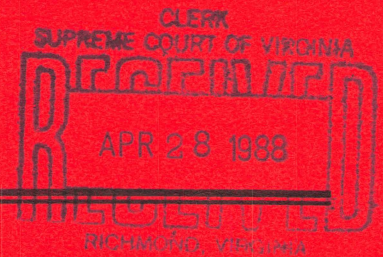


238 VA 148



IN THE
Supreme Court of Virginia
AT RICHMOND

870490

SEABOARD SYSTEM
RAILROAD, INC.,
Appellant,

870481

WILLIAM L. CALDWELL,
Appellant,

V.

V.

WILLIAM L. CALDWELL,
Appellee.

SEABOARD SYSTEM
RAILROAD, INC.,
Appellee.

JOINT APPENDIX

William T. Prince
Samuel J. Webster
Leonard C. Heath
WILLIAMS, WORRELL, KELLY & GREER, P.C.
600 Crestar Bank Building
Post Office Box 3416
Norfolk, Virginia 23514
(804) 624-2600

Counsel for Seaboard System
Railroad, Inc.

Eddie W. Wilson
John W. Hall
EDDIE W. WILSON, P.C.
2200 Colonial Ave. Suite 12-B
Post Office Box 11168
Norfolk, Va. 23517
(804) 625-1277

Counsel for
William L. Caldwell

TABLE OF CONTENTS

Motion for Judgment - Filed February 12, 1986	1
Objection to Venue and Motion to Dismiss Filed March 11, 1986	6
Exhibit A, Attached to Defendant's Brief in Support of Objection to Venue and Motion to Dismiss - Filed March 28, 1986	10
Excerpts from Transcript of Hearing on Defendant's Objection to Venue and Motion to Dismiss, held April 2, 1986	11
Order Denying Defendant's Objection to Venue and Motion to Dismiss - Filed April 8, 1986	28
Excerpts from Transcript of Pre-trial Hearing, held on November 21, 1986	30
Excerpts from Trial Transcripts Volumes I and II - November 24 and 25, 1986	32
Volume I	32
William L. Caldwell	32
Direct	32
Cross	95
Plaintiff's Exhibit 7	59
Defendant's Exhibit 7	60
John Frank Dunlap	61
Direct	61
Cross	65
Defendant's Exhibit 2	74
Marvin Reed Deese	75
Direct	75
Volume II	77
William Murphy Mauney	77
Direct	77
Certain Incidents of Trial	79

Mitchell Keith Schwaber	81
Direct	81
Cross	92
Redirect	102
Certain Incidents of Trial	106
Excerpts from the <u>De Bene Esse</u> Deposition Transcript of Dr. Trevor I. Goldberg, taken on October 9, 1986, and Used at Trial	114
Direct	114
Cross	123
Goldberg Exhibit 2	124
Excerpts from the <u>De Bene Esse</u> Deposition Transcript of Mr. Frank M. Butts take on November 10, 1986 and Used at Trial	125
Direct	125
Cross	148
Butts Exhibit Number 1	152
Butts Exhibit Number 2	153
Butts Exhibit Number 3	154
Jury Instruction Number 1	155
Jury Instruction Number 23	156
Jury Instruction Number 24	157
Order Setting Forth the Verdict of the Jury - Entered November 25, 1986	158
Excerpts of Transcript of Hearing on Defendant's Motion to Set Aside the Verdict, held on February 2, 1987	159
Final Judgment Order - Entered February 9, 1987	189

Defendant's Motion to Vacate and Set Aside, and Attached Exhibit - Filed February 12, 1987	190
Order Suspending Execution and Making Transcripts a Part of the Record - Entered February 20, 1987	197
Excerpts of Transcript of Hearing on Defendant's Motion to Vacate, held on February 24, 1987	200
Order Denying Defendant's Motion to Vacate - Entered February 26, 1987	211
Assignment of Error Number 1 of Appellant, Seaboard System Railroad, Inc.	212
Assignment of Error of Cross - Appellant, William L. Caldwell	214

MOTION FOR JUDGMENT - Filed February 12, 1986

MOTION FOR JUDGMENT

The Plaintiff hereby moves this court for a judgment and an award of execution against the Defendant, Seaboard System Railroad, Inc., in the sum of Two Million Dollars (\$2,000,000.00) by reason of the following facts, to-wit:

1. That the Defendant is a railroad corporation organized and existing under and by virtue of the laws of the State of Virginia, and was, at all times mentioned herein doing business within the jurisdiction of this Court as a common carrier of intrastate and interstate commerce.

2. That Plaintiff's action arises under the Acts of

MILLER, BONDURANT &
WILSON, LTD.
ATTORNEYS AT LAW

Congress of April 22, 1908, 35 Stat. 65, Chapter 149, with amendments thereto, commonly known as The Federal Employers' Liability Act (45 USCA Chap. 2, Sec. 51-60), as amended August 11, 1939, and the Acts of Congress of March 2, 1893, 27th Stat. 531, Chapter 196, with amendments thereto, commonly known as The Safety Appliance Act (45 USCA Chap. 1, Sec. 1-16), and the Acts of Congress of August 11, 1911 (45 USCA, Chapter 1, Section 23), commonly known as The Boiler Inspection Act, as hereinafter more fully appears.

3. That at all times herein mentioned Defendant was an intrastate and interstate carrier, and was engaged in interstate transportation and commerce. At the time of his injury, Plaintiff was working in furtherance of interstate commerce and participating in work which directly, closely and substantially affected the general interstate commerce carried on by the Defendant.

4. That on or about April 4, 1984, Plaintiff was an employee of the Defendant and on or about said date, while so employed, in the regular course of his duties at or near Pinoca Yard, Hoskins Crossing, Charlotte Terminal, Mecklenburg County, North Carolina, Plaintiff was injured while performing such duties.

5. That the Defendant negligently and carelessly failed to provide Plaintiff with a safe place to work; that Defendant negligently and carelessly failed to maintain and provide the Plaintiff sufficient and safe equipment; that Defendant negligently and carelessly failed to inspect, repair and maintain the equipment; that the Defendant failed to warn Plaintiff of a dangerous condition that existed in the work area; that the Defendant failed to provide sufficient and adequate assistance for Plaintiff to safely perform his work duties; that the Defendant negligently and carelessly allowed a dangerous condition to exist by Defendant's failure to correct unsafe conditions; that Defendant's employees and/or agents acted in an unsafe manner; that Defendant's employees and/or agents failed to properly supervise and act in a safe manner; that Defendant's employees and/or agents failed to appropriately follow safe customs, work rules and practices and that as a result of the aforesaid carelessness and negligence of the Defendant, the Plaintiff was caused to suffer severe and permanent injuries.

6. That the Defendant failed to comply with The Federal

Employers' Liability Act (45 USCA Chap. 2, Secs. 51-60) as amended on August 11, 1939, and the Acts of Congress of March 2, 1893, 27th Stat. 531, Chapter 196, with amendments thereto, commonly known as The Safety Appliance Act (45 USCA Chap. 1, Secs. 1-16), and the Acts of Congress of August 11, 1911 (45 USCA, Chap. 1, Section 23), commonly known as The Boiler Inspection Act, as hereinbefore more fully appears.

7. That as a result of the accident complained of herein, the Plaintiff was caused to lose, and will in the future be caused to lose, income which he otherwise would have earned.

8. That as a result of the accident complained of herein, the Plaintiff was caused to suffer, and will in the future be caused to suffer, great physical pain and mental anguish.

9. That as a result of the accident complained of herein, the Plaintiff was caused to expend, and he will in the future be caused to expend, large sums of money for medical expenses.

10. That as a result of the accident complained of herein, the Plaintiff was caused to be unable, and will in the future be unable, to perform his necessary and lawful affairs.

11. That this suit is brought under the venue provisions of Section 8.01-262 of the Code of Virginia of 1950, as

amended, since the Defendant regularly and systematically conducts its affairs and business activities in the City of Portsmouth, Virginia.

WHEREFORE, Plaintiff DEMANDS A TRIAL BY JURY and prays for judgment against the Defendant in the sum of Two Million Dollars (\$2,000,000.00).

WILLIAM L. CALDWELL

By Eddie W. Wilson

Eddie W. Wilson
MILLER, BONDURANT & WILSON, LTD.
706 London Boulevard at Green Street
Portsmouth, Virginia 23704

OBJECTION TO VENUE AND MOTION TO DISMISS

The defendant, Seaboard System Railroad, Inc., objects to venue in this court and moves to dismiss this action for improper venue, and in support of this motion comes and says:

1. Chapter 5 of Title 8.01, Code of Virginia, titled "Venue", states: "It is the intent of this chapter that every action shall be commenced and tried in a forum convenient to the parties and witnesses, where justice can be administered without prejudice or delay." Va. Code § 8.01-257.

2. This forum is not convenient either to the parties or the witnesses:

(a) The alleged accident occurred in Charlotte, North Carolina, and the cause of action arose in that place;

(b) It is believed that the plaintiff resides in or around Charlotte, North Carolina;

(c) Probably all of the potential liability witnesses reside in or around Charlotte, North Carolina;

(d) The plaintiff received all of his medical care by physicians in Charlotte, North Carolina.

3. Seaboard System Railroad, Inc. is amenable to process of state and federal courts in and for Charlotte, North Carolina, where the cause of action arose.

4. Plaintiff's accident and cause of action did not arise out of any of the affairs or business activities of the defendant within the City of Portsmouth, and no connection exists between said accident or cause of action and any business of Seaboard System Railroad, Inc. within the jurisdiction of this court.

5. The maintenance of this action in this court would be vexatious and oppressive to the defendant, would offend traditional notions of fair play and substantial justice, and would effectively deny defendant due process and equal protection of law, all in violation of the Constitutions of the United States and the Commonwealth of Virginia.

6. If the statutes of the Commonwealth of Virginia are construed to allow plaintiff to institute and maintain this action in this court, then said statutes as applied would violate the provisions of the Constitutions of the

United States and of this Commonwealth in that they would deny defendant equal protection of laws and due process of law under the Fifth and Fourteenth Amendments of the Constitution of the United States.

7. This court is without jurisdiction of this action against this defendant and no proper venue exists in this court.

WHEREFORE, defendant, Seaboard System Railroad, Inc., moves to dismiss this action since the venue statutes of the Commonwealth of Virginia, if construed to permit this action, would violate the Constitutions of the United States and this Commonwealth.

SEABOARD SYSTEM RAILROAD, INC.

By _____
Of Counsel

MOTION TO STAY FURTHER PROCEEDINGS

The defendant further moves the Court to stay further proceedings in this action because there is currently pending in the Circuit Court of Jefferson County, Alabama Civil Action No. CV84-6021, which is the same cause of action as alleged herein.

SEABOARD SYSTEM RAILROAD, INC.

By _____
Of Counsel

WILLIAMS, WORRELL, KELLY & GREER, P.C.
600 United Virginia Bank Building
Post Office Box 3416
Norfolk, Virginia 23514-3416

I hereby certify that a copy of the foregoing
was mailed to Eddie W. Wilson, Miller, Bondurant & Wilson,
Ltd., 706 London Boulevard at Green Street, Portsmouth,
Virginia 23704, counsel for plaintiff, on this the 11th
day of March, 1986.

EXHIBIT A

The plaintiff, a resident of Charlotte, North Carolina, was a 41 year old switchman on April 4, 1984 when he alleges he suffered a hearing loss while working for the defendant in Charlotte. All known liability and medical witnesses live in and around Charlotte.

[2]

2 THE COURT: All right. Gentlemen, I have
3 read the Memorandum that you all submitted. It
4 seems it is not a new issue with me. I have had
5 it before. But it seems to me that the crucial
6 issue here is the constitutionality of the
7 statute.

8 That is, I think Mr. Prince made some
9 very appealing arguments about why it should not
10 be that way, but I don't think that is the issue
11 here that we have.

12 The issue is, as I see it, is only on the
13 constitutionality of the statute. We have got a
14 statute that says you can't send this out of
15 state; you have to keep them here. That is what
16 the statute says. And, of course, in his
17 Memorandum, he says that that statute is
18 unconstitutional because it denied due process
19 and equal protection of law.

20 I am not concerned about whether it is
21 a good statute or a bad statute. It is a
22 constitutional statute and I have to, of course,
23 go by the statute. The only thing that I am
24 concerned with here is the question of the
25 constitutionality of that statute, so I think we

[3]

1 can eliminate any arguments about whether everybody,
2 if the case was tried down in Florida or whether it
3 was tried here, I don't think that is an issue
4 before us. I think the only issue, as I said,
5 is the statute.

24 I concede for the argument -- I concede
25 that this court has jurisdiction and that venue

JAIME & ASSOCIATES
REGISTERED PROFESSIONAL REPORTERS
VIRGINIA BEACH, VA.

[4]

1 lies here. I don't deny that. That is the
2 argument that Mr. Wilson addresses.

1 THE COURT: Well, why do you think the
2 legislature passed that law if it didn't have
3 any purpose? I mean there must have been some
4 reason that the legislature -- it is a relatively
5 new thing and that is something that has come
6 back from a long time ago relatively. I don't
7 know what the legislative history was on it --
8 on that thing, but evidently there was -- you
9 don't pass laws unless you've got a reason either
10 good or bad.

11 MR. PRINCE: I can tell you -- you asked
12 me and I can tell you why it was passed. It was
13 passed for this very purpose. It is called the
14 "Moody Statute", and it was passed for the purpose
15 of preserving for attorneys in this state to do
16 in FELA cases the right to bring these cases in
17 the state of Virginia.

Excerpts from Transcript of Hearing on Defendant's Objection to
Venue and Motion to Dismiss, held April 2, 1986

[14]

11 yourself up to be sued in Virginia. Any Virginia
12 corporation who commits torts anywhere, just like
13 over in India where the gas leaked, they brought
14 the suits in the United States. They brought it
15 where the corporation had a charter, I guess.

1 sue a Virginia corporation in Virginia.

2 The question is now that this is not a
3 convenient forum as has been alleged, and the
4 question then gets to be that the law says in
5 Virginia you can move, for instance if Richmond
6 was the more convenient forum, let's say, than --
7 and the doctor was there, whatever it was, there
8 would be no question this court would first have
9 to consider whether Richmond is a more convenient
10 forum than Portsmouth and would have to -- and
11 could, if found to be so, remove the case to
12 Richmond.

13 The problem is, from what has been alleged
14 here, Florida is the more convenient forum. No
15 question in my mind it's more a convenient forum
16 because you say everybody lives purportedly or
17 by deposition there, but the question is, in the
18 face of this statute that says even if it is a
19 convenient forum, you cannot move it out of the
20 state. I think you have got to address yourselves
21 to the issue of whether or not precisely it is not
22 a fact that Virginia has jurisdiction to hear
23 cases of this nature and has a venue to hear it,
24 but the issue is that can the state tell me you
25 have got to consider it in Virginia but you can't

[16]

1 consider it if it is considered out of the state.
2 Can the state just plainly state and say if you
3 bring them in Virginia you have got to leave it
4 in Virginia, you can't take it out of Virginia?
5 That is what you have got to address yourselves
6 to. And I'll tell you that the most appealing
7 part of it, and, of course, I want you to address
8 it, is the state purpose idea. I am not so much
9 concerned -- it doesn't appear to me having read
10 these briefs -- I spent some time thinking about
11 it last night the equal protection of law and due
12 process. You get a fair trial. Everybody gets
13 an opportunity to present their case and everybody
14 gets the same opportunities whether they are from
15 Virginia, North Carolina or wherever they are
16 from. As long as a full hearing is held and
17 everyone has got an opportunity to present
18 evidence and do the same as everybody else has
19 the same opportunity to do, I don't think you are
20 violating due process and equal protection.

21 I haven't given it much thought up to this
22 point the idea although it was briefed, although
23 you had it in the brief the idea that in order to
24 be constitutional -- under the state constitution
25 in order to be constitutional it has got to be a

1 state purpose. You just don't pass laws that have
2 no reason whatsoever to be on the books that there
3 is no legitimate state purpose for.

4 Now, I don't think the state purpose idea,
5 the equal protection and the due process relates
6 to the plaintiff and the Seaboard Railroad is
7 whether or not they are getting a fair trial and
8 getting equal or being treated equally like
9 everybody else. As I pointed out, if a Virginian
10 goes down and gets hurt by the Seaboard Railroad
11 down in Florida, he would bring it up here, and
12 it is the same as anybody else in Florida. I
13 don't think there is any discrimination in the
14 law as relating to the parties or out of state
15 plaintiffs or state plaintiffs. The only thing
16 that I think really causes some pause is the fact
17 that what is the legitimate benefit to the state
18 and to its citizens by passing such a law that
19 says you can't remove it out to a more convenient
20 forum especially when it concerns a -- out-of-
21 state -- no plaintiff who lives in Florida --
22 we really don't have a state that says we are
23 going to protect you better than Florida is going
24 to protect you.

25 MR. MILLER: Well, I think Mr. Prince

1 jokingly referred to it as the Moody Statute,
2 but he is one hundred percent correct because
3 at the time that this statute was passed, as
4 you know I was in the office at that time, and
5 I did quite a bit of research on that and the
6 purpose of the statute when Mr. Moody did
7 introduce it before the legislature and it was
8 adopted -- and I'll tell you exactly the reason
9 why it was passed by the legislature, at least
10 from my way of thinking, your Honor knows that
11 Virginia not only has -- we are under FELA federal
12 part but we also have FELA state statute also that
13 incorporates FELA provisions. What was happening,
14 and Mr. Prince brought this particular item up,
15 what was happening in all these cases when somebody
16 got hurt, for instance, from North Carolina in
17 Virginia in North Carolina and he was a Virginia
18 resident, the railroads always used to argue that
19 they could not bring a third-party into the case
20 if it happened on a third-party premises property
21 and they would constantly argue, Judge, we want
22 you to dismiss this cause of action because the
23 real party responsible for this particular case
24 is in Carolina and we can't bring them into this
25 cause of action and collect from them, and we used

1 to be caught in this bind all the time. Every
2 single case that we had where an accident happened
3 in North Carolina with a Virginia resident, the
4 railroad would argue we can't sue the third party
5 and some judges would allow that third party and
6 say, well, I'm going to have to dismiss the case
7 and allow it to be brought down in Carolina.
8 Because they have a contract with this third
9 party that would be more a convenient forum.
10 So these things used to happen all the time and
11 we used to come into court and we used to argue
12 back and forth on the forum non-convenience, and
13 one judge would rule that way and one judge would
14 rule another way. We got all kinds of confusion.
15 So Willard at that time presented this problem
16 to the legislature, and there is all kinds of
17 inconsistent rulings. We had a different ruling
18 in Roanoke. We had a different ruling in Norfolk.
19 We had a different ruling in Portsmouth. We had
20 different rulings in Richmond, all on these forum
21 non-convenience.

22 The purpose of this statute was to take
23 away this argument that every railroad was making
24 in all these cases and to force upon the judge the
25 ruling that you just can't take these cases out of

1 Virginia.

2 Now, another thing is this, Judge. You
3 realize, of course, these are transitory causes
4 of action. The Supreme Court of the United States
5 has addressed this on many occasions.

6 THE COURT: That a railroad resident has
7 the right to bring this case either in federal
8 court if he wants to or in the state court, or
9 either of them. You can't remove.

10 MR. MILLER: You can't remove it, that's
11 right. This is the only case that I know. This
12 is a very special statute. You can't remove a
13 FELA case period. Now, that being a transitory
14 cause of action and given the special status of
15 this particular type of law, Virginia has a right
16 to enact a special type of law. The poor railroad
17 guy that comes in here and gets injured in an
18 action hasn't got the money to go running around
19 the state fighting all these forum non-conveniences
20 arguments, although every time the case comes up,
21 they just don't have the time and the money to do
22 it. The legislature has just taken that argument
23 away. This has been happening day in and day out.
24 I can tell you my personal experience in arguing
25 these cases in all the states with different

[21]

1 rulings from different courts. Sometimes they
2 threw it out and sometimes they didn't and so
3 as I said the legislature took it away. It is
4 non-discretionary. It is a constitutional --
5 it is a statute passed according to the
6 constitutional right that Virginia has to hear
7 these cases under the United States Constitution.

14 THE COURT: But if this was in the
15 federal court, there is no question they would
16 send it down to Florida.

17 MR. MILLER: Absolutely, one hundred percent,
18 your Honor.

19 MR. WILSON: We keep saying Florida, but
20 it is North Carolina.

21 THE COURT: Well, I don't know where I
22 got Florida from in my mind.

23 MR. MILLER: The reason for this, your
24 Honor, what we have got to remember is that the
25 railroad is an intrastate corporation. These

[22]

1 fellows like in North Carolina, especially in
2 this particular case, the facts of this case is
3 that they moved between North Carolina and Virginia
4 every day. They go to Richmond down to Rocky Mount
5 and from Rocky Mount to Richmond.

[23]

23 MR. PRINCE: Right. What we have here
24 is different persons being treated different
25 ways.

JAIME & ASSOCIATES
REGISTERED PROFESSIONAL REPORTERS
VIRGINIA BEACH, VA.

1 THE COURT: I can't see where they are being
2 treated any differently. That is the part I'm
3 having difficulty with. I don't see where this
4 man who lives in North Carolina or he lived in
5 Virginia, the accident happened in North Carolina.
6 They treat it exactly the same. They came to the
7 same court, have the same judge, the same jury,
8 they are treated exactly the same. I don't see
9 any defendant who is doing business -- substantial
10 business in Virginia. I'll agree it is not long
11 arm because the whole idea is that means if some-
12 thing happened in Virginia, if you are doing
13 substantial business in Virginia, you give the
14 court jurisdiction under the long arm statute,
15 but I think this is based on the fact that we
16 are dealing with a Virginia corporation, and if
17 somebody down in North Carolina bought a locomotive
18 from the Seaboard and it turned out to be a bad
19 locomotive and they want to bring a suit against
20 Seaboard even though they bought it down in
21 North Carolina and the contract occurred in
22 North Carolina, they can sue the Seaboard since
23 the Seaboard for all practical purposes is in
24 Virginia, they could sue Seaboard in Virginia
25 as a Virginia corporation and you cannot say

1 that is not equal protection of law. I think it
2 seems to me, at least, that everybody is being
3 treated equally, all plaintiffs and all defendants
4 no matter where they resided are being treated
5 equally.

6 MR. PRINCE: I am missing the point.

7 THE COURT: If I'm missing the point, you
8 explain it to me.

9 MR. PRINCE: Just because of the example
10 I gave you of the Virginia citizen who is injured
11 in Patrick County and who brings a cause of action
12 in Virginia but in Portsmouth, he has to face your
13 discretion as to whether or not he can keep it
14 here in Portsmouth.

15 THE COURT: Well, North Carolina citizens
16 injured in Patrick County get that same privilege.

17 MR. PRINCE: No, but if the North Carolina
18 citizen with a North Carolina cause of action --

19 THE COURT: But I'm saying if he says that
20 it happened in Patrick County and I want to transfer
21 it to Patrick County even though he is a resident
22 of North Carolina, he still has -- I have to
23 consider that for convenience.

24 MR. PRINCE: That's true.

25 THE COURT: And I don't see where there is

1 any difference for Virginians or for non-residents.
2 It is a difference between states but not between
3 parties as I see it.

4 All right, gentlemen, what else have we
5 got?

6 MR. WILSON: One final thing, your Honor.
7 You asked what the state purpose is. It appears
8 from the discussion today and the briefs in this
9 type of cases that the state purpose is to protect
10 Virginia residents who may be injured in Carolina
11 while they are down there on railroad business and
12 allow them to go against Virginia corporations
13 here in Virginia and in doing this it also gives
14 these out-of-state residents from North Carolina
15 the right to come into Virginia and sue a
16 corporation. It is a spin-off type thing because
17 the purpose is to protect Virginia residents that
18 may be injured out of state just like Barney was
19 saying, these railroad men that go down to North
20 Carolina to doctors all the time and have to come
21 back.

22 THE COURT: Well, it is an interesting
23 argument, I don't mind telling you, and there is
24 a presumption of constitutionality. Anytime a
25 legislature passes a law, it is presumed to be

1 constitutional. Of course, that is a rebuttable
2 presumption, but I would be candid with you. I
3 don't think -- unless it's so clear and persuasive
4 that there can be no arguments in the other
5 direction, I don't think a Circuit Court ought
6 to declare a state law unconstitutional unless,
7 as I say, this presumption can be overcome. I'll
8 be candid with you. There is some parts of the
9 argument that are appealing, but I don't think
10 that I, at least, have enough information before
11 me as to why this law was passed. There has been
12 some explanation given, but I don't know if it is
13 a right explanation or the best explanation, to
14 tell you the truth. I think this is a matter that
15 the Supreme Court is going to have to decide one
16 way or the other, but I don't think sitting as a
17 Circuit Court judge with what has been shown here
18 or proffered here that the presumption of
19 constitutionality is overcome and the clear and
20 expressed language the legislature passed is an
21 unambiguous law. No question what it means, no
22 question that it says straight out that I can't
23 dismiss this case. I have to retain it. With
24 the clear expression of the legislature giving
25 them the benefit that I have to give them under

[28]

1 the law that they don't do things without a reason
2 and it just doesn't come out of thin air. It
3 doesn't come into the law, I don't believe that
4 I am in a position that I can say that this
5 statute is unconstitutional.

6 I realize that things do change, new
7 arguments are made and they are presented, but
8 I am inclined to view the statute as constitutional
9 and I will so rule on that. I don't want to take

Order Denying Defendant's Objection to Venue and Motion
to Dismiss - Filed April 8, 1986

ORDER

This cause came on upon the defendant's Objection to Venue and Motion to Dismiss and was argued by counsel;

And after consideration of the brief filed by the defendant in support of its motion and the brief filed by the plaintiff, and the arguments of counsel, the Court being of the opinion that the provision of § 8.01-265 of the Code of Virginia prohibiting the dismissal of this action on the ground of forum non conveniens violates neither Article I, Section 8, Clause 3 or the 14th Amendment of the Constitution of the United States, nor Article I, Section 11, Article IV, Section 14, Paragraph 18 or Article IV, Section 15 of the Constitution of Virginia;

It is ORDERED that the motion of the defendant to dismiss this action without prejudice is DENIED, to which action of the Court the defendant objects.

And came also the parties on the motion of the defendant to stay the proceedings in this action on the ground that the plaintiff has an identical cause of action against the defendant pending in the Circuit Court of Jefferson County, Alabama or in the alternative to order the plaintiff to take no further action in his cause in Alabama, and was argued by counsel, and the Court being of the opinion that the plaintiff can proceed with each pending action, DENIES the motion, to which action of the Court the defendant objects.

It is further ORDERED that the defendant shall have fifteen (15) days from the entry of this Order to file its responses to the pleadings served.

Enter this Order: 4-8-86

Reg

Judge

Seen:

_____, p.q.

William T. Smith, p.d.

Excerpts from Transcript of Pre-Trial Hearing,
held on November 21, 1986

[46]

11 THE COURT: Gross amount of loss of wages is
12 admissible up until day of trial. If he hasn't worked he's
13 lost that much money. Most of them come in and testify yes,
14 I been trying to get something to do but I haven't been able
15 to get anything. I don't know what it will be in the case
16 and certainly he can show his lost wages up to the moment
17 we're sitting there, but when you start speculating -- now,
18 see when you have permanent injury, we've had cases, say this
19 man has no education, he worked for the railroad, he lost his
20 leg, only work he can do is labor type work. Doctor gets up
21 and says he'll never be able to do another lick of anything.
22 Then it gets to be relevant what he lost. You can figure it
23 out almost to the dollar economically about what he lost, but
24 if a man has got work capability what he lost in my judgment
25 is not relevant. It's relevant until the moment of his loss

Zahn
411 Zahn
Z Ltd.

Registered Professional Reporters
(804) 627-6554

Norfolk, Virginia

London, England

[47]

1 but it's not relevant for future because you got one figure
2 without having the other figure, and how can you say a man is
3 going to lose million dollars if in fact without showing that
4 he was going to earn half a million so his loss is half a
5 million dollars. If we don't know what his earnings are
6 going to be the loss figure gets to be purely speculative on
7 the part of the jury, at least that's been my ruling and I
8 think that's correct.

18 THE COURT: I do not think -- I don't know
19 about that case. I don't know whether they showed what his
20 prospective earnings are going to be. Can you represent to
21 me they didn't, was that argued? In other words, it does not
22 make any sense unless you can show me where it does make some
23 sense to see a man -- how can you tell jury man's going to
24 lose a million when the facts are he won't lose a million,
25 and that's the point that was raised in that C & O case which

Zahn
Fall &
Zahn
Ltd.

Registered Professional Reporters
(804) 627-6554

Norfolk, Virginia

London, England

[48]

1 I ruled in favor of the railroad on that particular case.

Trial Transcript, Volume I
William L. Caldwell - Direct

[32]

1 Q Mr. Caldwell, where do you live?
2 A 1507 Vancouver Drive, Charlotte, North
3 Carolina.

15 Q You say you're a conductor/switchman. What
16 railroad did you work for?

17 A Seaboard Coastline Railroads.

18 Q And how long have you worked with that
19 railroad, Mr. Caldwell?

20 A Nineteen and-a-half years.

21 Q In those nineteen and-a-half years have you
22 held any other job outside the job with the railroad?

23 A No, I haven't.

24 Q Have you had any promotions on the railroad?

25 A I was promoted from a switchman to a conductor.

JAIME & ASSOCIATES

VIRGINIA BEACH, VIRGINIA

[34]

3 Q Did you have any problem on April 4th, 1984?

4 A Yes, I did.

5 Q Tell us how that problem occurred.

6 A We was coming west on the mainline going back
7 into the yard. We had to approach a crossing called Hoskins
8 Crossing. And as we were approaching the crossing I exited
9 the door. As soon as I stepped out the door, the front of the
10 engine -- I was inside the engine. I stepped out the door of
11 the cab. And as soon I stepped out the door the engineer gave
12 a loud blast on the whistle. I immediately grabbed both my
13 ears. And my ears started popping and my head hurted real
14 bad. I got real light headed. I got down. He went over the
15 switch. I got down, lined the switch and made a move back to
16 the yard. I caught on the rear end of the engine going back
17 to the yard.

13 Q All right. After you left the industry and
14 proceeded down the mainline tell me where your crew was
15 located.

16 A Inside the cab was the crew. The engineer was
17 operating the engine. The conductor was sitting in the front
18 seat. The field switchman was sitting in the back seat.
19 There are two seats on the left side. The field switchman was
20 sitting in the back seat. I was standing against the wall
21 inside the cab.

22 Q Did you have any cars behind your engine at
23 that time?

24 A No, we didn't. We had a light engine, no cars.

25 Q And were you headed towards Hoskins Crossing?

JAIME & ASSOCIATES

VIRGINIA BEACH, VIRGINIA

1 A We were headed towards Hoskins Crossing.
2 That's correct.

8 Q Do you know how long that crossing has been
9 there?

10 A Yes, I do.

11 Q How long has it been there?

12 A It's been there since March of '81.

13 Q How do you know that?

14 A I got it from the Communication Department in
15 Charlotte, North Carolina.

16 Q What Communication Department?

17 A The Seaboard Communication Department.

12 Q Okay. Where is the horn located in relation to
13 you as you exit the front door of the cab?

14 A It sits right above the door as you go out
15 of -- about two or three feet above your head as go out the
16 door.

17 Q How about the door closed and you inside the
18 cab can you hear the horn?

19 A Yes. You can hear the horn inside the cab.

20 Q Was the horn blowing when you left the cab?

21 A No, it wasn't. It wasn't blowing when I left
22 the cab.

23 Q What did you do when the horn started blowing?

24 A I immediately grabbed my ears with both hands
25 and ducked down and ran around the front of the engine, got

JAIME & ASSOCIATES

VIRGINIA BEACH, VIRGINIA

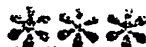
1 down on the ladder. When he got to the switch I stepped down.
2 I had to jump down really.

20 Q Okay. What happened then?
21 A He asked me did I want to go to the hospital.
22 I said, "Yeah. I better have my ears checked."
23 Q And were you taken for medical treatment?
24 A Yes, I was taken to Nile Clinic.
25 Q And where is that located?

JAIME & ASSOCIATES

VIRGINIA BEACH, VIRGINIA

1 A In Charlotte, North Carolina.
2 Q And what happened at Nile Clinic?
3 A I saw the company doctor, Dr. Beard.
4 Q And did he do anything for you?
5 A Yes. He gave me the audiogram.



[53]

13 Q Did you receive any medical treatment?

14 A Yes. I received other medical treatments.

15 Dr. Beard told me --

16 MR. WEBSTER: Your Honor, I object to
17 hearsay.

18 THE COURT: Overrule your objection.

19 THE WITNESS: Dr. Beard told me to make
20 an appointment with Dr. Coconus whose an ear doctor.
21 So I did that. And in the process, maybe two or three
22 days later when I could get an appointment I went to
23 see Dr. Coconus. And he told me to wait about three
24 months and come back and see him again.

25

JAIME & ASSOCIATES

VIRGINIA BEACH, VIRGINIA

1 BY MR. WILSON:

2 Q All right, sir. And did you go back to see
3 him?

4 A Yes. I went to see him three months later.

5 Q When was that? Do you recall the date or the
6 month?

7 A I saw him first in April and then three months
8 later, about June or July, around June or July.

9 Q During that time did you personally notice
10 if --

11 A It was '84 back in '84.

12 Q July of '84?

13 A Right.

14 Q I didn't mean to cut you off.

15 A Yes. July of '84.

16 Q Did you personally notice any difference in
17 your hearing at that time?

18 A Yes, I did. My ears were popping and ringing
19 on me. And I was getting headaches I never experienced
20 before.

21 Q Did you go for more medical treatments?

22 A Yes, I did. I went to see Dr. Coconus three
23 months later. And it was -- he told me that I had a hearing
24 loss, but that --

[55]

9 Q All right, sir. And did you receive this
10 medical treatment after you saw Dr. Coconus in 1984?

11 A Yes, I did. I thought I ought to get a second
12 opinion. So I made an appointment with the Eye, Ear, Nose,
13 and Throat Hospital in Charlotte.

14 Q Who did you see there?

15 A I saw Dr. Goldberg.

16 Q And when did you first see Dr. Goldberg?

17 A In July or August of '84.

18 Q Did you see him any times after that?

19 A Yes. I have seen him a number of times after
20 that.

21 Q Do you personally have any knowledge if you had
22 a problem with your hearing during that?

23 A Yes, I --

24 Q Tell us what problems you were having.

25 A Popping and the ringing headaches from time to

1 time. Each time I would have them I would go to the doctor
2 and he would give me an audiogram.

5 THE WITNESS: He treated me and gave me
6 medicines.

7
8 BY MR. WILSON:

9 Q Were you doing any work during that time?

10 A Yes, I was.

11 Q Tell us what time you missed from work.

12 A Some days seven or eight days, four or five
13 days, it all depended on how I felt until my pain would go
14 down. It never went all completely. I had to work. I had to
15 live.

16 Q All right, sir. And in July of 1985 were you
17 asked by the railroad to see a doctor?

18 A (Pause.)

19 Q In July of 1985 were you asked by the railroad
20 to see a doctor?

21 A Yes, I was. I was asked to see a Dr. Meade,
22 the railroad's doctor, in Jacksonville, Florida. They wrote
23 me a letter stated for me to see Dr. Swaber in Jacksonville,
24 Florida.

1 to Jacksonville?

2 A That's correct.

3 Q Did you go?

4 A Yes, I did.

5 Q Tell me what happened.

6 A When I went to Jacksonville Dr. Swaber gave me
7 the audiogram.

9 THE WITNESS: He gave me an audiogram
10 and a speech test, as I can recall.

11

12 BY MR. WILSON:

13 Q Did you return to Charlotte after that?

14 A Yes, I did.

15 Q Did you have occasion to see Dr. Swaber again?

16 A Yes. He told me that test was no good. He
17 wanted me to come back next week and take another test.

18 Q So you went the second time, you flew down to
19 Jacksonville; is that correct?

20 A That's correct.

21 Q What did he do that time?

22 A Same kind of test again, the audiogram and a
23 speech test.

24 Q Did he give you any type of balance test or
25 anything like that?

1 A No. He didn't give me no balance test at all.

2 Q After you saw Dr. Swaber were you ever advised
3 or were you off work at that time?

4 A Yes. I was off of work then.

5 Q Were you ever advised that you could return to
6 work?

7 A In November of '80 -- November of '85 I get a
8 letter from Dr. Meade stating for me to get some ear plugs and
9 return to work.

10 Q We keep saying Dr. Meade. Tell the ladies and
11 gentlemen of the jury who Mr. Dr. Meade is.

12 A Dr. Meade is the railroad doctor in
13 Jacksonville.

14 Q He is chief medical physician for the railroad?

15 A He is the chief medical physician for the
16 railroad in Jacksonville, Florida.

17 Q So up to November 1985 -- and you say you were
18 advised you could return to work. Tell me what happened.

19 A I was told to get ear plugs and return to work.

20 THE COURT: When was the last time you
21 worked before that day?

22 THE WITNESS: The last time I worked
23 was June 25th, 1985.

24

25

22 Q William, at my request did you have any other
23 medical examinations made?

24 A Yes, I have.

25 Q And where was that?

JAIME & ASSOCIATES

VIRGINIA BEACH, VIRGINIA

1 A Where was it?

2 Q Where was that? Yes, sir.

3 A In Richmond, Virginia.

4 Q And do you know the name of the place you had
5 the tests made?

6 A M. C. V., Virginia -- Commonwealth of Virginia.

7 Q Is that the Medical College of Virginia?

8 A The Medical College of Virginia.

9 Q Who did you see there?

10 A Dr. Butts.

11 Q All right, sir. How many times did you see
12 him?

13 A Three times.

14 Q Is that three different days?

15 A Three different days, right.

[61]

1 know their names. They did participate.

2 Q All right. Did you go back on the second day?

3 A I went back the second time. He gave me a

[62]

9 A The third time he gave me a second balance
10 test.

11 Q All right, sir. And who was present that time?

12 A Same people was present that time.

13 Q William, if you will, would you please tell the
14 ladies and gentlemen your rate of pay on the last day that you
15 worked on the railroad?

16 A I would have to look. I'm not sure the -- the
17 rate of pay I worked on the last day I worked on the railroad?

18 Q Yes?

19 A Was one -- or four ten per day.

20 Q Is that per?

21 A I'm sorry that's per hour.

22 Q A hundred and eighty dollars?

23 A No. A hundred and four dollars and ten cents.

24 THE COURT: Per hour.

25 THE WITNESS: Per hour.

3 right, per day.

4
5 BY MR. WILSON:

6 Q William, was that rate we settled at a hundred
7 and four was a day?

8 A That's correct.

9 Q What was the rate of pay when you first started
10 out in 1966.

11 MR. WEBSTER: Your Honor, I am going to
12 object to that testimony. That's not relevant to this
13 case.

14 THE COURT: Come up to the bench
15 gentlemen.

16 (The following is a bench held in the
17 presence, but out of the hearing of the jury.)

18 THE COURT: I ruled on this the other
19 day, Mr. Wilson. Unless you are prepared to show what
20 he -- in effect to show what he used to make and how
21 much it has increased over the years is relevant only
22 if you are prepared to show what he can make against
23 his lost income to the time of retirement what his --
24 what his income will be so we can determine the
25 difference. Otherwise it's not relevant.

1 MR. WILSON: Your Honor, he has a
2 guarantee on the railroad. He is guaranteed a certain
3 amount each month as long as he worked on the
4 railroad.

5 THE COURT: That's true. But you have
6 not shown that he has loss of income in your
7 statements to me that you have made pretrial. Your
8 doctors don't say this man is permanently disabled
9 from doing any kind of work. He is just disabled from
10 doing railroad work.

11 MR. WILSON: I agree.

12 THE COURT: Now, it's irrelevant how
13 much he would lose working for the railroad unless you
14 can discount that by how much he would earn from other
15 work. Both of these would have to be estimates. But
16 it would have to be based on some reasonable certainty
17 as to what a person of his age at this time could
18 earn. Just to give a figure of loss without
19 discounting the potential earnings would be to give a
20 false argument.

21 MR. WILSON: Can we excuse the law and
22 argue?

23 THE COURT: I know you have argued a
24 case. But that case didn't support what you are
25 doing. That case supported it's proper evidence in a

1 proper case to show the lost earnings that a man would
2 make of his experience. But that case did not address
3 the fact that man was capable of making other earnings
4 and what he would earn. That's just common sense. If
5 I could make a hundred dollars for the rest of my
6 days, a hundred dollars a day and now I can only make
7 a fifty dollars a day my loss is not a hundred dollars
8 a day. It's fifty dollars a day. You can't show one
9 figure without the other one.

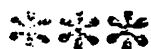
10 MR. WILSON: I thought the defendant
11 put on the gross wages in the defendant's case.

12 THE COURT: No way. In other words, I
13 am not going to allow economic loss unless all factors
14 are taken into consideration. I am not going to allow
15 it. If you are able to certify to me that you are
16 going to show loss of his earning capability and
17 discounts, I will permit you to do it. Otherwise, I
18 will not permit you to do this. We have been over
19 this one before.

20 MR. WILSON: I know we have. I can
21 only abide to your rules and what's --

22 THE COURT: That's my ruling.

23 (End of bench conference.)



Caldwell - Direct

1 BY MR. WILSON:

2 Q Mr. Caldwell, what was the last full year that
3 you worked on the railroad?

4 A 1984.

5 Q And how much money did you make?

6 A \$28,481.74.

7 Q I'm sorry?

8 A \$28,481.74 per year. That was that year.

9 Q All right, sir. Would you please tell me what
10 the mandatory retirement age is for railroad workers.

11 A Seventy years of age.

12 Q How old are you right now?

13 A Forty-four.

14 Q All right, sir. Are you familiar with the term
15 fringe benefits?

16 A Yes, I am.

17 Q Do you know what the fringe benefits are for a
18 railroad worker?

19 A Yes, I do.

20 Q Tell us what they are first?

21 A They are hospital, and life, travelers, dental
22 insurance.

7 BY MR. WILSON:

8 Q Okay. If you will --

9 A I'll start over. Hospital, and life,
10 travelers, dental insurance, all track insurance, railroad
11 retirement taxes, railroad unemployment, supplemental annuity.

12 Q All right. Mr. Caldwell, do you know whether
13 or not these fringe benefits have a monetary value?

14 A Yes, I do.

15 Q And what is that value per year, if you know?

16 A \$9,670.80 per year.

17 Q All right, sir. Where did you get that
18 information?

19 A I got it from the railroad and from the UTU
20 contract agreement, our union contract agreement.

21 Q Would you have been eligible to receive this
22 \$9,670 and some dollars if you had continued to work on the
23 railroad?

24 A Would I have continued?

25 Q Yes, sir.

1 A Yes, sir.

2 Q For each year you worked?

3 A Yes, sir. I would.

4 Q Mr. Caldwell, at my request you have figured up
5 how much lost wages you have to date through November 1986, at
6 my request?

7 A Yes, I have.

8 Q All right, sir. What were your earnings in
9 1985?

10 A 1985, \$16,902.23.

11 Q All right, sir. And how much earnings did you
12 lose in 1985?

13 A 1985 I lost \$7,779.51.

14 Q What were your earnings in 1986?

15 THE COURT: How much have you lost in
16 1986? Have you had any other job since that time?

17 THE WITNESS: No, I haven't.

18 THE COURT: How much did you lose in
19 1986.

20 THE WITNESS: Zero.

21 THE COURT: How much would have you
22 earned through November of 1986?

23

24

25

1 BY MR. WILSON:

2 Q How much would you have earned through November
3 of 1986?

4 A Through November of 1986 \$37,687.79.

5 Q That's your total loss.

6 THE COURT: That includes your
7 benefits.

8 THE WITNESS: No, sir. That don't
9 include my benefits.
10

11 BY MR. WILSON:

12 Q So let's get this straight, you lost \$37,687.79
13 wage loss, nothing but wages?

14 A That's right.

15 Q Through November of 1986?

16 A That's correct.

17 Q All right, sir. William, in your job on the
18 railroad did you have any type of wage guarantees?

19 A Yes. I did have a wage guarantee.

20 Q Tell me about the wage guarantee that you had?

21 A The wage guarantee is a protective thing that
22 we had through a merger.

23 Q What merger?

24 A Piedmonts.

25 THE COURT: Some, union contract you

1 argue with the judge.

2

3 BY MR. WILSON:

4 Q William, please tell us of your own personal
5 knowledge what problems you have, if any, with your ears at
6 this time?

7 A They wake me up at night. They pop on me.
8 They still give me headaches, make me light headed at times.

9 Q How about when you are out on social situations
10 do you have any problems?

11 A Yes. When I am in a room or big environments
12 with a lot of people they start acting, like at a high
13 altitude. They wants to open on me. I have to get out of
14 there. I can't stand it. At home I have problems with my
15 children and my wife. I turn the TV up loud and they turn it
16 down. I can't hear the telephone if I'm in the other room.
17 They be hollering "Why don't you answer the telephone?" I
18 can't hear it.

19 Q You said they ran a balance test on you. Do
20 you have any problems with balance?

21 A Yes. I get light headed sometimes. I try --
22 if I am going to make a step sometimes I don't step up the --
23 I -- I don't go where I -- I get light headed at times. I
24 never feel like, you know, it's something different. It's a
25 different life for me.

1 Q William -- I'm sorry. Were you finished?

2 A Yes, I am.

3 Q I have a habit of cutting in. I apologize.

4 Have you looked for another job, William?

5 A I have talked to people about work. But I
6 thought I was going to get my job back on the railroad.

7 Q Have you told anybody on the railroad that you
8 wanted to go -- that you wanted to keep your job?

9 A Yes, I have.

10 Q Who have you told?

11 A I told Miss Mary. She's the secretary. And I
12 talked to train master Bill Morrow. And I asked Seaboard
13 lawyer, Mr. Webster there, about my job, getting my job back.

22 BY MR. WILSON:

23 Q Were you allowed to return to work, William?

24 A No, I wasn't.

25 Q What are your plans for the future?

1 A I don't know. I found out last week I don't
2 have any job no more. I don't know what I am going to do. So
3 I don't know what I am going to do. I have got to do
4 something, though.

5 Q William, has this accident changed your life in
6 any way?

7 A Yes, it has considerably.

8 Q Tell us how it has changed your life, please.

9 A Well, I don't have an income for one thing. I
10 can't support my family like I have been doing. I got a
11 daughter in college, one that has got to go to college.

12 Q All right, sir. We're talking -- how about
13 limiting it personally to you, how it affected you?

14 A Talking about my health?

15 Q Yes, sir, please.

16 A My health, I can't be doing things I have been
17 doing. I can't be in any kinds of environment, watching TV or
18 in a large environment. If I be in a loud -- as I understand
19 it they give me the problems, have -- wakes me up at night.

20 Q How about going to church?

21 A I been going to church. I can't attend my kind
22 of church they get loud. The Baptist, they get really loud at
23 the church at times. I have to go to my wife's. She is
24 Presbyterian.

25 MR. WILSON: William, that's all I have

1 Q Mr. Caldwell, can you tell the jury how long
2 the horn blew when you were outside the cab?

3 A I don't know how long it was, because I grabbed
4 my ears immediately.

5 Q You mean after you grabbed your ears and you
6 couldn't hear anymore?

7 A I don't know. I was hurting.

8 Q Did it blow ten seconds, Mr. Caldwell?

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

10 Q Did it blow less than fifteen seconds?

11 A I don't know.

12 THE COURT: You weren't timing it; were
13 you?

14 THE WITNESS: I wasn't timing it.

11 Q You testified to Mr. Wilson that you went to
12 see Dr. Goldberg every time you had your popping, and ringing,
13 and headaches problems; is that correct?

14 A When they got bad. I didn't go every time.
15 When they bothered me real bad I went to see him.

16 Q How many times did you see Dr. Goldberg?

17 A Maybe four or five or six times.

18 Q You don't know for sure how many times you saw
19 him?

20 A Right now I don't know.

21 Q When you went to see Dr. Swaber at Jacksonville
22 you said he didn't give you the balance test; is that correct?

23 A That's correct.

24 Q Did you make any complaints to Dr. Swaber
25 about balance problems?

1 A I told him my conditions, the problems I was
2 having.

3 Q And that was popping, and ringing, and
4 headaches?

5 A As far as I can remember.

6 Q All right. Nothing about having a balance
7 problem?

8 A As I remember I did tell him about the balance
9 problem. I was light headed.

NAME: William L. Caldwell

AGE: 44

REFERRAL:

VIRGINIA COMMONWEALTH UNIVERSITY
Medical College of Virginia Hospitals
Richmond, Virginia 23298

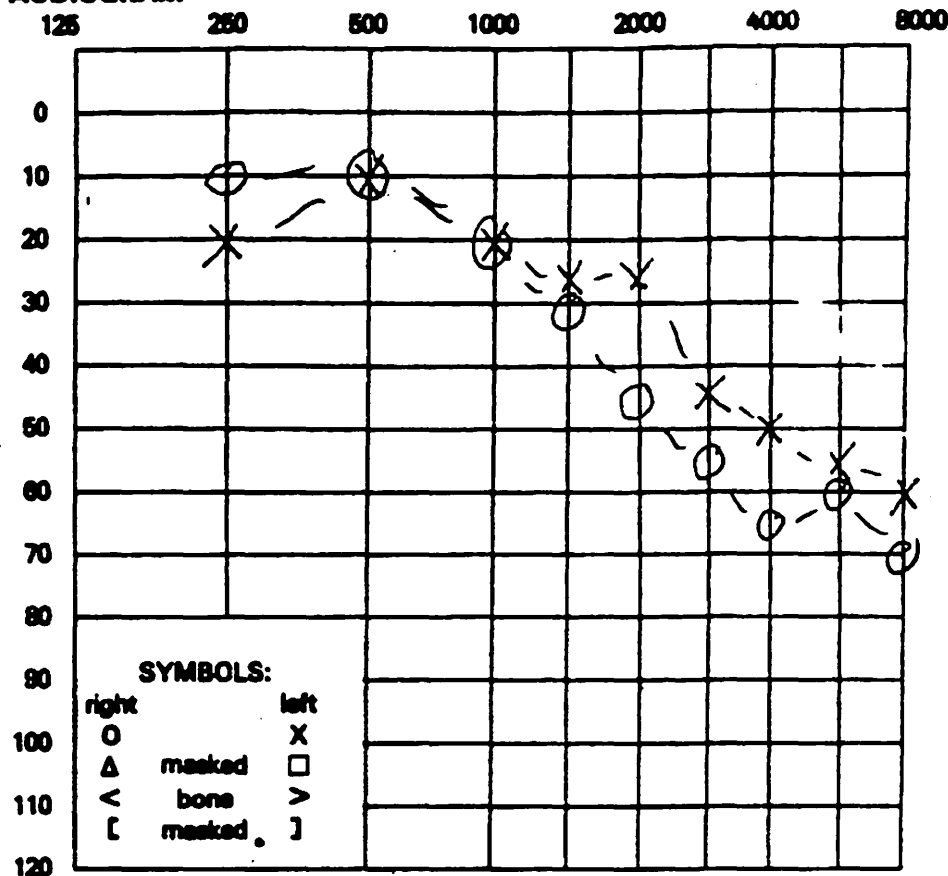
AUDIOLOGICAL EVALUATION

DATE: 10-20-86

AUDIOLOGIST: F. M. Smith

Patient Identification (Patient Plate)

AUDIOGRAM

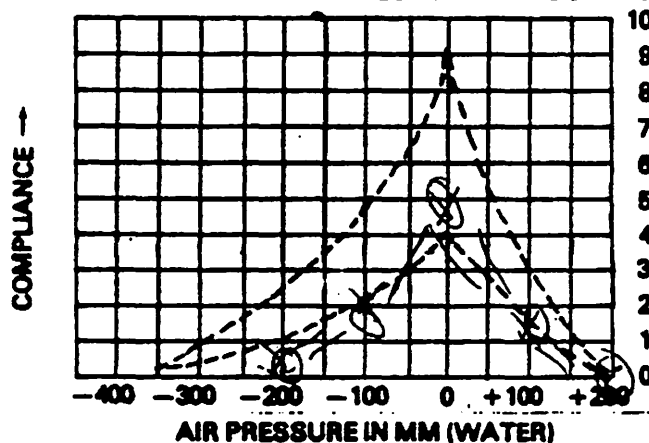


ANSI 1978
SPEECH

SPEECH RECEPTION THRESHOLD (SRT)	
Left	Right
20 dB	20 dB
SPEECH DISCRIMINATION	
Left	Right
%	%
HL	HL

Lt SSI Rt
100% +10 100%
60% 0 70%
10% -10 20%
0% -20 0%

IMPEDANCE MEASURES - TYMPANOGRAM



Bekesy Type T's Bilaterally

STATIC COMPLIANCE

Right
1
2
cc
Left
1
2
cc

ACOUSTIC REFLEX THRESHOLDS

Stimulus	Ear kHz	CONTRALATERAL STIMULATION			IPSI LATERAL STIMULATION		
		500					
Right	80						
Reflex Decay	-						
Left	75						
Reflex Decay	-						

Remarks: Imp of Labor 0.5 W C - P
7.5% HL = 7.5% Lt
22.5% Rt
10% Binaural

Recommendations:

PLAINTIFF'S
EXHIBIT



017 AUG 20 85

8-6-85

NAME (LAST, FIRST)

CALDWELL, William

AGE

43

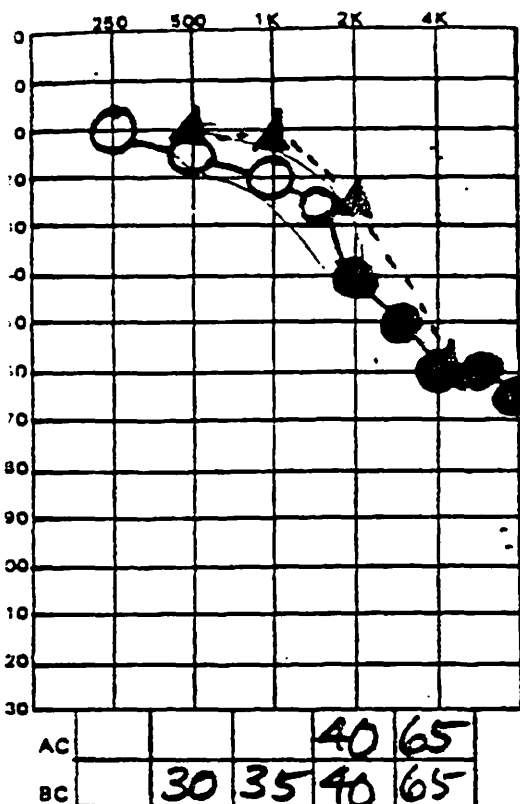
SEX

M

AUDIOLOGIST

W. Terry, MD

RIGHT EAR



WB NB masking dB

KEY TO SYMBOLS

Unmasked Masked
AC ○ ●
BC △ ▲
SAL ◇
Acoustic Reflex □ Uncrossed
..... ⊗ Crossed

SUMMARY

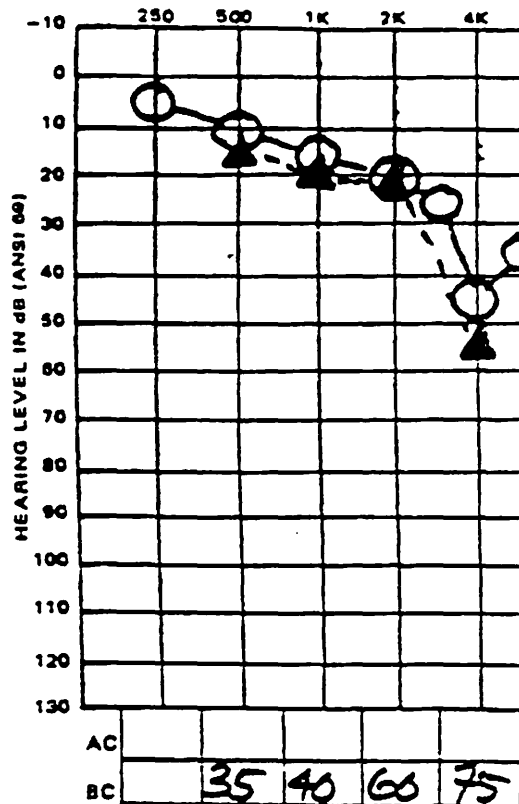
Right Ear

Left Ear

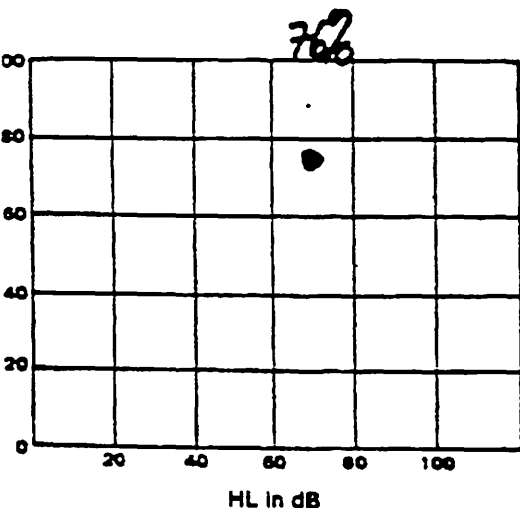
25 PTA 15
20 SRT 15
76% SSIM
76% PBM 80%
MCL
UCL

WEBER
OCCLUSION INDEX

LEFT EAR

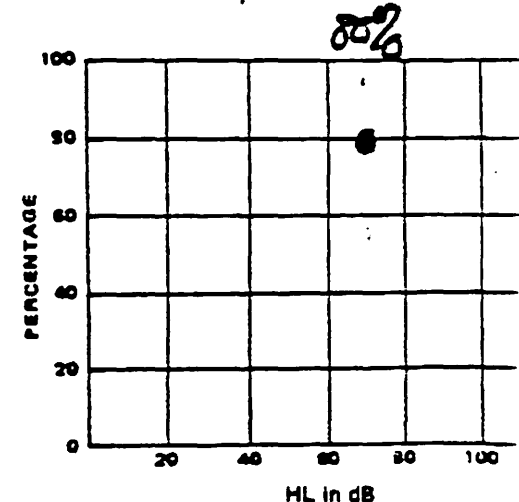
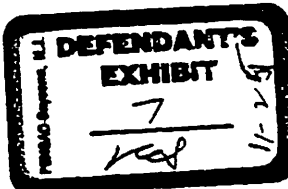


WB NB masking dB



KEY TO SYMBOLS

Unmasked Masked
SSI □ ■
PB ○ ●



mpanogram:

Tympanogram:

Trial Transcript, Volume I
John F. Dunlap - Direct

[123]

6 Q All right, sir. If you will, tell us how such
7 a test is conducted and explain the diagram to the jury as you
8 go along.

9 A Okay. I took the sound meter I showed you and
10 made measurements at several locations with the horn being
11 blown and without the horn being blown to get a background
12 level without the horn and then a level with the horn being
13 blown. I went a hundred feet from the locomotive on four
14 different directions the one, two, three, and four and took
15 readings. I took another reading at the base of the steps as
16 you go up to the locomotive, took another reading just outside
17 the door, outside the door as entering the cab, and took a
18 reading in the cab with the windows opened.

2 Q All right, sir. If you will, what were your
3 reading positions for number one?

4 A At position number one my reading was 105
5 decibels.

6 Q Position number two? And tell us where you
7 were then.

8 A Position number two, if I could see the
9 diagram.

10 Q What was the reading at position number two?
11 And where were you?

12 A Position number two was just off of the front
13 of the engine, a hundred feet off of the front of the engine.
14 And the reading was 109 decibels, D.B.A.

15 Q Okay. Let's move to measurements you might
16 have taken on the engine. Would you please tell us what your
17 position was and the measurement.

18 A At position number five, which was at the steps
19 to the base of the engine the reading was 115 D.B.A. At
20 position six, which is just outside the door of the cab the
21 reading was 136 D.B.A. And inside the cab with the windows
22 open the reading was 114 D.B.A.

23 Q All right, sir. If --

24 THE COURT: How long a blast did you
25 take for each one of those movements?

[125]

1 THE WITNESS: It varied, Your Honor,
2 depending on how long it took the meter to settle out
3 with noises. It didn't that take that long, three or
4 four seconds.

6 Q Mr. Dunlap, are you familiar with the term
7 OSHA?

8 A Yes, I am.

9 Q What do they stand for?

10 A Occupational and Safety and Health
11 Administration.

12 Q Are you aware whether or not that is a
13 government agency?

14 A Yes, it is.

15 Q Are you aware of whether or not they have
16 issued requirements concerning sound exposure?

17 A Yes, they have.

18 Q Are you familiar with these requirements?

19 A Yes, I am.

20 Q Are there standards of allowable noise within
21 the work place within these regulations?

22 A Yes, there are.

23 Q All right, sir. What is the permissible time
24 exposure at 136 D.B.A.'s per person?

25 A Less than one second.

1 Q Do you know which regulation specifies that?
2 A It's in the Code of Federal Regulations.
3 Q All right, sir. Do you have a copy of that
4 with you today?

[130]

5 THE COURT: But as far as you know
6 there are no regulations that say there is not a horn
7 that can blow that hard, just it can't blown at a
8 person?

9 THE WITNESS: As far as I know that's
10 correct.

7 Q Now, Mr. Dunlap, looking at Defendant's Exhibit
8 Two, position two, as I understand, was a hundred feet in
9 front of the engine?

10 A That's correct.

11 Q That would be in the direction of travel of the
12 engine?

13 A Yes.

14 Q Was that measured from the very front of the
15 engine or from the horn?

16 A That was measured from the rail on the front of
17 the engine.

18 Q How far back is the horn from that?

19 A I don't know exactly.

20 Q Number five was measured at the steps on the
21 front of the engine?

22 A That's correct.

23 Q Number six was immediately outside the door to
24 the cab?

25 A Yes.

1 Q And number seven was inside the cab with the
2 windows open; correct?

3 A That's correct.

4 Q Now, you said that you gave short blasts, three
5 to four seconds?

6 A That's an average, yes.

7 Q Did you ever give any blast as long as five or
8 ten seconds?

9 A I don't think so.

10 Q Now, you told Mr. Wilson you were familiar with
11 OSHA and certain regulations issued by OSHA; is that correct?

12 A Yes, sir.

13 Q And you said that the top continuous noise was
14 115 decibels; is that correct?

15 A That's correct.

16 Q Can you tell the jury exactly what section of
17 OSHA it is that provides that top continuous noise level?

18 A I don't have the exact regulation number, no.

19 Q Do you recall what title it's from in C.F.R.

20 A It's 40 C.F.R.

21 Q 40 C.F.R.?

22 A I believe so. That's correct.

23 Q Are you familiar with Title 49 C.F.R.

24 A Can you be a little more definitive?

25 Q Title 49 C.F.R. concerns transportation, in

1 particular Chapter Two of the Transportation Regulations?

13 Q First, if you will, direct your attention to
14 Section 229.29, Title 49, C.F.R. What is the title of that
15 section?

16 A Locomotive Cab Noise.

17 Q Now, Mr. Dunlap, are you familiar with that
18 section of C.F.R.

19 A Yes, sir.

20 Q And in fact wasn't it that section that you
21 testified to on your deposition on November 10, 1986?

22 A It was.

23 Q And isn't it -- in that section it's found to
24 have top continuous noise 115 D.B.A.

25 A Yes.

1 Q Can you tell the jury what section of that
2 section it is?

3 A It's Section A of 229.121.

4 Q Section A?

5 A Yes.

14 Q If I might direct you to the Section 229.121,
15 Section C.

16 A Yes.

17 Q Isn't that the Continuous Noise Section?

18 A Yes.

19 Q Would you read that for the jury.

20 A Exposure of continuous noise shall not exceed
21 115 D.B.A.

22 Q Now, would you go back to the subsection of
23 that section and read the entire section for the jury.

24 A After August 31, 1980 the permissible exposure
25 to continuous noise in a locomotive cab should not exceed

1 eight hours of time at 90 D.B.A.

2 Q Now, what does the table say about railroads at
3 115 decibels?

4 A A quarter of an hour or less.

5 Q That's fifteen minutes?

6 A Yes it is.

15 Q And your horn blasts were only three to four
16 seconds in duration; is that correct?

17 A Basically that's correct.

18 Q Were they has long as five to ten minutes?

19 A No.

20 Q Now, based upon your tests wasn't the noise
21 level inside the cab in compliance with this regulation
22 concerning locomotive cab noise?

23 A Yes, it was.

24 Q All right. Now, if I can direct your attention
25 to Section 229.129?

1 A Yes.

2 Q Do you have that section?

3 A I do.

4 Q What is the title of it?

5 A Audible Warning Devices.

6 Q Would you read for the jury Subsection A of
7 that section of the C.F.R.

8 A After August 31, 1980 each locomotive shall be
9 provided with an audible warning device that produces the
10 minimum sound level of 96 D.B.A. at one hundred feet forward
11 of the locomotive in its direction of travel. The device
12 shall be arranged so it will be convenient to the engineer's
13 normal position in the cab.

14 Q The audible warning devices on the engine
15 tested in compliance with that section of C.F.R.

16 A It met that minimum, yes.

17 Q In fact it exceeded the minimum; did it not?

18 A It did.

1 Q All right. If I might direct your attention
2 now to Section 210.3 and 210.2, would you read for the jury
3 Section 210.1 of the Code of Federal Regulations entitled 49?

4 A Scope part -- this part describes the minimum
5 compliance regulations to enforce the railroad noise emissions
6 to the standards established by the Environmental Protection
7 Agency in 40 C.F.R. in part 201.

8 Q Now, is that the form of the regulation that
9 you were referring to earlier in your testimony?

10 A Yes.

11 Q Okay. So the regulations under 210 and the
12 ones that you have just read are used to comply with the
13 earlier requirements; correct?

14 A They served to qualify the earlier
15 requirements.

16 Q They qualify them. Now, if you would look down
17 to Section 210.3. Please read for the jury Section A.

18 A Except as provided in paragraph B of this
19 section the provisions of the part apply to total sound
20 admitted by -- including the sound produced by refrigeration
21 and air conditioners and regarding the switch locomotive car,
22 culpable operations allowed and the test standards operated by
23 the common carriers as in 45 U.S.C. 42 as described the
24 conditions of the 40 C.F.R. part 201.

25 Q Now, what does Subsection B say? And I believe

1 it's subparagraph three of Subsection B.

2 A Would you like me just to read three?

3 Q Well read the --

4 A The provisions of this part do not apply to --
5 and then there are a number of exceptions.

6 Q Okay.

7 A Do you want number three that you are referring
8 to? Sound emitted by warning devices such as horns, whistles,
9 and bells when operated for the purpose of safety --

10 Q Would you agree with me that operating a horn
11 at the -- at the crossing where the railroad requires you to
12 blow that horn to warn pedestrians and motorists is operating
13 a horn for the purpose of safety?

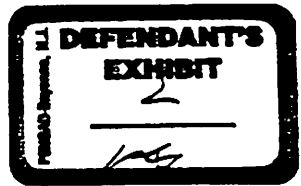
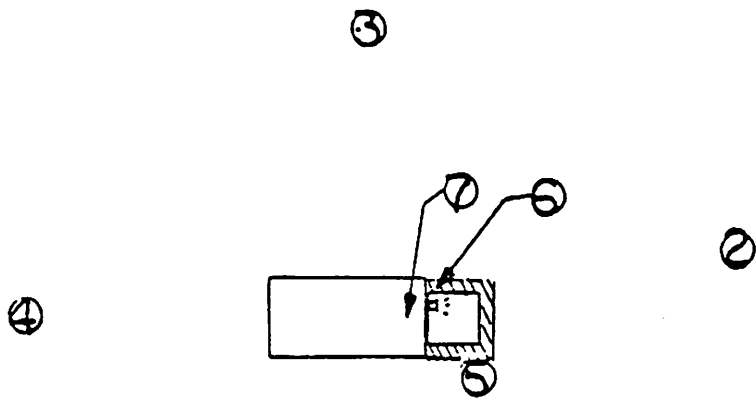
14 A I would have to answer that as a layman.

15 Q That's all I want, though.

16 A I would assume that it is.

17 Q All right.

- Position 1: As indicated.
- Position 2: As indicated.
- Position 3: As indicated.
- Position 4: As indicated.
- Position 5: At base of steps up to engine.
- Position 6: Just outside of engine cab door.
- Position 7: Inside cab w/ windows open.



NOT TO SCALE

2
D-2

Trial Transcript, Volume I
Marvin R. Deese - Direct

[153]

5	Q	Good day, sir. Would you please state your
6		name.
7	A	Marvin Reid Deese.
8	Q	Where do you reside?
9	A	Pardon?
10	Q	Where do you live?
11	A	Charlotte, North Carolina.
12	Q	And what's your occupation?
13	A	Yard conductor.

7 Q Mr. Deese, do you know this gentleman next to
8 me?
9 A Yes, sir.
10 Q Can you identify him, please.
11 A William Caldwell.
12 Q Was he working with you opening April the 4th,
13 1984?
14 A Yes, sir.
15 Q What job were you working on that day?
16 A Conductor.
17 Q What job was he working?
18 A He was the engine man.
19 Q Do you recall what duties you had when you went
20 to work that day?
21 A Regular yard duties.

16 Q Mr. Mooney, would you state your name, please.
17 A William Murphy Mooney.
18 Q And your address.
19 A Charlotte, North Carolina, 1924 Bennett Place.
20 Q And how long have you resided there?
21 A About 16 years.

21 Q And were you operating a yard engine on
22 April 4, 1984?
23 A I was operating a yard engine yes, sir.

[179]

5 Q How long did you blow the horn the first time
6 you blew it while Mr. Mooney was sitting in the seat on the
7 other side of the cab?

8 A How long was the first blast? Several seconds.
9 I don't know, just several seconds, three to four seconds I
10 think.

11 Q Around how long a blast was it when you blew it
12 and observed Mr. Mooney out on the side board?

13 A Now, Mr. Caldwell was.

14 Q Mr. Caldwell I'm sorry?

15 A I had started the second blow. And I saw
16 Mr. Caldwell standing on the running board. And I stopped
17 blowing the whistle. And I don't know, it wasn't but a second
18 or a second and-a-half or two seconds.

Certain Incidents of Trial

[204]

20 MR. WILSON: Your Honor, I didn't think
21 there was testimony yesterday that the fringe benefits
22 claim started in 1986. All he claimed yesterday was
23 lost wages.

24 THE COURT: He came and the told what
25 the fringe benefits were. Can't we stipulate that all

JAIME & ASSOCIATES

VIRGINIA BEACH, VIRGINIA

1 the fringe benefits up until to date have been
2 available to him at this time the medical bills have
3 been paid or would be paid if they have been
4 presented.

5 MR. WILSON: Yes, sir. Our only was
6 fringe benefits starting in 1987.

7 THE COURT: He claimed he -- I asked
8 him myself, if I recall, if that amount included his
9 fringe benefits. He said no they did not, that his
10 lost to date was thirty some thousand dollars plus his
11 fringe benefits. And you introduced into evidence
12 that his fringe benefits was some nine thousand
13 dollars or something of that nature.

14 MR. WILSON: All right, sir.

15 THE COURT: So the implication would be
16 that he lost thirty some thousand plus nine thousand
17 in benefits.

18 MR. WILSON: He did not, Your Honor.

19 THE COURT: It would be stipulated that
20 no fringe benefits up until today have not been lost?

21 MR. PRINCE: That's correct, Your
22 Honor. I have nothing else.

Trial Transcript, Volume II
Mitchell K. Schwaber - Direct

[206]

12 Q Dr. Swaber, would you state your name, please.
13 A Yes. It's Mitchell Keith Swaber.
14 Q And where do you reside?
15 A In Nashville, Tennessee.
16 Q Do you have a profession?
17 A Yes, I do.
18 Q What is it?
19 A I'm a physician. I practice otology and
20 neurotology.
21 Q All right. Would you explain to the jury what
22 otology and neurotology are?
23 A Otology and neurotology is the specialty that
24 deals specifically with diseases of the ear. Not only the
25 external part of the ear but also the inner ear including

JAIME & ASSOCIATES

VIRGINIA BEACH, VIRGINIA

1 hearing and balance disorders.

20 Q All right. Dr. Swaber, have you had occasion
21 to review records provided by me with regard to William
22 Caldwell, the plaintiff?

23 A Yes, I have.

24 Q Would you tell the jury exactly what records
25 you have reviewed?

JAIME & ASSOCIATES

VIRGINIA BEACH, VIRGINIA

1 A I have reviewed not only my own records, but
2 also the records of Dr. Coconus from the Nile Clinic, the
3 records from Dr. Trever Goldberg from Charlotte, North
4 Carolina.

8 THE WITNESS: In addition, I reviewed
9 Mr. Butts's records from the Virginia Commonwealth
10 University. In addition to the depositions from
11 Mr. Butts and Dr. Goldberg.

14 Q Now, including witness those records were test
15 records that included audiograms and other audiometric tests
16 performed by those various people?

17 A That's correct.

18 Q Did you have occasion to examine the plaintiff,
19 William Caldwell, yourself?

20 A Yes, I did.

21 Q Would you tell the jury when that occurred?

22 A I examined Mr. Caldwell in August -- correction
23 I'm sorry -- on July 30th, 1985 was my initial evaluation of
24 Mr. Caldwell.

25 Q And where did that evaluation occur?

1 A That evaluation occurred in Jacksonville,
2 Florida.

3 Q Was that evaluation done at Mr. Caldwell's
4 request or otherwise?

5 A No. That was done at the request of Dr. Meade,
6 who was the physician at the Seaboard Railroad.

7 Q All right. Would you tell the jury what
8 occurred when you examined Mr. Caldwell on July 30, 1985?

9 A Right. On July 30th, 1985 our examination on
10 Mr. Caldwell was terminated because of invalid and
11 non-reproducible results on the audiogram. We terminated the
12 test.

13 Q All right. Did you see Mr. Caldwell again?

14 A Yes, we did. Mr. Caldwell came back again on
15 August 6th, 1985, one week later, at which time he did give us
16 a valid hearing test and evaluation.

17 Q All right. All right. And what did that test
18 disclose, doctor?

25 A I performed a history and physical examination

JAIME & ASSOCIATES

VIRGINIA BEACH, VIRGINIA

1 as well as a hearing test.

2 Q And the hearing test was that just one test or
3 a series of tests?

4 A That's actually several parts to the hearing
5 test including not only the sensitivity test but also a speech
6 understanding test.

7 Q All right. With regard to the sensitivity can
8 you tell the jury is that just an audiogram?

9 A That's correct.

10 Q All right. And what did that disclose?

11 A That test was done on August 6th, 1985 revealed
12 in the left ear normal hearing up to about three thousand
13 hertz. Above that level he had a moderate degree of hearing
14 loss in the higher tones. On the right ear Mr. Caldwell had
15 normal hearing up to fifteen hundred hertz with again a
16 moderate degree of hearing loss in the higher tones above
17 fifteen hundred hertz. We did several other tests to be sure
18 of the validity. We have what we call a cross check
19 principle. It means we do several tests to make sure. And we
20 found it was accurate.

21 Q All right. Dr. Swaber, can you describe to the
22 jury what those other cross check tests were and how they
23 confirmed the accuracy?

24 A We did a test call an S. R. T. or a Speech
25 Reception Threshold. And what we do -- and we let the patient

1 listen to voice track and determine how well he hears that
2 voice track. It should correlate within about seven decibels
3 with the sensitivity level, and Mr. Caldwell did.

4 Q Okay. Any other tests?

5 A We also performed what's called a
6 discrimination or speech understanding test. This test is
7 done first by calculating what the speech reception threshold
8 was or the pure tone adding forty decibels to it and
9 determining how well he understood. Mr. Caldwell demonstrated
10 in the right ear he understood 76 percent of the words. And
11 in the left ear he understood 80 percent of the words.

12 Q Dr. Swaber, based upon your -- no, let me ask
13 this question first. Did Mr. Caldwell give you any history?

14 A Yes, he did.

15 Q Of an injury?

16 A Yes, he did.

17 Q What of the injury?

18 A Specifically Mr. Caldwell related to me that in
19 April of 1984 he began noticing a hearing loss following a
20 sudden high pitch noise from a horn.

21 Q All right. Did he give you any other history
22 after that?

23 A He noted that after that episode his hearing
24 came back to what he felt was normal. But several subsequent
25 episodes caused the same phenomenon, caused the hearing to get

1 worse but then come back up.

2 Q Based upon your history -- the history that
3 Mr. Caldwell gave you, your examination of Mr. Caldwell, and
4 the testing that you performed on Mr. Caldwell do you have an
5 opinion with a reasonable degree of medical certainty as to
6 whether Mr. Caldwell's hearing problem was a noise induced
7 hearing loss?

8 A Yes, it was. I think that there is very little
9 doubt that Mr. Caldwell has a noise induced hearing loss.

[215]

18 Q Did Mr. Caldwell complain to you or give you
19 any history of a balance problem when you examined him in
20 August of 1985?

21 A He did not.

22 Q Now, Dr. Swaber, do you have your hearing test
23 results with you?

24 A Yes, I do.

25 MR. WEBSTER: Your Honor, I would like

JAIME & ASSOCIATES

VIRGINIA BEACH, VIRGINIA

14 Q Can you explain exactly what an audiologist is
15 and compare it with the work you do?

16 A An audiologist is a person who primarily
17 performs hearing tests or audiograms in order to evaluate the
18 severity of a hearing loss, in other words to determine how
19 much disfunction a person has, and exactly where the
20 disfunction is, is it in the ear, is it in the brain, the
21 brain part of the hearing function, or is it in the external
22 part of the ear? So the audiologist is certainly trained to
23 do that part of the evaluation. They also are trained to fit
24 hearing aids and provide amplification.

25 Q And how does that compare to your profession?

JAIME & ASSOCIATES VIRGINIA BEACH, VIRGINIA

1 A I am a physician. I am an M. D. I not only
2 examine the patient, take a history, but I also evaluate the
3 balance system, hearing part of the system, external middle
4 ear. In addition to that I arrive at the diagnosis of the
5 cause of the hearing loss. I take all the test data and make
6 a decision about what caused the problem. I also prescribe
7 medicines, which audiologists do not. And I also operate. I
8 do surgery for the hearing loss, balance disorder, brain nerve
9 problems.

10 THE COURT: Do you use the same tests
11 in each of these instance?

12 THE WITNESS: Absolutely.

13 THE COURT: You use the same. All
14 right, sir.

15
16 BY MR. WEBSTER:

17 Q Dr. Butts -- Dr. Swaber, I want to show you
18 what I think has already been marked as an exhibit. I want to
19 show you what's been marked as Plaintiff's Exhibit Seven and
20 ask you if you can identify that?

21 A Do you mean have I seen it before?

22 Q Have you seen it before?

23 A Yes, I have.

24 Q And do you recognize that as Mr. Butts
25 audiometric testing results?

[219]

1 A Yes, I do.

2 Q All right. Looking at Mr. Butts's audiometric
3 testing results and first at the audiogram, how does that
4 compare with your audiogram on Mr. Caldwell?

5 A They are very very similar.

[221]

24 Q Dr. Swaber, referring to your own results, if I
25 may, are you familiar with certain standards for determining

JAIME & ASSOCIATES

VIRGINIA BEACH, VIRGINIA

[222]

1 total hearing impairment?

2 A Yes.

3 Q Can you describe briefly to the jury what those
4 standards are?

5 A Yes.

6 Q There is a formula for determining the total
7 percent hearing impairment that an individual has. It is a
8 formula that has been adopted by the American Medical
9 Association, the American Academy of Otolaryngology, the Long
10 Shoreman Union, as well as the Department of Labor. I might
11 add that these calculations do not reflect that formula.

2 Q Dr. Swaber, you have testified that there is a
3 Department of Labor Standard for determining hearing
4 impairment. Now, would you explain to the jury how that
5 formula works?

6 A The way the formula works is we first of all
7 add up the amount of hearing loss or the decibel level for the
8 frequency five hundred hertz, one thousand hertz, two thousand
9 hertz, and three thousand hertz, four numbers. We simply take
10 the number that the patient responded to right off the
11 audiogram, right off the hearing test, and add those four
12 numbers together, divide it by four. And that gives us a
13 number. We then subtract twenty-five, which is called the
14 fence established by the government. You subtract twenty-five
15 from that number that we have just added up averaged. Because
16 less than twenty five is normal. After subtracting the
17 twenty-five we then multiply that number by 1.5. And that
18 gives us a percent of hearing loss for one ear. Now, we have
19 done the calculations for both the right and left ear. And I
20 have actually done it for every audiogram in the record. For
21 the left ear the number comes out to be zero in every
22 audiogram in the record. For the right ear the number comes
23 out to be 11.25 percent. Now, we then establish how much
24 hearing loss we have for each ear. The remainder of the
25 formula is you take the better ear multiply it by five. So

1 it's five times zero, add the worse ear, which is 11.25, and
2 divide the entire number by six. When we do that we come out
3 with a total hearing impairment for Mr. Caldwell of 1.87
4 percent, meaning that in every -- and I did this on every
5 audiogram in the entire record. And the total hearing
6 impairment of every audiogram in the entire record is less
7 than two percent for every one.

2 Q Dr. Swaber, the formula that you just explained
3 to the jury is one that is propounded by the Department of
4 Labor?

5 A (Witness nodded head.)

6 Q You'll have to answer.

7 A Yes.

8 Q And that is a standard formula approved by
9 those four organizations?

24 Q Do you have an opinion with a reasonable degree
25 of medical certainty as to the amount or degree of

1 Mr. Caldwell's hearing impairment based upon your examination
2 of Mr. Caldwell in 1985?

3 A Yes.

4 Q What is that?

5 A It is less than two percent.

6 Q Now, you have testified that you have reviewed
7 the test results of Mr. Butts, which has been identified as
8 Plaintiff's Exhibit Seven; correct?

9 A That's correct.

10 Q Did you perform the same calculations based on
11 those test results, based on Mr. Butts test results?

12 THE COURT: He said all of them.

13 THE WITNESS: In the entire record.

14
15 BY MR. WEBSTER:

16 Q And your findings are the same with regard to
17 the findings of Mr. Butts?

18 A That's correct.

19 Q Doctor, can you describe to the jury where
20 Mr. Caldwell's two percent or less than two percent hearing
21 falls within the range of normal human experience?

22 A Well, for men forty-five years old I would say
23 that Mr. Caldwell hears better than forty percent of the
24 people his age.

[230]

2 Q Dr. Swaber, based upon the history obtained
3 from Mr. Caldwell, your examination of Mr. Caldwell, and your
4 review of the test records by Mr. Butts do you have an opinion
5 as to whether the noise induced hearing loss which you have
6 previously testified to as to whether or not that noise
7 induced hearing loss is related to a balance problem that Mr.
8 Caldwell seems to complain about?

9 A It is my opinion that the noise induced hearing
10 loss is probably with greater than fifty percent probability
11 it is not related to the noise balance problem and is not
12 related to the noise.

[231]

5 Q Based upon your experience in otology and
6 neurotology do you have an opinion as to whether a balance
7 dysfunction can be caused by a noise induced hearing loss?

8 A It's current -- recently with the bulk of the
9 research that's been done we do not feel that balance
10 disorders arise out of noise induced hearing loss. We're
11 talking about a vast amount of medical research investigating
12 this question.

13 Q Can you explain to the jury the basis for that
14 opinion, particularly with regards to the function loss of the
15 cochlea and the semi-circular canals?

16 A Right. The noise, of course, causes damage to
17 the hearing organ, to the hearing part of the ear. But there
18 are certain protection mechanisms that protect the balance
19 part of the ear from being really damaged by noise. Other
20 things can cause damage to the balance inner ear problems like
21 virus and diseases. But noise is not one that can extend
22 itself into that part of the inner ear. Therefore it's really
23 very rare to see balance disorders associated with noise
24 induced hearing loss.

- 16 Q How long have you been a practicing otologist?
- 17 A Five years.
- 18 Q You have? Where have you practiced?
- 19 A In Jacksonville, Florida and now in Nashville,
- 20 Tennessee.
- 21 Q How long did you practice in Jacksonville?
- 22 A Four years.
- 23 Q Isn't that headquarters for Seaboard?
- 24 A That's right.
- 25 Q Do you know why he was flown from Charlotte,

JAIME & ASSOCIATES

VIRGINIA BEACH, VIRGINIA

1 North Carolina all the way to Jacksonville to see you?

2 A Yes, I do.

3 Q Why is that?

4 A He was flown down because there was a bit of
5 controversy as to whether one can have an inner ear that
6 shifts when it's exposed to noise, the so called tin ear. And
7 so this is a very rare entity, but does occur. So that's why
8 he wanted another opinion to be sure about it.

17 Q When you did your test I believe your test back
18 in 1984, I think that you said that you checked his balance.
19 Tell us how you checked his balance would you, please.

20 A Yes. The first thing we do is we examine their
21 eyes nostagmous. Nostagmous is a jerking movement which
22 occurs when we look off into the distance to the left or to
23 the right. It is particularly noted when one has a balance
24 problem. In fact the balance test, the E. N. G. test, is
25 actually measuring nostagmous. When we had him look off to

JAIME & ASSOCIATES

VIRGINIA BEACH, VIRGINIA

1 the left and to the right there was no spontaneous nostagmous
2 noted.

3 Secondly, the second part of the balance test
4 is what is a modified Romberg Test. This is a test where we
5 have the patient hold his arms straight out in front, feet
6 together. Sometimes we do it sitting. Sometimes we do it
7 standing, close your eyes. And a person who has a balance
8 problem will drift his arms to the side of the problem. No
9 drift was noted. Third part of the test is what's known as
10 the dismetria exam. And that is really looking for the brain
11 part of the balance disfunction. And you may have seen people
12 do it. And the highway patrol does it. And when they do it
13 they are actually testing for the affects of the alcohol on
14 the balance system. And it involves touch the fingers to the
15 nose, like this. He had no problem with dismetria.

16 Lastly we did a test which is fine movements.
17 And you just do like this. If you have a brain problem you
18 can't do that very well.

19 Q Isn't it true --

20 A Okay. Those things -- those are excellent
21 screening tests for balance problems. And we didn't find any.

22 Q Isn't it true that there are much more
23 significant tests like hooking him up to a machine and testing
24 for the --

25 A Yeah.

1 Q Did you do that?

2 A No. We did not.

3 Q Isn't it true that there are tests where they
4 fill small ballons or things that appear to be the ballons and
5 put them in his ear and fill them with water?

6 A Right.

7 Q Did you review any tests of Dr. Butts
8 concerning his balance?

9 A Yes, I did.

10 Q Were those test findings normal or abnormal?

11 A They were abnormal. And I think I should be
12 able to add here that it was pretty surprising that you would
13 present them. Because they don't correlate for the noise
14 induced hearing loss. They would suggest another problem.

[241]

9 Q I want to show you the document and ask if you
10 can identify it?

11 A That's mine.

12 Q Does it have the word unsteady?

13 A Yes.

14 Q Isn't there a plus mark beside unsteady.

15 A Unsteady means that he had some light
16 headedness.

17 Q You just said he didn't have that earlier. Did
18 he have it or --

19 A He doesn't have vertigo.

5 Q Can you describe to the jury the difference of
6 light headedness and vertigo?

7 A Yes, I can.

8 Q What is it?

9 A As I noted in my examination when I tested him
10 for vertigo, which is signs of the room spinning around. When
11 a patient tells me that they have unsteadiness that may mean
12 that they have a tendency to blackout, that they feel that
13 their blood pressure is too low, they may feel like they are
14 going to stumble, they have queasiness and maybe are
15 nauseated. It doesn't necessarily mean that they have
16 vertigo, which is the key issue.

17 Q And were the preliminary threshold tests that
18 you performed for nostagmous, and the modified Romberg test,
19 and the dismetria exam what was the purpose of those tests
20 with regard to Mr. Caldwell's complaint of light headedness?

21 A Right. The purpose is to see if he has a
22 significant inner ear problem with the balance canals.

23 Q And did you reach a conclusion based upon that?

24 A I did not find one.

25 Q You referred in your testimony to Mr. Wilson

1 about -- or Mr. Wilson referred to an E. N. G.

2 A Right.

3 Q Can you describe to the jury what that test is?

4 A Sure. An E. N. G. is a formal balance test. A
5 rather crude one, but a formal balance test. It involves
6 pasted electrodes over the eye to actually measure these eye
7 jerking movements. Now, what we do is we first of all have a
8 patient go through a series of different tests measuring these
9 eye jerking movements. We have them look at lights. We are
10 have them go through various head positions. And we put a
11 ballon with warm and cold water in the ear to stimulate the
12 balance canal. That's how we do a test.

13 Q Now, did you perform an E. N. G. test on
14 Mr. Caldwell?

15 A No, I did not.

16 Q Is there a reason why you did not?

17 A Specifically we didn't have any indication to.

18 Q All right.

19 A He didn't have a history of vertigo at that
20 time.

21 Q You testified to Mr. Wilson that Mr. Butts's
22 test does not correlate with a noise induced hearing loss, but
23 another problem. Can you explain that to the jury?

24 A Yes, I will.

4 THE WITNESS: The balance test that Mr.
5 Caldwell had two findings. One found that both ears
6 had a decrease in balance function, and also found
7 that with pressure on the ear that some eye movements
8 were discovered.

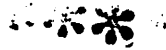
9 Now, it should be noted that balance
10 tests can be different day-to-day. I mean I bring the
11 patient in one day and do the test and bring him in
12 the next day you will get very often a different
13 result. But given this one isolated test -- it's hard
14 to base anything on one test. I would say that
15 certainly does and go along with noise induced hearing
16 loss.

21 Q Dr. Swaber, how valid is an E. N. G. test?

22 A Well, an E. N. G. test is very good when it
23 confirms what you are asking it. But among tests for validity
24 it's pretty low. It has less than a sixty percent test/retest
25 reliability. Meaning only about a sixty percent probability

[245]

1 that you can get the same test results taken on two different
2 days.



[257]

Certain Incidents of Trial

24 MR. PRINCE: Is there any evidence to
25 it?

JAIME & ASSOCIATES VIRGINIA BEACH, VIRGINIA

1 THE COURT: What evidence have you
2 shown of any loss of earnings in the future?

3 MR. WILSON: We showed that he was
4 making \$28,000 a year on the railroad. And the jury
5 has a right to draw a reasonable inference as to what
6 loss he is expected to sustain in the future.

7 THE COURT: What do you have to say
8 about that?

9 MR. PRINCE: Well, you had ruled
10 earlier that the plaintiff needed to present some
11 evidence.

12 THE COURT: That was in regards to
13 allowing him to show -- to show -- that was in regards
14 to allowing him to show a lifetime loss.

15 MR. PRINCE: Other than that I have no
16 objection to it.

17 THE COURT: All right, sir. Granted
18 number 1.

19 THE COURT: You understand, Mr. Prince,
20 that what I said is that I would not allow them to
21 show how much he lost from the railroad job without a
22 corresponding showing of what his possible earnings
23 could be. I think that's all I have ruled on.

24 Do you have any other objection to it?

25 MR. PRINCE: No, Your Honor.

[272]

16 THE COURT: I'll grant this one. But
17 grant this one because in the damage instruction you
18 put in "What he could lose in the future". Mr. Prince
19 did not object to that. But he is certainly entitled
20 to this instruction, "That if you believe that he
21 could earn money in the future that you should
22 discount that." That will be 23. All right.

23 MR. WILSON: Your Honor, there is no
24 evidence to this.

25 THE COURT: The law.

JAIME & ASSOCIATES

VIRGINIA BEACH, VIRGINIA

1 MR. WILSON: I understand it's the law.

2 But you have to have some evidence to back up the law.

3 The evidence is my man can recover for wages lost in
4 the future.

5 THE COURT: I didn't refuse to let you
6 put on any evidence. I didn't refuse to let you put
7 on any evidence. I just said that you could not put
8 on evidence of total loss, which would amount to total
9 disabilities when there was no evidence of total
10 disabilities. If you want to have his total loss of
11 earnings you would have to show that against what his
12 total loss of earnings would be.

13 But I have given you an instruction
14 that -- which is close, that allows you to say he can
15 recover for any earnings he will have, any loss of
16 earnings in the future. You have got that
17 instruction. And not to give this one that is tax
18 free income. And therefore, they are entitled to know
19 that. I'll grant it, 24.

20 Besides that there was no proffer made
21 of any lost income, future lost income as far as the
22 point that I turned down. There was no proffer made.
23 And there is nothing in the evidence the Court can
24 consider.

25 All right. I am going to give this.

[276]

3 For instance, you can't get up there and say that he's
4 going to lose his entire railroad salary for the rest
5 of his life. Because there is no evidence to that
6 affect. But anything that's in the evidence you can.

[278]

11 The Court instructs the jury that from
12 a preponderance of the evidence and the other
13 instructions of the Court you find your verdict in
14 favor of the plaintiff, then in assessing the damages
15 to which he is entitled you may take into
16 consideration any of the following which you believe
17 from the evidence to have been caused in whole or in
18 part from the accident of April the 4th, 1984: One,
19 any lost earnings in the past; Two, any lost earnings
20 or lessening or earning capacity you may reasonably
21 expect to sustain in the future; Three, any physical
22 pain and the mental anguish he suffered in the past
23 and any which may reasonably be expected to be
24 suffered by him in the future; Four, any affect of any
25 such injury upon his health according to degree and

1 probable duration; Five, any inconvenience or the
2 discomfort caused in the past and any which he may
3 reasonably be expected to sustain in the future; Six,
4 any doctors and medical expenses he may reasonably be
5 expected to incur in the future. And your verdict



10 The plaintiff has the duty to mitigate
11 or lessen his damages. Therefore, if you find your
12 verdict for the plaintiff you shall not include any
13 amount for the past or future lost wages which you
14 believe from a preponderance of the evidence he could
15 have earned in the past or will be able to earn in the
16 future.

17 If you return your verdict for the
18 plaintiff then in determining the amount of the lost
19 earnings in the past and also in the future you must
20 consider the matter of the federal and state income
21 taxes. Plaintiff's losses would only be his earnings
22 less federal and state incomes taxes and other
23 expenses he would not have as a railway employee.
24 Therefore, you should deduct from the the amount of
25 such taxes and other expenses -- therefore, you should

JAIME & ASSOCIATES

VIRGINIA BEACH, VIRGINIA

1 deduct the amount of such taxes and other expenses
2 from the gross loss of earnings and include only the
3 net loss in your verdict. Furthermore, the amount of
4 your verdict in favor of the plaintiff will not be
5 subject to federal or state income taxes. So you
6 should not consider any such taxes in determining the
7 amount of your verdict.

5 A. My name is Trevor Ian Goldberg. My office is at 1600
6 East Third Street in Charlotte 28204.

7 Q. What is your profession?

8 A. I'm a medical physician and I am a specialist in otolaryn-
9 gology.

20 A. I have been practicing in the specialty of otolaryngology
21 from July of '81 to the present time.

1 Q. Are you affiliated with any hospital?

2 A. I'm affiliated with four hospitals in Charlotte, namely
3 the Humana Specialty Hospital, Charlotte Presbyterian Hospital,
4 Mercy Hospital and Charlotte Memorial Hospital and associated
5 hospitals.

6 Q. Are you licensed to practice medicine in the State of
7 North Carolina?

8 A. I am.

9 Q. Would you please tell us what your specialty concerns?

10 A. I am a otolaryngologist which specializes in diseases of
11 the head, neck excluding basically the eye and the brain.
12 That includes ears, eye, throat, nose and related structures.

13 Q. Are you what is referred to as an ENT; ear, nose and
14 throat physician?

15 A. Yes, I am.

[5]

2 A. I have examined Mr. Caldwell on a number of occasions.

3 Q. What was the first date you examined him?

4 A. I first examined Mr. Caldwell on July 3rd, 1984.

5 Q. Do you recall where this examination took place?

6 A. It took place in my office.

7 Q. Were any tests conducted at that time?

8 A. A hearing test was obtained at that time.

9 Q. Was that test conducted at your direction?

10 A. Yes.

11 Q. Were any test results or writings generated from that test
12 or examination?

13 A. Yes. A test result is obtained.

14 Q. Would you please tell us what the test results were at that
15 time?

16 A. I want to make sure I get to the original. Excuse me while
17 I page through. The hearing test demonstrated some hearing loss
18 at the higher frequencies with a slightly greater hearing loss
19 on the right side as compared to the left. The peak of hearing
20 loss was at 4,000 hertz or cycles per second in both ears. And
21 his ability to understand speech, the discrimination, was
22 effected in the right ear at a level of 52%. The left ear was
23 normal at 96%.

24 Q. Doctor, is it usual and customary to conduct such tests to
25 assist you in making your examination and forming your medical

1 opinion?

2 A. In this particular instance, it is.

3 Q. Doctor, I would like to introduce that chart that you have
4 in front of you which showed results of the test as Plaintiff's
5 Exhibit 2. Can you identify this paper I have handed you as
6 being a copy of the original test results?

7 A. Yes, this is.

8 Q. I would like to introduce this as Plaintiff's Exhibit 2.

9 Doctor, on the first visit you saw Mr. Caldwell, did he
10 give you a history concerning his ear problem?

11 A. He described a noise injury to his ear at the work place in
12 April of that year stating that he heard this noise, a siren,
13 while exiting, a locomotive at his work place. This was
14 followed by ringing in his ear and severe headache, lasted for
15 about seven days and began to settle down about that time.

16 Q. Do you know whether or not he had seen any other medical
17 doctors previous to your examination?

18 A. I have on record that he had seen Dr. Kokonas sometime
19 prior to seeing me.

20 Q. Do you know who Dr. Kokonas is?

21 A. Dr. Kokonas is an ENT specialist in Charlotte.

[7]

6 Q. Doctor, based on the history given you by Mr. Caldwell and
7 your examination, do you have an opinion, with a reasonable
8 degree of otolaryngological certainty as to the cause of Mr.
9 Caldwell's hearing problem?

10 A. I believe that noise exposure has been the cause of Mr.
11 Caldwell's hearing loss.

12 Q. Based on the history, what noise exposure would you
13 attribute it to?

14 A. Based on his history of ringing and hearing loss following
15 an acute episode of noise exposure. I would attribute some of
16 his hearing loss to that episode.

17 Q. What degree would you attribute to that episode?

18 A. That is a question that I cannot answer absolutely because
19 I have no record of prior noise exposure but I would feel that
20 there is a high probability that a significant amount of hear-
21 ing loss resulted from this exposure.

22 Q. That is from the train whistle?

23 A. The train whistle.

24 Q. Is it correct that you are stating a significant amount?

25 It's your medical opinion that a significant amount of hearing

1 loss came from exposure to the train whistle?

2 A. Yes.

3 Q. Did you conduct any other examinations of Mr. Caldwell?

4 A. I have subsequently examined Mr. Caldwell on a number of
5 occasions.

6 Q. Would you please tell us of your findings on these
7 occasions dealing particularly with any changes that might have
8 occurred from your first examination.

9 A. My next visit with Mr. Caldwell was in January of 1985 wh
10 he related repeated exposure -- a repeat exposure to a very
11 loud noise caused by the train wheels on the train track, the
12 day before being seen and had been seen in the emergency room
13 with severe pain and given pain medication and saw me the next
14 day complaining of ringing in the ear and headaches.

15 Q. Would you please compare your findings at that time to your
16 findings on your initial examination?

17 A. I seem to be missing an audiogram. Let me look for it.
18 Okay. My findings at that time were a normal ENT examination
19 but the hearing test, once again, showed the high frequency
20 hearing loss with a discrimination in the right ear having
21 improved to 80%.

22 Q. So is it correct, Doctor, that there was some improvement
23 at that time in discrimination?

24 A. Mild improvement in discrimination.

25 Q. Was there any improvement in hearing ability or hearing

[9]

1 loss, whichever way you characterize it?

2 A. There was no improvement in pure tone testing at that time.

[13]

20 Q. Doctor, has Mr. Caldwell complained to you of any other
21 problems related to his ear damage?

22 A. He has complained of a popping sensation and discomfort in
23 the ears which I think are unrelated to the question of noise
24 induced hearing loss.

25 Q. Unrelated to?

[14]

1 A. Unrelated to noise induced.

24 Q. Do you have an opinion, with a reasonable degree of
25 otolaryngological certainty, as to whether or not Mr. Caldwell

1 | has a significant hearing loss?

5 | A. Mr. Caldwell does have a hearing loss in the high
6 | frequencies. When averaged down to speech frequencies, it's
7 | still within acceptable limits of normal, that is, being at or
8 | about 25 decibels. He still is able to understand communica-
9 | tion at normal levels but he does have a significant high
10 | frequency hearing loss which I think is suggestive of the
11 | etiology of his hearing loss.

11 Q. Do you know whether or not Mr. Caldwell has ever made any
12 complaints of being unsteady?

13 A. I don't believe Mr. Caldwell has ever complained of
14 problems of unsteadiness.

15 Q. Has he ever made any complaints to you concerning
16 equilibrium?

17 A. No.

18 Q. When was your last examination of Mr. Caldwell?

19 A. Last examination of Mr. Caldwell - on September 30th of
20 1986.

21 Q. Doctor, would you please compare what improvement there was
22 if any, from your first examination of him in 1985?

23 A. My last hearing test available to me showed there was some
24 mild improvement from his initial exposure from my initial
25 examination but he still had the high frequency hearing loss

1 in both ears, the right being slightly worse than the left.

2 Q. Could you tell us what percent of loss he has in each ear?

3 A. Based on a formula for hearing loss, I will have to figure
4 this out. I have to remember it.

5 Q. If you are able to.

6 A. Calculated on the formula for hearing loss based on OSHA
7 standards, he would not meet the criteria for more than one
8 and one-half percent of hearing loss on the right ear and no
9 hearing loss on the left ear. I will point out that this
10 formula is based on frequencies of 500, 1,000, 2,000 hertz
11 and excludes any hearing loss of less than 25 decibels.

2 Q. These hearing tests that you have described, I believe you
3 described one you did on July 3rd, 1984 and this last one on
4 September 30th, 1986. How are these tests conducted?

5 A Tests conducted in a booth and are done under audiological
6 control by a registered audiologist using an ANSI table of
7 1969.

8 Q. What does the test consist of?

9 A. It consists of presentation of pure tone noises to each
10 individual ear and a response by the patient as to his ability
11 to hear. A second part of the test involves presentation of
12 words to the patient to evaluate their ability to understand,
13 to discriminate speech.

22 A. No. They are conducted by our trained audiologist.

23 Q. Does this machine make some sort of reading or do they
24 just --

25 A. This is then charted down on the record.

1 Q. The audiologist makes the record?

2 A. The audiologist makes the record.

CHARLOTTE EYE, EAR, NOSE AND THROAT ASSOCIATES

1600 EAST THIRD STREET
CHARLOTTE, N. C. 28204

**PLAINTIFF'S
EXHIBIT**

T.G. Mr. Wm. Caldwell

DATE 7-3-84

2

SPEECH RECEPTION		DISCRIMINATION		LIV.	REC.
LEVEL	MASKING	LEVEL	MASKING	LEVEL	MASKING
A.B.	25dB	A.B.	52%	65dB	
A.S.	10dB	A.S.	96%	50dB	

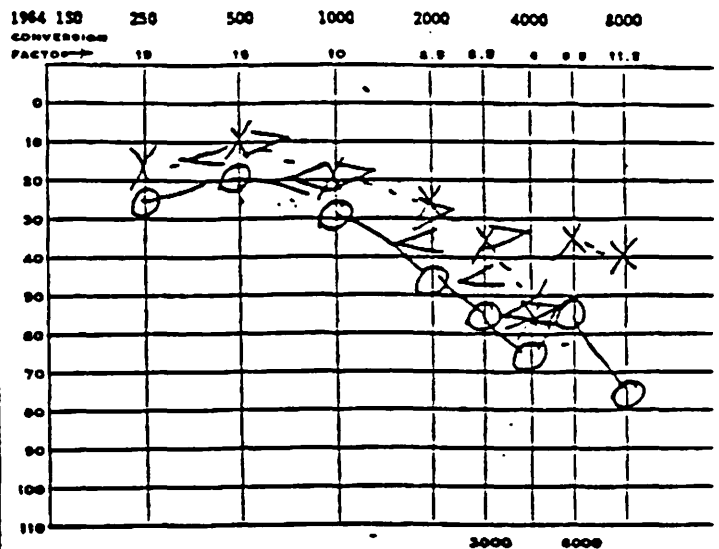
RELIABILITY: GOOD FAIR POOR

REMARKS:

Average loss:
H. 37.5 d.b.
Lt. 22.5 d.b.

audiometer Ma 18

TESTED BY: J.B.



RIGHT (AD) LEFT (AS)
RED BLUE

AIR

BONE

PLOTTED ON BASIS OF
1964 ISO
REFERENCE THRESHOLDS

MASKED
RIGHT (AD) LEFT (AS)
RED BLUE

AIR

BONE

NAME

DATE

4/4/84 phone report
BTS His Rm

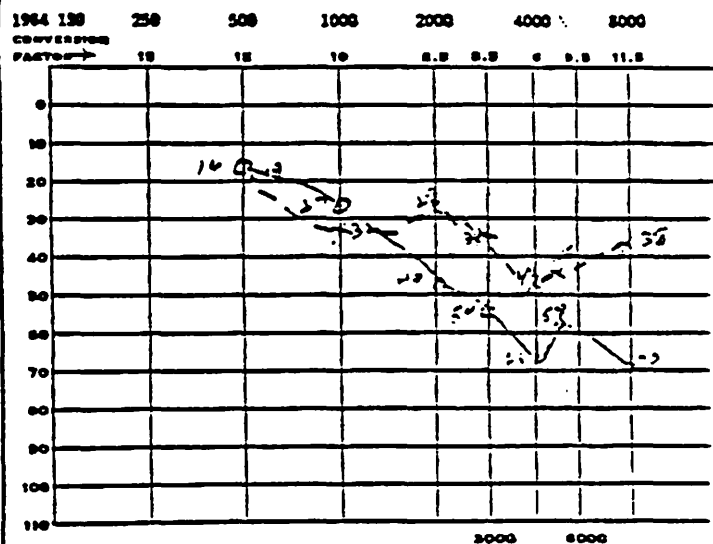
SPEECH RECEPTION		DISCRIMINATION		LIV.	REC.
LEVEL	MASKING	LEVEL	MASKING	LEVEL	MASKING
A.B.		A.B.			
A.S.		A.S.			

RELIABILITY: GOOD FAIR POOR

REMARKS:

audiometer

TESTED BY:



RIGHT (AD) LEFT (AS)
RED BLUE

AIR

BONE

PLOTTED ON BASIS OF
1964 ISO

MASKED
RIGHT (AD) LEFT (AS)
RED BLUE

AIR

BONE

16 A Frank McLaughlin Butts.
17 Q And what is your office address?
18 A My office address is 408 North 12th
19 Street, Richmond, Virginia.
20 Q And what is your profession?
21 A I'm an audiologist and Director of
22 Speech Pathology and Audiology at Medical College of
23 Virginia.

6 Q All right, sir. At my request, did you
7 examine a gentleman named William Caldwell?
8 A Yes, I did.
9 Q When did you conduct that examination?
10 A October -- yes, October 20 and October
11 22, 1986.
12 Q Where was that exam conducted?
13 A That was conducted at 408 North 12th
14 Street at the Audiology Center at the Medical College.
15 Q How many times did you see Mr. Caldwell
16 altogether?
17 A I saw Mr. Caldwell on three occasions,
18 those two and October 23 -- no, the 28, October 28.

21 The inner ear is an organ encased in
22 bone, and it's called the cochlea. The auditory portion
23 is called the cochlea, and the balance portion is called
24 the vestibular portion. So information from the
25 mechanical vibrations is transferred to the cochlea

AUDIO-VISUAL REPORTING SERVICES, INC.
700 East Main Street, Richmond, Virginia 23219 Ph. 804-644-2877

1 where they are turned into nerve impulses which then go
2 up the eighth cranial nerve or acoustic nerve into the
3 brain.

4 Q Is the inner ear actually connected to
5 the brain by this auditory nerve?

6 A Yes.

7 Q All right, sir. If you will, do you
8 have the results of your first examination of October
9 21?

10 A Yes, I do. I've got them here. All
11 right.

12 Q All right, sir. Would you please tell
13 us the results of your first examination of William
14 Caldwell, if you can?

15 A All right. The first examination of
16 Mr. Caldwell showed a bilateral hearing loss in the high
17 frequency or high-pitched region of sound sensitivity.

18 What you see here is an actual graphic
19 representation of that. And as we go from the left-hand
20 side of the graph over to the right-hand side, we are
21 testing higher and higher-pitched tones just as if we
22 were on a piano keyboard and going from low-pitched
23 notes to high-pitched notes.

24 As the symbols on the chart are placed
25 further and further down on the chart, that corresponds

1 to greater and greater sound levels that were required
2 for Mr. Caldwell to be able to hear the tones. And so
3 at five hundred cycles per second, Mr. Caldwell, in the
4 right ear, which is noted by the circle or red circle,
5 or the left ear, by the x, was able to hear that at a
6 sound level of ten decibels. Whereas, at three thousand
7 cycles, between two and four thousand cycles, his
8 ability in the left ear was forty-five decibels, the
9 amount of loss, and in the right ear was fifty-five
10 decibels.

11 So you have a hearing loss for the high
12 frequency region that generally averages in the fifty
13 decibel level range there; whereas, there is no
14 significant amount of hearing loss in the very low
15 frequencies.

16 Q Doctor, if you will, could you tell me
17 where you -- how you obtained the information to be able
18 to graph these figures on the chart?

19 A The person is placed in a sound-
20 controlled test booth so that no extraneous noises will
21 interfere with the testing, and they are asked to listen
22 very carefully for very soft sounds. Each sound, each
23 tone is tested a series of times, repeated several
24 times, in order to be able to determine the lowest level
25 at which the person can just barely hear that.

1 These sounds -- these tests are then
2 duplicated or replicated with other types of tests where
3 the patient actually controls the sound themselves.
4 This is another instance of a hearing test where the
5 person is controlling the volume himself and controlling
6 the softness or the loudness, and the two are compared
7 for any inconsistencies in that area.

8 Q All right, sir. Why would you compare
9 them for any inconsistencies?

10 A If there were any possibility that the
11 person were exaggerating the hearing loss or trying
12 somehow to not give their true organic thresholds, it
13 would be indicated by inconsistencies between these
14 results and these results on a particular test day, or
15 these results and others tests that were done by other
16 audiologists at other times.

17 Q Did you find any evidence of
18 exaggeration on the part of Mr. Caldwell in your
19 testing?

20 A No, there was no evidence of that.

21 Q I notice you have another chart in
22 front of you. Is that for the -- could you tell me why
23 you have two charts with blue and red markings on them?

24 A You have one for the right ear --

25 Q All right, sir.

1 A -- and then one for the left ear.

2 Q And do you check both of these to
3 determine whether or not there was any exaggeration on
4 the part of the patient being tested?

5 A That's correct.

6 Q Was there any exaggeration for the
7 other ear?

8 A No. If you'd like me to, I can
9 continue on with the examination here.

10 Q All right, sir. Let's move to the
11 other part of the exam.

12 A All right. This audiogram shows the
13 sensitivity for specific tones, but that does not
14 adequately describe the hearing ability of an
15 individual. And so you also test the person's ability
16 to understand speech, and you do that under two
17 different conditions.

18 The first condition is looking for a
19 threshold for speech where the person listens to very
20 familiar words. They're already aware of what the words
21 might be, and you simply raise and lower the sound level
22 until the person can just barely make out about half the
23 words. This information should correspond very
24 carefully, very closely to this information over here,
25 so this is yet another check for inconsistency.

1 Then, you want to know how well the
2 person can understand speech in a variety of typical
3 listening conditions, and that's what this SSI or
4 Synthetic Speech Index test is.

5 What you see here is that you are
6 looking for a very good score, a hundred percent being
7 an excellent discrimination score. This condition puts
8 the person in a situation where they are trying to hear
9 a sentence in the presence of another person talking at
10 the same time. And when the person in the background is
11 talking at a level which is about ten decibels below
12 normal conversational speech and the individual is
13 getting the sentences at normal conversational level --
14 Mr. Caldwell has no trouble with that.

15 However, when the background noise or
16 the competing message is the same loudness as the
17 conversational speech or, that is, there's a 0 db
18 difference between the two, Mr. Caldwell's
19 discrimination in his left ear drops to sixty percent
20 and drops to seventy percent in the right ear. Whereas,
21 people with normal hearing would not have any drop at
22 all at that particular level.

23 Then when you increase the sound level
24 mildly in the background where it's slightly louder than
25 what he's trying to hear, his discrimination drops to

1 ten percent in the left ear and twenty percent in the
2 right ear. Whereas, a person with normal hearing would
3 maintain at about seventy or eighty percent.

4 Q Could you give us a comparison as to
5 what's an everyday sound that we might be able to
6 associate with for the minus ten, the center figure, the
7 background noise?

8 A The minus ten level right here would be
9 typical of trying to function in a very reverberant
10 room, for example, if there was a place with a lot of
11 echoes, a place with hard floors and hard walls and
12 there were other people in the room talking -- a
13 clothing store, perhaps, a fast food store, a church or
14 a social situation like that where there was not a lot
15 of loud noise in the background but a moderate amount of
16 other things going on.

17 Q Explain to us, if you will, what
18 discrimination is. Use laymen's terms for the benefit
19 of the jury and myself.

20 A Discrimination is the ability to
21 understand what's being said. The two things that make
22 up hearing is sensitivity, the ability to hear things,
23 and discrimination ability, the ability to understand
24 what you have heard. In order to communicate
25 effectively, you have to do both.

1 Mr. Caldwell's sensitivity is mildly
2 impaired. Mr. Caldwell's discrimination ability is
3 moderately to severely impaired under certain
4 situations.

5 Q All right, sir. Did you have any other
6 test results that you need to discuss on that chart?

7 A Finally, down here at the bottom, there
8 is a test called an impedance measure. And this is
9 simply a test looking for pathology in the middle ear,
10 the area of the ear drum and the middle ear bones. Any
11 problems in this area would complicate other test
12 results and need to be ruled out.

13 These are normal, indicating no problem
14 in Mr. Caldwell's middle ear.

15 Q All right, sir. Any other test results
16 that you need to discuss on that chart?

17 A No.

18 Q Doctor, were the -- were testing
19 results conducted by an engineer, John Dunlap, made
20 available to you?

21 A Yes, they were.

22 Q Have you reviewed these testing
23 results?

24 A Yes, I have.

25 Q Are you familiar with the results

1 insofar as location six on that chart is shown?

2 A Yes.

3 Q And what is the reading on that chart
4 for location six?

5 A That's 136 decibels.

6 Q All right, sir. Based on the history
7 given to you and the materials available to you, do you
8 have an opinion with a reasonable degree of audiological
9 certainty as to whether or not the horn blast of April
10 4, 1984, was the cause of the ear injury to Mr.
11 Caldwell?

12 A Yes, I am certain of it.

13 Q All right, sir, did you conduct any
14 further exams of Mr. Caldwell?

15 A Yes, we did. On the final test date,
16 which was October 28, we also evaluated Mr. Caldwell's
17 balance mechanism, which you may recall is the other
18 part of the inner ear, conducted an ENG.

19 Q What did -- I'm sorry. I didn't mean
20 to cut in. When did you first conduct a balance test?

21 A According to my records here, it was
22 October 28.

23 Q All right, sir, did you conduct that
24 test yourself?

25 A Yes, I did.

1 Q All right. And tell us what the
2 results of that testing were.

3 A The results of that testing?

4 Q Yes, sir.

5 A The results of the testing showed two
6 problems. One was a reduced response from both balance
7 mechanisms and, in addition to that, an abnormality in
8 the left balance mechanism to changes in pressure in the
9 external auditory canal.

10 The general conclusion of that is
11 something -- abnormal function in the balance mechanism.

12 Q All right, sir. Based on your
13 audiological exams -- we've been discussing the reports
14 -- could you tell us as to whether or not there were any
15 particular problems that you found with Mr. Caldwell and
16 discuss those problems individually?

17 A All right. The audiological problems
18 of Mr. Caldwell fall into a few categories. The first
19 one is a loss of sensitivity, that is, a hearing loss,
20 specifically a hearing loss for high frequency sounds.

21 Now the problem with this kind of a
22 high frequency loss is that consonant sounds or certain
23 parts of speech are difficult or impossible for Mr.
24 Caldwell to hear. And so people at a distance, for
25 example, or people with soft voices, he's going to have

1 trouble understanding those people because the consonant
2 parts of what they say are not loud enough for him to
3 hear them clearly. There's an ambiguity or an
4 indecision on his part about what's being said, and
5 that's the sensitivity problem.

6 In addition to that, Mr. Caldwell has a
7 rather severe discrimination problem or a problem
8 understanding. And what that means is no matter how
9 loud you talk to Mr. Caldwell, when he has to hear in
10 the presence of background noise, he has a pretty
11 significant problem understanding what's being said.

12 Q All right, sir. Any other problems?

13 A In addition to that, he has a constant
14 ringing or tinnitus in his ears which he is aware of
15 when it's quiet, for example, when he goes to bed at
16 night and is trying to go to sleep. The ringing is
17 there if he's quiet, trying to read, at a quiet time,
18 something of that nature.

19 And then, finally, the balance
20 disfunction in the ears appear to be abnormal.

21 Q All right, sir. Are you familiar --

22 A Oh, there's also -- I'm sorry. There's
23 one other thing I forgot to mention. There's also a
24 phenomenon known as recruitment.

25 Q What is recruitment?

1 A Recruitment is an abnormal growth of
2 loudness or an adverse reaction to loud sounds. As I
3 mentioned, Mr. Caldwell has a sensitivity loss. That
4 is, he cannot hear soft sounds in the high frequency
5 range.

6 However, when you finally make it loud
7 enough for Mr. Caldwell to hear it, it to him is
8 subjectively louder than it is to you and I. And so
9 when someone has to listen to a loud sound, like Mr.
10 Caldwell with Mr. Caldwell's loss, they have to deal
11 with the fact that some things sound louder than they
12 ought to be. At the same time, they're distorted. It's
13 as if someone were actually yelling in your ear.

14 Q All right, sir. Do you have an
15 opinion, with a reasonable degree of audiological
16 certainty, as to whether or not these conditions that
17 you've just described are permanent?

18 A Yes.

19 Q What is that opinion?

20 A That they are permanent.

21 Q Is that as to each one?

22 A Yes.

23 Q Do you have an opinion with a
24 reasonable degree of medical certainty as to whether or
25 not further noise exposure will cause problems for Mr.

1 Caldwell?

2 A Any noise exposure that is extending
3 above allowable limits is likely to cause more damage.

4 Q All right, sir. Are you aware of Mr.
5 Caldwell's employment?

6 A Yes, I am.

7 Q What is that employment?

8 A He's a brakeman.

9 Q Is he a railroad employee?

10 A Yes.

11 Q Are you familiar with the work
12 environment of a railroad employee such as a brakeman?

13 A To some extent, yes.

14 Q How did you gain that knowledge?

15 A I discussed it with Mr. Caldwell when
16 we talked about his hearing. He described for me the
17 kinds of job duties that he had, what he had to do. I
18 have also evaluated other railroad employees for hearing
19 loss and had a chance to talk with them about theirs,
20 and you and I have talked somewhat about the duties of
21 railroad brakeman, a railroad employee.

22 Q Based on the history that you have,
23 your examination and the information available to you,
24 do you have an opinion, with a reasonable degree of
25 audiological certainty, as to whether or not Mr.

1 Caldwell is able to perform the duties of a railroad
2 employee?

3 A I do not have a certainty as to whether
4 he can or he cannot. I believe it is unlikely that he
5 is going to be able to perform them in a normal fashion.
6 Whether or not it's acceptable or not is simply not
7 revealed by this test data.

8 Q All right, sir. Doctor, if you will,
9 are you familiar with the term db(A)?

10 A Yes, I am.

11 Q Please tell us what a db(A) is.

12 A All right. In an effort to try to
13 characterize how loud sounds are, it's very hard to do
14 because sound is made up of a variety of high frequency
15 and low frequency sounds. So in order to put a single
16 number on it, what you do is you take a general level
17 reading with a sound level meter.

18 Now a db(A) reading is a reading of the
19 overall sound level and with the very low frequency
20 portions, low frequency sounds filtered out. So what
21 you're basically talking about is the amount of sound
22 that's present in the speech frequency ranges.

23 Q Is there any standard available that
24 sets a safe level of noise exposure?

25 A The Occupational Safety and Health Act.

1 Q And what is that standard for a safe
2 level of noise exposure?

3 A It is 90 dB on the A scale for eight
4 hours of continuous noise.

5 Q Is there any standard that sets what is
6 considered an unsafe level?

7 A The standard which constitutes a safe
8 level also, by definition, constitutes an unsafe level.

9 Q Anything above that would be an unsafe
10 level?

11 A That's correct.

12 Q Are you familiar with the term "damage
13 risk criteria"?

14 A Yes, I am.

15 Q Would you please explain that term to
16 us?

17 A Again, in an effort to understand and
18 estimate the potential risk of sound to an individual,
19 it is not simply a number like 90 dB. It's that amount
20 of sound for a period of time.

21 If you were to be exposed to a louder
22 sound, it may not damage your hearing, but you couldn't
23 take eight hours of it. And the damage risk criteria
24 simply figures out the amount of time that you could
25 safely stand in a certain amount of continuous noise.

1 Q Are you familiar with what the damage
2 risk criteria is for 115 db(A)'s?

3 A For 115, it's approximately fifteen
4 seconds.

5 Q Are you familiar with what the damage
6 risk criteria is for 136 db(A)'s?

7 A There is no amount of time that a
8 person can be exposed to 136 dB and not risk the almost
9 certain risk of permanent noise -- permanent hearing
10 loss.

11 Q Based on your experience and your
12 expertise, describe what happens to the ears when it's
13 exposed to 136 db(A)'s of sound.

14 A At 136 decibels, there are two things
15 that happen to the ear. The first thing is that the
16 activity in the ear that enables hearing -- this is
17 blood supply and metabolic functions in the ear which
18 provide nutrition to the microscopic hair cells in the
19 ear -- these metabolic functions and these blood supply
20 functions become fatigued. There is simply too much
21 demand. There's too much stimulation to allow the ear
22 to recover from this kind of sound and continue to
23 operate and, therefore, there is a saturation of
24 activity.

25 And the little microscopic hair cells

1 that are responsible for picking up the vibrations and
2 turning them into nerve impulses, they fatigue and they
3 just simply peak out. It's like riding a circuit --
4 turning the radio up in your car to a certain point
5 where it just simply all runs together and distorts and
6 blares off.

7 The second thing is there's physical
8 damage at 136 dB. The mechanical vibrations and the
9 vibrations in the inner ear are so severe that there's
10 actually a shearing off of the cilia or hair cells that
11 are in the cochlea, and there is actually damage to the
12 supporting microscopic cells, the supporting cells
13 around the actual organ of hearing.

14 These kinds of damages are permanent in
15 nature.

16 Q Based on your examination and your
17 findings, did this type of phenomena you just described
18 occur to Mr. Caldwell?

19 A Yes, it did.

20 Q Do you have an opinion as to whether or
21 not it's related to the horn trauma of 4/4/84?

22 A The type of loss that Mr. Caldwell
23 received and the kinds of patterns that we see here lead
24 us to believe that it was that 136 dB blast that caused
25 the loss, caused the damage.

1 Q Do you have an opinion, with a
2 reasonable degree of audiological certainty, as to
3 whether or not Mr. Caldwell will require hearing aids in
4 the future?

5 A It is likely that he will.

12 Q All right, sir. I think we need a
13 definitive answer from you as to whether or not you have
14 an opinion as to whether or not he will require, whether
15 or not there's a probability as opposed to a
16 possibility.

17 A I am certain that he will need hearing
18 aids.

19 Q All right, sir. Do you have any basis
20 for knowing the cost of hearing aids?

21 A Yes, I do.

22 Q What is that basis?

23 A I have been a hearing aid dealer and
24 fitter. I have dispensed hearing aids since 1973.

25 Q What is the approximate cost of a

7 Q All right, sir. What's the approximate
8 cost of a hearing aid?

9 A Five to seven hundred dollars per
10 hearing aid.

19 Q All right, sir. Based on your
20 examination, your findings and your experience in such
21 traumas as you described Mr. Caldwell underwent, do you
22 have an audiological opinion as to whether or not he
23 will need audiological examinations in the future?

24 A Yes, he will.

25 Q What is that opinion?

AUDIO-VISUAL REPORTING SERVICES, INC.
700 East Main Street, Richmond, Virginia 23219 Ph. 804-644-2877

1 A He will need yearly examinations.

2 Q All right, sir. And what is the cost
3 of such an examination?

4
5 MR. WEBSTER: Object to the form of the
6 question.

7 MR. WILSON: You can answer, Doctor.

8 THE WITNESS: \$40 to \$60.

9
10 Q All right, sir. On what do you base
11 that opinion?

12 A The opinion is based on fifteen years
13 of experience in dealing with people that have had
14 hearing loss as a result of trauma. The condition is
15 oftentimes not stable, increases. It tends to increase
16 at a fairly erratic rate and so has to be monitored
17 closely.

18 Also, any other problems that Mr.
19 Caldwell might have, problems which you and I wouldn't
20 have any trouble dealing with like congestion, middle
21 ear problems, labyrinthitis or infection of the inner
22 ear, other problems like that, could -- he could be more
23 susceptible to very severe damage and some very severe
24 complications from that, and therefore needs to be
25 checked on a regular basis.

1 Q Doctor, based on your experience and
2 your expertise, do you have an opinion as to a
3 reasonable degree of audiological certainty as to
4 whether or not the hearing problems you've described for
5 Mr. Caldwell will improve, remain constant or worsen in
6 the future?

7 A The majority of his problems here will
8 remain. Nothing will get better, and as he gets older,
9 his overall hearing ability will deteriorate.

10 Q Why is that?

11 A As we get older, after we get to the
12 fourth decade of life, forty years and older, we
13 generally have a decrease of our hearing, and the
14 hearing seems to get worse at a level of about 10 or 15
15 db per ten years for every decade of life past thirty-
16 nine.

17 If you take that kind of typical
18 hearing loss to expect in Mr. Caldwell's case, that is
19 added to what's already happened to him. For example,
20 he has a 50 decibel hearing loss at four thousand cycles
21 at the age of forty-four. At fifty-four, that's very
22 likely to be something in the area of 65 decibels, and
23 in the next decade at the age of sixty or sixty-four,
24 that's going to be down around 85 or 90 decibels. So
25 these losses will continue and will continue throughout.

1 Q Dr. Butts, are there any guidelines or
2 standards to measure a permanent impairment to hearing?

3 A The most accepted guidelines are the
4 Department of Labor's guidelines.

5 Q Are you familiar with those guidelines?

6 A Yes, I am.

7 Q Do you have an opinion with a
8 reasonable degree of medical certainty as to whether or
9 not Mr. Caldwell has permanent impairment of his
10 hearing?

11 A Yes, I have.

12 Q What is that opinion?

13 A The opinion is that he does have a
14 significant hearing loss bilaterally, using the
15 Department of Labor's own statistics for percent of
16 hearing impairment. He has a seven-and-a-half percent
17 loss in his left ear and a twenty-two-and-a-half percent
18 loss in his right ear.

19 Q Is that a permanent loss, Doctor?

20 A Yes, it is.

21
22 MR. WILSON: That's all the questions I
23 have. Answer Mr. Webster's questions, please.
24

25 ***

7 Q Did you review the hearing tests that
8 you received from Mr. Wilson?

9 A Yes, I did.

10 Q Did you compare them with the hearing
11 tests that you ran on Mr. Caldwell?

12 A Yes, I did.

13 Q All right. Referring first to the
14 audiogram, the audiogram is the graph that takes up the
15 largest portion of the page on your chart there, is that
16 correct?

17 A That's correct.

18 Q Did that audiogram compare -- how did
19 it compare to the audiograms you reviewed from previous
20 medical records furnished to you by Mr. Caldwell's
21 counsel?

22 A It was similar.

23 Q Similar meaning about the same?

24 A Yes.

25 Q All right. And those audiograms dated

BUTTS - Cross

[28]

1 back two years or more prior to your examination of Mr.
2 Caldwell, correct?

3 A Yes.

4 Q What about the remainder of your tests,
5 the speech reception threshold? Was that similar to the
6 ones you reviewed?

7 A I did not do the same type of speech
8 discrimination testing that Dr. Goldberg or the other
9 doctor did.

10 Q Was your testing consistent with what
11 they did?

12 A My testing is not inconsistent with the
13 kinds of results they got for what they did.

9 Q And you reviewed Mr. Dunlap's report on
10 his testing, correct?

11 A Yes, I did.

12 Q Referring to that report, if you would,
13 would you agree that location seven is inside the cab
14 with the windows open?

15 A Yes.

16 Q And the measurement of the horn at that
17 location was 114 decibels?

18 A That's correct.

19 Q Is that within the allowable parameters
20 under the OSHA regulations for noise inside an engine
21 cab?

22 A Not for any more than fifteen seconds.

23 Q All right. Do you have any knowledge
24 as to whether the horn is used for more than fifteen
25 seconds?

1 A Yes.

2 Q And what is that knowledge?

3 A That it is used for more than fifteen
4 seconds.

5 Q And where did you acquire that
6 knowledge?

7 A From Mr. Caldwell as well as other
8 cases, railroad cases.

9 Q All right. Mr. Caldwell -- did he tell
10 you the horn was blasted for more than fifteen seconds
11 constantly?

12 A No, he did not.

13 Q So the 115 db(A) is an allowable sound
14 for fifteen seconds at any given time, correct?

15 A Yes.

16 Q And that's inside the cab?

17 A Yes.

18 Q And the 90 db(A) is, again, an
19 allowable sound level over an eight-hour period inside
20 the cab of the engine, correct?

21 A No. 90 dB is the level at which you
22 have to provide ear protection to individuals, and you
23 have to test their hearing on a yearly basis.
24 Therefore, 90 dB is estimated to be a dangerous amount
25 of sound level for eight hours.

NAME: William L. Caldwell

AGE: 44

REFERRAL:

VIRGINIA COMMONWEALTH UNIVERSITY
Medical College of Virginia Hospitals
Richmond, Virginia 23298

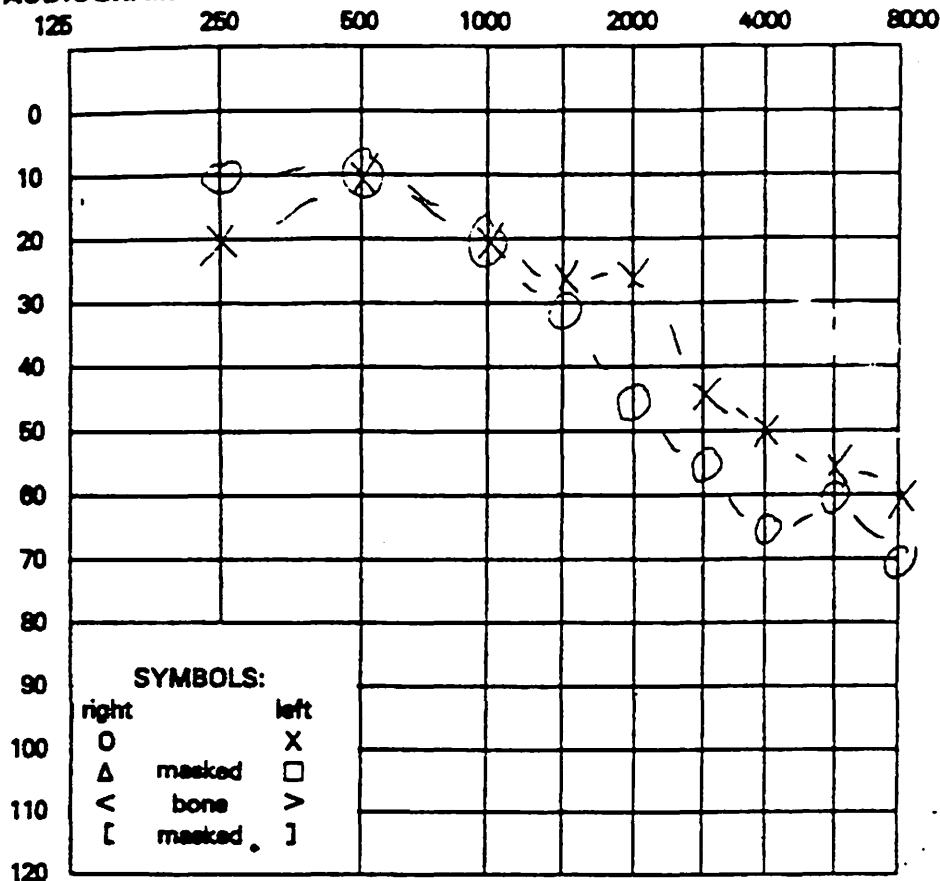
AUDIOLOGICAL EVALUATION

DATE: 10-20-76

AUDIOLOGIST: E. M. B. Jr.

Patient Identification (Patient Plate)

AUDIOGRAM



ANSI 1976
SPEECH

SPEECH RECEPTION THRESHOLD (SRT)	
Left	Right
20 dB	20 dB
SPEECH DISCRIMINATION	
Left	Right
%	%
HL	HL

Lt 551 Rt

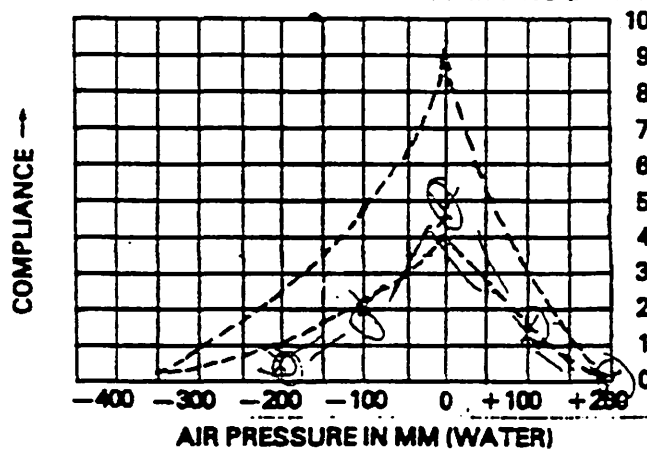
100% +10 100%

60% 0 70%

10% -10 20%

0% -20 0%

IMPEDANCE MEASURES - TYMPANOGRAM



STATIC COMPLIANCE

Right	Left
1	1
2	2
cc	cc

ACOUSTIC REFLEX THRESHOLDS

Stimulus	CONTRALATERAL STIMULATION	IPSI LATERAL STIMULATION
Ear kHz	500	
Right	80	
Reflex Decay	-	
Left	75	
Reflex Decay	-	

Remarks:

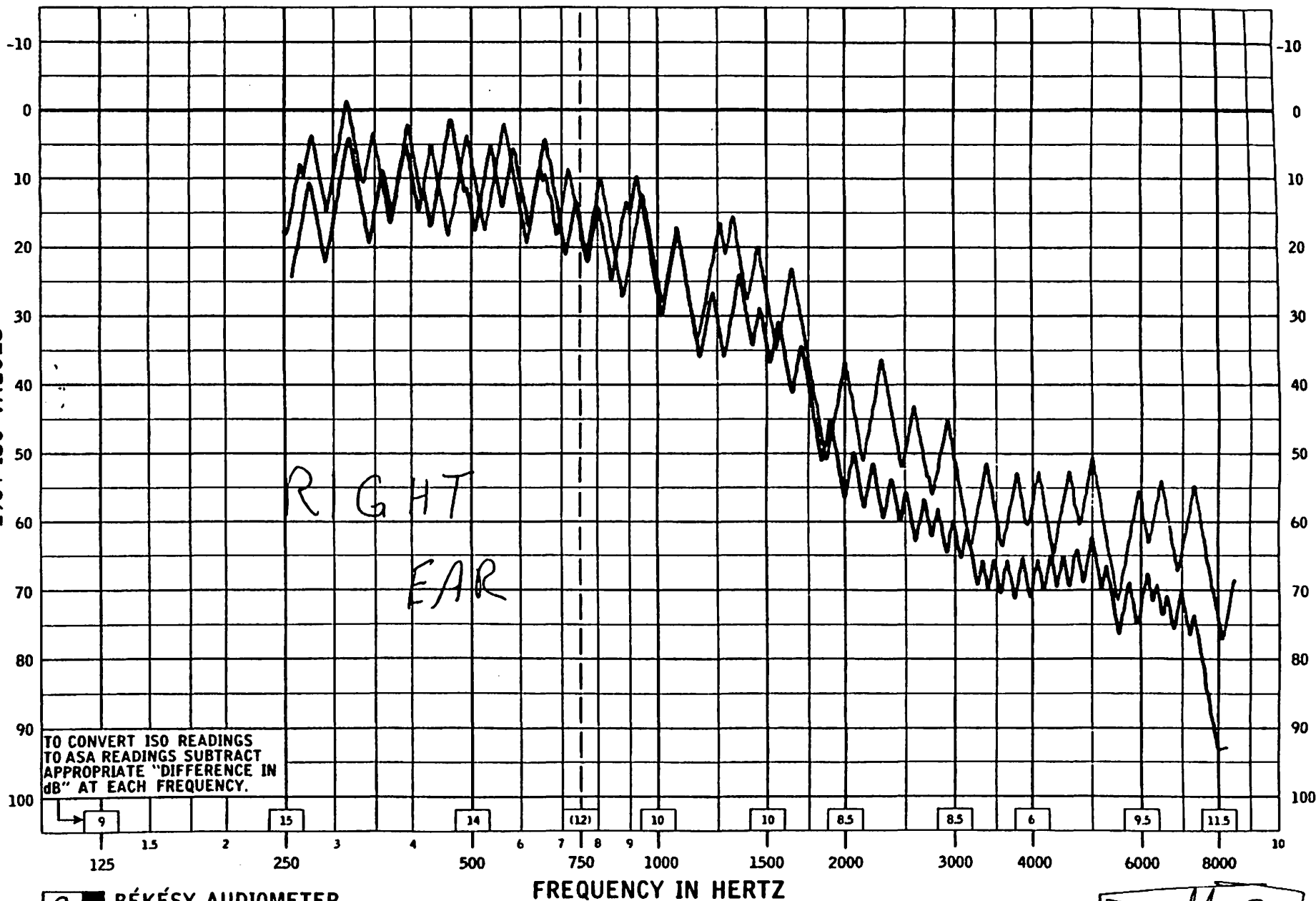
Recommendations:

351
HEARING THRESHOLD LEVEL IN DECIBELS
1964 ISO VALUES

TRACE	TONE		MASKING		20 dB	dB/SEC	OCTAVE/MIN.
B	P	R			0	2.5	1
COLOR	C, P	L, R, B	dB	0, +, -	1 1/4, 2 1/4, 5	1/2, 1, 2	

SISI	
FREQ.	%

NAME William Caldwell NO. _____
 SEX male AGE 44
 DATE 10/20/86 TIME 9:00 A.M. BY FRB



BÉKÉSY AUDIOMETER
 GRASON-STADLER COMPANY, INC.
 MODEL NO. _____ SERIAL NO. _____

Beth 2

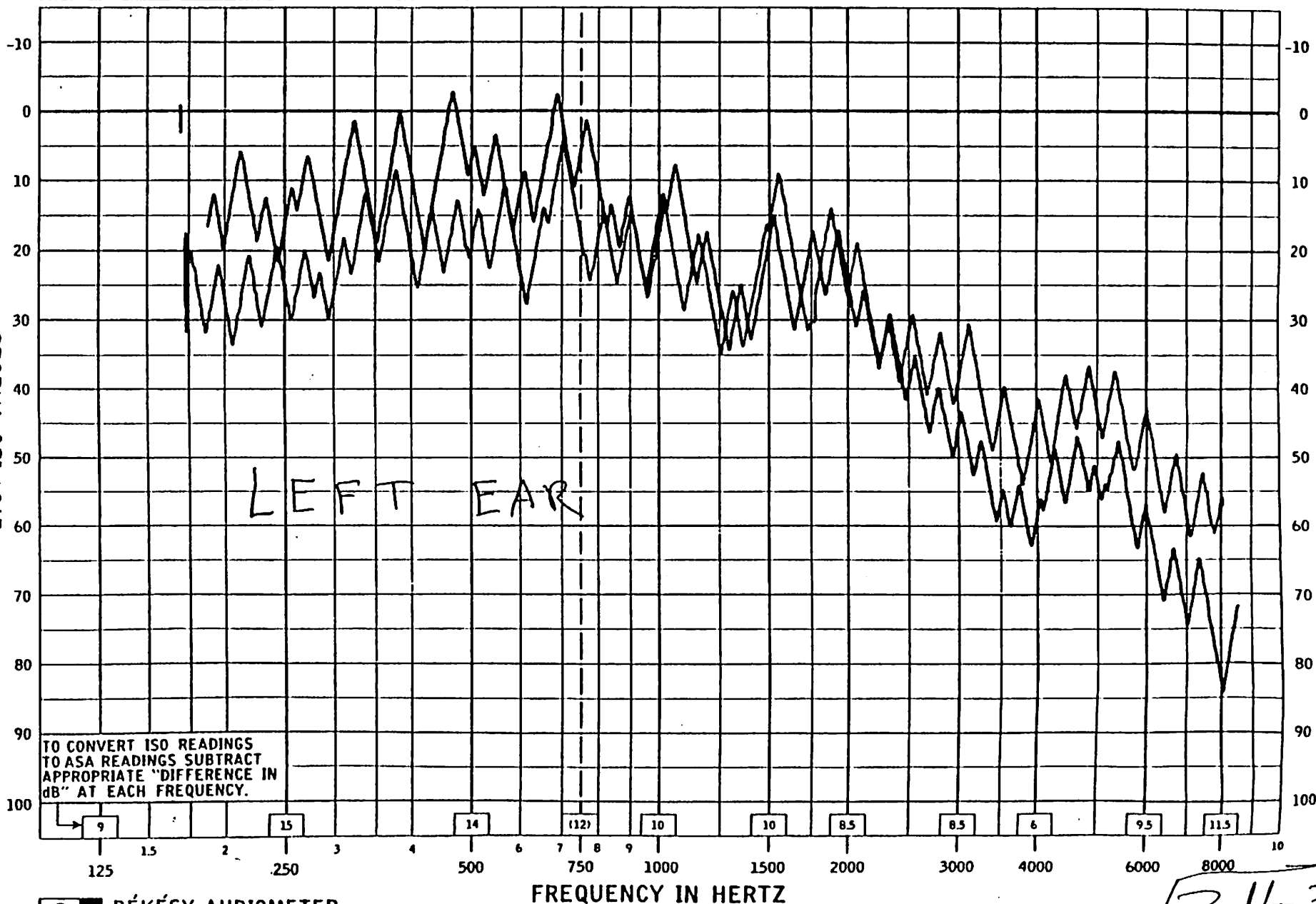
TRACE	TONE		MASKING		20 dB	dB/SEC	ULIAVE/ MIN.
B	P	L			O	2.5	1
COLOR	C, P	L, R, B	dB	0, +, -	1%, 2%, 5	1/2, 1, 2	

SISI	
FREQ.	%

NAME William Caldwell NO. 1
 SEX Male AGE 44
 DATE 10/20/74 TIME 8:45 AM BY FMB

HEARING THRESHOLD LEVEL IN DECIBELS

1964 ISO VALUES



BÉKÉSY AUDIOMETER
GRASON-STADLER COMPANY, INC.
 MODEL NO. SERIAL NO.

Butts 3

INSTRUCTION NO. 1

The Court instructs the jury that if from a preponderance of the evidence and the other instructions of the Court, you find your verdict in favor of the plaintiff, then in assessing the damages to which he is entitled, you may take into consideration any of the following which you believe from the evidence to have been caused in whole or in part from the accident of April 4, 1984.

1. Any loss of earnings in the past.
2. Any loss of earnings and/or lessening of earning capacity he may reasonably be expected to sustain in the future.
3. Any physical pain and mental anguish he suffered in the past and any which may reasonably be expected to be suffered by him in the future.
4. Any effect of any such injuries upon his health according to its degree and probable duration.
5. Any inconvenience and discomfort caused in the past and any which he may reasonably be expected to sustain in the future.
6. Any doctors and medical expenses that may reasonably be expected to occur in the future.

And your verdict should be for an amount that fully and fairly compensates the plaintiff for the damages sustained by him as a result of the injury of April 4, 1984, not to exceed the amount sued for in the Motion for Judgment.

The plaintiff has a duty to mitigate or lessen his damages. Therefore, if you find your verdict for the plaintiff, you shall not include any amount as compensation for past or future lost wages which you believe from a preponderance of the evidence he could have earned in the past or will be able to earn in the future.

If you return your verdict for the plaintiff, then in determining the amount of lost earnings in the past and also in the future, you must consider the matter of federal and state income taxes. The plaintiff's losses would only be his earnings less federal and state income taxes and less other expenses he would not have as a railway employee. Therefore, you should deduct the amount of such taxes and other expenses from the gross loss of earnings and include only the net loss in your verdict. Furthermore, the amount of any verdict in favor of the plaintiff will not be subject to federal or state income taxes, so you should not consider any of such taxes in determining the amount of your verdict.

(2)

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

WILLIAM E. CALDWELL,
Plaintiff

leave a S

AT LAW NO L-86-127

vs

SEABOARD SYSTEMS RAILWAY,
Defendant.

*IS
Do not label*

On this the 25th day of November, 1986, came the parties again in person and by their Attorneys and Court convened as of its adjournment of Tues Nov. 24th, 1986, and the jurors sworn to try the issue joined in this case appeared in Court according to their adjournment and after fully hearing all the evidence, the plaintiff, by counsel, again moved the Court to enter Summary Judgment in favor of the plaintiff, for reasons stated in the record, and said motion being heard, the Court doth overrule; and after fully hearing the argument of counsel, the jury retired to their room to consult of their verdict and after sometime returned into Court having found the following verdict: "We, the jury, find for the plaintiff and assess his damages at \$1,500,000.00 signed Jeffrey Neal Joyner, Foreman." 11-25-86, whereupon the defendant, by counsel, moved the Court to set the verdict of the jury aside and to grant it a new trial on the grounds that said verdict is contrary to the law and the evidence for reasons stated in the record, and the Court doth continue the case generally.

Enter 11/25/86
[Signature]

[Handwritten marks]

Excerpts of Transcript of Hearing on Defendant's
Motion to Set Aside the Verdict
held on February 2, 1987

[8]

24

Our second reason for moving to set aside

25

the verdict is that it was contrary to the law

JAIME & ASSOCIATES
REGISTERED PROFESSIONAL REPORTERS
VIRGINIA BEACH, VA.

1 of the case and the evidence and, therefore, was
2 excessive. Plaintiff proved at trial approximately
3 \$280,000 of lost wages to the time of trial,
4 future undiscounted fringe benefits and future
5 medical bills which totaled only about \$2300.
6 Your Honor repeatedly stated the law of the case
7 required that evidence of future lost earnings
8 was not relevant coupled with what plaintiff
9 could have earned in other occupations, and if
10 I might take upon myself to take the time to
11 quote briefly, this is from Page 46 and 47 of
12 the pretrial motion hearing that we had on the
13 Friday before trial, and I quote: "If a man
14 has got work capabilities, what he lost in my
15 judgment is not relevant. It is relevant until
16 the moment of his loss, but it is not relevant
17 for future because you have one figure without
18 having the other figure and how you can say a
19 man is going to lose a million dollars if in
20 fact without showing that he was going to earn
21 half a million, so his loss is half a million.
22 If we don't know what his earnings are going to
23 be, the loss figure gets to be purely speculative
24 on the part of the jury. At least that has been
25 my ruling, and I think that is correct."

1 Based upon that law of the case, there is
2 little dispute that plaintiff is only disabled
3 from being a railroad brakeman. There's no
4 evidence that plaintiff is totally disabled
5 from any other occupation, and I would submit
6 to your Honor that indeed the evidence suggests
7 otherwise.

8 You had a two percent overall hearing
9 disability which you would recall Doctor Swaber
10 stated was very similar to many men his age who
11 complain of inner ear ringing and popping of the
12 ears, which are not even causally related to the
13 horn blows in question, according to the testimony
14 of his treating physician, Doctor Goldberg, yet
15 plaintiff would have your Honor believe that he
16 was totally disabled based on no evidence and he
17 so argued. And this is from Page 329 and 330 of
18 the transcript. Mr. Wilson's argument to the
19 jury: "Let me ask you something. Who can he
20 turn to about this? Who wants a forty-four
21 year old man? Who wants to hire him with
22 disabilities and his only experience is on
23 the railroad? You tell me who is going to have
24 him?"

25 THE COURT: Was there any objection?

1 MR. WEBSTER: No objection raised to that
2 argument, your Honor.

3 THE COURT: All right.

4 MR. WEBSTER: Plaintiff is asking your
5 Honor to sustain a jury verdict in which
6 approximately 1.2 million is non-economic loss,
7 where there's no evidence of permanent disability
8 from all employment, and a minimal overall
9 hearing loss consistent with the rest of the
10 population. This award, we believe, is
11 contrary to the law of the case and the evidence
12 as submitted in the case. And I would cite to
13 the court a case that we did not cite in our
14 brief of Bassett Furniture Company v. McReynolds,
15 216 VA 897, 224 SE 2d, 323, a 1976 Virginia
16 Court case in which the court held as a matter
17 of law that the one million dollars verdict was
18 **excessive** in the case of a paraplegic with
19 approximately \$167 in economic damages.

20 Now, your Honor, plaintiff cites three
21 local cases in his brief to support his contention
22 that the verdict should not be set aside. The
23 first of these cases was Maurice Turner v.
24 Seaboard which, I believe, your Honor heard in
25 this case. As I recall, the verdict was

1 approximately 1.3 million dollars.

2 I should point out to the court that that
3 case has been settled for much less so that an
4 appeal would be void.

5 The other two cases which plaintiff cites
6 is Nelms v. Seaboard and Sonney v. Norfolk and
7 Western, both contained verdicts -- both had
8 verdicts which exceeded one million dollars.
9 In both cases, the Virginia Supreme Court has
10 granted a writ of error and both cases are on
11 appeal to the Virginia Supreme Court.

12 There was no evidence that plaintiff could
13 have or would have earned \$20,000 per year at
14 the railroad for twenty-six more years. There
15 was no evidence that plaintiff could not have
16 earned or been gainfully employed in another
17 occupation. The 1.2 million dollars that is
18 unaccounted for could only have been the result
19 of the jury's speculation on Caldwell's future
20 earnings. Therefore, we contend the verdict
21 must be set aside and a new trial granted.

22 THE COURT: You agree that I didn't allow
23 the evidence of future earnings.

24 MR. WEBSTER: Yes, your Honor, I agree
25 with that.

1 Finally, your Honor, we would contend that
2 the proper testimony of Doctor Swaber was
3 strictly rebuttal. They contradict Doctor Butts'
4 methods and test results and we believe that the
5 jury should have been permitted to hear this
6 testimony of Doctor Swaber, a board-certified
7 medical doctor, to give full and fair consideration
8 to all the evidence.

9 For those three reasons, your Honor, and
10 for the reasons discussed in our brief in more
11 detail and argued here, we contend that the
12 verdict should be set aside as contrary to the
13 law of the case and the evidence and a new
14 trial granted.

15 Thank you very much.

16 MR. WILSON: Excuse me this morning, your
17 Honor; I've got a sinus and I can barely talk,
18 but I'm not going to say very much anyway.

19 Mr. Webster discussed my statements in
20 closing arguments. I think your Honor asked
21 him the appropriate question of whether or not
22 he made an objection to my remarks during
23 closing arguments. I went down and looked up
24 in Michie's Jurisprudence and came up with the
25 same conclusion. You make the objection or

[14]

1 lose it. In addition to you making the objection,
2 you can ask the judge at the time to instruct the
3 jury to disregard these remarks if they are
4 prejudicial and inflammatory to the defendant,
5 and the defendant failed to do so. And that
6 should not be a point to be considered in this
7 case anymore.

8 As far as the incidents were concerned,
9 I think that during the initial arguments made
10 by the other side and myself to your Honor
11 concerning whether or not these should be
12 admitted, the points that I was making, these
13 were shown only for the purpose of notice that
14 an unsafe condition existed, that the agents
15 of the railroad, the railroad engineer, knew or
16 should have known of these or should have known
17 of the unsafe condition, and your Honor told me
18 you were not going to let these in unless the
19 railroad was claiming this was a safe place to
20 work, and the engineer was doing his job and
21 had no knowledge or notice that blowing a horn
22 right beside a person to cause damage to a person's
23 ear and under those conditions they can, and then
24 your Honor said that I'm going to make sure that
25 nothing prejudicial comes in or other deposition

1 testimony comes in except I'm going to allow a
2 stipulation and that is what we lived with
3 throughout the trial.

4 The second point that the defendant has
5 raised is the amount of the verdict. I think he
6 has admitted it was \$300,000 volunteered or
7 included in fringe benefits and the past lost
8 wages, and also in the future medical bills.
9 I think that the jury has a right to follow
10 the law. I think the instructions says to the
11 jury that you can award a reasonable amount in
12 future economic loss and then there were many
13 other things.

14 THE COURT: The instructions didn't tell
15 them anything about future economic loss,
16 Mr. Wilson. What we've got here, we've got
17 pain and suffering which if the verdict stands
18 at all, it stands on proving loss and if the
19 jury felt that he was disabled is for the future
20 and what his pain and suffering is that came as
21 a result. That is the intangible and the injuries
22 we have admitted. We have the lost wages. You
23 can almost do it mathematically. You can figure
24 how much the man has lost that he is entitled to.
25 The intangible is that if there is mental anguish,

[16]

1 pain instruction, damage instruction. That is
2 the basis that the jury estimates the injury on.
3 I can't put a figure on exactly what a jury will
4 do, how much they think a man suffered from this
5 thing, but I'll be candid. As I recall from this
6 record there wasn't too much evidence of too much
7 suffering in the case, but as far as the
8 \$300,000, I will agree with you there were
9 \$300,000 proven loss and as far as financial
10 loss is concerned, the thing I'm concerned with
11 and I want you to concentrate on is how much if
12 the jury verdict is consistent with what the
13 evidence was as far as what this man went
14 through, the anguish he had while all of this
15 was pending, whatever pain and suffering he had,
16 what future anguish, what future pain and
17 suffering he will have in the future. Those
18 are things the jury can consider under the
19 instructions as to fixing the amount of the
20 damages, and sometimes it is very difficult.

21 If a man breaks an arm, for instance, I
22 can't say as a matter of law whether that is
23 worth a thousand dollars or it's worth twenty
24 thousand dollars. That's where the jury comes
25 in in cases of that nature. If this verdict is

1 going to stand, it is going to stand on that.
2 But as far as any proof of any future lost
3 income, I don't recall that there was any in
4 the evidence.

5 MR. WILSON: The only point is there was
6 evidence before the jury that this gentleman had
7 a job with the railroad and a guarantee -- monthly
8 guarantee of over \$2,000 per month for the rest of
9 the time that he would have worked with the
10 railroad. That was put into evidence and that
11 is in the transcript, your Honor. And the jury
12 heard that and the jury knew that he no longer
13 had that job with the railroad.

14 THE COURT: Based on that, Mr. Wilson,
15 it would be an improper verdict if they based
16 it on the fact he will lose \$2,000 for the rest
17 of his life.

18 MR. WILSON: I'm just telling you what
19 was in the transcript.

20 THE COURT: But I don't think that was the
21 case. I certainly didn't instruct them to that
22 effect and I didn't allow -- you may have argued
23 it to the jury and whether we have any objection,
24 but I don't recall allowing any evidence to go
25 through to show that man was going to lose \$2,000

1 up to any certain age. I don't recall anything
2 of that nature. Certainly, my ruling was to the
3 contrary on that.

4 MR. WILSON: All right, sir. I think that
5 we come down to the matter which expert they
6 believe. I think Doctor Butts was a very
7 believable person who testified that Mr. Caldwell
8 suffered from fairly severe problems. He
9 testified that he suffered from a recruitment.
10 He testified that he suffered from loss of
11 discrimination of the ability to understand
12 what people were saying; that the nature of his
13 social setting at home was changed; that he
14 couldn't go to the same church anymore; that
15 he suffered from a ringing and popping called
16 tinnitus; that he suffered from a severe high
17 frequency hearing loss; that he had to avoid
18 loud noises and certain social settings, and
19 that his life had been changed and, essentially,
20 that's what it came down to. It came down to
21 who do you believe which is the weight of the
22 evidence, and I think that Doctor Butts was a
23 very believable person that the jury felt that
24 Mr. Caldwell would be suffering from these severe
25 changes and that's why they came back with this

1 verdict of a million and a half dollars that is
2 five times what we proved, losses here of
3 \$300,000, so the verdict falls within the realm
4 of the jury, I think, to establish what he should
5 be awarded for pain and suffering. Of course,
6 your Honor has the ultimate say in that.

7 THE COURT: I am a little bit concerned
8 about your argument, Mr. Wilson, I think, which
9 may go in the future, an argument that you proved
10 \$2,000 a month lost income for the future which
11 you did not prove, and I think you may have
12 argued it a little bit, but it wasn't objected
13 to, but you are building your case on a
14 foundation in my judgment, if that's what
15 you're claiming --

16 MR. WILSON: No, sir; I don't think that's
17 what I'm saying. What I'm saying is that forgetting
18 that, just dealing with the \$300,000, and dealing
19 with the pain and suffering, I think it comes down
20 to a matter which expert the jury believed. Did
21 they believe Doctor Swaber who said the man had
22 a tin ear or did they believe Doctor Butts when
23 he said he had a serious problem that this man
24 was suffering from?

25 THE COURT: What is the percentage of the

1 loss of hearing that your experts said?

2 MR. WILSON: He said, your Honor, if I
3 remember correctly, he had something around
4 twenty percent.

5 THE COURT: I thought he had seventeen
6 percent in the one ear and seventeen percent
7 of the high rate is my recollection.

8 MR. WILSON: He may have, your Honor.

9 THE COURT: It seems to me I recall that's
10 what he said.

11 MR. WILSON: Also, the social problems,
12 the abnormal balance test, the loss of
13 discrimination, the loss of recruitment which
14 is the ability to reduce loud sounds coming
15 into your ear. For example, if you're walking
16 along the street and you hear a horn other
17 person's ears are able to reduce that and
18 Mr. Caldwell does not. And he suffers pain.

19 THE COURT: My recollection of the main
20 injury in the light most favorable to the
21 plaintiff, my recollection was that the big
22 problem was that he couldn't work around or
23 be around in a place where there were loud
24 noises. Those were the things. He said he
25 couldn't hear, but he took the witness stand

1 and he was asked and I didn't recall him having
2 any difficulty hearing anybody that anybody asked
3 him. If I recollect his testimony was the high
4 range. The railroad would not have them. They
5 wouldn't let him work anymore because they felt
6 that he would not be able to discriminate against
7 them. There may be loud noises that he would not
8 hear. It is a funny thing about hearing where
9 we pretend to understand being of a condition
10 where you can hear low noises but you can't
11 hear high noises, and that's evidently what this
12 man's condition is as I deduced from the evidence
13 as I heard it. The low ranges is all right.
14 It is in the high ranges where it came where he
15 could not work around any job and as the Seaboard
16 point out, it would be dangerous sometimes for
17 him to even go into the street if there was a
18 loud noise coming along and he would not be
19 aware of it. From our ordinary day-to-day living
20 and conversation, he seemed to be capable of
21 hearing things like that, and as I recollect there
22 was a dispute between the two experts as far as
23 exactly what his loss was. The defendant's
24 expert said he had very little loss, not more
25 than a man of his age, but that was a jury

1 question now. The jury had the right to accept
2 either expert, and since they came with a verdict
3 for the plaintiff, and I have to review the
4 evidence in light most favorable to the plaintiff,
5 I would judge that the jury accepted the testimony
6 of the expert witness for the plaintiff who had
7 in the high ranges that there was a loss of hearing
8 which would make it impossible to work around a
9 place where there were loud noises. There was
10 some evidence of popping, but it wasn't, as I
11 recall the evidence, a great deal of testimony
12 but there was some. But there wasn't a great deal
13 of testimony on that. It was mostly loss of
14 hearing in the high range.

15 MR. WILSON: Your Honor, if you remember,
16 in the church where there's loud music, organ
17 music, that he would have to leave because it
18 would cause him pain, and the plaintiff even
19 testified that he had changed churches because
20 of that. Anytime he is around loud music, he
21 suffers pain and that would disrupt his day.
22 Anytime he is subject to loud noises, he had
23 to do something else and that caused him pain
24 and he did testify about the tinnitus and the
25 popping and he even said, if Mr. Caldwell was

1 sitting up there, and I'm talking that he doesn't
2 have any problem looking at me but when he got in
3 a place where there was background noise or if
4 there were two or three people talking that he
5 couldn't understand what was going on. Understand
6 I had to repeat to him several times questions that
7 I asked him. He also had his ear cocked, as a
8 matter of fact, as I recollect, to hear me. He
9 has got an ear which is a little bit better than
10 the other one. Essentially, it affects him every
11 moment of his life. It affects him all day long.
12 It will affect him in the future. But he didn't
13 say that he was getting any better. I believe he
14 said he is getting worse as he gets older in the
15 natural ageing process.

16 THE COURT: There was a motion by the
17 defendant which you objected to for lateness of
18 the discovery of the information they wanted.
19 They wanted to advance the theory that an injury
20 of this type where you have suffered a shock and
21 you have suffered the injury that if it is
22 progressive, if it gets worse, that is an
23 indication that it comes from some other source.
24 It comes from disease rather than from trauma,
25 and you objected to that and the court would not

1 allow that in. Now, you are arguing that you
2 put on evidence that the condition is going to
3 get worse as time goes by and certainly you can't
4 have it both ways, Mr. Wilson.

5 MR. WILSON: Your Honor, I think what
6 Mr. Butts has said was the natural ageing process
7 on top of the trauma. He didn't say that the
8 progressiveness as far as the hearing loss was
9 going to get worse. He said it was the natural
10 ageing process when we all lose a certain
11 percentage of our hearing and superimposed on
12 trauma on top of the other would make it worse,
13 at least, is what I'm trying to say.

14 Your Honor, the defendant also raised the
15 point -- he argued mitigation even though he
16 said he wasn't talking about any future economic
17 loss.

18 THE COURT: I think there was a little bit
19 of that on both sides. I'm not concerned with
20 the argument to the jury because there was no
21 objection raised by anybody. Unless you give
22 the court a chance to correct it, I don't think
23 that you have very much to stand on to come in
24 and object to that as an afterthought.

25 MR. WILSON: Moving to the third point of

1 what Doctor Swaber said in his testimony, you
2 read the discovery that was presented, you
3 limited it because it was surprising to the
4 plaintiff. As a matter of law, they gave it --
5 I think the night before his testimony was due
6 we could offer some testimony from Doctor Swaber
7 based on what other doctors have said, and I had
8 no idea that was going on. I think you did allow
9 it for well beyond what had been listed in the
10 plaintiff's Answer. Essentially, your Honor, I
11 guess what I'm saying here is we have a man who
12 had about \$300,000 worth of damages going into
13 the trial. His testimony is from Doctor Butts
14 that he suffered -- I'm trying to think --
15 significant sensory problems in one ear and
16 approximately seventeen percent, or maybe twenty
17 percent in the other. He suffered from the
18 ringing and popping. He suffered from
19 discrimination and also from recruitment problem
20 where he couldn't reduce sounds coming into his
21 ear. His life had been changed. He has been
22 disrupted from his job, his social setting had
23 changed. His church setting has changed. He
24 can't go on with his job. There will be jobs
25 that he can't get simply because he can't work

1 around machinery with loud noises. The loud
2 noise causes pain to him, and I think the jury
3 took all this into account. They came back with
4 a verdict of one million and a half dollars,
5 your Honor. I don't think that is out of line.
6 That was in the evidence before them. They were
7 the ones that spoke. -You have the final say in
8 this naturally, but those were the ones who had
9 evaluated him.

10 THE COURT: I don't have the final say.
11 The Supreme Court has the final say. I may do
12 something here that the Supreme Court may decide
13 what I did is wrong. I'm not the final say.
14 I do what I feel the law requires me to do.

15 MR. WILSON: That is all we ask you to do
16 this morning, what the law requires.

17 MR. WEBSTER: Your Honor, if it please the
18 court, first with regard to the admission of the
19 three prior occurrences, I just want to say the
20 plaintiff has basically admitted that it was the
21 engineer's negligence and not the horn itself.
22 That was the issue in the case when he argued
23 there was notice to the engineer of an unsafe
24 condition. In addition, we believe if the
25 argument that Mr. Wilson made which we contend

1 was so prejudicial and inflammatory was within
2 the court's ruling in allowing that evidence in
3 and it was as a result of allowing the evidence
4 in.

5 THE COURT: I would agree with that. In
6 other words, that no matter what I let in, if you
7 believed that this evidence was -- if you believed
8 that it was inflammatory, I believe it is your
9 duty to object to it. In fact, if something has
10 come in, are you saying it was proper argument
11 later in the light of the evidence that had been
12 let in improperly?

13 MR. WEBSTER: Your Honor, we believe that
14 the argument made by Mr. Wilson based on the
15 three incidents was proper under the court's
16 ruling, but the suggestion of an element of
17 punitive damages --

18 THE COURT: I stand by my ruling as far
19 as what I read in that stipulation, and you now,
20 as far as I'm concerned you are now saying he
21 argued based on the evidence that was before me.
22 I understand you say that is improper; that
23 should not have been admitted, but you can't
24 say that it was an argument designed to inflame
25 the jury if it was based on the evidence having

1 been admitted by the court.

2 MR. WEBSTER: Well, your Honor, as the
3 court correctly recalled Mr. Butts' testimony
4 that Mr. Caldwell's major problem was a high
5 frequency hearing loss which precluded him from
6 working around loud noises, there was evidence
7 that Mr. Caldwell had continued to work for almost
8 a year before he was finally forced to refer his
9 work as a brakeman, but dealing with the various
10 complaints he had, as I pointed out to the court
11 earlier, tinnitus, the popping and the ringing,
12 there was a conflict between Doctor Butts and
13 Doctor Goldberg. Doctor Goldberg said that the
14 popping and ringing was not related to the horn
15 blast.

16 THE COURT: Did anybody say it was related
17 to the horn blast?

18 MR. WEBSTER: No, sir.

19 THE COURT: All right. Now, we believe
20 that the one point, twenty-five million dollars
21 of non-economic loss, in view of the fact that
22 he has an overall hearing loss of roughly two
23 percent -- actually slightly less than two
24 percent, in view of the fact of that severe --
25 and Mr. Butts used the same Department of Labor

1 calculations that took it all the way through
2 the calculations as opposed to Doctor Butts
3 who did not apparently, that this 1.2 million
4 in non-economic pain and suffering loss is not
5 supported by the evidence in the case. You have
6 to understand that the jury has a right to accept
7 whatever evidence they want and reject whatever
8 they want when you are talking about experts.
9 I understand there is a difference but the
10 jury has a right to decide what expert they
11 believe and which one they trust as far as
12 the testimony is concerned, and that is their
13 prerogative. I agree that there were differences
14 in their testimony, but that is always the case
15 when opposing experts are on the stand. That
16 part of it is not -- as I see it -- does not
17 disturb me.

18 Go ahead.

19 MR. WEBSTER: Well, your Honor, we would
20 submit in light of that evidence that was before
21 the court, as well as Mr. Caldwell's -- what I
22 would call a lack of evidence of really being
23 seriously in a problem as far as finding other
24 employment or as far as handling his day-to-day
25 activities and his serious problem being the high

1 frequency hearing loss problem that the 1.2
2 million of non-economic damages awarded by
3 this jury is not consistent with the, essentially,
4 lack of verity of his overall problems.

5 THE COURT: But you agree he had some
6 damages, wouldn't you? He had some?

7 MR. WEBSTER: Your Honor, I would agree
8 that the court -- the jury is entitled and the
9 plaintiff is entitled to some pain and suffering.
10 What I don't agree with is that the pain and
11 suffering that they awarded, the 1.2 million
12 dollars, is consistent with the evidence in the
13 case and that is our position in moving to set
14 aside the verdict.

15 Thank you, your Honor.

16 THE COURT: Gentlemen, I have put a lot of
17 time and thought in this case since it was tried.
18 And I have done a lot of independent research on
19 my own part. If there is anything wrong with this
20 case, it is the amount of the verdict. I have been
21 over your briefs and I have been over the evidence
22 in this case and I find nothing evidentiary other
23 than as a perfect case and certainly I challenge
24 any judge to say, as long as the issues are fairly
25 presented to the jury and they've got an opportunity

1 to hear all sides and decide the case, then I
2 don't think anybody has any complaint. I don't
3 believe that anybody who heard this case and
4 who would hear a future trial can come to any
5 conclusion other than the fact that the conductor
6 blew that horn a tremendous blast when a man was
7 standing by the horn and that was the cause of
8 his injuries, and you can try the case a thousand
9 times before a thousand jurors, and it is my
10 belief that they would say there was liability
11 on the part of the railroad. I have no problem
12 with that whatsoever.

13 The problem that I do have, and this has
14 given me a great deal of pause, is that this man
15 from the evidence is apparently healthy, physically
16 able. He can do most anything that most anybody
17 else can do except when it comes to hearing in
18 the high ranges. There was some evidence of
19 tinnitus as they call it, but nothing like we
20 have had. I had heard in the prior cases that
21 you all mentioned of a hearing loss and that is
22 at a lesser amount which I don't know what it was
23 or anything like that. In that case, the evidence
24 was that the man was totally disabled, that he
25 could not work at any kind of job. There was

1 evidence in that other case he was totally
2 disabled and, therefore, the large proof of
3 earnings was shoved up into the millions. As
4 I recall in the other case, there was evidence
5 of economic loss because there was evidence,
6 and I don't think there was any real evidence
7 to rebut it in the other case which we referred
8 to that the man was totally disabled. Therefore,
9 the loss was something -- something like maybe
10 \$30,000 a year for a lifetime expectancy which
11 created a huge economic loss on which a jury
12 could base a finding. We don't have that in
13 this case. We don't have huge economic loss
14 and I went to the law library and I went through
15 the ALR and I found out there was a lot of hearing
16 loss cases in the ALR, and I admittedly -- some
17 of them were somewhat dated, and we come to a
18 more -- juries have become more inflationary
19 minded, I guess, as far as the amount of verdicts
20 are going. They had case after case in the ALR
21 annotations where hearing loss verdicts were
22 reduced, and I may say in none of them that I
23 could find were in the category in the amount we
24 are talking about here.

25 Now, we've got a man here who is capable

1 of working. He appeared to me -- and I believe
2 he appeared to the jury, too, that he answered
3 every question. I didn't discern any difficulty
4 in his hearing. As a matter of fact, it wasn't
5 even that they had alleged in the ranges that we
6 are talking here. There wasn't any allegation
7 of that at all. We have now got the basic
8 principal that is involved here, and, number one,
9 the court is reluctant in any case to set aside
10 a jury verdict. In fact, the Supreme Court of
11 Virginia has in recent years stated that verdicts
12 should not be set aside as being excessive. It
13 is very difficult. It is very difficult to
14 decide when you've got pain and suffering and
15 things of that nature how much the verdict should
16 be. And that is basically a jury question and
17 the court should not impose its judgment as against
18 the jury's judgment unless -- and that is the
19 fundamental thing -- unless it is just so
20 outrageous as to shock the conscience of the
21 court, if the court feels that this is a verdict
22 that is so shocking that it should not be allowed
23 to stand.

24 Now, if you can find any justification for
25 the verdict at all by any plan, by any reason, a

1 verdict should not be set aside as being
2 excessive but if it gets to the point where
3 the conscience of the court is shocked and the
4 verdict is totally out of line, then I think
5 the duty of the judge to set aside that verdict,
6 or at least to put the people on a remitter as
7 to a part of the judgment, and I say this because
8 it is not an easy task and it is not a likely
9 thing for the court to do, I venture to say that
10 I go through more anguish through the thing than
11 you gentlemen have over the past month or so
12 thinking about it, and I can only come to the
13 conclusion that under the facts in this case
14 that this verdict was totally excessive and it
15 shocks the conscience of the court. The trouble
16 with the court, when the court gets to do what
17 I'm prepared to, I imagine you have an appeal
18 from both sides and maybe the Supreme Court
19 will substitute their conscience for my conscience,
20 but I'm convinced that this man is totally
21 compensated outside of the proprieties of a clear
22 case of liability in this case. But I don't think
23 it can be successfully attacked in any way. I
24 think the man was injured. I think he is entitled
25 to a substantial amount of money, but a million

1 and a half dollars, even in these days and
2 times, in my judgment is a tremendous amount
3 of money, and I feel to me as a judge to place
4 plaintiff on terms, I'm going to require a
5 remitter of \$500,000 and if it is accepted by
6 the plaintiff I will enter up a judgment for
7 one million dollars for the plaintiff. If it
8 is not accepted by the plaintiff, you have a
9 right to -- I will set aside the verdict and
10 grant a new trial.

11 Mr. -- you are going to have to make a
12 decision whether you are willing to accept
13 the judgment of a million dollars and if you
14 feel that you cannot do that, I'm going to
15 set aside the verdict and grant a new trial.

16 MR. WILSON: Your Honor, how long do I
17 have to make that decision? Could I have a
18 couple of days? My client is not here. That's
19 why I say I may need to talk to him.

20 THE COURT: Yes, sir; I will give you --
21 How do you feel about that, Mr. Webster?

22 MR. WEBSTER: Your Honor, I think
23 Mr. Wilson is entitled to talk to his client.
24 If he says forty-eight hours is sufficient,
25 that is fine with us.

1 THE COURT: Are you all prepared to accept
2 that offer I am making?

3 MR. WEBSTER: Are we prepared? We would
4 have to talk to our clients but my initial reaction
5 is not, your Honor.

6 THE COURT: All right. I'm going to reserve
7 judgment on it. I think what I'm doing is
8 eminently fair to everybody concerned in this
9 case and they can't take a half a million dollars
10 from a verdict lightly, but anyway that is the
11 terms that I am giving you. And if you are not
12 able to accept these, if you are not able to
13 accept these terms, I will grant a new trial.
14 I'm talking about you, Mr. Wilson.

15 MR. WILSON: Could we set a time Wednesday
16 morning?

17 THE COURT: There is no rush, no big rush
18 about this, gentlemen. I don't think that under
19 the law that I can force the defendant to accept
20 it. He has to accept it. I don't think I can
21 do that, but I certainly feel that under these
22 circumstances if you are not prepared to accept
23 it, I'm going to grant a new trial in this matter.

24 MR. WILSON: All right, sir; if I can talk --

25 THE COURT: I'll give you a week to make up

1 your mind.

2 MR. WILSON: You want to return like, say,
3 on Friday?

4 THE COURT: No, sir; I don't see any need
5 for anybody to return. Today is the 2nd of
6 February. On the 9th of February or sooner,
7 if you gentlemen can come to some agreement,
8 but the 9th of February, I will enter up one
9 million dollars on behalf of the plaintiff or
10 else I'm going to set aside the verdict and
11 grant a new trial. One or the other.

12 MR. WILSON: All right, sir.

13 THE COURT: Is that clear to everybody?

14 MR. WEBSTER: Yes, your Honor.

15 MR. WILSON: Thank you.

16
17 -----oOo-----
18
19
20
21
22
23
24
25

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

WILLIAM L. CALDWELL,
Plaintiff

vs

SEABOARD SYSTEM RAILROAD, INC.,
Defendant.

AT LAW NO L-86-127

On this 2nd day of February, 1987, came again the parties by their Attorneys and the Court having fully heard the motion of the defendant to set aside the verdict of the jury heretofore rendered herein, and to grant it a new trial on the grounds that said verdict is contrary to the law and the evidence, which motion the Court doth overrule; and said plaintiff is Ordered to remit \$500,000.00 of said verdict and plaintiff by letter to this Court has consented to said remitter, judgment is entered on behalf of the plaintiff in the sum of One Million Dollars (\$1,000,000.00) with interest thereon to be computed at the rate of twelve per cent per annum from the 24th day of November, 1986, till paid and costs and this cause is removed from the docket of this Court.

W. L. Caldwell

Entered 2-9-87
[Signature]

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF PORTSMOUTH

WILLIAM L. CALDWELL,

Plaintiff

V.

AT LAW

NO. L-86-127

SEABOARD SYSTEM RAILROAD, INC.,

Defendant

MOTION TO VACATE AND SET ASIDE

Defendant, Seaboard System Railroad, Inc., by counsel, moves the Court to vacate and set aside the Final Judgment Order entered on February 6, 1987, solely for the purpose of requesting the Court to supplement the Record in this case by taking judicial notice of certain statistics gleaned from the Court's records with regard to Railroad cases filed in the Portsmouth Circuit Court, and the number of those which arise in a location other than the City of Portsmouth, both within and without the Commonwealth of Virginia, said statistics having been gleaned from a careful search of the Court's records and being certified as true and accurate to the best of counsel's knowledge, information and belief. A copy of statistics compiled through December 12, 1986, is attached hereto and incorporated herein by reference for the purpose of illustrating the type of statistics which defendant requests the Court to judicially notice. Updated statistics will be provided as soon as they become available, and

they will be the ones which defendant asks the Court to judicially notice. The statistics are relevant to defendant's Motion to Dismiss and the Court's Order overruling the Motion, all regarding the constitutionality of the Virginia forum non conveniens statute, §8.01-265 of the Code of Virginia, as amended.

Defendant, therefore, also moves the Court to take judicial notice of the statistics gleaned from the Court's records with regard to Railroad cases filed in the Court and the other information indicated on the attached exhibit.

Defendant further moves the Court, following judicial notice being taken of the statistics, to reinstate and reenter the Final Judgment Order of February 6, 1987, nunc pro tunc.

SEABOARD SYSTEM RAILROAD, INC.

BY:

Samuel J. Webster
Of Counsel

N O T I C E

TAKE NOTICE that defendant, Seaboard System Railroad, Inc., by counsel, will move the Court in accordance with the foregoing Motion on Tuesday, February 24, 1987, at 9:15 a.m., or as soon thereafter as counsel may be heard.

SEABOARD SYSTEM RAILROAD, INC.

BY:

Samuel J. Webster
Of Counsel

William T. Prince, p.d.
Samuel J. Webster, p.d.
WILLIAMS, WORRELL, KELLY & GREER, P.C.
600 United Virginia Bank Building
Post Office Box 3416
Norfolk, Virginia 23514

C E R T I F I C A T E

I hereby certify that I mailed a true copy of the foregoing Motion and Notice to Eddie W. Wilson, counsel for the plaintiff, on this the 12th day of February, 1987.



Samuel J. Webster

SEABOARD SYSTEM RAILROAD, INC.

Cases filed per year:

1981	2
1982	6
1983	9
1984	10
1985	28
1986	<u>30</u>
	85

Alleged location of accident:

Alabama	1
Florida	4
Georgia	13
Indiana	3
Kentucky	2
North Carolina	33
South Carolina	6
Tennessee	6
Virginia, not Portsmouth	9
Virginia, Portsmouth	2
Location not pled	3
Transferred to other	
Virginia jurisdictions	2
File in Supreme Court	<u>1</u>
	85

Suits filed by:

Moody Firm of Portsmouth	21
Miller Firm of Portsmouth	35
Hastings & Goldman of	
Florida	22
Pratt & Callis of Illinois	5
Other Virginia Firms	1
File Transferred	<u>1</u>
	85

CHESAPEAKE & OHIO RAILWAY COMPANY

Cases filed per year:

1981	2
1982	0
1983	7
1984	8
1985	29
1986	<u>36</u>
	82

Alleged location of accident:

Kentucky	12
Ohio	1
West Virginia	18
Virginia, not Portsmouth	39
Location not pled	<u>12</u>
	82

Suits filed by:

Moody Firm of Portsmouth	69
Miller Firm of Portsmouth	9
Hastings & Goldman of Florida	2
Pratt & Callis of Illinois	1
File in Supreme Court	<u>1</u>
	82

CSX TRANSPORTATION, INC.

Cases filed per year:

1986 15

Alleged location of accident:

Georgia	1
Kentucky	4
North Carolina	5
South Carolina	2
Virginia, not Portsmouth	2
Virginia, Portsmouth	<u>1</u>
	15

Suits filed by:

Moody Firm of Portsmouth	1
Miller Firm of Portsmouth	7
Hastings & Goldman of Florida	<u>7</u>
	15

NORFOLK AND WESTERN RAILWAY COMPANY

Cases filed per year:

1981	3
1982	0
1983	2
1984	0
1985	4
1986	<u>10</u>
	19

Alleged location of accident:

Ohio	1
West Virginia	4
Virginia, not Portsmouth	4
Virginia, Portsmouth	3
Location not pled	1
Transferred to other	
Virginia jurisdictions	3
Garnishments	<u>3</u>
	19

Suits filed by:

Moody Firm of Portsmouth	3
Other Tidewater Attorneys	3
Pratt & Callis of Illinois	7
Transferred to Norfolk	3
Garnishments	<u>3</u>
	19

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH
ON THE 20TH DAY OF FEBRUARY, 1987

WILLIAM L. CALDWELL,

Plaintiff,

v.

AT LAW NO. L86-127

SEABOARD SYSTEM RAILROAD, INC.,

Defendant.

O R D E R

IT APPEARING to the Court that defendant, Seaboard System Railroad, Inc., intends to petition the Supreme Court of Virginia for an appeal of this Court's final judgment order in favor of plaintiff, William L. Caldwell, entered the 6th day of February, 1987, and defendant, Seaboard System Railroad, Inc., having moved for suspension of execution of said judgment during the prosecution of said appeal, it is further hereby

ORDERED that execution of the said judgment order be, and the same hereby is SUSPENDED, with all rights of Plaintiff to interest thereon retained by Plaintiff, during the prosecution of defendant's appeal on the condition that defendant shall, on or before February 25, 1987, file with the Clerk of this Court a bond for costs and suspension, in the form required by law, in the penalty of One Million Dollars (\$1,000,000.00).

On the motion of defendant, Seaboard System Railroad, Inc., to which plaintiff, William L. Caldwell, agrees, it is further

ORDERED that the said bond need not be secured or executed by any surety and that the Clerk of this Court be directed to accept the said bond in a form executed solely by defendant, Seaboard System Railroad, Inc.

It is further ORDERED that

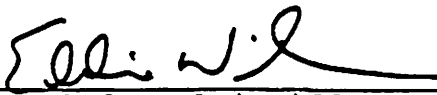
- (1) The transcript of the pre-trial hearing before the Court on November 21, 1986, is filed in the office of the Clerk of this Court and made a part of the record of this case;
- (2) The transcript of the trial proceedings in the Court on November 24, 25, 1986, is filed in the office of the Clerk of this Court and made a part of the record of this case;
- (e) The transcript of the proceeding before the Court held on February 2, 1987, on defendant's Motion to Set Aside the Verdict shall be filed in the office of the Clerk of the Court within 60 days after entry of the Final Judgment Order and made a part of the record of this case.

ORDER ENTERED:

Lester E. Schlitz, Judge
Portsmouth Circuit Court

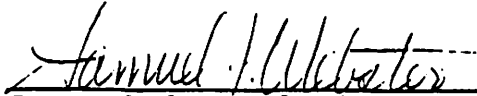
BY *Herrin Gross* CLERK

SEEN AND AGREED TO:



Counsel for Plaintiff.

SEEN AND AGREED TO:



Counsel for Defendant

1 MR. PRINCE: Your Honor, in this case
2 judgment was entered for the plaintiff on
3 February 6th, 1987. We're still within twenty-one
4 days of that. We're asking the Court to set aside
5 that judgment, take judicial notice of the records
6 in the clerk's office through an exhibit which I
7 would propose, and then enter judgment again
8 nunc pro tunc back to the date that judgment was
9 entered.

10 One of the points on the appeal in this
11 case, Your Honor, is the defendant's objection to
12 venue and motion to dismiss on the ground that
13 Section 8.01-265 of the Code is unconstitutional.
14 I'm sure Your Honor does not remember it, but it
15 happens to be that this is the case that we in fact
16 first argued to you, and thereafter we have just
17 been sending in orders. But, at any rate, we think
18 that because -- one of the arguments that we make as
19 to why the statute is unconstitutional is that it
20 discriminates against railway companies. We want
21 the Court to take notice of what the records in the
22 clerk's office would disclose.

23 We sent yesterday, and if you don't have it
24 there --

25 THE COURT: Just before you get into that,

[3]

1 let me just ask you one question, Mr. Prince.
2 Assuming that you were right that the statute is
3 unconstitutional and that I could relinquish
4 jurisdiction in this case, it would still be
5 discretionary on the part of the Court to do it;
6 and if that were the case, the Court has exercised
7 its discretion. Now, even if some other places
8 are more favorable jurisdiction, nothing is more
9 favorable than a case that's already been tried,
10 that all the witnesses have been heard, live
11 witnesses were brought in and they were all heard.
12 The -- I agree with you that there may sometimes be
13 abuse of judicial discretion, but the point is that
14 once that's been done and once the case has been
15 heard, been fully heard, with no witnesses that I
16 know of of record that did not appear because they
17 were not able to appear because of the ruling of
18 the Court, nothing is a more convenient forum than
19 a forum that's tried the case and heard all the
20 witnesses. I'm just talking about isn't this a
21 moot point at this time?

2 MR. PRINCE: Now, Section 8.01-389 of the
3 Code permits the Court to take notice of the
4 records in the clerk's office. I gave to
5 Mr. Wilson yesterday a summary. Do you have it?

6 THE COURT: Yes. You filed it. You
7 filed a copy with your pleadings.

8 MR. WILSON: This one is more up to date.

9 THE COURT: I'm going to mark this, your
10 motion to set aside, and the --

11 MR. PRINCE: I have a more updated one.

12 THE COURT: All right. I'll put it
13 all together and mark it as filed.

14 MR. PRINCE: All right, Your Honor. This
15 summary is a compilation of what is in the records
16 in the clerk's office of all FEIA cases filed
17 against any railroad, except Norfolk-Portsmouth
18 Beltline and NF&D from 1981 through February 17th
19 of this year. All I'm asking the Court to do is
20 to take notice that this -- of course, part of
21 your taking notice would be to accept the veracity
22 of the statement that this is a summary of what is
23 in your -- in the records in the clerk's office.

24 Now, I have here on sheets of paper -- one
25 sheet of paper for every single case that is here.

Excerpts of Transcript of Hearing on Defendant's
Motion to Vacate, held on February 24, 1987

[5]

So this is the backup data that supports this.

[6]

13 THE COURT: Well, gentlemen, there are
14 several problems with this. Number 1, while it's
15 true that we have a statute that says the court
16 takes judicial notice of its own records and also
17 that's rule of evidence anyway that courts take
18 judicial notice of its own records, that it has to --
19 before I take judicial notice, it has to be relevant.
20 Number 1, that it's got to be relevant. It does
21 not appear to me to be relevant in this case because
22 it was not offered to the court prior to the trial
23 of this case. While the motion was made as to the
24 constitutionality of the section, the records of
25 the court and the statistics of the court -- the

Excerpts of Transcript of Hearing on Defendant's
Motion to Vacate, held on February 24, 1987

[7]

1 records of the court were not offered and the
2 Court had to make its own judgment based on what
3 was offered to the Court at the time. It would
4 be patently unfair to the court that a court would
5 be required to be required to make a ruling and a
6 trial would -- and go all the way through a trial
7 and then, after the fact, when these records were
8 just as easily available at the time the Court
9 made its ruling as it was then, it would be just
10 unfair to the Court to require the court to make
11 a judgment, and then after the Court has made its
12 judgment and after the Court has held a trial in
13 this matter to then -- and even after judgment has
14 been rendered in this matter, to then come into the
15 court with evidence that cannot be described as
16 after-discovered evidence, because it was readily
17 available, just as readily available at that time
18 as it is today, to come into court and say, "Well,
19 Judge, you erred because you didn't take into
20 consideration these statistics," which were not
21 offered to the Court to take into consideration.
22 And I think that if you have evidence that you
23 don't produce at the proper time at a trial, and
24 that evidence is available to you and you fail to
25 produce it, then I think you have waived the right

1 to introduce that evidence. For that reason I
2 feel like that the Court should not accept this
3 evidence on the grounds of relevancy at this time.

4 In addition to that, though, I took the
5 liberty to look up some law on judicial notice.
6 And the law is quite clear. It's -- the extent of
7 my research is from the encyclopedias, but the law
8 seems to be quite clear that while a court must
9 take judicial notice of its own records, take
10 judicial notice that this is the record of the
11 court, the court does not take judicial notice of
12 what the facts in that record disclose. The
13 records speak for themselves, but the court does
14 not -- the court does not make a determination such
15 as what records of many cases statistically reveal.
16 That's not proper -- that's not a proper subject
17 of judicial notice. Even the facts that can be
18 gleaned from those records is not a subject for
19 judicial notice, because that calls upon the courts
20 to make a determination of some kind. Even the
21 fact that the statistics are correctly compiled
22 requires a determination from the court that they
23 are -- either the court's going to have to accept
24 somebody else's work, or else the court's going to
25 have to do the work itself to determine from these

1 records that Attorney A has had so many cases
2 before this court, or Attorney -- you can't tell
3 that just by looking at the records without making --
4 without doing the additional work of making a
5 compilation of these things. That is not the kind
6 of things that courts take judicial notice of.
7 Anytime it requires the added step of coming to
8 some conclusion from the record, what the records
9 reveal, then the court cannot take judicial notice
10 of that. The court -- the only judicial notice
11 the court takes -- in my judgment, the proper way
12 it would have been done in this case would have
13 been, if, assuming you get over the argument of
14 relevancy, if you can, then you present the court --
15 you say, "Judge, these are certified copies of
16 records of these various cases that have been held
17 in this court, and we ask that these records be
18 made a part of the record in this case, that the
19 Court take judicial notice that these are the
20 accurate court records of the Circuit Court of the
21 City of Portsmouth relating to these particular
22 cases, which happen to all be railroad cases." I
23 can't even take judicial notice of the fact these
24 are all of the railroad cases that have been tried
25 by this court, because I haven't been over -- I

Excerpts of Transcript of Hearing on Defendant's
Motion to Vacate, held on February 24, 1987

[10]

1 would have to accept -- while I'm confident counsel
2 would not deliberately produce to the Court or
3 represent to the Court that they are all of the
4 cases, I cannot say you haven't erred in your
5 research or that your totals have been added up
6 correctly, so to speak. I can't say that as a
7 matter of law that that's the case. The only way
8 I could do that would be if I did it myself or had
9 some master do it. But it simply -- this is
10 simply not -- statistics that can be gleaned from
11 records of a court and be compiled from records of
12 a court are not the subject of judicial notice,
13 although the records themselves would be the
14 subject of judicial notice.

15 So for the two reasons that I've mentioned;
16 Number 1, because of the relevancy of the late
17 presenting to the Court of these statistics it
18 would not be relevant at this time, the case being
19 over with and having been tried. The Court, in
20 making its rulings, was not given an opportunity
21 to even consider whether it would take these things
22 into account. That's the number one reason. The
23 number two reason is that statistics which can be
24 gleaned and compiled from the records of the court
25 are not the subject -- not a proper subject for

1 judicial notice, and therefore I overrule your
2 motion.

3 Now, I think we ought to have an order
4 prepared along that line.

5 MR. PRINCE: I would like to address that
6 a minute, what you have said. Because of the
7 first ruling, I will let the matter rest. But
8 because of the second ruling, I would like to say
9 to the Court we will, of course, present this
10 evidence in all other cases. That will mean a
11 prodigious amount of work for the clerk's office.
12 I assume every one of these FELA files is going to
13 grow by six inches, because we will have to get
14 certified copies of the motions for judgment in
15 every one of these cases, which we can do.

16 THE COURT: Well, first --

17 MR. PRINCE: My approach to this was an
18 approach I made with Mr. Bondurant in another case
19 in which Mr. Bondurant recognized was a reasonable
20 approach, and that is to accept the accuracy of
21 the compilation. Obviously, we would not exclude
22 any cases, because it serves our purpose best to
23 make these numbers as big as we can. So to the
24 extent that any cases have been overlooked, that
25 hurts us, not the plaintiff. But, as I understand

1 Your Honor, you cannot even take notice that if a
2 plaintiff alleges that he was injured in
3 Chillicothe, Ohio, that that is what he's alleging.
4 I believe you're saying you can't take notice that's
5 the allegation.

6 THE COURT: I can take notice that this is
7 the record of the court. What that record
8 discloses is not a subject for judicial notice.
9 Like I can say this is the accurate record of the
10 court, but when it comes to interpreting what that
11 record discloses and essentially combining what it
12 discloses in combination with other records, I do
13 not feel that's a proper subject for judicial
14 notice. Now, you understand I'm deciding this
15 case for this case today.

16 MR. PRINCE: I understand, but I just wanted
17 the Court -- I can't intimidate the Court, and I
18 apologize if I sound like that, but I'm just saying
19 to the Court what I've got to do.

20 THE COURT: I understand that. And sometimes
21 it has to be done.

22 MR. PRINCE: That would be about 250 copies
23 of 250 motions for judgment filed in every one of
24 these lawsuits.

25 THE COURT: Well, we can't change the law as

Excerpts of Transcript of Hearing on Defendant's
Motion to Vacate, held on February 24, 1987

[13]

1 we see it because it's an expedient thing to do.

2 MR. PRINCE: That's why I would have hoped
3 Mr. Wilson would agree the compilation is accurate.

4 THE COURT: That would be up to you and
5 Mr. Wilson. But as far as this case is concerned,
6 I have given you the two reasons.

7 MR. PRINCE: We won't fight it anymore;
8 we'll just get the records.

9 THE COURT: Thank you very much. If this
10 case goes up on appeal, you may want to -- this
11 issue to be decided on appeal, too. I suggest
12 that you present an order.

13 MR. PRINCE: We will do that.

14 THE COURT: And the statistics that you have
15 filed have been made a part of the record in this
16 case.

17 MR. PRINCE: Okay.

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF PORTSMOUTH

WILLIAM L. CALDWELL,

Plaintiff

V.

AT LAW
NO. L-86-127

SEABOARD SYSTEM RAILROAD, INC.,

Defendant

O R D E R

The Court, having fully considered defendant's Motion to Vacate and Set Aside the Final Judgment Order entered on February 6, 1987, for the purpose of taking judicial notice of summaries of the Court's records, the matter having been argued by counsel, ORDERS that defendant's Motion to Vacate and Set Aside the Final Judgment Order is denied as more fully stated by the Court at the hearing conducted on February 24, 1987 to which action of the Court the defendant objects; the transcript of said hearing shall be filed within 60 days of the Final Judgment Order's entry on February 6, 1987.

ENTER: 2-26-87

WJ
JUDGE

I ASK FOR THIS:

Eddie W. Wilson, p.q.
Eddie W. Wilson

A COPY, TESTE: WALTER M. EDMONDS, CLERK OF THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH, VIRGINIA

SEEN:

BY Carletha Vincent, D. C.

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on Tuesday the 22nd day of March, 1988.*

Seaboard System Railroad, Inc., Appellant,

against Record No. 870490
Circuit Court No. L-86-127

William L. Caldwell, Appellee.

From the Circuit Court of the City of Portsmouth

Upon the petition of Seaboard System Railroad, Inc. an appeal is awarded it from a judgment rendered by the Circuit Court of the City of Portsmouth on the 9th day of February, 1987 in a certain motion for judgment then therein depending, wherein William L. Caldwell was plaintiff and the petitioner was defendant.

And it appearing that an appeal bond in the penalty of \$1,000,000, has heretofore been given, no additional bond is required.

This appeal, however, is limited to the consideration of assignment of error No. 1 which reads as follows:

1. The trial court erred in denying Seaboard's motion to dismiss because of the unconstitutionality of Code § 8.01-265.

On further consideration whereof, it is ordered that the parts of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germane to assignment of error No. 1, and the briefs to be filed shall be limited to such discussion as is relevant to the assignment of error upon which this appeal is awarded.

The petition for appeal is refused as to the remaining assignments of error.

A Copy,

Teste:


Clerk

Assignment of Error of Cross-Appellant
William L. Caldwell

7. Assignment of Error:

DID THE TRIAL COURT COMMIT ERROR IN ORDERING A REMITTITUR OF
\$500,000.00 FROM THE VERDICT OF THE JURY?