer this as No. 7.

Mr. Gay: Your Honor, we note an objection for the same reason.

The Court: Yes, sir. I do not know whether a particular statistic with respect to the Southern Railway would affect the constitutionality of the statute in general. I do not think the experience of one railroad is particularly important. But I will sustain the objection and you may vouch it for the record. I will mark it 1 for Identification.

(The tabulation of Southern Railway fires was marked Commonwealth's Exhibit No. 1 for Identification.)

page 131] By Mr. Gray:

Q. Have you further prepared an exhibit containing like information for the Southern Railway in Albemarle County?

A. Yes, sir.

Mr. Gray: I assume the same objection?

Mr. Gay: We object, if Your Honor please.

The Court: Objection is sustained, and it may be marked for identification.

George Dean

(The tabulation for the Southern Railway in the County of Albemarle was marked Commonwealth's Exhibit No. 2 for Identification.)

By Mr. Gray:

Q. Mr. Dean, as State Forest Warden, do you receive information from other states with respect to forest fires and the causes of forest fires?

A. Yes.

Q. And have you prepared from statistics which were furnished by the United States Department of Agriculture a table showing the fires caused in 1957, '58, '59, '60, and '61 in Alabama, Florida, Georgia, North Carolina, South Carolina, and Tennessee which were attributed to railroads?

A. Yes, sir.

Q. Is this the table to which I refer?

page 132 } A. Yes, sir, that is the table.

Mr. Gay: We want to object to that on the grounds of hearsay, if Your Honor please.

The Court: All right. Objection is overruled.

Mr. Gay: Note the exception.

By Mr. Gray:

Q. Mr. Dean, that portion of the information on this statement which refers to the State of Virginia is from your records, rather than from the Department of Agriculture records; is that correct?

A. Yes, sir.

Mr. Gray: I offer that, Your Honor, as Commonwealth's Exhibit 7.

(The tabulation of information furnished by the United States Department of Agriculture was received in evidence as Commonwealth's Exhibit No. 7.)

By Mr. Gray:

Q. Mr. Dean, have you made an attempt to ascertain from the State Foresters in other states, which states have legislation which require the railroad to clean the right of way of inflammable material?

A. Yes, I have.

Q. Have you prepared a list of the states which

George Dean

page 133] have such legislation?

A. Yes.

Mr. Gay: I will have to object to this, if Your Honor please, as an improper and incompetent way to prove the law of a foreign state.

The Court: I think the objection is well taken.

Mr. Gray: We withdraw it.

(Discussion omitted.)

Mr. Gray: Your witness.

The Court: I will ask counsel to examine the statutes of the several states and find out.

Mr. Gray: I will do so.

Mr. Gay: What is the number of the first tabulation that Mr. Dean filed entitled "Number of forest fires in Virginia by causes?"

The Court: Commonwealth's Exhibit 6.

Mr. Gay: Would you let the witness have the original or a copy so he could follow my questions?

CROSS EXAMINATION

By Mr. Gay:

Q. Mr. Dean, I believe you have stated that you had been in the forest service in Virginia since 1929?
page 134] A. That is correct.

Q. Were you ever in the position locally of a Forest Warden?

A. Yes, sir, and I still am, sir, because immediately upon reporting for duty my name was submitted and I received a commission from the then Governor — who followed Byrd — anyway, from the Governor, and I took my oath of office in Chesterfield County, sir.

Q. And you served in that county as Forest Warden?

A. I served as a Forest Warden at large. I initially at that time had charge of the Eastern District Headquarters at Richmond, involving 32 counties, sir.

Q. So you have come up through the various stages of responsibility in the State Forestry Service?

A. That is right, sir.

Q. Did you ever swear out any of these warrants for failure to burn a right of way?

George Dean

A. Yes, when I was a district man, yes, sir.

Q. I take it they were sworn out pursuant to what you thought would be the applicable Virginia statute?

A. That is correct.

Q. In deciding whether you should swear out a warrant, did you inspect the rights of way to see the conditions with respect to which you had the warrant issued?

page 135] A. Yes.

Q. What did you decide were "weeds" on the rights of way?

The Court: All right, I have already ruled on that. I will rule it is inadmissible, but you may vouch it for the record.

Mr. Gay: That is what I wanted.

The Court: The Court knows what a weed is, Mr. Gay. Maybe you don't, but I do, and I disagree with Mr. Garth. I consider honeysuckle a weed. All right.

Mr. Gay: I am not going to argue anything.

The Court: I know you are serious. Just vouch it for the record, please. I rule it is inadmissible.

A. I consider a weed in the technical classification below shrubs and trees. I consider a weed any of the vegetation that does not have an economic, commercial, or esthetic value.

By Mr. Gay:

Q. Which of those categories would you put golden rod in?

A. I would put that in no commercial value.

Q. Non-commercial?

A. Non-commercial, yes, sir.

Q. But not a weed?

page 136] A. According to my definition, it would be a weed.

Q. It has neither esthetic nor commercial value?

A. It has no economic, commercial, or esthetic value. And, may I add, in the location where it is found, because some of the previous witnesses had the buck-eye Daisy come up. Well, some of the ladies in their gardens think it is beautiful, yet the farmer out in the field thinks it is one of the worst kind of weeds.

Q. Would you so regard it if you found it on a right of way?

A. I would so regard it if I found it on a right of way, yes. If I found it in my wife's garden, it would be a different situation.

George Dean

Q. How would you regard blackberry bushes within your definition?

A. Well, the flower belongs to the rose family, Rosaceae, and that is considered a flower.

Q. Not a weed?

A. Within that family. And there again it depends on its location from a commercial and economic value. If I had it on my back fence where I could gather the berries, I would not consider it a weed, but if I found it on the right of way where it would constitute a flammable material, I would consider it a weed, sir.

page 137] I think in this whole thing, weeds or not, if we go back to "Grass Anatomy," even he, I don't think, with all of his wisdom — and that is the foremost botanical classification of flowering and woody plants in the North American continent — that even he tries to pin down what is a weed and what is a flower, except as I mentioned, its economic and commercial value in the location where it is found.

Q. You would determine the matter largely then to some extent as to its location, wouldn't you, from what you said?

A. I think we would have to, as a practical matter.

The Court: A weed has been defined as a flower misplaced.

The Witness: It smells like a rose, no matter what the name.

By Mr. Gay:

Q. Look at this Exhibit 6, please, sir.

A. Yes, sir.

Q. Did you compile or have this compiled under your direction?

A. Yes, I did.

Q. And you said the number of forest fires shown in this statement as caused by railroads for the years
page 138] '53 to '62 reflect what was shown on the reports to your office by field representatives of the Forest Service?

A. That is right, by Forest Wardens scattered throughout the state who make these reports.

Q. Isn't it true, too, that when called on by the railroads here two or three years ago, you provided them with a statement of fires which you attributed to the railroads and which, among other classifications, stated railroad operations and which in effect meant that no definite showing or proof had

George Dean

been provided that the railroad set out the fire except that a train passed and a fire occurred?

A. I, from time to time, have prepared for various purposes and on various requests, including the railroads, tabulations; and without seeing that tabulation and seeing my name attached to it, I just don't know.

Q. I show you a letter over your signature, dated June 16, 1960, addressed to Mr. Cooper, the Executive Director of Virginia Forests, Incorporated, which has nothing to do, as I understand it, with the Virginia Forest Service, it is a separate corporation?

A. That is right.

Q. With a copy to Mr. Steel, the Executive Secretary of the Virginia Railroad Association, and I ask if you wrote that letter? Will you show it to Mr. Gray there, please?
page 139 } Can you answer the question? Did you write the letter?

A. That is my signature, yes, sir.

Q. Will you hand it to me? I would like to examine you about it.

This letter states to Mr. Cooper, who, as I said, is addressed as the Executive Director of Virginia Forests, Inc., that he may advise Mr. Steel as follows, and I quote:

"A tabulation by one of the clerks through the actual reports submitted by the Forest Wardens on fires attributed to railroads breaks down in causes as follows:

93 moving trains
18 burning right of way
5 fusees
5 sparks from brakes
3 burning railroad ties
1 hot ashes from train stove
1 cigarette thrown from train
1 burning oil filter."

A total of 127 fires, which ties in exactly with the figure of 127 you show as the *first* caused by railroads on your Exhibit No. 6, does it not?

A. That is right.

page 140 } Q. 1959. I beg your pardon.

A. 1959, this shows 127, that is correct.

George Dean

Q. So, of that 127 fires that you attributed to the railroads as being the cause in 1959, all of the evidence that you have as to 93 of them was that it was a moving train went by; is that not correct?

A. Evidently; that is what was shown on the fire report, that it reported as the passing of a train by that location.

Q. Isn't that what I asked you a while ago, that a very large portion of the number of fires exhibited in your Exhibit 6, which you say were caused by railroads, you have no proof from the report of your own department, other than the fact that a train passed; isn't that correct?

A. That is a tabulation of the fire reports as they come in.

Q. Isn't it from the same source?

A. This is from a summary that is based on the individual reports of the individual fires.

Q. Both of them are, aren't they?

A. Yes, that's right.

Q. We are talking about the same thing, aren't we?

A. We are talking about the same number, 127.

Q. We were talking about the same 127 fires, page 141] the sources of which, so far as your department is concerned, were attributed to cause as to 1959 that 93 out of 127 fires were said to have been caused by the railroad because a moving train went by?

A. That is right, that the fire originated on the right of way by reason of the train passing by. I don't know what the specific cause of those 93 fires were. Evidently, it didn't show the other reports, otherwise it would have been tabulated.

Q. Aren't these causes that are listed here which are broken down to show the 127 taken directly from the Forest Warden's reports to your office?

A. That is right. But those others were — you could specifically prove that it came from that individual cause, like a flare, I believe you said, brake shoe, whatever is listed on there.

Q. And as to the 93, they did not show what the cause was, except there was a moving train went by?

A. Except that there was no fire there before the train went by, and the train went by and the fire was afterwards.

Q. That is all that I have asked you, Mr. Dean. Isn't it true that this report has no bearing, except to show that a moving train went by and for that reason you said that the railroad set a fire?

George Dean

page 142] A. There was no fire before and the train went by and then there was a fire and it shows that.

Mr. Gay: We would like to offer this as evidence, if Your Honor please.

The Court: Admitted.

(The letter containing breakdown of fire causes was received in evidence as Defendant's Exhibit No. 11.)

By Mr. Gay:

Q. Mr. Dean, where it appears that a railroad right of way is, say, 100, 200, 300, 400 feet wide, how much of it do you think should be cleared, to insure reasonably safe protection from forest fires?

A. May I answer that in this manner? The statute, of course, says the "right of way."

Q. I am not asking you to interpret the law.

The Court: Mr. Gay, let the witness answer the question, please, sir. Do not interrupt him in the middle of an answer. He has the right to answer it in his own way.

Mr. Gay: All right. I just do not want him to interpret the statute.

A. (Continuing) The statute says the "right of way," which would mean from the point of the right of way on page 143] the right, if we were looking up the track, over to the edge of the right of way on the left, or the north and south if we were looking toward the east, we will say.

As Chief of the Division of Forestry and as evidenced by this policy statement which you gentlemen introduced this morning, the Division has — its objective policy has been to work carefully and closely and cooperatively with the railroad —

The Court: Mr Dean, I do not think you are answering the question, now.

Mr. Gay: The witness is making a speech and I did not ask for a speech.

The Court: I think your objection is well taken.

The Witness: May I have the question read again?

The Court: Yes. I am afraid you have forgotten entirely what it was.

George Dean

(The following question was read:)

“Q. Mr. Dean, where it appears that a railroad right of way is, say 100, 200, 300, 400 feet wide, how much of it do you think should be cleared, to insure reasonably safe protection from forest fires?”

A. It would depend upon the slope at which
page 144] the tracks were located. Ordinarily, I would say 70, 75 feet horizontal distance. Now if — and I mean horizontal distance and not the radiant distance. Let me put it like this. I believe that if the railroad right of way was cleaned of inflammable material for 70, 75 feet in a horizontal distance, that there would be very few fires occur.

By Mr. Gay:

Q. A total distance of 75, or 75 feet on either side?

A. On each side of the outside rail, I will say.

Q. And if that were done, in your opinion, reasonably adequate protection would be provided against the inflammable material spreading fires to the forests?

A. I would say so, because that is certainly wide enough to keep hot brake shoes, some slivers of flares, and that sort of thing away, and there would only be on an extremely windward day, and on a down-slope, that it might be a hot spark would come out of the smoke stack and the wind might blow it over beyond the 70 feet. But that would not be very frequent. I would say 70 feet, 75 feet would be about right.

Q. On the showing that that had been done, and we will say, for purposes of illustration, in Albemarle County, would your Forest Wardens be instructed to withhold the arm of the
law?

page 145] A. I would say this, sir, that if — I will answer that yes, sir, absolutely.

Q. The statute that you have just referred to uses the words “weeds, grass, and decayed timber, which from their nature and condition are combustible —” Is it or is it not a fact that the type of material enumerated in the statute would become combustible at varying times and at varying places on different dates?

A. Yes, that is true. It would depend on the moisture content there, the humidity, the temperature, and wind, and the atmospheric conditions existing both as to location and the time of day.

Q. So if you could visualize a person under the duty of com-

George Dean

pliance with this law finding himself in Fairfax County and observing conditions which, according to his best judgment, did not render the material I have described flammable there, he might, if he had been at the same instant down near the North Carolina line, because of the change in temperature and that sort of thing, have an entirely different opinion of the same class of material, might he not?

A. Yes, because there you have got a number of miles between the location and the atmospheric and weather conditions kind of vary.

Q. Having regard to those facts, has your department, in the exercise of sound, experienced judgment, fixed on any time in the fall or winter when, everything generally being considered, the railroad should move to do what this statute contemplates?

A. The statute contemplates, at least it says, keep clean. The Division of Forestry, and myself as Chief Forester, with my obligation to fulfil, and based on our experience and the records, we know that fire conditions exist when the leaves, these woods and grass and decayed woody vegetation would most generally burn, and we know from our records there are three periods of the year when that will occur, generally speaking, year in and year out, and that varies a couple of weeks within the state, from, say, the Norfolk area to the Wise County area. That period begins to exist in the fall as soon as the frost kills the weeds and grass and the leaves come down; and that condition exists on through the fall, through the winter, and through the spring months, until such time as the vegetation becomes green, the new vegetation coming up, because the condition of the area keeps that down. Normally, under the average condition, there isn't a great deal of fire danger until in the fall again, unless we have a drought period, and then the vegetation of the inflammable material on the right of way that has not decomposed into the ground at the point that it is going into the upper soil horizon will burn when the weather conditions are right under drought conditions.

Q. Is the answer to my question, after listening to your very lucid statement, that there is no period in the year when anybody can safely say, "The time of combustion has arrived and I must get to work to clean?" Is that what you mean by that long answer?

A. No. I want to catch your question, because there are periods in the year when any man who is experienced knows

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when the time has come and the conditions on the right of way are such that he can burn.

Mr. Gay: Won't you go back, Mr. Lee, and ask the question to which he gave that long answer, and which I did not object to, although I thought it irresponsible.

(The following question was read:)

“Q. Having regard to those facts, has your department, in the exercise of sound, experienced judgment, fixed on any time in the fall or winter when everything generally being considered, the railroad should move to do what this statute contemplates?”

A. My answer to that would be yes.

page 148] By Mr. Gay:

Q. What is the date?

A. From the time the frost kills the vegetation and the leaves fall off the trees, through until the period in spring when the vegetation leafs out and the new vegetation the new annuals spring up. If you want a date on that, I would say that is generally from the first killing frost —

The Court: I do not think you have answered the question, Mr. Dean. I think Mr. Gay's question is when should they begin cleaning? — to put it simply.

A. (Continuing) Okay. November 15.

By Mr. Gay:

Q. Do you think that the positive duty of what you say arises on the 15th of November is one that can, as a practical matter, be performed on a statewide basis in such an immediate and prompt manner as to satisfy your department's view as compliance with the law?

A. Yes, in this way. Any practical man will recognize that beginning the 15th day of November that you cannot go out and burn every day. We all admit to that. But during those days when vegetation will not burn because of weather and atmospheric conditions, certainly if your line is built, as was discussed here previously, so that when you get a good burning day you could go out and do burning alone,

page 149] that would certainly expedite the cleaning.

Q. Doesn't it come down then, Mr. Dean, to the

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point whether a railroad has complied with this statute involves a judgment of the Forestry Department, rather than compliance with any fixed rule of law that the Court might interpret and apply?

Mr. Gray: Your Honor, I object to that.

The Court: Objection sustained.

Mr. Gay: I would like to have the witness answer it for the record, if Your Honor please.

The Court: Certainly. I do not think there is anything to answer, Mr. Gay. If you insist upon it, he may answer it.

A. I will answer that in this way: Yes, it is a matter of judgment —

The Court: I think the question is improper. I will rule that the witness cannot answer it.

Mr. Gay: I beg your pardon?

The Court: I will rule that the question is improper, and you know it is improper. The Court decides that. The Forest Department does not decide whether anybody is guilty or not. They may decide whether to prosecute, but the Court decides whether they are guilty. I consider the question
page 150] improper. Proceed.

Mr. Gay: Your Honor —

The Court: I have ruled.

Mr. Gay: I know Your Honor has ruled, but you stated in the ruling that I knew that it was improper.

The Court: I think you knew it was improper, that the Court does decide whether he is guilty or innocent or not.

Mr. Gay: I fully agree with that, Your Honor.

The Court: All right, let's go ahead.

Mr. Gay: I believe that is all, if Your Honor please.

RE-DIRECT EXAMINATION

By Mr. Gray:

Q. Just one or two short questions of the fires, Mr. Dean. With reference to this last series of questions that you have been asked, I would like to ask you from your experience and years of training in forest fire prevention, do you believe that on any given day, at any given spot, on any railroad in Virginia, you can determine what steps must be taken to remove from the right of way such weeds, grass and decayed materials as are liable to take and transmit fire of a passing train to abutting or adjoining land?

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page 151] Mr. Gay: Just a moment.

A. Yes, sir.

Mr. Gay: Just a moment. If Your Honor please, I want to object to that question for the same reason that Your Honor ruled my other question out, because it involves the opinion of this witness as to how this statute is to be complied with, and does not leave it to the Court.

The Court: I do not think that involves the opinion of the Court, as to how it can be complied with. It is his opinion as to whether it can be complied with, it seems to me. Objection is overruled.

Mr. Gay: We note an exception, if Your Honor please.

By Mr. Gray:

Q. Answer the question.

A. Yes, sir.

Q. Now, Mr. Dean, I would like to direct your attention to the letter dated June 16, 1960, and to Commonwealth's Exhibit No. 6, and Mr. Gay asked you with respect to some 93 of these reported fires, which in the letter of June 16 are attributed solely to "moving trains." He asked you if this wasn't meaningless, except to say that a train went by and there was a fire. Now I should like to ask you, sir, in the
page 152] report which you received from the Forest Wardens regarding fires throughout the State, they do not list other causes for fires, if such causes exist? Trains are not the only things that would cause fires, are they?

A. No. They are listed — let's see, there are 2, 4, 6, — 8. We have 8 different classifications.

Q. Those 8 classifications are lightning, railroads, camp fires, smokers, brush burning, incendiaries, lumbering and miscellaneous?

A. That is correct.

Q. When the Warden submits a report to you regarding a forest fire, has he, to the best of his ability, determined which is the source of the fire?

A. He has investigated —

Mr. Gay: I object to that, if Your Honor please.

A. — and determined this on the report.

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Mr. Gay: I object to that, if Your Honor please. That is bound to be an expression of opinion by this witness.

By Mr. Gray:

Q. Is it your instruction to your wardens?

A. That is their instruction.

Mr. Gay: That is improper.

The Court: Objection overruled.

page 153] By Mr. Gray:

Q. If the Warden reports that the fire was as a result of a railroad operation, has he eliminated these various other causes which might have been the cause of a fire? Has he determined that it was not lightning?

A. These 8 primarily?

Q. Yes.

A. Yes, he has eliminated those, and to the best of his belief and evidence.

By The Court:

Q. After all, it is just the Warden's best judgment as to what started the fire, isn't it? Naturally, they make mistakes about the causes, don't they?

A. Well, sometimes it is his best judgment and sometimes he has got the absolute evidence.

Q. Some of these others were started in the other classifications by railroads, might they not?

A. They may be.

The Court: Gentlemen, this is just statistics. I understand about that, Mr. Gray. You do not have to explain all of that. Let me see if this isn't what it is.

By The Court:

Q. All of them that start on the railroad right
page 154] of way, are they all classified "railroad fires"
necessarily?

A. No, sir. If investigation shows that there was some other cause, it is so recorded in one of those other seven categories.

Q. And if it starts on the railroad right of way and no other cause shown, you attribute it to the railroad?

A. That is right. If we eliminate all of those others, and

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the investigation shows that that is the cause, why that is what we put *it* down.

By Mr. Gray:

Q. Mr. Dean, in this category of the 93 fires which are attributable to the moving trains, did I understand you to say that that report is made when the Warden determines that there was no fire on the right of way and the train went by and then immediately a fire was determined to exist on the right of way?

A. That is right.

Q. And he could find no other cause to which to attribute it?

A. That is right.

Mr. Gray: Thank you, sir. No more questions.

(Witness stood aside.)

page 155] Mr. Smith: That completes the Commonwealth's rebuttal testimony, Your Honor.

(Discussion omitted.)

Mr. Pasco: The demurrer which is filed alleges that this statute is insufficient in law on the ground that it is unconstitutional, it being in violation of the Fourteenth Amendment of the United States Constitution, and Section 6:11-58 of the Virginia Constitution. Argument can be broken down into three principle points:

First, that the equal protection of the law provision of the Constitution is violated on the basis of the proof in this case that the railroad rights of way vary considerably and Southern Railway has rights of way up to 4- or 500 feet, which are wider than any other railroad whose widths are in this record.

* * * * *

Our second basis for demurrer is that the statute is invalid because of vagueness and results in a violation of the Fourteenth Amendment and deprives the railway of property without due process of law.

* * * * *

Finally, we submit that the statute deprives the railroads of property without due process of law because
page 156] a proper and strict compliance with this statute would require the railway to completely keep its right of way clear of any growing material likely to be considered a weed or grass or decayed timber before the frost comes.

* * * * *

(Arguments omitted.)

The Court: All right, gentlemen, I will take the matter under advisement and give you three weeks to file a brief.

(Whereupon, at 4:44 p. m., March 27, 1963, the trial was adjourned.)

page 157] CERTIFICATE OF COUNSEL

Final judgment in the foregoing suit having been rendered on the 13th day of June, 1963, counsel for plaintiff and defendant hereby affix our signatures to the foregoing transcript of testimony and other incidents of trial to the end that the same may become part of the record on appeal.

Given under our hands this 15th day of July, 1963.

THOMAS B. GAY
H. MERRILL PASCO
Attorneys for Defendant-Appellant

FREDERICK T. GRAY
DOWNING L. SMITH
Attorneys for Plaintiff-Appellee

page 158] CERTIFICATE OF TRIAL JUDGE

• Date tendered July 16, 1963

Date signed July 16, 1963

LYTTELTON WADDELL
Judge

Supreme Court of Appeals of Virginia

CERTIFICATE OF CLERK

Date received July 16th 1963

**EVA W. MAUPIN
Clerk**

A Copy—Teste:

H. G. TURNER, Clerk.

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