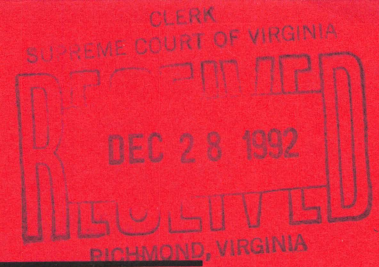


295 Va 483



IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 921044

TERRY LEE PATTERSON,
Appellant,

V.

CSX TRANSPORTATION, INCORPORATED,
Appellee.

JOINT APPENDIX

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TABLE OF CONTENTS

	<u>Page</u>
1. MOTION FOR JUDGMENT, FILED APRIL 27, 1990.....	1
2. PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS, FILED APRIL 27, 1990.....	7
3. RESPONSE TO REQUEST FOR ADMISSIONS, FILED JUNE 29, 1990.....	9
4. DEFENDANT'S GROUNDS OF DEFENSE, FILED JUNE 29, 1990..	10
5. EXCERPTS FROM DEPOSITION OF TERRY L. PATTERSON TAKEN ON OCTOBER 30, 1990.....	14
6. DEPOSITION OF JERRY JOHNSON TAKEN ON FEBRUARY 26, 1991.....	57
7. SPECIAL PLEA TO JURISDICTION FILED MARCH 25, 1991....	126
8. DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO DISMISS, FILED SEPTEMBER 25, 1991.....	127
9. PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS SPECIAL PLEA TO JURISDICTION, FILED SEPT- EMBER 25, 1991.....	143
10. TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE NORMAN OLITSKY ON SEPTEMBER 26, 1991.....	164
11. DEFENSE COUNSEL'S LETTER TO JUDGE OLITSKY DATED NOVEMBER 12, 1991 WITH EXHIBITS A THRU L.....	216
12. PLAINTIFF'S COUNSEL'S LETTER TO JUDGE OLITSKY DATED DECEMBER 12, 1991 WITH 4 AERIAL PHOTOGRAPHS.....	233
13. AFFIDAVIT OF TERRY LEE PATTERSON TAKEN ON DECEMBER 9, 1991.....	237
14. OPINION LETTER OF JUDGE OLITSKY DATED FEBRUARY 13, 1992.....	240
15. FINAL ORDER, ENTERED APRIL 1, 1992.....	242
16. ORDER ENTERED MAY 20, 1992.....	244

to cause the Plaintiff injury, pain and disability, and these conditions will reasonably be expected to continue for some time in the future.

10. That as a further result of these injuries, the Plaintiff has been compelled to seek medical attention, including hospitalization, and to incur medical expense for the treatment of his injuries and for travel necessary to secure medical treatment, and in the future will be compelled to incur expenses for medical care, hospitalization, and travel.

11. That as a result of his injuries, Plaintiff was caused to lose, and he will in the future be caused to lose income and certain fringe benefits which he otherwise would have earned.

12. That as a further result of his injuries and the conditions resulting therefrom, Plaintiff's earning capacity and working ability were impaired, and in the future he will suffer permanent loss of his earning capacity and his ability to work.

13. That as a result of his permanent injuries, Plaintiff has suffered physical handicap and disability in connection with his usual activities and recreation, and will continue to suffer such handicap and disability in the future.

14. That as a further result of his injuries and the conditions resulting therefrom, Plaintiff suffered humiliation and embarrassment and mental pain, anguish and suffering and will continue to so suffer in the future.

TABLE OF CONTENTS

	<u>Page</u>
1. MOTION FOR JUDGMENT, FILED APRIL 27, 1990.....	1
2. PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS, FILED APRIL 27, 1990.....	7
3. RESPONSE TO REQUEST FOR ADMISSIONS, FILED JUNE 29, 1990.....	9
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14. OPINION LETTER OF JUDGE OLITSKY DATED FEBRUARY 13, 1992.....	240
15. FINAL ORDER, ENTERED APRIL 1, 1992.....	242
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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

TERRY LEE PATTERSON,

Plaintiff,

vs.

AT LAW NO. _____

CSX TRANSPORTATION, INC.,
a Virginia corporation,

Defendant.

MOTION FOR JUDGMENT

TO: PATRICIA J. AFTOORA
1 James Center
901 E. Cary
Richmond, VA 23219

COMES NOW the Plaintiff, TERRY LEE PATTERSON by and through his undersigned counsel, and moves this Honorable Court for a judgment and an award of execution against the Defendant, CSX TRANSPORTATION, INC., a Virginia corporation, in the sum of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$1,500,000.00), by reason of the following facts, to wit:

COUNT I

1. The Defendant, CSX TRANSPORTATION, INC., ("CSX") is a Virginia corporation engaged as a common carrier in interstate commerce. Prior to approximately July 1, 1986, Defendant was doing business under the name SEABOARD SYSTEM RAILROAD, INC., a dissolved Virginia Corporation. Where hereinafter Defendant is referred to as CSX TRANSPORTATION, INC., such reference is interchangeable with SEABOARD SYSTEM RAILROAD, INC.

2. That the Plaintiff's action arises under the Acts of Congress of April 22, 1908, 35 Stat. 65, Chap. 149, with amendments thereto, commonly known as the Federal Employers' Liability Act (45 USCA, Chap. 2, Sec. 51-60) as amended August 11, 1929, as hereinafter more fully appears.

3. That at all times mentioned herein, Defendant, CSX TRANSPORTATION, INC., was an intrastate and interstate common carrier and was engaged in interstate transportation and commerce.

4. That at all time material hereto, Plaintiff was an employee of the Defendant, CSX TRANSPORTATION, INC., and was acting within the course and scope of his employment.

5. That at the time of receiving his injuries, Plaintiff was working in the furtherance of interstate commerce and in work which directly, closely and substantially affected the general interstate commerce carried on by the Defendant.

6. That on or about May 29, 1988, Plaintiff PATTERSON was in the employ of Defendant, CSX, as a switchman at or near Defendant's Oakworth Yard, located in Decatur, Alabama, and while in the course and scope of his employment, Plaintiff was instructed to switch railroad cars which required him to uncouple a certain car by pulling on its cut lever device (i.e., uncoupling mechanism). That during his attempt to uncouple a tank car by pulling on its cut lever in the routine and usual manner, the cut lever failed to operate properly thereby resulting in injuries and damages as hereinafter

alleged.

7. That the Defendant, its officers, employees, and/or agents were guilty of one or more of the following negligent acts or negligent omissions which caused or contributed to the cause of Plaintiff's injuries and damages which acts and omissions are set out herein by way of illustration and not limitation:

- (a) In negligently failing to provide Plaintiff with a reasonably safe place to work; and/or
- (b) In negligently failing to inspect, maintain and/or repair the said cut lever device prior to Plaintiff's use thereof; and/or
- (c) In negligently failing to discover the defective and/or inefficient cut lever device prior to Plaintiff's use thereof; and/or
- (d) In negligently failing to warn the Plaintiff of the defective and/or inefficient condition of the cut lever device.

8. That the Defendant failed to comply with the Federal Employers' Liability Act (45 USCA, Chap. 2, Secs. 51-60), as amended.

9. That as a result of Defendant's negligence, Plaintiff has sustained personal injuries including injuries to his back, legs, spine, discs, nervous system and other injuries not yet diagnosed, and/or an aggravation of a previously existing condition. These injuries are continuing in their nature so as

to cause the Plaintiff injury, pain and disability, and these conditions will reasonably be expected to continue for some time in the future.

10. That as a further result of these injuries, the Plaintiff has been compelled to seek medical attention, including hospitalization, and to incur medical expense for the treatment of his injuries and for travel necessary to secure medical treatment, and in the future will be compelled to incur expenses for medical care, hospitalization, and travel.

11. That as a result of his injuries, Plaintiff was caused to lose, and he will in the future be caused to lose income and certain fringe benefits which he otherwise would have earned.

12. That as a further result of his injuries and the conditions resulting therefrom, Plaintiff's earning capacity and working ability were impaired, and in the future he will suffer permanent loss of his earning capacity and his ability to work.

13. That as a result of his permanent injuries, Plaintiff has suffered physical handicap and disability in connection with his usual activities and recreation, and will continue to suffer such handicap and disability in the future.

14. That as a further result of his injuries and the conditions resulting therefrom, Plaintiff suffered humiliation and embarrassment and mental pain, anguish and suffering and will continue to so suffer in the future.

15. That this suit is brought under the venue provisions of Section 8.01-262 of the Code of Virginia since the Defendant regularly and systematically conducts its affairs and business activity in the City of Portsmouth, Virginia.

WHEREFORE, Plaintiff, TERRY LEE PATTERSON, demands a trial by jury and prays for a judgment against the Defendant, CSX TRANSPORTATION, INC., in the sum of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$1,500,000.00), or in such amount as a Court or Jury deems fair.

COUNT II

16. That the Plaintiff realleges and incorporates herein by reference Paragraphs 1 through 6 of Count I of the Motion for Judgment.

17. That the Defendant, CSX TRANSPORTATION, INC., violated the absolute requirements of the Safety Appliances Act, 45 U.S.C. §2 by hauling, permitting to be hauled or using on its line a car used in moving interstate commerce with a defective and/or inefficient cut lever device which failed to operate properly at the time and place of Plaintiff's alleged incident.

18. That as a result of Defendant's failure to comply with the Safety Appliances Act, 45 U.S.C. §2, Plaintiff has sustained personal injuries including injuries to his back, legs, spine, discs, nervous system and other injuries not yet diagnosed, and/or an aggravation of a previously existing condition. These injuries are continuing in their nature so as to cause the Plaintiff injury, pain and disability, and these

conditions will reasonably be expected to continue for some time in the future.

19. That the Plaintiff realleges and incorporates herein by reference Paragraphs 10 through 15 of Count I of the Motion for Judgment.

WHEREFORE, Plaintiff, TERRY LEE PATTERSON, demands a trial by jury and prays for a judgment against the Defendant, CSX TRANSPORTATION, INC., in the sum of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$1,500,000.00), or in such amount as a Court or Jury deems fair.

TERRY LEE PATTERSON

By: 
Of Counsel

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Filed in the Clerk's Office the 27th day of April, 1990
Filing Fee \$ 25.00 Teste: WALTER M. EDMONDS, CLERK
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Total Paid \$ 127.00 Linda M. Keller D.C.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

TERRY LEE PATTERSON,

Plaintiff,

vs.

AT LAW NO. _____

CSX TRANSPORTATION, INC.,
a Virginia corporation,

Defendant.

TO: PATRICIA J. ALTOORA, Registered Agent
1 James Center
901 E. Cary
Richmond, VA 23219

PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS

NOW COMES the Plaintiff, TERRY LEE PATTERSON, by counsel, pursuant to Rule 4:11 of the Rules of the Supreme Court of Virginia, and in connection with the alleged accident involving the Plaintiff, as more fully described in the Motion for Judgment, moves to have the Defendant admit the following:

1. That at the time and place of the alleged accident, the Plaintiff was an employee of the Defendant.

2. That at the time and place of the alleged accident, the Plaintiff was acting in the course and scope of such employment.

3. That at the time and place of the alleged accident, the Defendant was engaged as a common carrier in interstate or foreign commerce by railroad.

CIRCUIT COURT
PORTSMOUTH, VA.

FILED
4/27/90

CV 7 D.C.

4. That at the time and place of the alleged accident, the Plaintiff was employed by such carrier in connection with such interstate or foreign commerce and that his employment at the time and place referred to in the Motion for Judgment was in furtherance of interstate or foreign commerce and affected transportation in such interstate or foreign commerce.

5. That the incident referred to in Plaintiff's Motion for Judgment did, in fact, occur on the date and at the place referred to in the Plaintiff's Motion for Judgment.

6. That the tank car's cut lever involved in the alleged incident herein was defective and/or inefficient at the time Plaintiff attempted to operate same.

TERRY LEE PATTERSON

By: 
Of Counsel

William S. Sands, Jr., Esq.
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Co-Counsel for Plaintiff
P.O. Box 3248
Norfolk, VA 23514
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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

TERRY LEE PATTERSON,

Plaintiff,

v.

AT LAW NO. CL-90-458

CSX TRANSPORTATION, INC.,

Defendant.

RESPONSE TO REQUEST FOR ADMISSIONS

Comes now the defendant, CSX Transportation, Inc., and responds as follows to plaintiff's request for admissions:

1. Specifically denying that the alleged accident occurred, defendant otherwise admits request for admissions 1, 2, 3 and 4.

2. Request for admissions 5 and 6 are denied and strict proof is called for.

CSX TRANSPORTATION, INC.

By  Of Counsel

John Y. Richardson, Jr.
Williams, Worrell, Kelly, Greer & Frank, P.
600 Crestar Bank Building
Norfolk, VA 23510

CIRCUIT COURT
PORTSMOUTH, VA.

CERTIFICATE OF SERVICE

FILED

I hereby certify that a true copy of the foregoing was mailed to counsel for the plaintiff WALTER M. MONROE day of June, 1990.

By  D.C.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

TERRY LEE PATTERSON,

Plaintiff,

v.

AT LAW NO. CL90-458

CSX TRANSPORTATION, INC.,

Defendant.

GROUND'S OF DEFENSE

Comes now the defendant, CSX Transportation, Inc., and in and for its grounds of defense to plaintiff's motion for judgment states as follows:

1. As to paragraph 1 of plaintiff's motion for judgment, defendant admits it is CSX Transportation, Inc., however, the other allegations contained therein do not require a response.

2. Paragraphs 2, 3, 4 and 5 of plaintiff's motion for judgment are admitted except to the extent a compensable incident or accident and injuries occurred which defendant specifically denies.

3. As to the allegations contained in paragraph 6 of plaintiff's motion for judgment it is admitted only that plaintiff was working for the defendant on May 29, 1988 as a switchman in the location stated. The other allegations in paragraph 6 are specifically denied.

4. The allegations contained in paragraph 7 and 8 of plaintiff's motion for judgment are specifically denied as

is each and every allegation of wrongdoing on the part of this defendant.

5. Paragraphs 9, 10, 11, 12, 13 and 14 of plaintiff's motion for judgment are denied.

6. With regard to the allegations contained in paragraph 15 of plaintiff's motion for judgment, defendant adopts its objection to venue and motion to dismiss filed herein.

7. With regard to the allegations contained in paragraph 16 of plaintiff's motion for judgment, defendant incorporates its prior responses previously filed herein.

8. With regard to the allegations contained in paragraphs 17, 18 and 19 of plaintiff's motion for judgment, defendant denies same as it does each and every allegation of wrongdoing on the part of this defendant.

9. Defendant denies that plaintiff is entitled to \$1,500,000.00 or any sum whatsoever and denies that plaintiff is injured to the extent he claims.

10. Plaintiff may have been guilty of negligence which caused or contributed to cause the injuries complained of.

11. Plaintiff may have had conditions or ailments which pre-existed the subject incident which are not the responsibility of the defendant and plaintiff's injuries may have been caused by conditions or incidents for which the defendant is not responsible.

12. Plaintiff's action and recovery for injuries may be barred by accord and satisfaction and release and the statute of limitations.

13. Defendant reserves the right to amend its grounds of defense up to and including trial as new matters come to light.

WHEREFORE defendant moves that plaintiff's motion for judgment be dismissed and judgment entered in favor of defendant.

CSX TRANSPORTATION, INC.

By 

Of Counsel

John Y. Richardson, Jr.
Williams, Worrell, Kelly, Greer & Frank, P.C.
600 Crestar Bank Building
Norfolk, VA 23510
624-2600

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to counsel for the plaintiff this 29th day of June, 1990.



CIRCUIT COURT
PORTSMOUTH, VA

FILED

-3-

6/29/90
WALTER M. EDMONDS, CLERK

By 

D. A.

CERTIFIED COPY

CLERK
SUPREME COURT OF VIRGINIA

RECEIVED
JUN 30 1992
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RICHMOND, VIRGINIA

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

TERRY LEE PATTERSON,

Plaintiff,

v.

CSX TRANSPORTATION, INC.,

Defendant.

)

(

)

(

)

AT LAW NO.

90-458

DEPOSITION UPON ORAL EXAMINATION

OF TERRY L. PATTERSON

TAKEN ON BEHALF OF THE DEFENDANT

Norfolk, Virginia

October 30, 1990

*Thee
2/25/91*

TAYLOE ASSOCIATES, INC.

Registered Professional Reporters

Telephone: (804) 461-1984

Norfolk, Virginia

1 Appearances:

2
3 SAMS, DONATO, SPIER & HASTINGS, P.A.

4 By: HOWARD A. SPIER, ESQUIRE

5 Counsel for the Plaintiff

6
7 WILLIAMS, WORRELL, KELLY, GREER & FRANK, P.C.

8 By: JOHN Y. RICHARDSON, JR., ESQUIRE

9 Counsel for the Defendant

1 or anything?

2 A. No, sir.

3 Q. Do you have any -- any problem reading?

4 A. Not that I know of.

5 Q. Now, in 1988, what was your__job?

6 A. In when?

7 Q. For the railroad.

8 A. What year?

9 Q. '88, when you got injured.

10 MR. SPIER: Can I have the tax return?

11 MR. RICHARDSON: Yes, sir.

12 THE WITNESS: I was switchman.

13 BY MR. RICHARDSON:

14 Q. Did you hold conductor seniority, as
15 well?

16 A. In '88, yes, sir.

17 Q. How long had you been a conductor?

18 A. Seemed like I obtained it in '81.

19 Q. In '88, did you work mostly as a
20 switchman?

21 A. Probably the majority of the time, I
22 did.

23 Q. Did you hold a regular job or work the
24 extra board in '88?

25 A. Seemed like I was on a regular job most

1 of the time, the majority of the time.

2 Q. What was the regular job you had in '88?

3 A. I worked in Decatur yard.

4 Q. Do you know what shift you worked?

5 A. Second, most of the time. --

6 Q. Do you know what hours -- excuse me,
7 days of the week you worked?

8 A. It varied, because they changed the jobs
9 quite a bit. I think Tuesday -- Monday and Tuesday
10 was the off days.

11 Q. Do you know where you stood on a
12 seniority list, who was above and below you on the
13 seniority list?

14 A. Immediately following me?

15 Q. Yes, sir.

16 A. Do I know the name?

17 Q. Yes, sir.

18 A. I believe it's C. W. Miller.

19 Q. And do you know who was immediate before
20 you -- immediately before you?

21 A. I don't remember.

22 Q. Do you know anybody else who's close
23 to -- close above you?

24 A. Do you want the closest one, or --

25 Q. You told me you didn't know who was

1 closest above you. I'm trying to say, is there
2 anybody else that you recall who was close in
3 seniority to you who's above you?

4 A. I can't think of any names right off
5 that are -- are close.

6 Q. Did you have a regular crew you worked
7 with, other -- the other members of your crew, when
8 you worked the second shift job?

9 A. Yes, sir.

10 Q. Who were they?

11 A. J. W. Johnson.

12 Q. And what was his job?

13 A. He was foreman at the time.

14 Q. Was that the same as conductor?

15 A. Yes, sir.

16 Q. And who else?

17 A. G. E. Williams.

18 Q. Was he another switchman?

19 A. He was engineer.

20 Q. Anybody else?

21 A. That's all.

22 Q. Just a three-man crew?

23 A. Yes, sir.

24 Q. And what typically did you all do,
25 switch cars in the Decatur yard?

1 A. Our primary job was switching industries
2 on the river.

3 Q. And what industries were there?

4 A. Jim Dandy Dog Food plant, Bunge
5 Corporation.

6 Q. B U N G Y?

7 A. E. G E. Champion Paper, ConAgra.

8 Q. How do you spell that?

9 A. C O N G R A, I believe -- or G A R A.

10 Q. Okay.

11 A. And Wolverine Tubing.

12 Q. Is that about it?

13 A. Those were the biggest ones.

14 Q. What type of cars were your men
15 switching, if you can --

16 A. Anywhere from boxcars to hopper cars.

17 Q. Did you have tank cars, as well?

18 A. Yes, sir.

19 Q. All cars?

20 A. All kinds of cars.

21 Q. When you say second shift, are you
22 talking 3 to 11?

23 A. Three to 11 and 4 to 12.

24 Q. Who was your immediate supervisor above
25 Mr. Johnson, the yardmaster?

1 A. Yes, sir.

2 Q. Do you know who you -- what yardmaster
3 you generally worked under?

4 A. The regular second shift yardmaster was
5 Edwin Smith.

6 Q. Edwin Smith?

7 A. Yes, sir.

8 Q. Was there -- on the evening you were
9 injured, was there a different yardmaster?

10 A. Yes, sir.

11 Q. Who was that?

12 A. Bobby Cotner.

13 Q. C O T T N E R?

14 A. I believe just one T.

15 Q. Anybody else on board that evening, that
16 you recall?

17 A. No, sir.

18 Q. Who was the yard train master or agent
19 train master above the yardmaster during that time?

20 A. Immediately above Edwin was Glenn
21 Cunningham.

22 Q. What was his title?

23 A. He's agent and general yardmaster.

24 Q. Is he basically the head of the yard,
25 the boss of the yard?

1 A. Yes, sir.

2 Q. Is he still in that job, to the best of
3 your knowledge?

4 A. Yes, sir, I think so.

5 Q. What day of the week did you-get
6 injured?

7 A. Sunday.

8 MR. SPIER: At this time, John, why
9 don't you take a quick break and see if our little
10 package has arrived.

11 MR. RICHARDSON: Not a bad idea, Mr.
12 Spier.

13 (A short break was taken.)

14 BY MR. RICHARDSON:

15 Q. When we took a break, Mr. Patterson, we
16 were talking about your duties on the date of the
17 accident. Before we get on to that, I've asked that
18 you sign some medical releases, and I'll go through
19 them. Dr. Deinlein, D E I N L E I N, University of
20 Alabama at Birmingham, Dr. Michael --

21 A. Excuse me.

22 Q. Yes.

23 A. Deinlein's not at the university.

24 Q. I'm not suggesting he was.

25 A. Oh, okay.

* * *

1 Q. In what respects?

2 A. She -- she is having to do a lot of the
3 things that -- that I am supposed to do.

4 Q. Like what?

5 A. Taking care of the horses, feed the
6 dogs, cut the grass, regular household chores.

7 Q. Does that describe --

8 A. We have had a lot of arguments.

9 Q. Have you sought counseling because of
10 that?

11 A. Yes, sir.

12 Q. Has that assisted in smoothing out those
13 problems?

14 A. I guess it has helped.

15 Q. Okay. Had you had any problems before
16 the accident?

17 A. No.

18 Q. None at all?

19 A. (Witness shakes head).

20 Q. You're going to have to say no for the
21 court reporter.

22 A. Oh, I'm sorry. No.

23 Q. Now, you had an opportunity a few
24 moments ago to listen to the recorded statement taken
25 by Mr. McClendon. Do you recall doing that?

1 A. Yes, sir.

2 Q. Do you recall giving that statement?

3 A. Yes, sir.

4 Q. Do you -- is it an accurate statement of
5 what you told Mr. McClendon in the summer of '88
6 about your accident?

7 A. Yes, sir.

8 Q. Is there anything that you feel was
9 stated incorrectly, either by you or Mr. McClendon,
10 that comes to mind?

11 A. No, sir, not that I can think of.

12 Q. Okay.. There was some discussion about
13 the identity of the car which you were dealing with
14 when injured. Do you recall that discussion?

15 A. On the tape?

16 Q. The number of it?

17 A. Yes, sir.

18 Q. Yes, sir. Do you know today what number
19 car you were dealing with or trying to attempt to
20 uncouple when you had this incident?

21 A. Yes, sir.

22 Q. What is the number of that car?

23 A. GATX49820, I believe.

24 Q. Is that what you told Mr. McClendon on
25 the tape?

1 A. Yes, sir, I think so.

2 Q. How -- did you make some notation of the
3 number of that car on the evening you were injured?

4 A. I thought it was on the accident report.

5 Q. Okay. Well, did you make any separate
6 record of the car?

7 A. Yes, sir.

8 Q. When did you do that?

9 A. It was either that night after we got
10 off or the next day. No, it wasn't the next day. It
11 was the night we got off, I believe.

12 Q. Where did you write it down?

13 A. I wrote it down on a piece of paper.

14 Q. Do you still have that paper?

15 A. Yes, sir.

16 Q. Is anything else written on that paper?

17 A. No, sir.

18 Q. Now, what date, if you can recall, did
19 your incident take place?

20 A. May the 29th of 1988.

21 Q. What day of the week?

22 A. It was a Sunday.

23 Q. And as I understand it -- what were your
24 rest days during that time period?

25 A. Tuesday and Wednesday.

1 Q. And you were working with Mr. Johnson?

2 A. Yes, sir.

3 Q. As foreman or conductor?

4 A. Yes, sir.

5 Q. And who else were you working with?

6 A. G. E. Williams was the engineer.

7 Q. Where did the incident take place
8 that -- where you got hurt?

9 A. What we call the main line on the river
10 track.

11 Q. Was it near a particular industry?

12 A. There's several through there, yes.

13 Q. Were you working on a particular
14 industry track --

15 A. Yes, sir.

16 Q. -- setting off a particular industry
17 when you got hurt?

18 A. Working a certain industry, yes.

19 Q. Which industry was that?

20 A. It's a boat.

21 Q. How do you spell that?

22 A. B O A T. Which is affiliated with
23 Champion Paper Company.

24 Q. Is there one track there?

25 A. Well, there's actually two tracks.

1 Q. All right. Were you setting off on one
2 of the two?

3 A. Well, there's -- there's the main line.
4 Then there's two tracks on the boat. That's what
5 you're talking about.

6 Q. What time did this incident take place?

7 A. Seemed like it was between 6 and 7 p.m.

8 Q. What had you been doing before you had
9 to set some cars off at the boat track? Is that how
10 you call -- can we call it the boat track?

11 A. Boat, uh-huh. We had worked the Bunge
12 Corporation.

13 Q. Anything else?

14 A. I think that was the first place we
15 worked. No. Yeah. I think that was the first place
16 we worked.

17 Q. Had you worked there basically from 3 to
18 6?

19 A. No. We had to do some switching, other
20 switching.

21 Q. Had you just left the Bunge or Bunge
22 track when you went to the boat track?

23 A. Yes, sir.

24 Q. When you -- had you had any problems
25 that evening doing your work prior to that time?

1 A. No, sir.

2 Q. What was the visibility around 6 or 7
3 o'clock where this incident happened?

4 A. It was clear.

5 Q. Was it well lighted in that area?

6 A. Yes, sir.

7 Q. When you arrived at the boat, did you
8 have one engine?

9 A. I think we had two engines that night.

10 Q. And what did the consist consist of,
11 approximately? How many cars?

12 A. I don't remember.

13 Q. Did you have 20 cars or five cars?
14 What's the approximate range of cars you would have
15 had to switch that track?

16 A. To switch that one particular track?

17 Q. Well, that evening. Or typically.

18 A. On the average, I guess there's probably
19 20 to 25 cars that go to the river.

20 Q. Some you leave; some you pick up?

21 A. Uh-huh.

22 Q. Would it have been in that range, 20 to
23 25 cars that you had with you, when you arrived at
24 the boat track?

25 A. I don't really -- I don't really know
27

1 about that.

2 Q. Would Mr. Johnson have had a switch
3 list?

4 A. Yes.

5 Q. Would there be any other document
6 generated or in the records that would indicate how
7 many cars you all had that evening?

8 A. There should be a copy or a record in
9 the yard office.

10 Q. Of the switch list?

11 A. Yes, sir.

12 Q. Any other document, though, other than
13 the switch list that you're aware of?

14 A. No, sir.

15 Q. Now, when you arrived at the boat track,
16 what were you all to do? Do you recall how many cars
17 you were going to set off and how many cars you were
18 going to pick up or what actually you all were to do?

19 A. I don't remember. Don't seem like there
20 was a full load coming off. Seemed like there were
21 eight or ten cars going back on.

22 Q. All right. You're going to have to
23 explain to me what you mean by eight or ten cars
24 coming back on. Does that mean you were going to
25 take eight or ten cars off the boat track and take

1 them back to the yard?

2 A. Right. Yes, sir.

3 Q. Okay. Were you going to set any cars
4 off on the boat track?

5 A. Yes, sir.

6 Q. All right. Do you know how many you
7 were going to set off?

8 A. Off the boat?

9 Q. Yes, sir. No. Off the main line on to
10 the boat.

11 A. Seemed like there were ten or 12 going
12 back on.

13 Q. Okay. So you're basically putting in
14 the range of ten cars on the track and taking ten
15 off, approximately?

16 A. Yes, sir.

17 Q. Who was -- whose job was what when you
18 arrived there? What was your duty? Let me start
19 with this. When you left the Bunge track, where did
20 you -- how did you ride from the Bunge track to the
21 boat track?

22 A. Walked.

23 Q. Walked. Okay. How far is that?

24 A. The Bunge track and the boat track
2529 are -- they start out within six inches of each

1 other, and then they widen out probably to -- they're
2 no more than 20 feet apart, I guess.

3 Q. Did the train move on the -- on the main
4 line?

5 A. From where? --

6 Q. From the Bunge track to the boat track.
7 Or do you work them both off the same track,
8 basically?

9 A. Both of them off the same track,
10 basically.

11 Q. Okay. So you really don't have to move
12 them much at all?

13 A. None other than to get over to the
14 switching.

15 Q. Okay. Whose responsibility for throwing
16 the switch?

17 A. Which switch are you talking about?

18 Q. The boat track switch.

19 A. I think at that particular time it was
20 my job.

21 Q. Did you -- did you throw it?

22 A. Yes.

23 Q. All right. And then your next
24 responsibility was to cut off some cars?

25 A. No. I sent the train back to Mr.

1 Johnson, back on the boat.

2 Q. Okay. Mr. Johnson was back in the track
3 to --

4 A. Yes.

5 Q. -- couple up the cars you all were to
6 take off?

7 A. Yes, sir.

8 Q. And did that happen?

9 A. Yes, sir.

10 Q. And then they pulled the train back out?

11 A. Yes, sir.

12 Q. You stayed at the switch throughout that
13 time?

14 A. I went further out to another switch.

15 Q. All right. Why did you go to another
16 switch?

17 A. The cars that we take off of the boat go
18 into another track, and it goes back to the yard.

19 Q. Okay. All right. Well, just tell me
20 generally what occurred after you threw the switch to
21 allow the engine to come back and couple up to the
22 cars on the boat track. Just -- just tell me in a --

23 A. To unload the boat?

24 Q. Yes, sir. And when during that time
25 period you got hurt.

1 A. Mr. Johnson -- we gathered the cars -- a
2 couple of cars off of the boat and brought the cars
3 off, and then we went back to the main line to get
4 the cars to go back on the boat. You have to equal
5 out your load, because you can't put all the loads on
6 one side and all the empties on one side, so you have
7 to equal out your load.

8 Q. When you say on one side, one side of
9 what?

10 A. Of the boat. There's two tracks, and
11 you have to equal out your load. We were going to
12 make a move to cut this particular tank car off and
13 put some on the boat or set them over to make a
14 switch, and --

15 Q. All right. Let me -- let me back up a
16 minute. You pulled back into the boat to pick up
17 some cars; is that right? And Mr. Johnson was
18 responsible for seeing that they were coupled?

19 A. Yes, sir.

20 Q. You were out at the switch?

21 A. Yes, sir.

22 Q. He picked up the coupled cars or in that
23 vicinity and pulled back out to the main line; is
24 that right?

25 A. You have to double over to -- to get

1 both tracks off the boat.

2 Q. All right. Well, what do you mean by
3 doubling over?

4 A. There's two tracks. You have to double
5 one track to the other track and then take them to
6 the main line.

7 Q. You're going to have to explain what you
8 mean by doubling over.

9 A. You got two tracks, and there's cars on
10 one track and there's cars on the other track. You
11 have to couple two to one side. You have to pull out
12 to a switch and come back to the other side.

13 Q. Okay. All right.

14 A. And then take them out.

15 Q. Okay. Any problems up to that time?

16 A. For me?

17 Q. Yes, sir.

18 A. No, sir.

19 Q. Okay. So you basically emptied two
20 tracks of the cars you wanted to pull out?

21 A. Yes, sir.

22 Q. Two tracks side by side?

23 A. Yes, sir.

24 Q. Now -- now, you're back out on the main
25 line with over 20 cars hooked up to the engine?

1 A. No, sir. Not at that time.

2 Q. Okay. How many cars, approximately?

3 A. About eight, I think. Eight or nine.

4 Q. Then I take it you -- you're lined up on
5 the main line --

6 A. Yes, sir.

7 Q. -- at this point, and you have to cut
8 off some cars so that you can drop some cars in the
9 middle of the consist back on to the boat track?

10 A. Yes, sir.

11 Q. Okay. Do you know how many cars you've
12 got to cut off in order to get to the cars you want
13 to leave on the boat track?

14 A. How many cars --

15 Q. How many cars in the consist at that
16 time, once you're back out on the main line,
17 approximately?

18 A. We probably had ahold of probably 20
19 cars.

20 Q. Okay. And how many cars are you going
21 to have to set off in order to drop back into the
22 boat track?

23 A. I believe it was four.

24 Q. And they -- they would probably be the
25 four that you'd actually picked up in the boat track,

1 or not?

2 A. No. They were cars going back on the
3 boat.

4 Q. Okay. All right. What happens next,
5 after you're back out on the main line and you've got
6 to set these cars back in the boat track?

7 A. I was going to make a cut on this
8 particular tank car to try to equal out the load
9 going back on the boat.

10 Q. Okay. How many cars did you have to cut
11 off, four?

12 A. I believe it was four or five.

13 Q. Where are you --

14 A. Six.

15 Q. -- in the vicinity of the main line?

16 Which side of the main line are you on?

17 A. Directionalwise, I was on the north side
18 of the cars.

19 Q. All right. Would that be on the same
20 side as the boat tracks?

21 A. Yes, sir.

22 Q. Where are you in the vicinity to the two
23 boat tracks when you cut these cars off?

24 A. I don't understand.

25 **35** Q. All right. Which way does the track

1 run, the main line?

2 A. East and west.

3 Q. And the -- I take it the boat tracks run
4 basically north to south or close to it.

5 A. Yes, sir. --

6 Q. Something like this?

7 A. Yeah. These two more or less come
8 together down here.

9 Q. Down here somewhere?

10 A. Yeah. Right in here. And then they
11 split off -- split off down here.

12 Q. Like this?

13 A. Yeah. Yes, sir.

14 Q. Has a switch here? Where are the
15 switches?

16 A. Kind of comes off like this.

17 Q. All right. Okay. So there's really
18 only one connection with the main line?

19 A. Right. Here.

20 Q. All right. And there's a switch here?

21 A. Yes, sir.

22 Q. And any back here?

23 A. Yes, sir. One here.

24 Q. The X is being the switch. Now,
25 somewhere in this vicinity, you set the cars off; is

1 that correct?

2 A. The cars coming off the boat?

3 Q. The car -- the cut you were going to
4 make to allow the engine to come back into the boat.

5 A. They were on the main line.--

6 Q. All right. Where were you,
7 approximately? Put a P just for directional
8 purposes. Were you on this side or this side?

9 A. Oh, on this side.

10 Q. Okay. East -- east of the boat switch?

11 A. Yes.

12 Q. And north of the main line?

13 A. Yes, sir.

14 Q. And you were going to cut off four cars,
15 in that vicinity?

16 A. Approximately.

17 Q. And you -- you said that you had to pull
18 the cut lever of this tank car?

19 A. Yes, sir.

20 Q. Was the engine -- was the train stopped
21 at the time?

22 A. Yes, sir.

23 Q. And what did you do?

24 A. To cut the car off?

25 **37** Q. Yes, sir.

1 A. I made sure everything was clear around
2 me, had good footing, no obstruction in the way. I
3 asked the engineer for slack.

4 Q. What do you mean by that?

5 A. By slack? --

6 Q. Yes, sir. What does he do when you ask
7 him for slack?

8 A. He bunches the cars together.

9 Q. Does he come back?

10 A. In that instance, he would have backed
11 up.

12 Q. And then what do you do, or what did you
13 do?

14 A. I asked him for slack, and I pulled on
15 the cut lever to separate the cars. It would not
16 come up. I attempted again after checking, making
17 sure nothing was hanging down or broke or anything,
18 pulled it again, and it just felt like I hit a brick
19 wall, and past practice is usually you pull it two,
20 three, four times, so I pulled it again, and -- and
21 that time is -- I felt kind of a burning sensation,
22 didn't think a whole lot about it.

23 Q. What part -- what part of your body did
24 you feel a burning sensation?

25 A. The low back.

1 Q. What is your physical posture when
2 you're pulling the cut lever?

3 A. I was kind of -- kind of bent over
4 looking at the cut lever.

5 Q. Pulling with which arm? --

6 A. Left arm.

7 Q. Where's your right arm?

8 A. I think it was on my radio.

9 Q. Okay. So you pulled it three times,
10 approximately?

11 A. Approximately, yes, sir.

12 Q. And the third time you felt a burning
13 sensation in your lower back?

14 A. Yes, sir.

15 Q. Did you pull it any harder than normal?

16 A. No, sir. Just normal.

17 Q. Just pulled it normal, as you would any
18 time?

19 A. Yes, sir.

20 Q. And it just didn't drop?

21 A. Didn't come up.

22 Q. Okay. The pin didn't come up?

23 A. Right.

24 Q. And the engine stopped at this time?

25 **39** A. The engine stopped.

1 Q. What did you do next?

2 A. I climbed over to the other side.

3 Q. How did you climb over? Is there a
4 brake platform?

5 A. Yes. There's a walkway, catwalk.

6 Q. On which car?

7 A. On the tank car.

8 Q. All right. Just so we can know what
9 we're talking about, let's put two cars right here.
10 You say this is the tank, okay? Is that fair?

11 A. Make that a little tank for my side.

12 Q. All right. This would be the tank?

13 A. Yeah.

14 Q. Do you remember what kind of car this
15 was?

16 A. To the best of my recollection, it was a
17 boxcar.

18 Q. All right. Well, let's say box. You
19 were pulling with your left arm -- hand?

20 A. Yes, sir.

21 Q. Okay. Which cut lever are you actually
22 pulling?

23 A. This one.

24 Q. Can you draw -- can you draw it on here?

25 A. This is on the tank car here.

1 Q. Okay, Can you just point an arrow?
2 That's the CL, cut lever. Is that okay?

3 A. Uh-huh.

4 Q. Now, you say that you then -- the pin
5 didn't come up after pulling it three times.

6 A. Right.

7 Q. Did you tell the engineer anything?

8 A. I told him I had to cross over.

9 Q. Okay. And that meant for him not to do
10 anything?

11 A. Told him to sit still, I had to cross
12 over.

13 Q. Then you crossed over the tank car?

14 A. Yes, sir.

15 Q. There's a platform there?

16 A. Yes, sir.

17 Q. And got on the other side?

18 A. Yes, sir.

19 Q. At any period of this time, did you
20 realize your back was hurting?

21 A. Yes, sir. Felt -- I felt some pain in
22 it.

23 Q. When did you first feel the pain?

24 A. When I actually -- when it actually hit
41 me was after I pulled the cut lever.

1 Q. Did you feel it when you were walking
2 across the tank car?

3 A. Yes, sir.

4 Q. Was it real painful or just sort of a
5 pull?

6 A. It was kind of a sharp pain to start
7 with.

8 Q. Had you ever had that kind of pain
9 before?

10 A. No, sir, not like that.

11 Q. Didn't compare to any pain you'd ever
12 had before?

13 A. No, sir.

14 Q. All right. You got on the other side.
15 Where is the cut lever you were pulling on the other
16 side?

17 A. On the boxcar.

18 Q. Okay. And you'd also pulled that one
19 with your right arm?

20 A. Pull -- I pulled -- not also. I pulled
21 that one with my right arm.

22 Q. Okay. Did you feel any problems pulling
23 that one?

24 A. Still -- about the same amount of pain.

25 Q. All right. Now, how long did it take

1 you to pull that one?

2 A. The one on the boxcar came up the first
3 time.

4 Q. First time? Did you have to pull any --
5 ask the engineer to give you any slack for that one?

6 A. No. The slack was already in.

7 Q. All right. And once -- when you pulled
8 that one, did the tank car go on back, or did it
9 stay -- was it stationary?

10 A. It was stationary.

11 Q. And you just told -- what did you tell
12 the engineer?

13 A. Go ahead.

14 Q. All right. You went ahead. And did you
15 then cross back over and throw the boat switch?

16 A. Yes, sir. Came back up here to the boat
17 switch.

18 Q. Okay. How far, approximately, were you
19 from that boat switch?

20 A. Probably four, five, six car lengths.

21 Q. Where was Mr. Johnson during this time
22 period?

23 A. He was down on the boat.

24 Q. All right. When you say down on the
25 **43** boat, was he down in the vicinity of the other

1 switch, or was he further down?

2 A. Further on down.

3 Q. Lengthwise, how far are you talking
4 about?

5 A. Approximately 20 car lengths.

6 Q. So the engine pulled on -- pulled on up.
7 You went over and threw the boat switch. And did you
8 tell him to come on back?

9 A. Yes, sir.

10 Q. When was the first time you told anybody
11 about -- about your back hurting?

12 A. I guess it was about an hour to two
13 hours later. We took a break.

14 Q. And how did it come up?

15 A. I just mentioned that I needed to fill
16 out an accident report.

17 Q. Who did you mention that to?

18 A. Foreman.

19 Q. Mr. Johnson?

20 A. Yes, sir.

21 Q. And what -- what did you tell him, just
22 orally?

23 A. More or less just told him that I felt
24 some pain in my back and that I -- that they keep
25 preaching safety, and they want the work done, and

1 more or less if you skin your finger, they want
2 you -- want an accident report.

3 Q. Okay.

4 A. So I told him I was going to fill out
5 one.

6 Q. Did you tell him what had happened?

7 A. Yes, sir.

8 Q. What did you tell him?

9 A. Told him the cut lever on that tank car
10 wouldn't come up and I felt a little pain in my back
11 and didn't know if it was anything serious or not,
12 but they holler safety, so I was going to fill out an
13 accident report.

14 Q. Other than the fact that the pin
15 wouldn't stay up --

16 A. Pin wouldn't come up.

17 Q. Come up, was anything else wrong with
18 the cut lever as far as you could see?

19 A. Not that I could see.

20 Q. Did you pull any harder than normal?

21 A. Did I pull any harder than normal?

22 Q. Yes, sir.

23 A. No harder than I'm supposed to.

24 Q. Now, what happened after you told Mr.
25 ⁴⁵ Johnson about the accident?

1 A. Seemed like we had one or two more
2 industries to work, and we finished our work up and
3 then went in.

4 Q. Is it unusual to have to pull a cut
5 lever two or three times? --

6 A. If the car's working properly, it should
7 come up the first time.

8 Q. But in your experience, have you had to
9 pull a cut lever more than once?

10 A. Can you rephrase the question?

11 Q. Yes, sir. In your experience, in your
12 ten-plus, 15-plus years as a carman, have you had to
13 pull a cut lever more than once to -- to uncouple a
14 car?

15 A. On occasion.

16 Q. More than twice?

17 A. On occasion.

18 Q. Do you consider it defective if it
19 doesn't uncouple with the first pull?

20 A. Yes, sir.

21 Q. Do you report them?

22 A. Would I do what?

23 Q. Do you report those cars?

24 A. Sometimes.

25 Q. Sometimes not?

1 A. Sometimes not.

2 Q. Did you report this car?

3 A. Not at that particular time.

4 Q. How did you determine that that was the
5 car you were dealing with an hour or so later? How
6 did you know that the -- the number you mentioned a
7 little earlier is, I believe --

8 A. Because that was where I made the cut to
9 load the boat back.

10 Q. GATX49820?

11 A. Yes, sir.

12 Q. Well, just tell me -- maybe it's clear
13 to you -- how an hour later you would know that it
14 was the cut lever on GATX48920 was the cut lever that
15 you were pulling? Was there only one tank car --

16 A. There was only one tank car going back
17 on the boat, I believe.

18 Q. Okay. And this car was going to be set
19 off on the boat?

20 A. Yes, sir.

21 Q. And that was shown on the switch list?

22 A. Yes, sir.

23 Q. Did you have to refer to the switch list
24 to remember which car you were dealing with?

25 47 A. I believe I did.

1 Q. Did you have a copy of the switch list,
2 as well, or would that have been with Mr. Johnson?

3 A. I don't recall if I had one with me or
4 not.

5 Q. A GATX car, what -- what kind of
6 material does that hold?

7 A. It's a variety of different things. I
8 don't know what was in that one.

9 Q. But it was a full tank?

10 A. I'm not sure.

11 Q. Do you know where it -- it originated
12 from --

13 A. No.

14 Q. -- for you to set it off on the boat
15 track?

16 A. I'm not sure -- I don't understand the
17 question.

18 Q. Well, how did it get from wherever it --
19 you started that evening to where it was on the rear
20 of that -- that cut across?

21 A. It came in the yard on -- on another
22 train, I guess.

23 Q. Okay. And you all had picked it up in
24 the yard that evening to set off on -- on the boat
25 track?

1 A. Yes, sir.

2 Q. Would you have -- you or anybody else
3 have placed it in the train that you were handling
4 that evening to set it off on the boat track?

5 A. Placed it in a particular place?

6 Q. Yes, sir. In other words, you came to
7 the boat track from the Bunge track with that car in
8 your train; did you not?

9 A. Yes, sir.

10 Q. And at some point in that evening, it
11 had been hooked on to a train that your crew was
12 handling?

13 A. Yes, sir.

14 Q. Would you have made up that cut, that
15 train, to switch that evening?

16 A. I particularly would not have.

17 Q. All right. Who would have?

18 A. I guess it would have been Mr. Johnson.

19 Q. Or yourself, or would it have just been
20 Mr. Johnson?

21 A. Mr. Johnson was working what we call
22 long field is what the foreman does on a reduced
23 crew, and he would have been the man furthest away
24 from me.

25 **49** Q. Okay. So he would have made up the

1 train that evening in the yard before you all went
2 out to switch industries?

3 A. Yes, sir.

4 Q. Okay. And you wouldn't have
5 participated in the making up of that?

6 A. No, sir.

7 Q. Would have been just him and the
8 engineer?

9 A. Not -- you're not -- I'm not clarifying
10 myself or you're not clarifying yourself, one of the
11 two of them.

12 Q. That's fine. You understand what I'm
13 getting at, what I'm asking? At some point, somebody
14 makes up a cut of cars to take out to the industry to
15 either set them off or pick up some cars to bring
16 back to the yard, right?

17 A. Right.

18 Q. When you left the yard to go to the
19 Bunge track and then to the boat yard, somebody
20 made up a cut of cars to take out there. Who
21 have done that?

22 A. Both of us together would have
23 train up.

24 Q. Okay. Would both of you a
25 handled the GATX car that you attempted

23
24
25

1 that evening?

2 A. Would we both have handled it?

3 Q. Would one of you have handled it?

4 A. One of us could have.

5 Q. But might not have necessarily used the
6 cut lever?

7 A. Right.

8 Q. To your knowledge, had either of you had
9 any problems with the cars you'd handled that evening
10 up to that point?

11 A. Not that I know of.

12 Q. When you told Mr. Johnson an hour or so
13 later that you may have hurt your back on a coupling
14 car, were you -- did you go home that -- right away,
15 or did you go to the doctor, or what happened after
16 you reported it?

17 A. We were nearly finished with work. I
18 finished the shift out.

19 Q. Did you speak to anybody else other than
20 Mr. Johnson?

21 A. About what?

22 Q. About what happened that evening?

23 A. The engineer and the yardmaster.

Q. All right. Who was the yardmaster? You
mentioned earlier it was a Mr. --

1 A. Cotner --

2 Q. Cotner.

3 A. -- is who I -- I thought was the
4 yardmaster.

5 Q. Well, you're sort of suggesting he may
6 not have been the yardmaster. Is there somebody else
7 who may have been the yardmaster? To the best of
8 your knowledge, who was the yardmaster you talked to
9 that evening?

10 A. I thought it was Bobby.

11 Q. Bobby Cotner?

12 A. Bobby Cotner.

13 Q. All right. Did -- did you tell him what
14 had happened? Did he ask you questions about what
15 happened?

16 A. Not really, other than filling out an
17 accident report.

18 Q. You've seen a couple of accident reports
19 which the railroad has furnished your counsel. Have
20 you had a chance to look at the two accident reports?

21 A. Two accident reports?

22 Q. Well, one's a telegraphic report, and
23 the other one's -- do you recall looking at those
24 two?

25 A. I don't recall looking at this one.

1 Q. I'm not suggesting either one of them
2 are, but have you had an opportunity to look at those
3 two reports?

4 A. Oh. This one, that part I haven't.

5 Q. All right. Are either one of those --
6 well, the one you're looking at right now, the
7 four-page fill-in-the-blank, is that in your
8 handwriting?

9 A. Looks like it.

10 Q. Okay. Did you fill it out that evening?

11 A. Yes, sir.

12 Q. Who was with you?

13 A. Mr. Johnson.

14 Q. Anybody else?

15 A. I think that's all.

16 Q. Did you fill out anything else, that you
17 recall?

18 A. No, sir.

19 Q. Is there something to make you question
20 whether Mr. Cotner was in fact the yardmaster?

21 A. Is there something in question?

22 Q. Yeah. I mean, you seem to have some
23 doubt whether Mr. Cotner was indeed the yardmaster
24 that evening.

53 25 A. Well, there was some question, yes.

1 Q. All right. Why is there some question?

2 A. I'm not sure.

3 Q. Well, who else could have been the
4 yardmaster?

5 A. Edwin Smith.

6 MR. SPIER: Tell him you heard it on the
7 tape.

8 THE WITNESS: Well --

9 MR. SPIER: Tell him.

10 THE WITNESS: Okay. I heard it on the
11 tape --

12 MR. SPIER: That's what he wants to
13 know.

14 THE WITNESS: -- that it was Edwin, but
15 we had had some dealings with Bobby Cotner.

16 BY MR. RICHARDSON:

17 Q. Okay. Who -- who mentioned Edwin Smith
18 on the tape?

19 A. I think it was me.

20 Q. Okay. So you're either wrong today or
21 you're wrong on the tape; it was either Mr. Smith or
22 Mr. Cotner?

23 A. One of the two.

24 Q. And you think today it was Mr. Cotner?

25 A. I'm not really sure, because -- can I

1 explain myself?

2 Q. Yeah. Sure.

3 MR. SPIER: Sure. No one's stopping
4 you.

5 THE WITNESS: Edwin is the regular
6 yardmaster.

7 BY MR. RICHARDSON:

8 Q. Okay.

9 A. Cotner works extra yardmaster. Now, it
10 was brought up that Edwin was there. Cotner was the
11 clerk, and if he's the clerk, he does -- he is there,
12 also, whether he's clerk or yardmaster. And it's
13 just hard to explain. I think Bobby was there
14 because he was the billing clerk that night.

15 Q. Now, were you offered medical attention
16 that night?

17 A. Yes, sir.

18 Q. By either Mr. Smith or Mr. Cotner?

19 A. Yes, sir.

20 Q. Did you refuse it?

21 A. Yes, sir.

22 Q. Why did you refuse it?

23 A. At the time, I had three off days coming
24 up, and I thought I would just kind of give it a
25 chance to relax and let it heal itself, I guess.

1 Q. Okay. You had -- your normal off days
2 were Tuesday and Wednesday; is that right?

3 A. Yes, sir.

4 Q. Why were you off Monday?

5 A. It was a holiday.

6 Q. What holiday was it; do you recall?

7 A. Let's see. Let me think. May -- I
8 don't know.

9 Q. I don't know what it was.

10 MR. SPIER: Memorial Day. What, am I
11 crazy?

12 MR. RICHARDSON: You may be.

13 MR. SPIER: Memorial Day. Not Labor
14 Day. Labor Day in Soviet Union. Memorial Day in
15 America.

16 BY MR. RICHARDSON:

17 Q. Okay. Now, when did you first realize
18 that your back was really hurting?

19 A. To what extent?

20 Q. Well, when did you first seek medical
21 attention?

22 A. I believe it was the 7th of June.

23 Q. Okay. About a week later?

24 A. Yes, sir.

25 Q. Did you -- did you come back Thursday

ORIGINAL

CLERK

SUPREME COURT OF VIRGINIA

JUN 30 1992

RICHMOND, VIRGINIA

1 VIRGINIA: IN THE CIRCUIT COURT
2 THE CITY OF PORTSMOUTH

3
4 AT LAW NO. L-90-458

5
6
7 TERRY LEE PATTERSON,
8 PLAINTIFF,

9
10 VS.

11
12 CSX TRANSPORTATION, INC., a
13 Virginia Corporation,
14 DEFENDANT.

15
16 S T I P U L A T I O N

17
18 IT IS STIPULATED AND AGREED, by
19 and between the parties through their
20 respective counsel, that the deposition
21 of JERRY JOHNSON may be taken before
22 Linda Brasher, Commissioner, at 220
23 Park Place Tower, Birmingham, Alabama,

1 on the 26th day of February, 1991,
2 commencing at approximately 9:30
3 a.m.

4 IT IS FURTHER STIPULATED AND
5 AGREED that the signature to and
6 reading of the deposition by the
7 witness is waived, said deposition to
8 have the same force and effect as if
9 full compliance had been had with all
10 laws and rules of court relating to
11 the taking of depositions.

12 IT IS FURTHER STIPULATED AND
13 AGREED that it shall not be necessary
14 for any objections to be made by
15 counsel to any questions except as to
16 form or leading questions, and that
17 counsel for the parties may make
18 objections and assign grounds at the
19 time of the trial, or at the time said
20 deposition is offered in evidence, or
21 prior thereto.

22 IT IS FURTHER STIPULATED AND
23 AGREED that notice of filing of

1 BEFORE:

2
3 LINDA BRASHER, COMMISSIONER

4
5 APPEARING ON BEHALF OF THE PLAINTIFF:

6
7 MR. HOWARD A. SPIER

8 Sams, Donato, Spier & Hastings

9 214 SE 13th Street

10 Ft. Lauderdale, Florida

11
12 APPEARING ON BEHALF OF THE DEFENDANT:

13
14 MR. JOHN Y. RICHARDSON, JR.

15 Williams, Kelly & Greer

16 600 Crestar Bank Building

17 500 East Main Street

18 Norfolk, Virginia

19
20 ALSO PRESENT: Rick Roberts

21 Larry D. McClendon

22
23 I, Linda Brasher, acting as

1 Commissioner, certify that on this
2 date as provided by the Virginia Rules
3 of Civil Procedure, and the foregoing
4 stipulation of counsel, there came
5 before me at 220 Park Place Tower,
6 Birmingham, Alabama, on the 26th day
7 of February, 1991, commencing at
8 approximately 9:30 a.m., JERRY JOHNSON,
9 witness in the above cause, for oral
10 examination, whereupon the following
11 proceedings were had:

12
13 JERRY JOHNSON,

14
15 being first duly sworn, was examined
16 and testified as follows:

17
18 EXAMINATION BY MR. SPIER:

19 Q. Sir, would you give us your
20 full name, please?

21 A. Jerry W. Johnson.

22 Q. Mr. Johnson, where do you
23 reside?

1 A. Cullman, Alabama.

2 Q. What is your specific
3 address?

4 A. 1114 Avenue A Southeast.

5 Q. How long have you lived in
6 Cullman?

7 A. Forty-two years.

8 Q. And is that how old you are?

9 A. Yes, sir.

10 Q. Mr. Johnson, my name is
11 Howard Spier and I represent Terry
12 Patterson in his case against CSX
13 Transportation, Inc. If I ask you any
14 questions that you don't understand or
15 want me to repeat or it just doesn't
16 seem clear to you, please simply ask me
17 to rephrase it or ask it a different
18 way and I'll be happy to. Is that all
19 right with you?

20 A. All right.

21 Q. Mr. Johnson, who do you work
22 for currently?

23 A. CSX Transportation.

1 Q. And what do you do for that
2 railroad company?

3 A. I'm an engineer.

4 Q. And how long have you held
5 the position of engineer?

6 A. About two years.

7 Q. When you say you're an
8 engineer, is that the person who
9 operates the locomotive engines?

10 A. That's right.

11 Q. Before you became an
12 engineer, what were you doing for that
13 railroad?

14 A. Switchman.

15 Q. And when did you cease being
16 a switchman for the railroad? Do you
17 know the approximate date?

18 A. Probably around June or July
19 of 1988.

20 Q. And how long did you hold the
21 position of switchman before that?

22 A. About twelve years.

23 Q. Did you obtain the rank of

1 promoted conductor at some point?

2 A. Yes.

3 Q. What is the seniority date of
4 your conductor's seniority?

5 A. September of 1979.

6 Q. From 1979 to June of '88,
7 what percentage of the time did you
8 work as a conductor versus being a
9 switchman, can you give us an idea
10 about that?

11 A. No, not really, not accurate.

12 Q. Toward -- well, in 1988 from
13 January to June of '88, take that
14 period of time, did you spend more time
15 as a conductor or as a switchman?

16 A. Well, first part of '88 I was
17 in the engineers training program, and
18 then it went for about four weeks there
19 I was working a foreman's job.

20 Q. When you say foreman, what is
21 that position?

22 A. Same thing as conductor.

23 Q. All right. Now, let's try to

1 get some definitions here if we can.
2 Tell us about what a switchman does for
3 the railroad.

4 A. He switches boxcars.

5 Q. Man on the ground who throws
6 switches and so forth?

7 A. (Witness nods).

8 Q. Are you shaking your head yes
9 or no?

10 A. Yes.

11 Q. I would ask you that you try
12 to articulate an answer --

13 A. Okay.

14 Q. -- because otherwise the
15 court reporter can't get it down.

16 A. All right.

17 Q. And the job of a conductor,
18 you called that position a foreman.
19 Explain that job to me just a little
20 bit.

21 A. Well, the foreman, he makes
22 sure that, you know, everything is done
23 and done right. He's, more or less, a

1 boss.

2 Q. In the early months of 1988,
3 were you assigned to any particular
4 location to work for the railroad, any
5 yard or any particular area?

6 A. I was working in Oakworth or
7 Decatur.

8 Q. Is Oakworth and Decatur the
9 same place?

10 A. Yes, sir.

11 Q. Is that where CSX has a
12 yard?

13 A. Yes, sir.

14 Q. And during this time period
15 in the weeks and months before May of
16 1988, what kind of work were you
17 doing?

18 A. I was working what they call
19 the river job.

20 Q. And what did the river job
21 consist of, Mr. Johnson?

22 A. Working industries on the
23 Tennessee River.

1 Q. During the time that you were
2 working the river job, did you have a
3 crew assigned to you?

4 A. Yes, sir.

5 Q. And was Mr. Patterson part of
6 that crew?

7 A. Yes, sir.

8 Q. When Mr. Patterson worked
9 with you, what job did he hold?

10 A. He was our footboard man,
11 switchman.

12 Q. Who else would have been
13 assigned to you on a routine basis
14 during that period of time?

15 A. Glenn Williams, he was the
16 engineer.

17 Q. Anybody else?

18 A. No, that's it.

19 Q. So you had three people
20 assigned to that job including
21 yourself?

22 A. Yes, sir.

23 Q. How would you get your

1 instructions as to what you would be
2 doing on a daily basis?

3 A. From the yardmaster.

4 Q. And let me ask you this, what
5 shift were you assigned to during these
6 days?

7 A. Second shift.

8 Q. What are the hours of the
9 second shift, Mr. Johnson?

10 A. Well, then starting time was
11 four o'clock railroad time.

12 Q. Is that to be distinguished
13 from civilian time?

14 A. Three o'clock regular time.

15 Q. So three o'clock on the
16 watch, but four o'clock railroad time?

17 A. Yes, sir.

18 Q. And that went until when?

19 A. Twelve.

20 Q. Midnight?

21 A. Yeah.

22 Q. And who was the yardmaster
23 assigned to that particular shift at

1 the Oakworth or Decatur yard?

2 A. Bobby Cotner.

3 Q. Take me through, if you
4 could, a typical day or a second shift
5 day when you would come to work and get
6 your instructions, how does that work?

7 A. What, the instructions or
8 what we did?

9 Q. Well, how do you get lined up
10 to do your work?

11 A. The yardmaster, he gives us a
12 list of cars that's needed and cars
13 that's to be pulled at the industry.

14 Q. What is that list called, Mr.
15 Johnson?

16 A. Switch list.

17 Q. And would he directly give it
18 to you?

19 A. Yeah.

20 Q. And the switch list would
21 tell you what, specifically?

22 A. What cars was needed and what
23 cars was to be released from the

1 plants.

2 Q. At these various industries
3 along the Tennessee River?

4 A. That's right.

5 Q. After you would get the
6 switch list, what would you typically
7 do next?

8 A. We'd go out in the yard and
9 build our cut or train or whatever to
10 go to the river.

11 Q. So the cars that needed to go
12 to the river and sitting in the yard
13 and you'd have to bring them together
14 and couple them up?

15 A. That's right.

16 Q. And you would supervise that
17 as the conductor?

18 A. That's right.

19 Q. After you'd get your cars
20 assembled in the yard, what would you
21 do next?

22 A. Go to the river track.

23 Q. And start spotting these at

1 the various industries?

2 A. Yes, sir.

3 Q. All right. Let me take you
4 to the day of May 29th, 1988, if I can.
5 Obviously, that's the date we allege
6 something occurred to Mr. Patterson.
7 Were you working the foreman's job at
8 that time?

9 A. Yes, sir.

10 Q. And were Mr. Patterson and
11 Mr. Williams your crew members?

12 A. Yes, sir.

13 Q. And were you working the
14 second shift during that period?

15 A. Yes, sir.

16 Q. Do you recall building a
17 train in the Decatur or Oakworth yard
18 during that time?

19 A. Yes, sir.

20 Q. And who was the yardmaster?

21 A. Bobby Cotner.

22 Q. Did you receive a switch list
23 for that train that you were building?

1 A. Yes, sir.

2 Q. Have you seen that switch
3 list, Mr. Johnson, recently?

4 A. No, sir.

5 Q. Do you keep a copy of that
6 list?

7 A. No, sir.

8 Q. You did receive a copy at one
9 time?

10 A. Yes, sir.

11 Q. What did you do with it?

12 A. Threw it away.

13 Q. Is that routine for you?

14 A. Yeah.

15 Q. Do you know whether or not
16 the railroad saves its copy?

17 A. I don't know.

18 Q. Well, let me ask you this,
19 are there duplicates and triplicates
20 made of the switch list?

21 A. I don't know.

22 Q. Do you share that switch list
23 with your crew members?

1 A. Yes, sir.

2 Q. Do you give them a hard copy
3 or do you just show them what it is?

4 A. They get a copy.

5 Q. Does that include the
6 engineer and Mr. Patterson?

7 A. No, sir, just Mr. Patterson
8 or the helper.

9 Q. And on this day, May 29th,
10 1988, what job was Mr. Patterson
11 assigned?

12 A. Y-201.

13 Q. That's the job number?

14 A. Yes, sir.

15 Q. And what were his specific
16 duties on that day?

17 A. What was his specific
18 duties?

19 Q. What was his job title that
20 day?

21 A. He was helper or switchman or
22 footboard man.

23 Q. Okay, we've got all sorts of

1 names for these fellows. All right.
2 And can you tell us anything about the
3 train that you assembled in the Decatur
4 or Oakworth yard?

5 A. It was just like any other
6 day.

7 Q. Do you know what kind of cars
8 were in your consist?

9 A. It was grain hoppers,
10 boxcars, tanks, and that's just about
11 it.

12 Q. All right. Did you
13 participate in the assembling of the
14 cars in the Oakworth or Decatur yard?

15 A. Yes, sir.

16 Q. In the course of assembling
17 the train to take out of the yard and
18 bring it to the industries, do you
19 perform any kind of inspection on these
20 cars? Are you required to do that as
21 conductor or does that belong to
22 someone else?

23 A. You mean like a -- what kind

1 of inspection are you talking about?

2 Q. Well, I don't know.

3 A. Visual inspection?

4 Q. Any inspection.

5 A. Yeah, visual inspection, yes.

6 Q. And what are the things that
7 you're looking for during the visual
8 inspection?

9 A. Brake rigging dragging or
10 tanks leaking or hopper doors open,
11 grain falling out, stuff like that.

12 Q. Do you recall anything
13 unusual about the cut that you put
14 together at the Decatur yard on that
15 occasion?

16 A. No, sir.

17 Q. Okay. In building the train
18 that was going out to the industry on
19 that occasion, were you required to
20 couple up certain cars to other cars?

21 A. Sure.

22 Q. And was there anything
23 unusual about that activity at the yard

1 at that time?

2 A. No, sir.

3 Q. Did you come across any cars
4 that were, for some reason or another,
5 unable to be coupled up?

6 A. Not to my knowledge, no.

7 Q. In addition to coupling cars,
8 did you also have to uncouple cars to
9 build your train?

10 A. Yes, sir.

11 Q. At the yard?

12 A. Yes, sir.

13 Q. Was there anything unusual
14 about that during that time?

15 A. No, sir, not to my knowledge.

16 Q. Did you have the occasion
17 while building your train at the
18 Decatur yard to uncouple cars and pull
19 on various cut levers in order to do
20 that?

21 A. Sure.

22 Q. And was there anything
23 unusual about that experience that you

1 remember on that day?

2 A. No, sir.

3 Q. Just for the sake of clarity,
4 tell us how you would normally,
5 usually, or customarily, if you will,
6 operate a cut lever in order to
7 separate a car from another car. How
8 is that done, Mr. Johnson?

9 A. Pull a lever.

10 Q. And where is this lever
11 situated?

12 A. It's on the end of the car.

13 Q. All right. And you just pull
14 it?

15 A. Just pull it.

16 Q. On occasions during your
17 experience with the railroad as a
18 switchman or a conductor, have you
19 experienced where you'd pull the cut
20 lever and it wouldn't work?

21 A. Yes, sir.

22 Q. And from time to time do you
23 then pull it again for the second or

1 third time to try to get it to work?

2 A. Yes, sir.

3 Q. Is that rather routine for
4 switchmen and conductors?

5 A. Well, it is for me.

6 Q. How many years have you been
7 out there working in that capacity?

8 A. About twelve years.

9 Q. As a switchman or a
10 conductor, are you sufficiently
11 experienced and schooled in knowing how
12 to distinguish defects in a cut lever?

13 A. Sure.

14 Q. Have you had the occasion to
15 take cut levers and knuckles apart and
16 so forth?

17 A. Knuckles.

18 Q. Do you know what, if any,
19 involvement Mr. Patterson had in the
20 building of the train that second shift
21 on May 29th, 1988?

22 A. You mean what was he doing?

23 Q. Was he part of that activity

1 or did he have other things to do?

2 A. Yes, sir, he -- like I said,
3 most of the time it was just standard
4 stuff. Usually I made the air on the
5 cuts and he was switching the cars in
6 different tracks and I was aligning the
7 switches.

8 Q. How were the both of you
9 communicating with each other?

10 A. Radio.

11 Q. And how were you all
12 communicating with the engineer?

13 A. Radio.

14 Q. Okay. Did there come a time
15 that you left the yard --

16 A. Yeah.

17 Q. -- and off to the
18 industries?

19 A. Yeah.

20 Q. How far a trip is that?

21 A. I would probably say three or
22 four miles, maybe five.

23 Q. Now, during that period in

1 1988, were the industries rather busy,
2 to your knowledge, along the river?

3 A. Well, about average. I mean,
4 like, during the fall months it might
5 be a little heavier on the account of
6 soybeans coming in and stuff like that.

7 Q. Can you give us an idea, Mr.
8 Johnson, what industries that you would
9 work along the river?

10 A. Well, do you want them in the
11 way we worked them, the way they lined
12 up to be worked, the way we worked them
13 or just right off what --

14 Q. I think it would be probably
15 better if you would tell us in the
16 sequence in which you worked them.

17 A. That we worked them?

18 Q. That's right.

19 A. Probably the barge, which was
20 -- well, the boat, and then probably
21 Bunge.

22 Q. That's another industry?

23 A. Yes, sir, and then Con-Ag.

1 Q. Con-Ag?

2 A. Yes, sir.

3 Q. Anybody else?

4 A. And sometimes Jim Dandy.

5 Q. Anything else that you can
6 recall?

7 A. No, that's all.

8 Q. This Champion, what is that?

9 A. That's the barge.

10 Q. So the barge would be the
11 first industry worked?

12 A. Yeah, most of the time, yeah.

13 Q. Do you know whether on this
14 occasion you worked the barge first?

15 A. I'm sure we did.

16 Q. And do you recall sitting
17 here today what kind of cut you wanted
18 to place on the barge? Give us the
19 best description that you can.

20 A. You mean what cars were on
21 the barge?

22 Q. What were you going to put on
23 the barge?

1 A. Well, we were going to put
2 eight cars.

3 Q. All right.

4 A. It would consist of probably
5 tanks, boxes, sometimes wood racks, but
6 not that often.

7 Q. How many tracks go on to this
8 floating barge?

9 A. Two.

10 Q. And is there any requirement
11 as to what track you're going to use on
12 the barge or do you use them both?

13 A. We use them both.

14 Q. Why do you use them both?

15 A. To balance the barge.

16 Q. Once this barge is full with
17 cars, the barge would then go on down
18 the river?

19 A. Well, not that minute after
20 it's loaded and all. Later on it does,
21 yeah.

22 Q. What track do you come in on
23 to the industries in order to work these

1 various tracks or industries?

2 A. River track?

3 Q. Excuse me?

4 A. River track?

5 Q. Is that the main track coming
6 in, is that called the main line?

7 A. Well, it's called the main
8 river track.

9 Q. And how, for example, do you
10 get your train from the main river
11 track ultimately to these two barge
12 tracks? Can you take me through that
13 sequence of events?

14 A. Do what now?

15 Q. How do you get the cars that
16 you want onto the barge from the main
17 river track, how is that maneuver
18 made?

19 A. Well, first you cut your
20 engines off and pick up idler cars.

21 Q. What are idler cars?

22 A. Spacers to keep the weight of
23 the locomotive off, I guess, a bridge

1 or off the barge.

2 Q. Is that because the
3 locomotive weighs much more than these
4 other cars?

5 A. Yeah.

6 Q. So the idler car is going to
7 spread from the other cars?

8 A. That's right.

9 Q. All right. Then what do you
10 do?

11 A. Then you pick up the cars
12 that you're going to put on the barge,
13 kind of -- well, like, if you've got
14 eight cars, you might put two on one
15 side and then four on the other side
16 and put two on, you know, kind of
17 balance it out so it won't flip over.

18 Q. So you want to avoid flipping
19 the barge over?

20 A. That's right.

21 Q. Do you know whether or not
22 these cars are empty or loaded?

23 A. Well, yeah.

1 Q. What tells you that, if
2 anything?

3 A. Well, most of the time you
4 can tell. You know, like, usually
5 boxcars go on empty, tank cars are
6 loaded, and if you've got wood racks,
7 they're empty or -- well, I say -- if
8 they're
9 loads they go in loads.

10 Q. When you begin to work the
11 barge job I'll call it, what are your
12 responsibilities? Take me through that
13 first, what do you do customarily?

14 A. Well, usually what I do, I
15 work the barge end simply because -- I
16 don't know, I'm not saying that I know
17 that much more about it, but some
18 people, they get kind of scared about
19 working it.

20 Q. So you position yourself
21 where?

22 A. On the barge.

23 Q. On the barge. All right.

1 And how about Mr. Patterson, where
2 would he position himself?

3 A. He would be on the main line,
4 or I say main line, river track.

5 Q. And the engineer remains in
6 the engine?

7 A. Yeah.

8 Q. Who directs the movement from
9 the main line or river track to the
10 barge?

11 A. Well, after the -- say the
12 helper, he gets across the road
13 crossing, whoever's on the barge track.
14 In this case, me.

15 Q. So you would have radioed the
16 engineer back?

17 A. Yeah.

18 Q. Are there switches to be
19 thrown in order to get cars from the
20 main track or the river track to the
21 barge?

22 A. Yeah.

23 Q. And can you tell us about how

1 many switches have to be lined up in
2 order for your engineer to make that
3 particular move?

4 A. Well, all right, if you're
5 coming off the river track, to come
6 back on the barge lead, you've got one,
7 and then if you go from the east barge
8 to the west barge you've got another
9 one, that's two.

10 Q. Okay. In the ordinary course
11 of events, if Mr. Patterson is working
12 the main river track and you're working
13 the barge area, whose responsibility is
14 it to throw those switches in order to
15 make the movement onto the barge?

16 A. Well, usually we run around
17 the cut. I would probably walk over
18 and line up the switches going to the
19 barge tracks, but after we started
20 switching, it was up to the helper to
21 pull the main line switch.

22 Q. Is that Mr. Patterson?

23 A. Yes, sir, the main line

1 switch or the east and west barge
2 track.

3 Q. In terms of distance, how far
4 would the barge be from the river
5 track?

6 A. I'm going to say less than a
7 quarter of a mile.

8 Q. During the work on May 29th,
9 1988, did you, in fact, take a position
10 on the barge?

11 A. Yes, sir.

12 Q. Were you able to observe your
13 train on the river main line or do you
14 lose that because of the curve and so
15 forth?

16 A. I don't think you'd be able
17 to see what was going on on the main
18 line.

19 Q. Were you able to observe --
20 this is an academic question based on
21 your answer there, but I just want to
22 make sure -- were you able to observe
23 Mr. Patterson during any of his

1 uncoupling activities on the river
2 track?

3 A. No.

4 Q. All right. Approximately
5 what time in the course of the shift
6 did you arrive on May 29th, 1988, at
7 The barge or in the vicinity of the
8 river track in order to work the barge
9 tracks? A good estimate will do.

10 A. Well, probably around five or
11 five-thirty in the afternoon.

12 Q. So the sun is still shining?

13 A. Yeah.

14 Q. Do you recall offhand any
15 particular weather conditions on May
16 29th, '88?

17 A. No. I'm sure it was -- it
18 wasn't raining or cloudy or anything I
19 don't think.

20 Q. All right. Now, take me
21 through the movement, as best you can
22 recall, when you were working the
23 barge. What happened out there that

1 day?

2 A. Well, I got off, after we run
3 around the -- or when we pulled down
4 the river track I probably got off and
5 lined -- if the Bunge switch was wrong
6 I lined it and probably the barge track
7 either which way it wanted to go to
8 pick up the idlers, and I went on down
9 to the barge.

10 Q. Yes, sir. And what happened
11 next?

12 A. Coupled up, probably pulled
13 the loads, if we had any, you know,
14 pulled them off.

15 Q. So cars had to come off the
16 barge first?

17 A. Well, ninety-nine percent of
18 the time, yeah.

19 Q. Do you recall on this
20 occasion whether there were any cars on
21 the barge?

22 A. I don't know.

23 Q.. Would that be a routine,

3 A. Well --

4 MR. RICHARDSON: He's trying
5 to, I think, testify to the best of his
6 recollection.

7 Q. (BY MR. SPIER) You said
8 ninety-nine percent of the time there
9 would be cars on the barge that would
10 have to come off?

11 A. Yes, sir, but in this
12 particular case, I don't really know if
13 we had to pick up any or not.

14 Q. All right. Then what
15 happened?

16 A. Well, coupled up -- if there
17 wasn't any on there we coupled up to
18 the idlers and went back out to the
19 main line.

20 Q. Yes, sir.

21 A. And usually when we build a
22 cut in the yard we didn't exactly build
23 it, you know, how they go on the barge

1 because, like I said, you had to
2 balance it out a little bit, and picked
3 up the cars that's supposed to go on
4 the barge track, maybe switched them
5 out. He sent them back to me and I
6 made a cut and come back.

7 Q. Take me through the
8 movements, if you can, though, of the
9 cars coming back onto the barge.
10 That's what I'm interested in.

11 A. Well, you set up one side
12 like just maybe if you've got, in that
13 case, eight cars, if you've got any
14 loads, you don't want to put two loads
15 on one side, you want to kind of put
16 one on one side and one on the other.
17 If you haven't, you put two on or --
18 yeah, two on one side and then shove
19 four on the other side and then come
20 back and --

21 Q. What track do you work first
22 on the barge?

23 A. Well, it's not --

1 Q. Is there any routine to
2 that?

3 A. No.

4 Q. What happened next in this
5 case?

6 MR. RICHARDSON: Wait a
7 minute now. I think the record ought
8 to clarify that he's telling you how he
9 normally does it. I'm not sure he's
10 telling you how he recalls it being
11 done that night, he may not even recall
12 how he did it that night. Your
13 question infers he's telling you
14 exactly how it was done that night.

15 Q. (BY MR. SPIER) Do you
16 remember how it was done that night?

17 A. No, not really.

18 Q. Let me ask you, do you think
19 you're capable, based upon your
20 experience of being out there, to make
21 me a little drawing of how the river
22 main line track interconnects with the
23 barge?

1 A. Yes, sir.

2 Q. Let me give you this paper
3 here. Use my pen, if you would, and
4 don't be afraid to use the whole piece
5 of paper.

6 A. I won't.

7 Q. And label things, if you
8 would, so we know east and west and
9 what's the name of these various
10 things.

11 A. All right.

12 (Witness drawing
13 illustration).

14 A. Do you want me to put the
15 boat?

16 Q. Sure, put the boat if you
17 have any room left.

18 A. All right.

19 Q. Where's the river?

20 A. The river's back here
21 (indicating).

22 Q. What's the name of that
23 river?

1 A. Tennessee River.

2 Q. Label the barge, put a B
3 there for barge.

4 MR. SPIER: Do you want to
5 look at that, John?

6 MR. RICHARDSON: Well, after
7 you ask him some questions I may want
8 to.

9 Q. (BY MR. SPIER) Apparently,
10 from your drawing, Mr. Johnson, the
11 river track runs east/west?

12 A. Yeah.

13 Q. And there is a track that
14 splits directly off the river track.
15 What is that called, this branch thing
16 here?

17 A. Well, that's a lead track
18 going to Bunge and it goes to the ham
19 track, which is a storage track, and to
20 the barge tracks.

21 Q. Can you put a little arrow
22 and just label that as lead track?

23 A. All right.

1 Q. Now, in order for the cars to
2 get from the river track onto the lead
3 track, is there a switch that has to be
4 operated?

5 A. Yes, sir, right here
6 (indicating).

7 Q. Put an S there for switch.

8 A. All right.

9 Q. Circle it so we know what it
10 is.

11 A. All right.

12 Q. When the train is running
13 cars to the barge, is the engineer
14 shoving his cars back onto the lead
15 track?

16 A. Yes, sir.

17 Q. Is there another switch that
18 has to be thrown after that lead track
19 switch that gets you to the barge? I
20 think you told us there were two
21 switches.

22 A. Well, you've got to line the
23 switch right here (indicating), if it's

1 not lined.

2 Q. On the day of this incident,
3 was that switch lined for your movement
4 or against your movement?

5 A. I don't know.

6 Q. Just put an S there and
7 circle that.

8 A. All right.

9 Q. That's the switch that's at
10 the Bunge track?

11 A. Yeah.

12 Q. Okay.

13 A. And then you've got a switch
14 here at the ham track.

15 Q. Does the ham track hold
16 hams?

17 A. No, boxcars.

18 Q. Do you think the jury is
19 going to know that?

20 A. I'm just --

21 Q. I understand, I'm only
22 kidding, take it easy. So put another
23 S there for the ham track.

1 A. All right.

2 Q. And what is the purpose of
3 the ham track?

4 A. Well, it's more or less a
5 storage track for empty hoppers going
6 into Bunge or --

7 Q. Okay. Any other switches
8 that have to be thrown in order to get
9 you folks to the barge?

10 A. Well, right here you've got
11 another switch that goes from the east
12 barge to the west barge.

13 Q. Those are the two tracks that
14 end up going onto the barge?

15 A. Yeah.

16 Q. Okay. Now, the specifics of
17 how many cars you put on one side
18 versus the other, you don't remember
19 that?

20 A. No.

21 Q. I think you told us that. Do
22 you know what track you worked first?
23 You don't remember that either?

1 A. Well, I tell you, probably it
2 was the west barge.

3 Q. Why do you say that?

4 A. Well, simply because this --
5 the car that I -- I'm sure that you're
6 going to ask me about, that was the
7 last car that I cut off.

8 Q. What track did you cut it off
9 on?

10 A. On the east barge.

11 Q. Okay. Now, did there come a
12 time that you had a car to cut off on
13 the east barge?

14 A. (Pause).

15 Q. You have to say something.

16 A. Do what now?

17 Q. Did there come a time that
18 you had a car to cut off on the east
19 barge?

20 A. Yeah.

21 Q. Can you identify that car for
22 us?

23 A. Yes, sir, it was a tank car.

1 Q. And was that tank car --
2 where was it in relation to the other
3 cars on that east barge track, was it
4 the head car, the rear car, where was
5 it in relation to other cars?

6 A. Well, it would have been --
7 when I cut it off it would have been
8 the head car.

9 Q. The car --

10 A. That I left.

11 Q. And there were cars behind
12 it?

13 A. Yeah.

14 Q. Do you remember how many?

15 A. Three.

16 Q. Three. When I say behind it,
17 that means toward the river?

18 A. That's right.

19 Q. What kind of --

20 MR. RICHARDSON: I'm confused
21 now. When you say behind it, toward
22 the river -- don't explain yet, I want
23 the record to reflect what the question

1 is. Are you saying the tank car and
2 there were three cars in front of it
3 toward the river and the barge?

4 MR. SPIER: Three cars behind
5 it toward the river.

6 MR. RICHARDSON: Okay.

7 Q. (BY MR. SPIER) Am I right,
8 Mr. Johnson?

9 A. You lost me.

10 Q. Mr. Johnson, the tank car was
11 the last car left on the east barge
12 track?

13 A. That's right.

14 Q. So you had cars behind it
15 backing up toward the river?

16 A. That's right.

17 MR. RICHARDSON: The
18 semantics are confusing.

19 Q. (BY MR. SPIER) Any problem
20 with that?

21 A. No problem.

22 Q. What kind of car was coupled
23 to the tank car before you attempted to

1 make a cut, if you can remember?

2 A. I'm going to say it was a
3 boxcar that was used -- idlers.

4 Q. Idler car?

5 A. Yeah.

6 Q. Did there come a time that
7 you attempted to operate the cut lever
8 on that tank car in order to separate
9 it from the idler?

10 A. Yes, sir.

11 Q. And take us through the
12 routine of what you did out there that
13 evening with that particular car.

14 A. Well, I pulled the cut lever
15 and --

16 Q. What happened?

17 A. It wouldn't pull. I jiggled
18 it a little bit and it still wouldn't
19 pull so I crawled across the car and
20 cut the other cut lever.

21 Q. Which cut lever did you
22 ultimately have to operate, to what
23 car?

1 A. You mean which one did I
2 finally use?

3 Q. That's right.

4 A. On the boxcar.

5 Q. The idler?

6 A. Yes, sir.

7 Q. And that caused you to crawl
8 -- how did you get from one side of the
9 tank car across to the other side?

10 A. Crawled across the end of the
11 tank.

12 Q. When you attempted to operate
13 the cut lever on that tank car, could
14 you determine of your own observation
15 what, if anything, was wrong with it?

16 A. No, sir.

17 Q. Did it operate in the normal,
18 routine manner?

19 A. No, sir.

20 Q. Did you closely inspect to
21 see what the problem was?

22 A. No, sir.

23 Q. How many times did you try to

1 lift it up?

2 A. Well, I really don't know,
3 probably a couple of times.

4 Q. After you tried to lift it up
5 a couple of times -- well, were you
6 able to get it up at all?

7 A. No, sir.

8 Q. What was the sensation like?

9 A. Just -- it wouldn't pull.

10 Q. And the motion that you use
11 to operate that cut lever is what? Do
12 you pull it out or --

13 A. No, just pull it up.

14 Q. And describe this cut lever
15 mechanism to me, what does it look
16 like?

17 A. Well, it's about a one-inch
18 bar that comes from the drawhead to a
19 holding device and it's got a handle
20 on it, and you just pull it up.

21 Q. It sticks out from the side
22 of the car, does it?

23 A. Well, no.

1 Q. Towards the end?

2 A. Yeah.

3 Q. And it's a piece of metal?

4 A. Yes, sir.

5 Q. Under normal circumstances,
6 if the cut lever is working correctly,
7 what do you anticipate?

8 MR. RICHARDSON: I'm going to
9 object to the leading.

10 Q. (BY MR. SPIER) Let me ask it
11 this way. Have you operated cut levers
12 that have worked on the first try?

13 A. Oh, sure.

14 Q. What do you anticipate when
15 you do that, when you try to lift up on
16 a normal, working cut lever?

17 MR. RICHARDSON: Object to
18 the leading.

19 Q. (BY MR. SPIER) Go ahead.

20 A. Just pull it up.

21 Q. What kind of effort is used
22 on a cut lever that is working and not
23 defective in any way?

1 MR. RICHARDSON: Object to
2 the leading.

3 Q. (BY MR. SPIER) Go ahead.

4 A. Very little effort.

5 Q. You said after you tried the
6 cut lever on this particular car you
7 crawled over or crossed over?

8 A. Crossed over.

9 Q. How did you do that?

10 A. Over the end of the tank,
11 it's got kind of a catwalk.

12 Q. All right. Use the black
13 pen, I don't know if you can do this.
14 Was the idler car on the barge entirely
15 or half on, half off, how was the idler
16 car?

17 A. When you spot these cars, the
18 end of the cars that you're leaving are
19 like that, and your idlers are
20 (indicating) --

21 Q. Put an arrow pointing to the
22 tank car and call it tank.

23 A. All right.

1 Q. Do you know what a bad order
2 tag is?

3 A. Yeah.

4 Q. What is a bad order tag?

5 A. Any defects on a car, you put
6 it on the tag.

7 Q. This is just a tag that's
8 placed right on the car?

9 A. Yeah.

10 Q. Were you furnished with bad
11 order tags that occasion, do you know?

12 A. I didn't have any.

13 Q. Did you in any way mark that
14 car as being one that had a hard to
15 throw cut lever?

16 A. No, sir, I didn't.

17 Q. Any reason for that?

18 A. Well, usually -- well, the
19 tank car was already on the barge.

20 Q. Right.

21 A. Usually on -- just because
22 the pin on the car wouldn't pull wasn't
23 necessarily that it was bad order. I

1 mean, the pressure -- you shove -- you
2 spot the cars, well, the engineer, he
3 has the brakes on, you're shoving
4 against the brake. Therefore, it puts
5 pressure on your knuckles and then
6 sometimes it won't pull. I mean, I'm
7 not saying that's the case. What I'm
8 saying is, you know, it's not uncommon
9 for cut levers not to pull, you know,
10 and then you could go back and couple
11 up to it and then it would pull.

12 Q. Well, do you know what the
13 term slack is?

14 A. Yeah.

15 Q. Describe slack for us.

16 A. Slack is in between -- the
17 distance in between the knuckles or
18 drawheads.

19 Q. What condition or position
20 should the slack be in when you attempt
21 to throw a cut lever, if you know?

22 A. In.

23 Q. Have you -- did you satisfy

1 yourself on the evening of this
2 incident that when you tried to throw
3 the cut lever on the tank car the slack
4 was in the appropriate position?

5 A. Yes, sir.

6 Q. And was it?

7 A. Yes, sir.

8 Q. The slack was in?

9 A. Yes, sir.

10 Q. If the slack is out, that is,
11 the cars were stretched out, does that
12 have an impact on your ability to throw
13 a cut lever?

14 A. You can't throw one.

15 Q. That you've learned from your
16 experience on the railroad?

17 A. Yes, sir.

18 Q. Did there come a time that
19 evening, Mr. Johnson, that you learned
20 of an incident involving Terry
21 Patterson?

22 A. Yes, sir.

23 Q. Approximately what time did

1 you learn of it?

2 A. Well, I really don't
3 know. It was either when we got back
4 into the office or maybe when we were
5 taking a cut back into the yard.

6 Q. And you said you were at the
7 barge track about five o'clock in the
8 evening. What time would it have been
9 that you first learned about an
10 incident involving Mr. Patterson?

11 A. Well, I don't really know
12 what time we started in or what time we
13 really got off that night.

14 Q. Did you work the other
15 industries after the barge?

16 A. Yes, sir.

17 Q. The ones you told us about,
18 Bunge, Con-Ag, and Jim Dandy?

19 A. Yes, sir.

20 Q. Any other industries?

21 A. No.

22 Q. Once you complete those
23 industries, what do you do typically?

1 A. Well, we get our cut back
2 together and take it back into the
3 yard.

4 Q. Where did you first discuss
5 -- where were you when you first
6 learned of the incident involving Mr.
7 Patterson?

8 A. I'm not sure if it was on the
9 way back in or when we got into the --

10 Q. And did you learn what
11 happened to him directly from Mr.
12 Patterson himself or through some other
13 means?

14 A. Yes, sir, from him.

15 Q. And what did he tell you?

16 A. He said that he hurt his
17 back.

18 Q. Did he indicate how he hurt
19 his back?

20 A. On a cut lever.

21 Q. Did he identify the type of
22 car that we was trying to operate?

23 A. He said it was a tank.

1. Q. Incidentally, did you have
2 the occasion to write down or make any
3 note of the number of the tank car that
4 you were involved with on the barge
5 that you described to us earlier?

6 A. I didn't make no -- I didn't
7 write it down or anything, but when we
8 got back to the yard office, all the
9 information had gotten to the
10 yardmaster, or should have.

11 Q. Do you know the number of
12 that tank car today?

13 A. No, sir.

14 Q. Did Mr. Patterson tell you
15 anything else about this incident
16 involving that -- a tank car?

17 A. Not to my recollection.

18 Q. After learning about the
19 incident with Mr. Patterson, what, if
20 anything, did you do in response?

21 A. You mean --

22 Q. As his conductor, his
23 foreman, did you do anything in

1 response to what he told you?

2 A. Well, no, not really.

3 Q. Did there come a time that
4 you finally arrived back at the yard?

5 A. Yes, sir.

6 Q. And was anything further said
7 or done regarding this incident that
8 Mr. Patterson told you about?

9 A. Yes, sir, we filled out an
10 accident report and notified the
11 yardmaster.

12 Q. Did you participate in the
13 filling out of the report?

14 A. No, not really.

15 Q. Were you present when Mr.
16 Patterson filled out the report?

17 A. Well, I was probably, while
18 he was filling it up, fixing up a trip
19 card and turning in, I guess, weigh
20 bills or whatever.

21 Q. All right. Do you recall the
22 time that you finally got back into the
23 yard that evening?

1 A. I couldn't really say. I'd
2 say probably around nine or ten
3 o'clock. I'm just guessing.

4 Q. Okay. Did you speak with Mr.
5 Patterson further after he had filled
6 out his accident report about this
7 incident?

8 A. In regards to --

9 Q. The incident itself?

10 A. No, not really.

11 Q. Maybe I asked you this. Did
12 you help him fill out the report at
13 all?

14 A. I don't think I did, no.

15 Q. Did you report the incident
16 yourself to Mr. Cotner, the
17 yardmaster?

18 A. Well, all of us was
19 there. He heard it. I mean, I don't
20 know if I said that Terry got hurt or
21 anything like that, but he knew about
22 it.

23 Q. How did he know about it?

1 A. Well, I think Terry got the
2 number from him, the car number from
3 him. I don't really know that, but he
4 knew.

5 Q. Were you all assembled with
6 Mr. Cotner in discussing this?

7 A. Well, we was all in the yard
8 office.

9 Q. In Mr. Cotner's office?

10 A. Well, it's -- yeah.

11 Q. Okay. Anything else further
12 said about the incident that you can
13 recall that evening?

14 A. No, sir.

15 Q. Did you have any further
16 involvement concerning that specific
17 incident any more that shift?

18 A. No, sir.

19 Q. What time did you ultimately
20 leave to go home, if you can recall?

21 A. Probably around ten-thirty,
22 eleven o'clock, maybe earlier.

23 Q. Did you have any further

1 conversation with Mr. Patterson?

2 A. I don't reckon so.

3 Q. Did you meet with Mr.

4 Patterson again or see him again after
5 that particular shift?

6 A. Oh, yeah.

7 Q. Do you know whether or not he
8 came out the next day to work?

9 A. I think he did.

10 Q. Do you recall at any time
11 after this incident you observing Mr.
12 Patterson and his ability to do his job
13 physically or otherwise?

14 A. I can't recollect.

15 Q. Have you, at any time,
16 observed the repair records of that
17 particular tank car that you were
18 involved with on the evening of May
19 29th, 1988?

20 A. No, sir.

21 Q. Were you present at any time
22 when that car was inspected by the
23 railroad?

1 A. No, sir.

2 Q. The routine for a car
3 inspection at the Decatur or Oakworth
4 yard, can you tell us how that occurs?

5 MR. RICHARDSON: I'm going to
6 object to that. You're suggesting he
7 knows.

8 Q. (BY MR. SPIER) Let me ask
9 you this way. Do you know whether or
10 not Decatur employees come to inspect
11 inbound cars at the Decatur yard?

12 A. No, sir.

13 Q. You don't know that?

14 A. No, they don't.

15 Q. When cars come into the
16 Decatur yard, inbound, and are left in
17 the yard, do you know whether or not
18 they're inspected for safety appliances
19 and so forth at any time?

20 A. The only thing would probably
21 be by the visual inspection by the
22 crews.

23 Q. You mean the train crews like

1 you and Mr. Patterson here?

2 A. Yeah.

3 Q. Yes?

4 A. Yes.

5 Q. And do you try everything on
6 the car to see if it's working?

7 A. No, sir.

8 Q. Was there a time in your
9 career where you had carmen working in
10 the yard and doing inbound inspections
11 on cars?

12 A. Not at Decatur.

13 Q. Anyplace else that you've
14 ever worked?

15 A. Birmingham.

16 Q. Who does the inbound
17 inspection on cars in Birmingham?

18 A. Well, car inspectors.

19 Q. Do you know whether or not
20 they try cut levers to see if they're
21 working?

22 A. I don't know.

23 Q. Any reason why, to your

1 knowledge, there's no carman working in
2 Decatur?

3 MR. RICHARDSON: Object to
4 leading.

5 A. Do you want me to answer it?

6 Q. (BY MR. SPIER) Do you have
7 an answer?

8 A. No.

9 Q. That wasn't much of an answer
10 at all, was it?

11 Since this incident of May
12 29, 1988, have you had opportunities to
13 talk with Mr. Patterson about this
14 case?

15 A. Well, yeah, and no.

16 Q. Is there anything further
17 that you know about it that has come to
18 your attention?

19 A. No, sir.

20 Q. Mr. Myrick, do you know J.H.
21 Myrick?

22 A. No, sir.

23 Q. This gentleman who is

1 outside, you don't know him?

2 A. I just met him this morning.

3 Q. Okay. What he does or what
4 his involvement is in this case, you
5 really don't know?

6 A. No.

7 Q. Do you know whether or not
8 field repairs are made from time to
9 time on cars such as to cut levers?

10 A. I'm sure they are.

11 Q. What kind of field repair
12 could be done to a cut lever?

13 MR. RICHARDSON: I'll object
14 to that. First of all, I'm going to
15 object to the response as I'm sure they
16 are not being responsive, and I'm going
17 to object unless you qualify this man
18 whether he knows. His first answer
19 was non-responsive.

20 Q. (BY MR. SPIER) Let me ask
21 you this way. Have you ever
22 participated in a field repair on the
23 line of road to a cut lever, where

1 you'd hook something up to get it
2 working there?

3 A. I've replaced knuckles.

4 Q. How about anything to do
5 specifically with a cut lever?

6 A. Well, tied one up, you know,
7 if it was dragging or something.

8 Q. Have you observed other train
9 personnel doing things to cut levers to
10 make them work, replacing them or
11 fixing something on them?

12 A. I've heard about it, I've
13 never actually seen it.

14 Q. When you left that tank car
15 on the barge, do you know what happened
16 to it after that?

17 A. It went down the river.

18 Q. And where would it go down
19 the river, if you know?

20 A. Probably Champion, Champion
21 Paper. I guess that's where they went.

22 Q. Do you know whether or not
23 that tank car was loaded?

1 A. Yeah.

2 Q. And what was its contents, if
3 you know?

4 A. I don't know.

5 Q. Do you know whether it was
6 liquid or solid?

7 A. I don't know.

8 Q. You really don't know
9 that. Can you sign and date your
10 drawing there, Mr. Johnson, so that we
11 can have it?

12 A. Okay.

13 MR. SPIER: If you gentlemen
14 will give me about two minutes with my
15 colleagues here, I'll step outside and
16 see if we're completed.

17 (Whereupon, an off-the-record
18 discussion was had).

19 Q. (BY MR. SPIER) Mr. Johnson,
20 we have had some information given to
21 us that the tank car was a GATX. Do
22 you know what that stands for?

23 A. No, not really.

1 Q. Do you know whether the tank
2 car that you have identified on your
3 drawing, which I'll have identified as
4 Exhibit A, do you know whether or not
5 that was a GATX car?

6 (Whereupon, Plaintiff's
7 Exhibit A was designated for
8 identification and copy of same is
9 attached hereto).

10 MR. RICHARDSON: Now I'm
11 going to object because he just said he
12 doesn't know what GATX is, how are you
13 going to ask --

14 MR. SPIER: He can see the
15 lettering, he may not know what it
16 stands for.

17 MR. RICHARDSON: I think it's
18 an unfair question.

19 Q. (BY MR. SPIER) Let me ask
20 you, you don't know what GATX stands
21 for, do you?

22 A. No.

23 Q. Have you seen it on cars?

1 A. Yeah.

2 Q. You know it when you see it,
3 don't you?

4 A. Yeah.

5 Q. Was there a GATX on that
6 car?

7 A. I don't know.

8 Q. You don't remember?

9 A. No.

10 Q. Okay. If I had said to you
11 the number of that car was a
12 GATX-49820, do you know?

13 MR. RICHARDSON: That really
14 is --

15 MR. SPIER: He can say no.

16 Q. (BY MR. SPIER) Did you write
17 that number down that night?

18 A. No, sir.

19 Q. Okay.

20 MR. SPIER: Other than
21 identifying your drawing as Exhibit A,
22 I have no further questions for you,
23 Mr. Johnson.

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EXAMINATION BY MR. RICHARDSON:

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Q. I don't have any questions, but you have the right to read and sign this deposition. You may waive that right, that's assuming she's going to type it up right. You can't change it, but you have a right to read and sign it. Most people waive that right. I would recommend you waive it, but you have to tell her I waive it. If you want her to send it to you and you sign it, you're entitled to do that. Did I make sense?

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A. You mean --

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Q. Let me explain. She types it up. Under the rules that we work under, you're entitled to get the deposition and look at it and see if it's typed up accurately -- you can't change anything -- and sign it, but most witnesses waive that right because they assume she's going to type it up

1 accurately. You have the right,
2 though, to waive it or say I want to
3 sign it, but that's your decision.
4 I'm just telling you most people waive
5 that right.

6 A. I guess I waive that right
7 then.

8 Q. Does that make sense? If
9 you're uncomfortable about it, say it.

10 A. Well, I mean, I'm satisfied
11 with the deposition.

12 Q. That's fine.

13 MR. RICHARDSON: Thank you
14 very much.

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16 FURTHER DEPONENT SAITH NOT

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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

TERRY LEE PATTERSON

Plaintiff,

v.

DOCKET NO. CL-90-458

CSX TRANSPORTATION, INC.

Defendant.

SPECIAL PLEA TO JURISDICTION

Now comes the defendant, CSX Transportation, Inc., and states affirmatively in response to plaintiff's motion for judgment that this Court lacks jurisdiction herein on the ground that plaintiff's sole and exclusive remedy under the matters alleged in the motion for judgment is under the Longshoremen's and Harbor Workers Compensation Act, 33 U.S.C. § 905a.

CSX TRANSPORTATION, INC.

By 

Of Counsel

John Y. Richardson, Jr.
Williams Kelly & Greer, P.C.
600 Crestar Bank Building
Norfolk, VA 23510
804/624-2600

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to counsel for the plaintiff, this 22nd day of March, 1991.

CIRCUIT COURT
PORTSMOUTH, VA

FILED

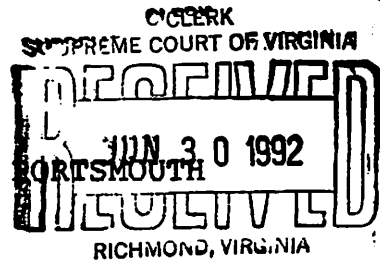
3/25/91

WALTER M. EDMONDS, CLERK

By 

D. G.

38



VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF

TERRY PATTERSON,

Plaintiff,

v.

CIVIL ACTION NO. L-90-458

CSX TRANSPORTATION, INC.,

Defendant.

BRIEF IN SUPPORT OF MOTION TO DISMISS

FACTS

On the date of the alleged accident plaintiff was employed by defendant as a yard switchman ^{1/} assigned in Decatur, Alabama. Rail cars filled with cargo destined for delivery to industries come from all compass directions in both interstate and intrastate commerce and eventually some come to rest in what is called the "Boat Track" located on the shore of the Tennessee River. Before the cars arrive at the Boat Track, they are customarily placed on other tracks at the railroad terminal in Decatur. When the rail cars are delivered to the Boat Track, the process of loading the cars onto barges begins. The loaded cars roll down from the Boat Tracks usually by gravity but sometimes by use of locomotive power, onto a barge.

^{1/}The term "switchman" denotes a railroad transportation employee. Some railroads call the employee "brakeman" or "trainman". The employee typically does the same job no matter the locale or employer: coupling and uncoupling rail cars; setting and untying hand brakes on rail cars; and operating or "throwing" switches.

Once on the barge, the cars are delivered to industries on the river. Unloaded rail cars are also picked up at the Boat Track for delivery to the terminal and return to their point of origin.

Plaintiff, Patterson, was injured, as alleged when uncoupling a four car "cut" of loaded rail cars onto the Boat Track in the vicinity of the switch at the main line. In other words, he was at the intersection of the main line with the Boat Track. The cars were to be placed on a waiting barge where a fellow crew member would place or "spot" them. Plaintiff, when injured, was allegedly pulling a cut lever which would disengage the cars from the train.

ARGUMENT

In C. & O. Railway v. Schwalb and its companion case Norfolk and Western Railway v. Goode, 493 U.S. ____, 110 S. Ct. ____, 107 L. Ed.2d 278 (1989), the United States Supreme Court found employees working at two separate railroad terminals here in Hampton Roads to be "maritime employees" within the meaning of the LHWCA. In so doing, the Court overruled the Virginia Supreme Court's narrow construction of coverage under the LHWCA. In describing the C & O facility in Newport News, which is virtually identical in procedure to the Norfolk and Lambert's Point Terminal, the Court stated: "The loading process begins when a hopper car is rolled down an incline to a mechanical dumper. . . which dumps the coal through a hopper

onto conveyor belts. The belts carry the coal to a loading tower from which it is poured into the hold of a ship." 107 L. Ed. 2d at 284. The primary issue in the Schwalb and Goode cases was whether railroad employees whose duties included maintaining, cleaning and repairing the loading equipment were engaged in work that was "an integral or essential part of loading or unloading of a vessel." 107 L. Ed. 2d at 286. In language relevant to the case at hand the Schwalb Court noted that "it makes no difference that the particular kind of [work being done] might be considered traditional railroad work or might be done by railroad employees wherever railroad cars are unloaded." 107 L. Ed. 2d at 287-88.

The Fourth Circuit had previously construed Section 902(3) coverage in its review of three Benefits Review Board decisions awarding LHWCA benefits to land-based workers in ITO Corp. v. Ben. Review Bd., 529 F.2d 1080 (4th Cir. 1975). One of the three employees (Harris) worked as a "hustler" at Norfolk International Terminals; he was injured while moving containers of cargo from a long-term storage area to the container marshalling area adjacent to the pier for loading aboard a ship later that day. Id. at 1082. On initial hearing, the Fourth Circuit analyzed the case under the "point of rest" theory, reasoning that the maritime portion of the loading process did not begin until the cargo was moved from its last holding area to the ship. Id. at 1087. The panel initially concluded that Harris was not involved in maritime employment because his

duties ceased landward of the cargo's point of rest in the marshalling area. Id. at 1088. On rehearing, the Fourth Circuit rejected this analysis and concluded that Harris was engaged in the overall process of loading the ship because he was moving the cargo "solely for loading purposes, not for mere convenience". ITO Corp. v. Benefits Review Bd., 542 F.2d 903, 905 (4th Cir. 1976) (en banc) (aff'g award to Harris by equally divided court), cert denied, 433 U.S. 908 (1977).

But for minor differences in the equipment employed, hustler Harris and switchman Patterson were performing the same work with respect to ship loading. Both handled cargo delivered to the terminal by overland transport in large metal containers; both moved the cargo container, rather than handling the cargo itself; both worked on land,^{2/} between the drop off point (in Harris' case, the long term storage area; in Patterson's case, the terminal tracks) and a pier-side staging area from which other workers would have attended to loading the cargo onto ships (in Harris' case, the marshalling area; in Patterson's case, the Boat Track and, in fact, the barge). In both cases, the cargo containers were moved because their contents had been designated for loading on a vessel, not for the mere convenience or organization of the terminal. If Harris was involved in "an intermediate but essential step in the

^{2/}Harris worked entirely on land. Fellow crew members of Patterson were actually on the barge to ensure coupling and an even distribution of the loaded cars.

overall process of loading cargo aboard vessels," then so is plaintiff here. Furthermore, Patterson actually performed his work exclusively seaward of the cargo's last point of rest: when he released the car on the Boat Track, the loading process continued basically uninterrupted until the cargo rested on the barge. Thus, Patterson would have been deemed a maritime employee even under the more restrictive "point of rest" doctrine first applied by the panel in the ITO cases. Cf. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 275-76 (1977) (rejecting point of rest doctrine as too restrictive). In fact, Patterson was involved directly in the loading; certainly more than an intermediate step.

Numerous administrative decisions have also conferred LHWCA status on workers engaged in the intermediate steps of moving cargo delivered in rail cars to pier side storage in preparation for subsequent loading aboard ships. See, e.g., Toomer v. Machinery Rental, 4 Ben. Rev. Bd. Serv. (MB) 256 (July 23, 1976); Scalmato v. Northeast Marine Terminal Co., 1 Ben. Rev. Bd. Serv. (MB) 461 (May 7, 1975).

In an earlier time or at a different terminal workers such as Patterson might have moved the cargo from the Barney Yards to the piers by dray wagon, pail or wheel barrel. Today's switchmen employ hopper cars as a more efficient substitute for the older transportation methods. Functionally, this is the work typically performed by the land-based members of a longshoring crew "who move cargo from a warehouse to the

side of a ship". P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 81 (1979). In Pfeiffer, a cotton header was found to be performing an intermediate step in the loading process when he moved cotton by dray wagon from one storage area to a warehouse on the pier. Patterson, plaintiff here, was performing an analogous intermediate, if not the final, step in the loading process when he moved the cargo by rolling rail cars from a temporary holding area to the barge. Another claimant in Pfeiffer was securing cargo already loaded onto railroad cars so that the cars could be safely coupled to a locomotive for shipment landward by rail. Patterson, in this action, was merely unsecuring the cargo to allow it to be rolled onto the barge. The work performed by Patterson was at least as essential and integral to the loading process as the work of the two Pfeiffer claimants was to the loading and unloading process. Where the Pfeiffer claimants represent the final step in the rail/ship unloading process, Patterson represents the final step in the rail/ship loading process. Moreover, the Pfeiffer claimants' work was performed landward of temporary storage areas and preceded by several days the actual ship loading or unloading process. By contrast, Patterson's work was performed seaward of any temporary holding area and within moments of the actual deposit of the cargo on the vessel. Applying the Pfeiffer standard to the facts in this case, plaintiff Patterson has the status of a maritime employee.

In the recent case of Antoinette Etheridge v. N. and W. Ry. Co., civil action no. 90-1941-N (April 8, 1991), the United States District Court for the Eastern District of Virginia considered a factual situation almost identical to that presented here. Etheridge, the plaintiff, was a brake person (a/k/a switchman) in the N. & W.'s Lambert's Point terminal. She was injured when using a "pinch bar" to start a coal car down a rail incline towards mechanical dumpers. She was in a yard (Barney Yard) which is 1/2 mile to 1 mile from the water's edge. The court, in dismissing the FELA action, stated:

Applying Schwalb to the case at bar, we have little difficulty in concluding that plaintiff, injured while "performing the final task of delivering a coal train," was engaged in work essential to the loading of a vessel. . . The coal cars had been classified and were positioned . . . for the final run to the hold of the vessel. The loading process had thus begun . . . By her act of prodding the coal car into its descent, plaintiff was performing a vital part of the loading process. . .

Slip opinion at pp. 4-5. (Citation omitted). A copy of Judge MacKenzie's letter opinion is attached as Exhibit A. That case has been appealed by plaintiff to the Fourth Circuit Court of Appeals. A decision is pending

Since the Schwalb opinion the state courts, including Portsmouth, have also liberally construed the LHWCA to include railroad workers within its jurisdiction. Judge Schlitz's opinion finding a C & O employee to be a maritime employee was, in fact, one of the three trial court opinions affirmed by the

United States Supreme Court in Schwalb. Since Schwalb, Judge McMurren, in Zeno Council v. N. & W., and Judge Manning, in Richard Ladlee v. C. & O., both have dismissed FELA actions for want of jurisdiction. Both actions involved machinists at the coal loading terminals. In Norfolk, Judge Whitehurst, in John Givens v. C. & O., also dismissed a C & O brakeman's FELA action who was allegedly injured while riding a coal car towards the mechanical dumpers at the C & O facility in Newport News. This case was appealed to the Virginia Supreme Court and the writ was denied. A copy of Judge Whitehurst's opinion is attached as Exhibit B.

It is possible to accomplish overland carriage of cargo from the point of origin to the loading terminal without the assistance of yard switchmen like Patterson. Without the yard brakemen or switchmen, however, the cargo would remain stored forever in the stationary rail cars, the piers would stand idle and barges and ships would go elsewhere for cargo. The conclusion is inescapable that Patterson was a maritime employee who was engaged in Section 902(3) "maritime employment" when he was injured; his sole remedy, therefore is supplied by the LHWCA. Since the LHWCA precludes any cause of action under the FELA, this case should be dismissed.

CSX TRANSPORTATION, INC.


By 

Of Counsel

John Y. Richardson, Jr.
Williams Kelly & Greer, P.C.
600 Crestar Bank Building
Norfolk, VA 23510
804/624-2600

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing
was ~~mailed~~ or faxed to counsel for the plaintiff this 24
day of September, 1991.





FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

ALFRED W. WHITEHURST
JUDGE

February 13, 1990

100 ST. PAUL'S BOULEVARD
NORFOLK, VIRGINIA 23510

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600 Crestar Bank Building
Post Office Box 3416
Norfolk, Virginia 23514-3416

Re: John H. Givens
vs. The Chesapeake and Ohio
Railway Company
At Law No. L-86-1019

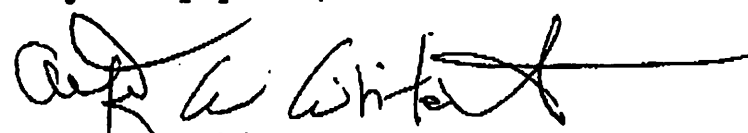
Gentlemen:

I have reviewed the law and facts of this case. The Schwab, et. al. case, decided by the United States Supreme Court (November 29, 1989) is controlling. The definition of "engaged in maritime employment" is very significant.

The Supreme Court of the United States said that the loading process begins when a hopper car is rolled down an incline to a mechanical dumper. Enroute coal may spill necessitating housekeeping and janitorial services. It makes no difference that the particular work involved might be considered traditional railroad work if it is part of the loading process.

Therefore, the court must rule in this case that the injured employee was "engaged in maritime employment" by definition and this would come under the jurisdiction of the LHWCA and not FELA.

Very truly yours,


Alfred W. Whitehurst
Judge

AWW:se

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

EDDIE W. WILSON P.C.

Norfolk Division

Antoinette Y. Etheridge,]
 Plaintiff,]
]]
v.]]
]]
Norfolk & Western Railway Company,]
 Defendant.]

CIVIL ACTION
NO. 90-1941-N

ORDER

Defendant Norfolk & Western Railway Company has filed a motion to dismiss plaintiff's tort action under the Federal Employers' Liability Act, 45 U.S.C. § § 51-60 (FELA), on the ground that her injuries are covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901-950 (LHWCA), which provides an exclusive remedy for injured maritime employees. The issue before the Court is whether plaintiff, injured while working as a brakeworker for the defendant railroad, was engaged in "maritime employment," i.e., work that is essential to the loading or unloading of a vessel, thereby precluding her FELA claim.

For the reasons stated below, we DISMISS plaintiff's suit.

I.

The facts relevant to this motion are essentially uncontested. Plaintiff Antoinette Etheridge worked as a brakeworker with the Norfolk & Western Railway Company (N & W), assigned to the Barney Yard at Lambert's Point, Norfolk, Virginia. The Barney Yard is

located near Pier 6 at the terminal, and coal cars arrive in the yard after being classified. The tracks in the Barney Yard are sloped downwards toward the pier to facilitate the loading of vessels. To load the coal aboard the vessel, the coal cars are taken to the tracks of the Barney Yard where a brakeperson sets the brakes on each coal car to ensure that it does not roll downhill. When the individual coal car is ready for dumping, the brakeperson uncouples it from the train and releases its brakes. Generally, the coal car will freely roll downhill because of the slope of the tracks. However, if a coal car does not roll on its own, the brakeperson will use a pinch bar or "teaser" to prod it down the hill en route to the scales. After rolling over the scales, the coal car passes through a thawing shed, and then is pushed up another incline by a "mule" toward the dumpers. Mechanical arms then hoist the coal car, turn it upside down, and empty its contents onto conveyor belts which carry the coal to the vessel's hold.

On August 12, 1990, plaintiff was using a pinch bar to start a coal car on its descent toward the scales. Plaintiff alleges that the bar slipped in some excess grease which had been left on the track, causing the bar to slip, and injuring plaintiff's wrist as a result. The claims department at N & W began paying plaintiff's benefits under the LHWCA shortly after the accident.

On December 27, 1990 plaintiff filed a complaint under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, alleging negligence on the part of N & W.

to support her claim that, as a brakeperson, she was not engaged in maritime employment at the time of injury. At first glance, the facts of that case mirror those of the case at bar: brakepersons were injured at the Barney Yard of N & W's Norfolk terminal and sued under FELA. The Conti court held that brakepersons were not maritime employees for purposes of § 902(3). Id. at 895. Fundamental to that holding was the court's conclusion that the occupation of brakeperson was "not of a traditionally maritime nature, but was one more traditionally associated with railroading," i.e., the unloading of a coal train. It was on this basis that the court allowed the brakepersons' FELA suits to proceed.

The United States Supreme Court recently rejected this logic in Chesapeake and Ohio Railway Co. v. Schwalb, 110 S. Ct. 381 (1989). In Schwalb, the Court considered whether employees engaged in repairing and maintaining loading equipment qualified as maritime employees. The Court held that they did. In so doing, the Court stated unequivocally that whether an employee's task is "essential or integral to the loading or unloading process," and, therefore, maritime employment, is in no wise related to whether the employee's work is considered "traditional railroad work." Id. at 386. Instead, the status of maritime employment is properly determined by looking at the overall loading and unloading process of the vessel and the employee's role within that process.

Applying Schwalb to the case at bar, we have little difficulty in concluding that plaintiff, injured while "performing the final

Defendant N & W filed this motion to dismiss on January 22, 1991, to which plaintiff filed a motion in opposition on February 4, 1991.

II.

The LHWCA¹ provides an exclusive remedy to employees injured while engaged in "maritime employment," thereby foreclosing the employee's right to sue his employer in tort. 33 U.S.C. § 901 et seq. The United States Supreme Court has held that the maritime employment requirement as applied to land-based activity (such as that of plaintiff's) other than those listed in § 902(3) is an occupational test focusing on loading and unloading. See Herb's Welding, Inc. v. Gray, 470 U.S. at 423. An occupation will be deemed maritime only if it is an "essential or integral part of the loading or unloading of a vessel." See Chesapeake and Ohio Railway Co. v. Schwalb, 493 U.S. ___, 110 S. Ct. 381, 384 (1989); Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977).

Plaintiff relies entirely on a Fourth Circuit Court of Appeals case, Conti v. Norfolk & Western Railway Co., 566 F.2d 890 (1977)

¹For our purposes, the relevant part of the Longshore and Harbor Workers' Compensation Act is found at 33 U.S.C. 902(3), which sets forth the categories of "employees" covered by the LHWCA: i.e., those employees injured while engaged "... in maritime employment, including any longshoreman or other person engaged in longshoring operations, and harbor-worker including a ship repairman, shipbuilder, and ship-breaker ..." (emphasis added).

This list of occupations that qualify as "maritime employment" is not all-inclusive. See Herb's Welding, Inc. v. Gray, 470 U.S. 414, 423, n. 9 (1985).

Plaintiff does not dispute the issues of whether Norfolk & Western qualifies as an "employer" for purposes of the LHWCA, 33 U.S.C. § 902(4), or whether plaintiff's injury occurred at a situs covered by the LHWCA, 33 U.S.C. § 903(a).

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task of delivering a coal train," was engaged in work essential to the loading of a vessel. By her own admission, plaintiff was engaged in the "final" act of delivering the coal for loading. See Plaintiff's Brief in Opposition to Dismiss at 1. The coal cars had been classified and were positioned on the Bainey Yard's tracks for the final run to the hold of the vessel. The loading process had thus begun. See Schwalb, 110 S. Ct. at 383. By her act of prodding the coal car into its descent, plaintiff was performing a vital part of the loading process, without which the coal car would have remained stalled on the tracks. See P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 82 (1979); Schwalb, 110 S. Ct. at 385; Schwalb, 110 S. Ct. at 386.

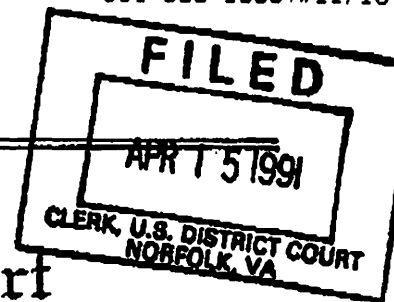
Accordingly, plaintiff's injuries are compensable solely under the LHWCA, and plaintiff's action under FELA is hereby DISMISSED.

IT IS SO ORDERED.


United States District Judge

Norfolk, Virginia
April 8th, 1991

AO 450 (Rev. 5/85) Judgment in a Civil Case



United States District Court

Eastern

DISTRICT OF Virginia
Norfolk Division

Antoinette Y. Etheridge,

PLAINTIFF

V.

Norfolk & Western Railway Company,

DEFENDANT

JUDGMENT IN A CIVIL CASE

CASE NUMBER: Civil Action No. 90-1941-N

- ☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- ☒ **Decision by Court.** This action came ^{for consideration by} ~~before the Court~~ ^{considered} ~~before the Court~~ and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's motion to dismiss is granted and this action is dismissed.

April 8, 1991

Date



142

Doris R. Casey

Clerk

(By) Deputy Clerk

A TRUE COPY, TESTE:
Doris R. Casey, Clerk
By Deputy Clerk

VIRGINIA

IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

TERRY LEE PATTERSON

Plaintiff,

v.

CSX TRANSPORTATION, INC.

Defendant.

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:
:

Law No.: 90-458

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANT'S SPECIAL PLEA TO JURISDICTION**

On April 27, 1990, plaintiff, Terry Lee Paterson, filed a Motion for Judgment in the Circuit Court in the City of Portsmouth, pursuant to the Federal Employers' Liability Act, 45 U.S.C., chap. 2, sec. 51-60 (FELA), alleging that he sustained serious bodily injuries on or about May 29, 1988, while in the course and scope of his employment as a switchman for the CSX railroad. Almost a year later, on or about March 22, 1991, the defendant, by counsel, filed a Special Plea to Jurisdiction alleging that this Court lacks jurisdiction in this matter on the grounds that plaintiff's sole remedy is under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §905(a) (LWHCA). Trial of this action is set for October 9, 1991.

A copy of the plaintiff's Motion for Judgment and relevant excerpts from two depositions (the deposition of the plaintiff, taken on October 30, 1990, and the deposition of Jerry Johnson taken on February 26, 1991) are attached to this memorandum. Copies of relevant court decisions are also attached.

Handwritten:
Terry
9/25/91
rld

I. SUMMARY OF FACTS

Terry Patterson worked for CSX for approximately 14 years prior to the May 29, 1988, accident, in which he sustained serious back injuries. Mr. Patterson's regular job at that time was "switchman" out of CSX's Oakworth Yard in Decatur, Alabama, although he did have conductor seniority and occasionally performed different types of work. He worked the second shift, from approximately 4:00 pm to approximately 11:00 pm.

Mr. Patterson was assigned to a three man crew comprised of himself as switchman, Jerry Johnson as foreman/conductor, and G. E. Williams as engineer. The primary task of this crew was switching industries along the Tennessee River, which involved assemblage of the train at the defendant's Oakworth Yard and then running the train along the Main Line Track to set off and pick up cars at various industries located along the track. (Patterson dep. at 44.)

The Oakworth Yard is about 1.5 miles from the first of the industries, Bunge. At this point, the Main Line Track parallels the course of the Tennessee River at a distance of about a quarter mile to the south. The river runs roughly east to west. At no point does the Main Line Track adjoin the river or any floating dock, barge, or vessel situated upon the river.

There is a spur or lead track off the Main Line Track for each of the industries serviced by the railroad, which include, Bunge, Con-Ag, Jim Dandy, Walverine, and General Electric near the Main Line Track. The Bunge Lead Track splits into two tracks, one going to the Bunge plant and the other to a dock for barges which transport train cars to Champion Paper, which is not directly accessed by the Main Line Track.

Mr. Patterson's job was to operate the switches that allowed the cars access to and from the spur tracks and the Main Line Track. He also participated in uncoupling cars that were to be set off at the industries or spur tracks. The accident of May 29, 1988, happened while Mr. Patterson's crew was working the barge track.

Mr. Patterson relates that his crew first performed switching operations for Bunge and then began the drop off/add on tasks at the barge track while remaining in radio contact with one another. Mr. G. E. Williams, the engineer, stayed with the train engine. Mr. Johnson worked the cars on and off the barge itself, a distance of about a quarter mile from the Main Line Track.

Mr. Patterson either performed switching operations or was engaged in cutting cars from the main train. At no time did his work take him down to the river or the dock.

Mr. Patterson initially threw the Main Line Track/Bunge Lead Track switch and the barge track switch so the engines (there were two) could travel the quarter-mile distance to the river where Mr. Johnson was working. (Patterson dep. at 69.) Mr. Patterson then went to another switch nearby which regulated the east and west, or parallel, barge tracks. The engineer and Mr. Johnson then performed the coupling and uncoupling operation to remove the cars from the barge. Mr. Patterson was not involved in this activity.

The cars from the barge were then taken to a set off track parallel to the Main Line Track. The engines, with some idler cars, went back on the Main Line Track where Mr. Patterson coupled them to the remainder of the train which had been left on the Main Line Track.

Mr. Patterson then had to cut the cars destined for the barge. He injured himself while on the Main Line Track making this cut at a tank car. Mr. Patterson was injured while he was cutting a tank car off of the train on the Main Line Track. (Patterson dep. at 70-79.) In order to disconnect a car from the rest of the train, a cut lever located on the end of the car has to be pulled to open the car coupling device. To facilitate this process, the engineer gives the train "slack", which means that the cars are pushed closer together so that there is no tension between the coupling devices of the two adjoining cars. If there is no "slack" (meaning that there is tension at the coupling device), the cut lever will not operate.

After making sure everything was clear, that he had a good footing, that there was no obstruction, and having verified that there was "slack" between the cars, Mr. Patterson attempted to pull the cut lever on a tank car which would not come up even after three tries. On the third attempt he felt a burning sensation in his low back. He explains that he did not think much about it at the time. (Patterson dep. at 78.) Because the cut lever on the tank car would not operate, he climbed over to the other side of the train to pull the cut lever on the adjacent boxcar which came up on the first try, disconnecting the two cars. Mr. Johnson testified that he had the identical problem in trying to pull the cut lever on the tank car while working at the barge, somewhat later. He attempted to pull the cut lever several times, but had to crawl over the train to operate the cut lever on the adjacent tank car. (Johnson Dep. at 46.)

After disconnecting the cars, Mr. Patterson told the engineer to push the remainder of the train to the barge tracks. (Patterson dep. at 82.) During this time, Mr. Johnson

remained at the barge and Mr. Patterson remained at or near the Main Line Track. The crew then performed the rest of their tasks for the remainder of the work day, which consisted of essentially the same type of coupling, uncoupling and switching activities at other industries. There was nothing different about the tasks Mr. Patterson performed at the barge track as compared to the other industry tracks.

Mr. Patterson reported his injury to Mr. Johnson several hours after the accident occurred and an accident report was completed. As a direct consequence of the May 29, 1988 accident, Mr. Patterson has sustained severe and permanent back injuries which prevent him from engaging in his usual occupation as a switchman for CSX Transportation, Inc.

Plaintiff's allegations of negligence center around the defective cut lever. Also, plaintiff alleges, in Count Two of his Motion for Judgment, that CSX violated the strict liability provisions of the Safety Appliances Act, 45 U.S.C. §2, because the inoperable cut lever constituted defective and/or inefficient equipment.

ARGUMENT

In order to establish jurisdiction of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §905(a) (LHWCA), as opposed to FELA jurisdiction, the defendant must demonstrate that this case satisfies the two-part LHWCA coverage test: the injury must have occurred on a covered situs, i.e., over navigable water or adjoining areas as enumerated in §903 of the LHWCA; and, the railroad must show that Mr. Patterson was engaged in maritime employment, the status test, as defined by §902(3) of the LHWCA.

The plaintiff submits that CSX's Main Line Track, the place where Mr. Patterson was injured, is not a situs covered by the LHWCA, in that it is not an area "adjacent to navigable water" as contemplated by §903(a) of the LHWCA. Further, neither Mr. Patterson's general work as a switchman, nor the specific activities in which he was engaged at the time he was injured on May 29, 1988, constitute "maritime employment" as defined by §902(3) of the LHWCA. He was a railroad worker performing railroad, not maritime, tasks. In support, the plaintiff relies on the Fourth Circuit case of Conti v. Norfolk and Western Railway Co., 566 F.2d 890 (4th Cir. 1977), which held that the activities of three workers employed as brakemen at the Lambert's Point Coal Pier in Norfolk, were not covered by the LHWCA and were entitled to pursue FELA remedies. Prior to examining these issues in detail, it might be helpful provide a brief overview of LHWCA jurisdiction.

A. OVERVIEW OF LHWCA JURISDICTION

The Longshore and Harbor Workers' Compensation Act was adopted in 1927 to provide workers' compensation for individuals injured upon navigable waters who the Supreme Court had held were not covered by state workers' compensation acts. Southern Pacific Co. v. Jensen, 224 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 (1917). The only two criteria for coverage in the 1927 Act were "working for a maritime employer" and sustaining an injury "upon navigable water", thus providing benefits to workers who fell outside of traditional state jurisdiction. Because jurisdictional boundaries were set at the water's edge, maritime workers were constantly walking in and out of LHWCA coverage (the "Jensen line").

The 1972 amendments redefined LHWCA jurisdiction to avoid situations where an injured worker's entitlement to benefits depended on which side of the gangplank he fell. The situs requirement was expanded to include injuries sustained at adjoining specifically enumerated areas and other areas "customarily used by an employer" in the loading/unloading and shipbuilding and dismantling process. While increasing the Act's geographic scope, Congress limited coverage to individuals who met a new employment or status test providing, in §2(3), coverage to "any person engaged in maritime employment, including any longshoremen, or other person engaged in longshoring operations, and any harbor worker, including a ship repairman, shipbuilder, and shipbreaker" (and excluding certain specific job classifications).

The United States Supreme Court's earliest attempt to explain and apply the 1972 coverage requirements was the case of Northeast Marine Terminal v. Caputo, 432 U.S. 249, 53 L.Ed.2d 320, 97 S.Ct. 2348 (1977). The Court noted that Congress extended coverage of the LHWCA in 1972 to the shore side of the waters' edge in order to (1) "permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity", Caputo, 432 U.S. at 269, 53 L. Ed. 2d at 334, citing S. Rep. 13; H. R. Rep. 10-11 (1972); and (2) to take into account in the Act's definition of a covered employee the fact that "the advent of modern cargo handling techniques had moved much of the longshoremen's work off the vessel and onto land." Caputo, 432 U.S. at 265, 53 L.Ed.2d at 336, citing S.Rep. 13 and H.R.Rep 10.

The Supreme Court looked to the 1972 legislative history and determined that connection with the loading and unloading process was the essential element to look at

when determining the "status" of a claimant. In presenting the 1972 amendments to the Senate, Senator Williams stated "it is our intent to permit a uniform compensation program. ... We did not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel just because they are injured in an area adjoining navigable waters." 118 Cong. Rec. 36271 (1972).

Noting Congress' desire for uniformity of coverage, the Supreme Court stated guidelines for applying the status test focusing on the overall nature of claimant's occupation:

The Act focuses primarily on occupations — longshoreman, harbor worker, ship repairman, shipbuilding, shipbreaker. Both the text and the history demonstrates a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the 1972 Amendments, would be covered only for part of their activity. It seems clear, therefore, that when Congress said it wanted to cover "longshoremen," it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity.

Conti, 432 U.S. at 273, 97 S. Ct. at 2362.

In Director, OWCP v. Perini North River Assoc., 459 U.S. 297, 74 L. Ed.2d 465, 103 S. Ct. 634 (1983), the Supreme Court grappled with the issue of whether a worker injured upon navigable waters (who would have been covered prior to the 1972 amendments regardless of the nature of his work) was covered even though he did not meet the post-1972 status test. Justice O'Connor's majority opinion found that Congress did not intend to take LHWCA benefits away from formerly covered workers; therefore, anyone working for a "maritime employer" who was actually injured upon navigable waters remained entitled to LHWCA benefits (Justice O'Connor did caution that individuals who are transiently or

fortuitously injured on navigable waters may not be covered). Because Mr. Patterson was not injured upon navigable water, the Perini decision is not controlling here.

In 1985, the Supreme again confirmed that the work of an employee not injured on navigable waters, must have some connection with traditional longshoring and harbor work activities, such as loading and unloading, in order to be entitled to LHWCA coverage. Herb Welding v. Gray, 470 U.S. 414, 105 S. Ct. 1421, 84 L. Ed.2d 406 (1985). The Supreme Court rejected the expansive approach to the status test taken by the Fifth Circuit, which had held that anyone engaged in activities under the broad spectrum of maritime commerce was entitled to LHWCA benefits. The Court held that a welder injured on a fixed offshore drilling rig (defined as land for LHWCA purposes) was not entitled to LHWCA benefits because his activities had nothing to do with traditional longshoring activities and were the same as would be performed on a drilling rig on land. The Supreme Court rejected the employee's arguments that the welder's activities were essential to the normal business of the oil rig and that because the employee was exposed to maritime hazards, he should be covered by the LHWCA.

While the Supreme Court was considering the Herb's Welding case, Congress was passed the 1984 amendments to the LHWCA. Realizing that the 1972 amendments had opened up a Pandora's Box of litigation on the jurisdiction issue, Congress acknowledged that it was not equipped or willing to engage in the task of redefining maritime employment. While admitting that Congress had decided not to address this issue in any major way, and that it would leave case by case determination to the courts, Senator Hatch stated "it is the Committee's intention that these amendments not be interpreted to enlarge the present

scope of the Act's coverage." 130 Cong. Rec. S11621-24 (1984). Congress did specifically enumerate in §2(3), some occupations which were to be excluded (including office staff; recreational, restaurant, and museum personnel; suppliers; et al.).

In the case of Chesapeake & Ohio Railway Co. v. Schwalb, 493 U.S. _____, 110 S. Ct. 381 107 L. Ed. 2d 278 (1989), the Supreme Court reaffirmed that, when determining LHWCA coverage, emphasis should be placed on loading and unloading tasks. Schwalb consolidated three cases involving railroad laborer and maintenance personnel, two of whom were injured cleaning spilled coal from loading equipment and the third was a pier machinist injured while repairing coal loading equipment. None of the individuals were engaged in traditional railroad tasks such as the switching and cutting duties performed by Mr. Patterson in this case.

In Schwalb, the Virginia Supreme Court had held that the three workers were not covered by the LHWCA and thus were entitled to pursue FELA remedies. The United States Supreme Court reversed, on the basis that the employees' work activities were part of the overall loading process and were therefore covered by the LHWCA. The Supreme Court acknowledged that lower federal courts had unanimously held that individuals performing maintenance and repair work on loading and unloading facilities were entitled LHWCA benefits. Schwalb is significant because it provides a basis for comparison between jobs covered by the LHWCA in a railroad-operated port terminal and traditional railroad work. Mr. Patterson's switching and cutting duties are traditional railroad work, which plaintiff submits is covered by the FELA and not the LHWCA.

B. THE INJURY DID NOT OCCUR ON A COVERED SITUS

Section 903(a) of the LHWCA defines a covered situs as follows:

Except as otherwise provided in this subsection, compensation shall be payable under this chapter in respect to disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, buildingway, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

Mr. Patterson was injured throwing a cut lever on a tank car situated on the Main Line Track one-quarter of a mile from the Tennessee River. Nothing about that particular location would bring it within the scope of the §903(a) definition of a covered situs. Mr. Patterson was certainly not working in a marine terminal, as found in most of the decisions that discuss situs requirement such as Caputo, and Conti. The Main Line Track where he was working was devoted specifically and exclusively to the railroad industry. Nothing about it was immediately devoted to the purpose of loading and unloading. The fact that some of the cars on the train were destined to be loaded onto a barge or had been taken off a barge does not change the character of the locus of the injury. The Main Line Track was no different than any other railroad track.

Nor was the location of the injury an "other adjoining area customarily used by the employer in loading, unloading, repairing, dismantling, or building a vessel". The railroad track immediately adjacent to the barge dock might constitute such a location; the Main Line Track, where Mr. Patterson was injured, does not. See, Humphreys v. Director, OWCP, 834 F.2d 372 (4th Cir. 1987), cert. den. 485 U.S. 1028, 108 S. Ct. 1585, 99 L. Ed. 2d 900 (Denying coverage where claimant, a ship foreman, was injured in an automobile

accident outside of a restaurant where he obtained food for shipbuilding personnel. Although the roadway was not far from navigable water, the Court held that claimant was not injured on a covered situs.) Since Mr. Patterson's injury did not occur on a covered situs, the LHWCA does not apply to this case and the railroad's motion to dismiss should be overruled.

C. THIS MATTER DOES NOT MEET THE STATUS TEST FOR LHWCA JURISDICTION

The essential inquiry in applying the status test of the LHWCA is whether the claimant's occupation was one that played an integral part in the loading and unloading process. Northeast Marine Terminal v. Caputo, 732 U.S. 249, 53 L. Ed. 2d 320, 97 S. Ct. 234 (1977). Section 902(3) of the LHWCA, the status test, provides, in pertinent part:

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship breaker, but such term does not include

The Courts have rejected an approach to this test which focuses on the moment of injury alone, in favor of a test which focuses on the overall nature of the employee's work. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 97 S. Ct. 2348, 53 L. Ed. 2d 320 (1977). See also, Justice Blackmun's concurring opinion in C&O v. Schwalb, 493 U.S. _____, 110 S. Ct. 381, 107 L. Ed. 2d 278 (1989). Looking at Mr. Patterson's overall work duties, as well as his activities at the moment of injury, it is apparent that his employment

did not have the necessary nexus with loading and unloading activities required for LHWCA jurisdiction.

Conti v. Norfolk & Western Railway Co., 566 F.2d 890 (4th Cir. 1977) is a Fourth Circuit decision dealing with factual situations strikingly similar to the one at hand. Conti is actually a consolidation of three claims brought by railway workers under the FELA which N&W asserted fell within the LHWCA and not the FELA. Each of the three plaintiffs worked at N&W's Lambert's Point Terminal in Norfolk, an indisputably covered situs. Conti was a brakeman who was working at a point where loaded cars were being brought into the yard. He was "responsible for tying, uncoupling levers, giving signals, inspecting cars, and starting cars on their way to the scales and dumpers". Conti was in the process of moving cars a short distance with a pinch bar when the car on which he was working was hit by other cars, causing the bar to fly out of his hand and injure his leg. Another plaintiff, Scarano, a conductor/brakeman, was also engaged in pinching loaded coal cars toward the dumper. After having removed a car that for some reason failed to unload at the coal dumper, he fell while walking towards the brakeman's shack into an unlighted ditch and injured himself. The third plaintiff, Funk, was also a brakeman, whose job was to make certain that the knuckles on the cars were closed after the contents had been dumped. Funk was injured while attempting to pull empty cars out of the dumper area.

Looking to the recent Supreme Court decision in Caputo, for guidance, the Fourth Circuit held, "it is clear that in the cases before us, the occupations of the plaintiffs were not of a traditionally maritime nature, but, on the contrary, were those traditionally associated with railroading. ... Plaintiffs were engaged in unloading a coal train, not loading a vessel."

Conti, 566 F.2d at 895 (emphasis supplied). The Fourth Circuit ruled that none of the three claims were covered by the LHWCA and that each employee was entitled to pursue an FELA action.

As the Fourth Circuit noted, the U.S. Supreme Court decision in Caputo is of particular help in resolving an issue such as the one at hand. Caputo was the first attempt by the Supreme Court to define the scope of the new 1972 jurisdictional criteria. The decision dealt with two claimants who were each injured on a covered site and were engaged in the actual handling of cargo as it was moving between sea and land transportation after its immediate unloading from the vessel. The Court rejected the employer's argument that such workers are not covered by LHWCA if they are handling cargo after it has reached the "point of rest" after its initial unloading. The Court essentially found that the new coverage requirements did not lend themselves to such bright line definitions. Setting up a model to be followed by lower courts in making such determinations, the Court stated the purposes of the 1972 amendments and examined whether the claimants were in the class of individuals which Congress meant to cover.

Noting that one of the primary motives for Congress' expansion of LHWCA coverage was the recognition that modern cargo-handling techniques had moved much of the loading and unloading process off of the vessel and onto land, the Caputo Court found that these considerations encompassed the work performed by Blundo, one of the two workers considered in Caputo, whose job was to check and mark items of cargo as they were unloaded from a container. Whether the job was performed on land or on a ship, the Court

reasoned, the work was essentially maritime, hence Blundo was held to be covered by the LHWCA.

The same cannot be said of Mr. Patterson's switching operations, which had not been impacted by modern cargo-handling techniques. As the Fourth Circuit noted in Conti in discussing the duties of a brakeman, such tasks were traditional railroad work and not, in any way, traditional longshore work. Therefore, the advent of modern cargo-handling techniques does not provide a basis for coverage in this case.

Addressing Caputo's claim, the Supreme Court noted that another purpose of the 1972 amendments was to provide uniform coverage to individuals who, prior to these amendments, had walked in and out of the checkerboard of LHWCA jurisdiction. The Court observed that the Act's status requirement focused "primarily on occupations — longshoreman, harbor worker, ship repairman, ship builder, ship breaker." Caputo, 432 U.S. at 273, 97 S. Ct. at 2362. The Court reasoned that "when Congress said it wanted to cover 'longshoremen' it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 amendments, would be covered for only part of their activity." Caputo certainly fell within this class of individuals as a member of a regular stevedoring gang. Although he was actually injured "in the old-fashioned process of putting goods already unloaded from a ship or container into a delivery truck", the Court looked to his overall occupation to determine whether he was entitled to LHWCA benefits. The Court found that "Since it is clear that he would have been covered while unloading ... a vessel, to exclude him from the Act's coverage in the morning, but include him in the afternoon would be to revitalize the shifting

and fortuitous coverage that Congress intended to eliminate." Caputo at 432 U.S. at 271-72, 97 S. Ct. at 2348.

Applying the twin goals of Congress in expanding LHWCA coverage in 1972, to this case reveals that Patterson's activities do not offer him LHWCA coverage as Patterson's switching duties were not affected by modern cargo handling techniques and he was not in a job that had him walking in and out of LHWCA coverage. To hold that LHWCA coverage stems from cutting a car from a train so that it could be pushed onto a track and ultimately loaded onto a barge would bring Patterson within jurisdiction for only one very small portion of his job, while leaving him outside of LHWCA coverage for the vast majority of his work day. This would be exactly the type of inconsistent treatment the 1972 amendments sought to avoid. Moreover, such a holding must necessarily be grounded on a "moment of injury" approach to jurisdiction that was rejected by the Supreme Court in Caputo.

An examination of case law subsequent to the Fourth Circuit's decision in Conti and the United States Supreme Court's decision in Caputo reveals a consistent line of authority which provides LHWCA coverage for only those individuals whose tasks were clearly related to the loading and unloading process and the maintenance and repair of equipment necessary to that process, demonstrating that Mr. Patterson's job for CSX was clearly outside of the scope of such coverage.

In Price v. Norfolk & Western Railway Co., 618 F.2d 1059 (1980) the Fourth Circuit again looked to the nature of the connection between the claimant's job duties and loading and unloading operations. This case involved the Continental Grain Co. elevator on the

Elizabeth River in Norfolk, which was owned and partially maintained by Norfolk and Western. Plaintiff, John Price, was employed by N&W as a painter and was assigned to a paint crew working at the Norfolk terminal, which included work on the warehouses, docks, drawbridges, and coal piers. Price was injured while painting the structure housing the conveyor mechanism that transports the grain. His other work duties included painting similar port facilities. The Court held that such maintenance duties were essential to the loading and unloading process and that Price was covered by the LHWCA.

Although Price was an employee of the railroad, it is obvious that his job duties were much more connected to the maintenance of a port facility than to anything that might be called traditional railroading tasks. In contrast, Mr. Patterson's very traditional railroad work as a switchman, setting off and picking up cars, did not have any discernable connection with loading and unloading tasks. At best, the cars that he was setting off might ultimately be loaded onto barges, providing a tenuous connection with traditional loading and unloading activity no more substantial than the worker who helped put the train together hundreds of miles inland.

The Fourth Circuit had no problem in distinguishing Price's claim from its previous holding in Conti: "We do not think our decision is contrary to Conti v. N&W Ry. Co., 566 F.2d 890 (4th Cir. 1977) in which the injured employee was employed on the railway cars engaged in hauling coal to mechanized loaders, not upon the loaders themselves." Price v. N&W at 1062. Instead, the Fourth Circuit reasoned that Price's jobs duties were much more akin to those encountered in Newport News Shipbuilding and Dry Dock Co. v.

Graham, 573 F.2d 167 (1978) which it held that a shipyard mechanic injured in a machine used in shipbuilding satisfied the maritime employment status requirement of the LHWCA.

After Price the Fourth Circuit dealt with a this issue again in Vogelsang v. Western Maryland Railroad Co., 670 F.2d 1347 (1982). The plaintiff was injured while working in a hopper atop railway cars which were being loaded with bauxite ore. The Fourth Circuit affirmed the District Court's dismissal of plaintiff's FELA action noting that the lower court had properly distinguished Conti: "In the instant case, however, we conclude that the District Court properly followed P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 100 S. Ct. 328, 62 L. Ed. 2d 225 (1975), and Northeast Terminal Company v. Caputo, 432 U.S. 249, 97 S. Ct. 2348, 53 L. Ed. 2d 320 (1977), in deciding otherwise and properly distinguished Conti as involving employees who, unlike Vogelsang, were not engaged in an integral part of the shiploading or unloading process."

In Merrill v. Chicago & Illinois Midland Railway, 751 F. Supp. 770 (C.D. Ill. 1990) the court found that, although plaintiff's activities at the time he was injured did not constitute maritime employment, his overall job duties of the maintenance and repair of equipment integral to the loading and unloading process brought him within the scope of the LHWCA, thus dismissing a nine million dollar jury verdict rendered under the FELA. Mr. Patterson's work was much more similar to the task Merrill was performing at the moment he was injured, which the court found not to constitute maritime employment, than Merrill's general job duties, which formed the basis of LHWCA coverage.

Merrill was a lead master mechanic at the railroad's Havana, Illinois Coal Transfer Plant on the Illinois River and was injured while assisting in the rerailing of a car that had

derailed upon leaving the dumphouse (where the coal is dumped off to conveyor belts to be loaded onto river transportation). He was severely injured upon being crushed between a railway car and a truck. Looking to the Supreme Court cases of Schwalb and Herb's Welding, Inc. and noting that the status requirement is "an occupational test focusing on loading and unloading" the Court distinguished Schwalb by noting that the claimant there was actually injured performing tasks connected with the loading process:

In contrast, Merrill was merely helping to rerail a derailed train car at the time he was injured — his services at that time were not "an integral part of [or] essential to" loading or unloading the barges, except to the extent the derailment happened to halt loading operations that day. Compared to the breakdown of the actual loading equipment in Schwalb, the derailment's suspension of loading operations here was merely a fortuitous consequence of a railroad accident, as would have been a derailment of a loaded coal train prior to reaching the facility. The rerailment was not longshoring activity, it was railroad activity.

Merrill at 779 (emphasis supplied).

Observing that the courts had rejected the moment of injury test and acknowledging that he was not performing maritime operations when injured, the Court went on to find that Merrill's position as master mechanic was essential to the terminal's purpose as a loading operation and that he was therefore covered by the LHWCA.

Obviously the line between LHWCA and FELA can be somewhat hazy when railroad employees are working full time in port terminals; however, Mr. Patterson was not performing such work and this claim falls outside the scope of LHWCA jurisdiction. Conti and Merrill (to the extent that it addresses plaintiff's participation in the rerailment of a derailed car) indicate that activity which is peculiarly railroad in nature does not give rise to LHWCA jurisdiction, even though it is performed in proximity to a port facility and on

railway cars the contents of which may be immediately destined for maritime transportation. On the other hand, LHWCA jurisdiction does arise when employees of a railroad are working on the actual mechanisms, such as conveyor belts, hoppers, and machinery essential thereto, that are utilized in the process of loading and unloading goods onto and from vessels. The outer reach of LHWCA jurisdiction appears to cover work on the mechanisms which load and unload goods from the railroad cars, however, once the cars leave the hoppers or container removal devices, they regain their purely railroad status. Workers, such as Mr. Patterson, whose railroading duties do not even bring him within the confines of the immediate port terminal area, can hardly be said to be integral to the loading and unloading process in a way which gives rise to LHWCA jurisdiction.

The occupations of each of the three plaintiffs in Conti, had a closer connection with loading and unloading activities than the work performed by Mr. Patterson. Each was employed on a full time basis in the Lambert's Point Terminal and was performing railroad work necessary to effect the actual unloading of the coal cars in close proximity to a coal dumper, which the Fourth Circuit found to be they were covered by the FELA and not the LHWCA. In contrast, Patterson's activities never took him from the Main Line Track and his work duties were far removed from the kind of tasks which would satisfy the LHWCA status test.

CONCLUSION

For all of the foregoing reasons, the plaintiff's cause of action does not satisfy either the situs or status test for Longshore and Harbor Workers' Compensation Act coverage and defendant's Motion to Dismiss should be overruled.

Respectfully submitted,

Terry Patterson,

By: 

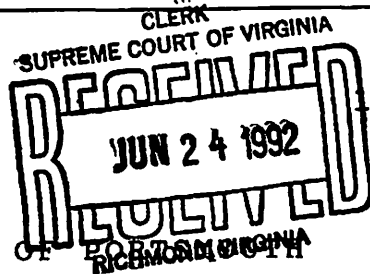
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1 VIRGINIA:

2 IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH, VIRGINIA

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4
5 TERRY LEE PATTERSON, (

6 Plaintiff,)

7 v. (AT LAW NO.

8 CSX TRANSPORTATION, INC.,) L 90-458

9 Defendant. (

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12 TRANSCRIPT OF PROCEEDINGS

13 Portsmouth, Virginia

14 September 26, 1991

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17 Before:

18 THE HONORABLE NORMAN OLITSKY, JUDGE

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Counsel for the Plaintiff

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1 THE COURT: Okay.

2 MR. RICHARDSON: Judge, it's my motion.
3 If you want me to start, I'll be glad to.

4 THE COURT: All right, sir.

5 MR. RICHARDSON: My brief pretty much
6 states my position. I believe in seeing Bill's brief
7 that I don't believe there are any substantial
8 differences in the facts.

9 THE COURT: The only thing I need, in
10 reading -- I've read all the depositions, I've read
11 all your briefs, I've read the Supreme Court case.
12 Where are the exhibits that go with these depositions
13 so I can see where they were physically? I want to
14 know where that car was that he was having that cut
15 level with, and I also want to know does that car
16 that he was working with, was that going onto the
17 barge?

18 MR. RICHARDSON: It was.

19 MR. SANDS: The car was going on the
20 barge and he was on the main line track.

21 MR. RICHARDSON: I can't dispute the
22 fact that he was near the main line switch. This is
23 the drawing he drew, which is not a great one, but my
24 understanding is this is about where he was. That's
25 the switch, and these are the bow tracks. I think

1 there were two tracks, right, Bill, onto the barge?

2 MR. SANDS: Yeah.

3 MR. RICHARDSON: One for each side of
4 the barge.

5 MR. SANDS: I think as --

6 MR. RICHARDSON: This is what he drew.

7 MR. SANDS: Right.

8 THE COURT: Are you saying that X
9 mark --

10 MR. RICHARDSON: That's where the switch
11 was.

12 THE COURT: That he has to -- did he
13 also move that switch so that that car could come
14 down on this, the track, to get on the barge?

15 MR. RICHARDSON: Yes, sir, that's what
16 he testified.

17 THE COURT: And what is the distance
18 from that particular X mark to where the barge is?

19 MR. RICHARDSON: Bill said a half a
20 mile. I can't dispute that.

21 MR. SANDS: That's what the depositions
22 say. I ferreted that out of that.

23 MR. RICHARDSON: I picked up from his
24 deposition at first that he thought he was only four
25 or five car lengths away from the barge. If Bill

1 says it's a half a mile --

2 MR. SANDS: I think --

3 MR. RICHARDSON: -- that should be a
4 matter of --

5 THE COURT: Well, gentlemen, all I want
6 to know, is it an integral or essential part of the
7 loading or unloading the vessel. If it is, there's
8 no jurisdiction here.

9 MR. RICHARDSON: That's correct.

10 THE COURT: If there isn't, we have
11 jurisdiction, and that's it. I think that might be
12 oversimplifying it, and that's it.

13 MR. RICHARDSON: That's correct.

14 THE COURT: All right, sir. Go ahead.

15 MR. RICHARDSON: Bill raised, as do most
16 plaintiffs in this case, the Conti case.

17 THE COURT: Hasn't that been overruled
18 by this new Supreme Court case?

19 MR. RICHARDSON: It has effectively been
20 overruled. If not overruled directly, certainly
21 indirectly by the Schwalb case dismissing that test,
22 which is the traditional railroad versus the integral
23 loading test. Conti has been recognized as not even
24 being followed in the Fourth Circuit in several
25 cases. In all the cases we've argued, that we were

1 the person arguing the Schwalb case, the Goode case,
2 two out of the three cases which were the primary
3 source of that appeal, the Etheridge case, which I
4 attached to Your Honor's brief, argued in front of
5 Judge MacKenzie, all of those cases, the Conti case
6 was argued in each one of those cases. The Court
7 ignored the Conti case and didn't even address it.

8 The only person who's addressed it
9 specifically is Judge Waters in the Goode case at the
10 trial court level, and he did not find it
11 persuasive. All I can say is that nobody's followed
12 the Conti case. Certainly, nobody's followed it in
13 Virginia or the Fourth Circuit even before Schwalb.
14 And I think that if Schwalb -- if Conti's still good
15 law, I'd have to agree we've got some trouble, but
16 it's not good law.

17 Bill, I know you don't agree with that.

18 MR. SANDS: Well, I think that it's --
19 the Schwalb case dealt with a situation that in
20 longshore parlance had been settled for years. That
21 was do people that work in maintenance and repair
22 facilities for the loading and unloading of goods,
23 are they covered by the Longshore Act. And the
24 answer to that in every single circuit everywhere in
25 the country was yes.

1 And along comes the Virginia Supreme
2 Court and says, "No, they're FELA workers," and the
3 Supreme Court without any problem said, "You're
4 wrong. If you're working on repair and maintenance
5 of a port loading and unloading facility, you're
6 covered." The same way if you're working on
7 construction of a port facility, you're covered by
8 the Longshore Act. Any of those functions are
9 longshore kinds of work.

10 The Conti case deals with a brakeman's
11 job or job -- I think there were two or three
12 brakemen in it, and it's at least one step removed
13 from the Schwalb case. I think the important --
14 whether we're talking about Conti or whether we're
15 distinguishing Conti from this case or whatever, all
16 of these cases that hold that there's coverage are
17 dealing with port terminal facilities. They're
18 dealing with workers whose eight-hour-a-day work is
19 within the confines of a marine railroad terminal
20 whose function is to off-load and -- off-load the
21 train cars that come in and put that cargo either by
22 the container cars or the coal that's on them or
23 whatever onto the vessels. And they're there all day
24 long, they're doing those kind of functions.

25 So I maintain, first of all, I cited in

1 the brief the Conti case, and I've gone through the
2 succession of Fourth Circuit cases that distinguish
3 it certainly, because I think the distinguishing
4 cases are as helpful here as anything else because
5 you can compare. And to the extent that the Fourth
6 Circuit has never overturned it and to the extent
7 that the Schwalb case deals with repair work as
8 opposed to brakeman work, I think that it's still
9 good law.

10 But no matter what the status of the
11 Conti case, Mr. Patterson was outside of that line of
12 work. He's on the other side of whatever line you
13 want to do. I think that's what's happening here is
14 that there's no question that people working in
15 marine terminals ought to be covered by and large.
16 There are people -- there's going to be a gray area
17 where the railroad workers are bringing the trains in
18 and out, but aren't really getting involved in the
19 loading and unloading process, and I don't know where
20 that line is. And there are certainly people that
21 are working on the tracks outside of the terminals
22 around here are FELA workers as opposed to marine
23 workers.

24 THE COURT: Some instances yes and some
25 instances no, according to these cases. It's

1 according -- isn't it essential or integral to the
2 loading or unloading of the vessel?

3 MR. SANDS: Well, I think if you look at
4 the geography of all this, I think that the situs and
5 status test are separate and you look at them
6 separately, but by and large somebody's occupation is
7 defined by where he is every day. Occupation doesn't
8 just focus on the moment of injury, it focuses on
9 what this guy's job was, this guy's, other than the
10 particular track going down to the barge. There
11 should be no claim that any rest of it was a
12 longshore function. He's simply setting off cars for
13 these various industries to use and having nothing to
14 do with maritime transportation.

15 So if there's any connection at all, it
16 focuses on this one small portion of his workday.
17 And we've got to figure out what part of that
18 conceivably is covered by the Longshore Act. And
19 looking at the geography of it, certainly, Mr.
20 Johnson, who's down at the water and he's working the
21 cars back and forth on the barge, he's definitely
22 covered under the Longshore Act when he's on that
23 barge.

24 THE COURT: How about when he's off the
25 barge?

1 MR. SANDS: When he's off the barge he's
2 probably covered when he's pushing the cars on and
3 off. I don't know where --

4 THE COURT: Where does it stop?

5 MR. SANDS: I don't know. That's a good
6 question. I don't know where the line is.

7 THE COURT: That's what we have to
8 decide in the case today, right?

9 MR. SANDS: I think it stops definitely
10 at the main line. As I understand the geography of
11 this, there is a lead track going off the main line
12 that services both the Bunge Corporation, which is
13 not a maritime function, and the barge.

14 THE COURT: The barge was for Champion,
15 wasn't it?

16 MR. SANDS: Right.

17 THE COURT: That's the maritime. The
18 rest were -- didn't need the barge. They were on you
19 might say the side of the river that they were
20 working.

21 MR. SANDS: They just happened to be
22 next to the water. But to the extent that the
23 railroad's going in --

24 THE COURT: They weren't working boats
25 or anything to go over there.

1 MR. SANDS: And if it's loading or
2 unloading, it's on the other side of the industry and
3 this guy doesn't have anything to do with that.

4 THE COURT: So where do you say the line
5 is?

6 MR. SANDS: At the very least, it's at
7 the main line track. When you go off on that spur
8 you get into the questionable areas. As I understand
9 it here, the first switch went to a track and then
10 there was another switch. And that other switch
11 divided the track, part to go to Bunge, part to go
12 down to the barge. And when you go down further on
13 that track, there's another switch which divides the
14 track into parallel tracks on which they set, which
15 they take the cars off, set them off, going back and
16 forth.

17 THE COURT: So they have to balance them
18 going on and off the barge?

19 MR. SANDS: I would imagine that at the
20 time where there are parallel tracks, you're under
21 longshore coverage without a whole lot of question.
22 I'd also think that it's, sitting here as I am, I'd
23 have to say it's a gray area, but I think it's
24 pretty, you know, nearing to white and black as
25 opposed to gray that there is longshore coverage on 174

1 up that track to at least the switch that goes over
2 to the Bunge yard. And at that time that location
3 has a dual purpose. It's no longer exclusively
4 defined for maritime functions, and I think --

5 THE COURT: How about the car that he
6 was cutting at that time, the plaintiff? That was
7 definitely going to go onto the barge, wasn't it?

8 MR. SANDS: No question. No question.

9 THE COURT: Do you all have a picture of
10 these facilities?

11 MR. RICHARDSON: Bill has some. You've
12 got some of the area.

13 THE COURT: I wanted to ask, too, after
14 I finished reading all of this yesterday, were you
15 all planning to put on any more evidence? Are you
16 just going to rise and fall with these depositions?

17 MR. SANDS: If you think more evidence
18 is necessary, we can get it for you.

19 MR. RICHARDSON: Yeah.

20 MR. SANDS: If you've got any questions.

21 THE COURT: Have you all read these
22 depositions?

23 MR. SANDS: Oh, yeah.

24 MR. RICHARDSON: We've read the
25 depositions.

1 THE COURT: Does it make it clear?

2 MR. RICHARDSON: Well, Bill and I have
3 reached, I think --

4 THE COURT: If you're a third party
5 reading them, they're not the -- I'm not taking
6 anything away from the lawyers.

7 MR. RICHARDSON: No question.

8 MR. SANDS: It's a mess. No question
9 about that. It took me forever to figure, because I
10 wasn't even at these depositions. I'm sitting there
11 trying to say -- we're trying to ferret it out.

12 MR. RICHARDSON: He was not too
13 articulate. I was the one questioning, mainly. It
14 was a discovery deposition.

15 Your Honor, Bill and I have reached some
16 common ground on the facts. I think we're both
17 arguing the nuances of the facts. Except for the
18 geographical distance from the water to the main line
19 switch, I think we both agree to the interpretation
20 of the yard. I will say this, and I think Bill may
21 not dispute this, that this was a track frequently
22 used by these crews and you'll probably find that
23 there were days that Mr. Patterson no doubt served
24 the same field job that his fellow crew member was
25 doing that day, that being --

1 THE COURT: He was a conductor also,
2 according to the depositions.

3 MR. RICHARDSON: That being he also
4 worked on the barge, too, on days where they loaded
5 the barge. I doubt if he would dispute that.

6 THE COURT: That's not the question.

7 MR. RICHARDSON: No, it's not the
8 question. The question is whether the task he was
9 performing was integrally related.

10 THE COURT: Do you all agree at least at
11 this point in time that the question is according to
12 the Supreme Court case whether it was essential or
13 integral to the loading or unloading of the barge?

14 MR. SANDS: I think it's broader than
15 that. I think the test is whether his occupation --

16 MR. RICHARDSON: No, I --

17 MR. SANDS: The general term. I don't
18 think you necessarily focus on just the minute that
19 this man is injured. I think if you remember the
20 reason why I cited all those cases is to get into the
21 policy stuff.

22 THE COURT: I read your briefs. I
23 didn't pull all the cases and --

24 MR. SANDS: I understand.

25 THE COURT: I just read what you cited

1 as case law in your briefs, but I did go to the
2 library and get the Chesapeake and Ohio versus
3 Schwalb case.

4 MR. SANDS: Uh-huh.

5 THE COURT: And then I pulled the cases
6 that, you know, that were the basis of this out of
7 235 Virginia.

8 MR. SANDS: Right.

9 THE COURT: I read that here and then
10 read the Supreme Court case.

11 MR. SANDS: Right.

12 THE COURT: After I read your briefs.

13 MR. SANDS: Right.

14 THE COURT: But I did not pull all the
15 cases in your briefs.

16 MR. SANDS: I think I had sent you some
17 of them, and Schwalb may have been in there as well.
18 Also, Conti is interesting, because that's the first
19 time --

20 THE COURT: You have several cases in
21 there, but the work -- what he does is no question he
22 is a man that works on the railroad. However, with
23 this Supreme Court case and the Conti case and all of
24 the cases, if he was in any way having to do any
25 essential or integral part for that loading or

1 unloading of that barge, it's my opinion based on
2 this law that regardless of what he does
3 traditionally as railroad work, that he would come
4 within the jurisdiction of the Longshoreman's Act
5 under certain factual situations.

6 MR. RICHARDSON: Exactly.

7 THE COURT: Setting up the geography and
8 the facts. Now, then again he may not. But that's
9 the question before me today, and I want all the help
10 I can get --

11 MR. RICHARDSON: Yes.

12 THE COURT: -- before I make a decision.

13 MR. SANDS: I think you're exactly
14 right, that there are times when this man can go far
15 enough into longshore work that he's covered. And
16 just if you're looking at the case law on this, the
17 Merrill case that we decided out of the Central
18 District of Illinois is a pretty good decision, which
19 deals with somebody who has a dual kind of capacity.
20 And in that case the court found that what he was
21 doing at the time he was injured was not covered.
22 And that was essentially the same thing that the
23 man's doing, you know, cutting and this kind of
24 thing, but that his overall functions were covered,
25 and so looking at his overall work he was entitled to

1 longshore as opposed to FELA remedies.

2 And the court there set aside something
3 like a \$9 million verdict. It was a pretty drastic
4 decision. But I think, if I can focus this a little
5 bit, I think you look at the situs and the status. I
6 think situs is really important here, because I think
7 it's unquestioned when you look at Schwalb, situs
8 isn't an issue in that case.

9 Men working or men and women working on
10 terminals, the whole broad area of Newport News
11 terminal, the Norfolk and Western coal pier, all this
12 kind of stuff, that's a situs, but I think you have a
13 real decision here to make as a threshold matter as
14 to whether that main line track is a situs and how
15 far up it goes. The Schwalb case isn't going to help
16 you with that because that's not going to deal with
17 it. I culled all of these cases -- I recently argued
18 a case in the Fourth Circuit, which I lost on a
19 jurisdiction issue, and all the cases I cited there
20 trying to find a situs case dealing with a location
21 such as this, and there aren't any.

22 I think the reason is because it falls
23 outside of it. Most of these cases are terminal
24 cases, within the terminal. So I think, one, you
25 don't -- I submit you don't have an injury, which is

1 the moment of injury. You look at the moment of
2 injury for situs. You don't look at anything to do
3 with what he was doing, you don't look at his
4 occupation, you don't look at the tasks. You simply
5 look at where he is. Is he on a covered situs?
6 Somebody performing an arguably maritime task but not
7 on situs isn't covered by the act. So that main line
8 track I submit is pure and simple railroad situs and
9 not longshore situs.

10 THE COURT: Was he cutting this car to
11 go onto the barge track similar to cutting a car and
12 going into the -- rolling down like they say to go to
13 the hoppers to turn the railroad cars over, is this
14 similar or dissimilar?

15 MR. SANDS: Well, similar in the sense
16 that he's cutting cars that are going to
17 ultimately -- the car itself here is actually the
18 cargo.

19 (Discussion off the record).

20 THE COURT: All right.

21 MR. SANDS: Okay, I think we're
22 grappling with this issue of what he's doing. He's
23 cutting cars, which at some point might be a
24 longshore task and at some point and most points is a
25 railroad task. He's doing nothing more, nothing

1 different than he would do for any of these other
2 industries. I think that's an important fact.

3 To answer your question, is it similar
4 to going down to the hopper, I think it's dissimilar
5 on two grounds. One is location. He's -- that
6 hopper going down the ramp has already entered into a
7 maritime situs. That car is at the terminal.
8 It's -- the train is stopped. It's gone into the
9 terminal and it's getting ready to go up to get into
10 the loading and unloading process.

11 In this instance he's cutting the car,
12 and what has to happen here now is the train with the
13 engines backs up the track after he made the cut,
14 stops. The engine, as I understand it in this event,
15 then pushed -- he threw the switch after he made the
16 cut, which is more --

17 MR. RICHARDSON: Well --

18 MR. SANDS: The engine backs up or
19 whatever, bumps up.

20 MR. RICHARDSON: It may go back.

21 THE COURT: Tell me what all this means,
22 now, when you say "bumps." I think I know what
23 "back" means. Bumped, it just means hit?

24 MR. RICHARDSON: Yeah, it just shoves it
25 on down. By gravity it rolls it on down towards the

1 barge.

2 THE COURT: Oh.

3 MR. SANDS: I'm not sure whether the
4 engine actually bumped --

5 MR. RICHARDSON: I'm not sure it is,
6 either.

7 MR. SANDS: He tells me anyway, and this
8 isn't in the evidence because it's hard to ferret, so
9 I had to ask. He says in this instance the train --
10 the engine -- there were two engines. There were
11 some what's called idler cars, which are simply
12 spacers, because they don't want the engines to go on
13 the barge.

14 THE COURT: That's a matter of the
15 deposition is not clear.

16 MR. RICHARDSON: Yeah.

17 MR. SANDS: When the trains -- when the
18 engines are pushing the cars back down toward the
19 barge to be loaded on the barge, they put the spacer
20 cars between the cars to be loaded and the engines
21 because the engines are too heavy to go onto the
22 ramps. So what happens -- so in this instance there
23 were these cars set off on the main line track. They
24 had already, with the engines already gone on the
25 barge, gone down the barge track, and they had taken

1 off the cars that were on the barge, brought them off
2 and set them off on a side track.

3 THE COURT: All right. Was the barge
4 already unloaded at the point in time that this
5 gentleman got hurt?

6 MR. SANDS: Yes.

7 MR. RICHARDSON: Under his testimony it
8 was. They had unloaded, that crew had unloaded it.

9 MR. SANDS: Right.

10 THE COURT: The plaintiff's crew had
11 unloaded the barge?

12 MR. RICHARDSON: Yes.

13 THE COURT: And were there any cars
14 placed on the barge at the time he was injured?

15 MR. RICHARDSON: Yes. My understanding
16 is based on his deposition -- and I'd have to stand
17 on that; and, frankly, Your Honor, we're not going to
18 have any better evidence, because there weren't any
19 witnesses other than the two crew members -- is that
20 there were some loaded railcars already on the
21 barge. The conductor was down there placing them and
22 these were some others that were being put on as
23 well.

24 THE COURT: All right. Question.

25 MR. RICHARDSON: Yes, sir.

1 THE COURT: When they bump a car --

2 MR. RICHARDSON: It goes --

3 THE COURT: -- does it go by its own
4 gravity and roll all the way down and then goes right
5 on the barge by itself?

6 MR. RICHARDSON: It's our understanding
7 that it can go one of two ways. It can either be
8 pushed by the locomotive after it's uncoupled or it
9 can go by gravity.

10 THE COURT: Wait a minute.

11 MR. RICHARDSON: I can't say for this
12 specific one.

13 MR. SANDS: Meaning is there continuous
14 flow?

15 MR. RICHARDSON: Right.

16 MR. SANDS: I don't think so.

17 THE COURT: Because if it goes by
18 gravity, there will be a continuous flow. Then does
19 somebody stay behind that car, because as it rolls on
20 the barge isn't there a manual way of stopping that?

21 MR. RICHARDSON: There is, there is.

22 THE COURT: So how do they load it?

23 MR. RICHARDSON: I can't answer that.

24 THE COURT: Do we need -- well, it's
25 your case, you all's case, but I have some questions

1 about that.

2 MR. SANDS: As I understand the facts of
3 this thing, this wasn't simply he cut it and he
4 watched the car go down to the barge. So I think
5 when you're looking at the hopper scenario, maybe
6 this is the distinction here, when you use the
7 hopper, it rolls into the hopper and unloads the car,
8 so that cut triggers the loading event.

9 That's not what happened here. I think
10 this is unquestioned. He's on the main track. He's
11 uncut. You've got the engine, the idlers and a whole
12 string of cars attached to it. He makes a cut that
13 separates the cars that are destined for the barge
14 from the cars that aren't destined for the barge.
15 He's cut two cars, he's cut the tank car, but he's
16 also cut another car, and there are two cars at this
17 little joint here. He's throwing the lever on the
18 tank car and he couldn't do it, so he goes over the
19 other side of the linkage and he throws the lever on
20 the other car that I don't know where that's
21 destined. So one is definitely destined for the
22 barge and one we don't know.

23 MR. RICHARDSON: But his intention is to
24 cut off the four cars that go to the barge.

25 MR. SANDS: Right, and the four cars go

1 to the barge, then the engine --

2 THE COURT: How were they going to get
3 to the barge once he pulled that lever?

4 MR. SANDS: The engine brings the cars
5 back down the main line track to where they clear the
6 switch, stops. He walks over to the switch and he
7 throws it.

8 THE COURT: I thought the switch
9 already -- all right, the switch hasn't been thrown
10 yet, or has it been thrown?

11 MR. SANDS: It's being thrown back and
12 forth. Engines are gaining access on and off these
13 little tracks. It's this, you know, maneuvering
14 operation.

15 THE COURT: Uh-huh.

16 MR. SANDS: At this point the engine's
17 gone back down, he throws a switch, he's done; Mr.
18 Patterson is.

19 THE COURT: And they bump the car?

20 MR. SANDS: He says that the engine
21 backs the cars on down the track to the barge track,
22 the Bunge track, and over to the barge track. It's
23 a quarter mile down the road. He doesn't know where
24 it stops, where it starts, what's going on. Mr.
25 Johnson and the engineer take care of the actual

1 loading down there. They've got the east/west tracks
2 to worry about and all of that, so there's another
3 process down there.

4 THE COURT: How does that car get down
5 there, by gravity?

6 MR. RICHARDSON: According to Bill's
7 scenario --

8 THE COURT: How did it do it in this
9 instance, that night they were working?

10 MR. RICHARDSON: Right, is that the
11 locomotive pushed them back in there after they had
12 been uncoupled.

13 MR. SANDS: He believes the locomotive
14 continued on down the road and kept pushing it. He
15 says it wasn't gravity.

16 MR. RICHARDSON: It wasn't hooked to the
17 locomotive, but the locomotive serves as a pusher.

18 MR. SANDS: It was hooked to the
19 locomotive.

20 THE COURT: But that locomotive can't go
21 on the barge because of its weight.

22 MR. RICHARDSON: Correct.

23 THE COURT: So what, does it give it a
24 final push, it just rolls on by itself?

25 MR. RICHARDSON: Presumably.

1 THE COURT: Does somebody stay on that
2 car to make sure it doesn't keep other cars off the
3 barge? How does that work?

4 MR. SANDS: Mr. Johnson is down there
5 with one of those bars, one of those, what are they
6 called?

7 MR. RICHARDSON: Pinch bars.

8 MR. SANDS: Pinch bars. The purpose of
9 those idler cars, so that the engine can apply
10 whatever pressure is going on so that the idler cars
11 can be on the intermediate level so that the cars
12 that are going on the barge can be there; and Mr.
13 Johnson's there with these pinch bars pushing the
14 cars around.

15 Now --

16 THE COURT: He pushes the car with a
17 bar?

18 MR. SANDS: Yeah, they have these pinch
19 bar things.

20 MR. RICHARDSON: I know what he's
21 talking about. I don't know if they used them in
22 this situation.

23 MR. SANDS: I don't know, either.
24 That's what I'm assuming.

25 MR. RICHARDSON: A loaded car can be --

1 MR. SANDS: If it already has momentum.

2 THE COURT: Oh, it has momentum, already
3 going?

4 MR. SANDS: Yeah. Mr. Johnson made
5 another cut -- his testimony is he threw -- he later
6 attempted to throw that same cut lever where Mr.
7 Patterson says he was injured.

8 THE COURT: Do you have a clear, cogent
9 photograph of all of this?

10 MR. RICHARDSON: Bill has some in his
11 discovery, but --

12 MR. SANDS: The only thing I've been
13 given is --

14 MR. RICHARDSON: Yeah, shows --

15 MR. SANDS: You're talking to the
16 out-of-town lawyer, but this is also something that
17 Howard drew up.

18 THE COURT: Where is the barge?

19 MR. SANDS: I think --

20 THE COURT: This is not --

21 MR. RICHARDSON: That's the barge;
22 that's the track onto the barge. The barge is not
23 physically located right there.

24 MR. SANDS: Either that this is the
25 barge maybe here, this is from the barge.

1 THE COURT: But you don't know.

2 MR. SANDS: No, sir.

3 THE COURT: Well, then we can't use
4 that.

5 MR. RICHARDSON: I can't rely on this.

6 MR. SANDS: This is the other lawyer's
7 version of the scenario here and shows the tracks and
8 stuff. I mean, if --

9 MR. RICHARDSON: We can get you a
10 picture and a plat.

11 THE COURT: Do we need any -- do you all
12 want to give me any further evidence in addition to
13 what you've given me on these depositions or --

14 MR. SANDS: I think you've got
15 questions.

16 MR. RICHARDSON: Yeah, I think you have
17 questions. It's not fair to you.

18 MR. SANDS: If you have questions, we
19 have questions.

20 MR. RICHARDSON: Yeah, it's not fair to
21 you. We came in here, frankly, I think both of us
22 came in here, frankly, thinking that the facts
23 necessary for you to make your ruling were evident,
24 but maybe they're not. And that's not fair to you to
191²⁵ put you in that position.

1 MR. SANDS: Let's see what we can find
2 out. I'm trying to figure out what do we need to
3 know. You want something to depict the area for you,
4 right?

5 THE COURT: In listening to you all,
6 you're not -- in other words, your positions are not
7 that certain on what the actual mechanics were,
8 whether it's a bump, whether it's a pull, the actual
9 loading and unloading process of the barge, how it
10 was to be handled and done, how the cars were to go
11 on and come off, who was to do them, how they were to
12 do them.

13 MR. SANDS: I think --

14 THE COURT: I couldn't make that out in
15 the deposition.

16 MR. SANDS: Because that's not what Mr.
17 Patterson was doing. He doesn't know. He wasn't
18 there.

19 MR. RICHARDSON: That deposition was not
20 designed to be used as a factual scenario for this.
21 It was merely a discovery deposition, to find out
22 basically what happened. It was not designed, and
23 I'll be honest with you, my intention was, as Your
24 Honor knows, to have the supervisor up here to
25 explain, but I didn't really think --

1 MR. SANDS: He wouldn't know, either,
2 because he wasn't there.

3 MR. RICHARDSON: He wouldn't know what
4 happened that night, but he would know the general
5 procedure.

6 MR. SANDS: Apparently, there are
7 several different procedures we were coming up with
8 here, and the point is that guy wouldn't know which
9 one was applied here any more than anybody else.

10 THE COURT: He would not?

11 MR. SANDS: There are only three people
12 going to know are the three people on that train
13 crew. The depositions I think are pretty clear to
14 the extent that they don't talk about bumping, they
15 talk about coupling these cars to the engine. They
16 talk about the engine pushing the cars back down the
17 track. I think what you're focusing on are those
18 cases where you get these cuts in the ramps and all
19 that kind of thing. I think that's what was talked
20 about in defendant's brief. But I didn't -- that's
21 the first, the fact that there was a gradation and
22 they had to use that.

23 THE COURT: Well, there is one in the
24 photograph you showed me, but I don't know which way
25 it went.

1 MR. SANDS: Yeah, but that's a quarter
2 mile away from where this is.

3 THE COURT: It may be a quarter of a
4 mile down, but if it's gradually beginning at a
5 certain spot a quarter of a mile or half a mile away,
6 it could be an essential or integral part of loading
7 or unloading of the barge. We all agree I have to
8 decide where does it begin and where does it end,
9 right?

10 MR. SANDS: Exactly.

11 MR. RICHARDSON: I don't know if you
12 need to determine where it starts. I think it's
13 under FELA to say it starts at least where this guy
14 was. Well, an argument could be made that when they
15 made up -- when these trains come in from all the
16 points that are made up in the yard to be taken out
17 to the bow track, that that's where the loading
18 begins.

19 Certainly, we feel that when you're out
20 from the classification yard back out to the boat
21 yard and he's uncoupling it from a mere intermediate
22 train to take it out to this industry, uncoupling it
23 for its destination right then, I mean, we're talking
24 momentarily before that those railcars are put on the
25 barge, that that's certainly an integral part of

1 loading that barge.

2 THE COURT: Well, are you saying then
3 that when they bring the cars in from some station,
4 we'll say in Alabama, you could theoretically say,
5 "Well, it's an integral part of the loading and
6 unloading when you pick up the car"?

7 MR. SANDS: When you're in West Virginia
8 loading coal.

9 THE COURT: Right.

10 MR. RICHARDSON: No, I didn't say that.
11 What I'm saying is when they bring it into the
12 Decatur yard.

13 THE COURT: Oh, you're saying once it's
14 in the Decatur yard.

15 MR. RICHARDSON: An argument could be
16 made that the Decatur yard is no different than the
17 Lambert's Point terminal.

18 THE COURT: But I'm not --

19 MR. RICHARDSON: You're not ruling on
20 it, you're saying.

21 THE COURT: In fact, if I had to rule on
22 it, my case would be a lot easier.

23 MR. RICHARDSON: It would be easier
24 factually, no question.

25 MR. SANDS: Let me address one thing

1 just very briefly.

2 THE COURT: According to this law, it
3 would make it a lot easier if this man got hurt in
4 Decatur doing something on the railroad, for the
5 railroad. I think it would be sort of a simple
6 decision as compared to what we have to decide here
7 today, in my mind.

8 MR. RICHARDSON: Yes, sir.

9 MR. SANDS: I think that's right. John
10 mentioned the liberal interpretation to be given to
11 the Longshore Act, and unquestionably that's the way
12 the courts deal with these things when you're talking
13 about situations where a claimant has made a case. I
14 would submit to you that that policy consideration
15 isn't appropriate here, because the Longshore Act is
16 being used as a shield rather than a sword. It's
17 being used as a defense to this case, not as
18 something that this man is seeking, and he's entitled
19 to the broad benefits Congress wants him. Congress
20 has given him the FELA, too, and when you've got
21 these two acts, I don't know why you'd have to
22 liberally construe the Longshore Act as opposed to
23 the FELA. I don't know that there's any authority on
24 that. I just don't understand why the policy of
25 liberal construction should be applicable in this

1 case.

2 Secondly, I think one of the -- if
3 you're focusing on the Schwalb case and those cases,
4 I think one of the main problems with this case and
5 trying to deal with it is you're trying to put --
6 we're trying to put -- the railroad is, anyway --
7 this man in the same classification as those terminal
8 yard workers. And I ask you to think very carefully
9 about how that impacts upon this and where that line
10 is drawn and how significant that once you're a
11 full-time terminal yard worker and your function,
12 your purpose, your raison d'etre, is to assist in the
13 loading and unloading of vessels and trains. It's
14 really a very different situation than when you've
15 out there a trainman on the yard doing one little
16 thing that's ultimately going to get the car on the
17 barge.

18 And, thirdly, I think no matter what the
19 facts are in this case, I think the depositions
20 unquestionably indicate this was not a simple part or
21 he pulled the cut or he made the cut and then the car
22 rolled down. There was at least one and probably
23 three, four or five intermediate steps in there, and
24 his task was over once the cut was done. It was then
25 the obligation of the engineer who's driving the

1 train, who arguably has more of a connection to
2 longshore work when that engineer of a train gets on
3 down that track than does Mr. Patterson. And that's
4 kind of an unusual thing. Are you going to hold the
5 engineer of a train, you know, I think he falls on
6 the other side of that.

7 THE COURT: Well, let me ask you this:
8 Suppose our coal trains here, Norfolk and Western,
9 now Norfolk Southern, when they bring all those
10 loaded cars into Lambert's Point and then uncouple
11 them from the engine and they're sitting there
12 waiting for someone to hook them on, take them up to,
13 you know, that platform where they can let them
14 loose.

15 MR. RICHARDSON: Yes, sir.

16 THE COURT: Are you saying then that the
17 brakeman and conductors that are working in that
18 terminal cutting, moving cars from one track to
19 another --

20 MR. RICHARDSON: Yeah, I think they've
21 got to.

22 THE COURT: -- fall under the
23 Longshoreman Act?

24 MR. RICHARDSON: Yes, sir, and almost
25 everybody out there has been placed under the

1 Longshoreman Act as a result of the Schwalb and
2 McGlone case. We're over in the administrative
3 longshoreman board hearing these cases not on
4 jurisdiction most of the time now but merely on the
5 sort of injury. We've gotten the best education from
6 Judge MacKenzie. The barney yard is a half mile to a
7 mile away from the yard, and he had no problem saying
8 loading was beginning back there where the uncoupling
9 was done.

10 I've got a case -- I didn't know,
11 frankly, until I got Bill's brief yesterday afternoon
12 I didn't know situs was an issue. I've got a Detroit
13 case where it was a barge yard similar to this where
14 they clearly said situs --

15 THE COURT: Well, it's not just a barge
16 yard. There are two yards here.

17 MR. SANDS: I know that case. This
18 isn't that.

19 MR. RICHARDSON: I know that, but the
20 point is that you're doing railroad work. I mean,
21 you're falling back into the Conti argument when you
22 say he's coupling and shifting the car around. The
23 point of it is when he uncoupled these cars, the work
24 he was doing was to put these cars on the barge
25 track. It doesn't matter whether it was a minute,

1 ten minutes later, but the point of his work was to
2 put those four cars on the barge.

3 MR. SANDS: I don't think you can argue
4 with that. You're then arguing situs. I agree with
5 you but not because I don't think that you can
6 totally take out the character of what the man's --
7 this is why the function, why you look more at the
8 overall guy's other occupation, the guy's overall
9 occupation than you do what he was doing at the
10 moment of the injury. Because if he's performing
11 this task back at the main yard there, whatever that
12 was called, John's argument is that's maritime
13 employment, too.

14 MR. RICHARDSON: No, I didn't say that.
15 I said an argument could be made that that --

16 MR. SANDS: Well, it's still cutting,
17 it's still ultimately destined. That's obviously not
18 a maritime situs.

19 THE COURT: No, it couldn't be
20 maritime. Suppose it's nothing to do with going on
21 the barge.

22 MR. SANDS: But I also submit simply the
23 fact he was performing a cut on a car that's
24 ultimately going into a barge doesn't make it
25 maritime employment for the status test, either. 200

1 that his function here was more analagous to that.

2 THE COURT: To me the question still is
3 is it an essential and integral part of the loading
4 or unloading that barge.

5 MR. RICHARDSON: And the only law that
6 would support your position, Bill, is the Conti case,
7 because you're arguing that coupling is a railroad
8 function and, therefore, it wouldn't -- simply
9 because he was on a rail track a half a mile from the
10 barge track, he shouldn't be found to have the
11 situs. And I don't think there's really any law to
12 support your position other than the Conti case.

13 MR. SANDS: I don't think there ever
14 would be, because you're going to get the situs
15 argument, it's going to kick you out right away.

16 MR. RICHARDSON: You know that situs is
17 the least restrictive element of the case law. There
18 have been a mile or two miles, there's been -- I
19 don't know of a case involving a railroad worker
20 where situs was found not to be applicable. The gist
21 of it is if he's doing maritime employment, he's
22 going to be found to be on the covered situs.

23 MR. SANDS: No, I think definitely the
24 courts say that you don't get situs because of what
25 you do. You look at location and you look at the

1 occupation separately.

2 MR. RICHARDSON: Well, in the Pfeiffer
3 case: "The situs test of 3(a) allows recovery for an
4 injury suffered on navigable waters or certain
5 adjoining areas landward of the Jensen line. This
6 test defines the broad geographic coverage of the
7 Act."

8 As you know, since '72 when they
9 broadened it on the land side to adjoining areas,
10 it's been very few cases like you may be aware of
11 some, but that have not found the area to be
12 adjoining. And, certainly, a half a mile is
13 within --

14 MR. SANDS: Well, I don't think it's
15 function. It's a matter of what the land is for, not
16 distance. I think you're right. It can be a mile,
17 it can be two inches, but it's a matter of what the
18 land's dedicated purpose is and the function of the
19 land.

20 THE COURT: Let me ask you all this:
21 We've all been discussing this and arguing our
22 relative -- you all have your relative positions in
23 the matter, you have your briefs, you have your
24 depositions. I've heard your arguments. First, we
25 have to decide is there any other testimony you ~~202~~t,

1 do you feel is necessary, or any type of exhibits
2 that you all would like to offer either now or later,
3 and we can come back and use those. Or, if you all
4 want to, just feel that you've got enough before me
5 now and you want the Court to rule on what's before
6 it.

7 MR. SANDS: May we ask you what
8 questions you may have? Because I think that's what
9 we're all here for.

10 MR. RICHARDSON: I think we don't need
11 to come back. We could supply a plat, we could
12 probably supply an affidavit of the conductor to
13 describe specifically how that operation went on that
14 day.

15 MR. SANDS: Even take his deposition if
16 we have to.

17 MR. RICHARDSON: Yeah, Bill and I can
18 probably do that without the necessity of coming back
19 in front of you.

20 MR. SANDS: But if you'll give us some
21 guidance as to what facts you think are key that are
22 not clear, then we'll give them to you.

23 THE COURT: Really, it's not a matter of
24 key. I think it's the overall picture. I don't
25 think you can just say one and one equals two and

1 that's it, or one plus two equals two.

2 MR. SANDS: I understand. I just mean
3 are there factual questions.

4 THE COURT: I'm trying to visualize
5 also, we're taking words and putting mental pictures
6 in our mind. I thought that maybe even a clear
7 photograph of the area, how, you know --

8 MR. RICHARDSON: I tell you what I can
9 do, probably --

10 THE COURT: Because you all have been
11 there, I take it.

12 MR. RICHARDSON: I've never been there.

13 MR. SANDS: We're all sitting here --

14 THE COURT: You have the picture in your
15 mind clearly.

16 MR. RICHARDSON: I've seen the
17 pictures. Bill and I can go down and take a video of
18 what they did. I mean, they do it every day.

19 THE COURT: No, I don't want you to do
20 that. I don't need that.

21 MR. SANDS: I think an aerial
22 photograph, this kind of thing would be --

23 THE COURT: Something just to show how
24 the operation really is. Maybe my mind just doesn't
25 conjure it up like it does in yours. You've got a

1 clear picture in your mind.

2 MR. SANDS: No. I was sent these
3 depositions cold as well. I understand it's very
4 hard to ferret out of those depositions.

5 MR. RICHARDSON: I took them. I
6 certainly apologize, but at the time --

7 THE COURT: Nothing to apologize. I
8 thought they were very well done, but it's still, you
9 know, it's easy to be a Monday morning quarterback.

10 MR. RICHARDSON: Oh, sure. At the time
11 I thought I had every understanding of how he was
12 doing it, and Bill corrected me on a few things.

13 MR. SANDS: We can bring -- I had to
14 call Mr. Patterson and find out. We can even bring
15 him here if that would be helpful. This is crucial
16 to this case.

17 THE COURT: We have another issue.

18 MR. RICHARDSON: Yeah, we do.

19 THE COURT: And that is the continuance
20 that you had made a motion for.

21 MR. RICHARDSON: And I'm prepared to
22 tell you that he is a material witness. I told Bill
23 I didn't want to sandbag him, but I called to find
24 out. He is the only management employee at that
25 yard. Everybody else is union. And Bill knows the

1 significance of that in the defense of these cases.
2 I need him. And he's -- his medical condition is
3 fragile at this time. That's all I can say. But you
4 ask me if he's material. He is. And I'm not aware
5 at this time that his testimony can be substituted.

6 THE COURT: What's your position as far
7 as the plaintiff is concerned?

8 MR. SANDS: John's given you his own
9 judgment of the materiality. I'm not here to
10 question that. That's his tenet. But what I
11 understand of the facts, this man certainly is the
12 head hauncho at this yard. He's back at the yard
13 miles away. There were several people under him who
14 assumed his duties when he was away, and he was not
15 the yardmaster that was on duty when this accident
16 was recorded. This was a night shift accident.
17 These people went out at 4 o'clock in the afternoon
18 and there was another individual who was on duty.

19 THE COURT: Who is that? Do you know
20 his name?

21 MR. SANDS: I'll get the name out of the
22 file. Kottner maybe.

23 MR. RICHARDSON: He's a union person.

24 MR. SANDS: I don't know whether their
25 contracts are the railroad doesn't want them because

1 they're --

2 THE COURT: On your --

3 MR. RICHARDSON: There's another factor
4 which Bill knows about that may even bear. We had an
5 IME scheduled for Mr. Patterson two days ago. He
6 didn't show up for it. I don't know whether Bill
7 knows something about the reasons. We can't get
8 another IME before the trial date. I know that's
9 just one of the things that happened.

10 THE COURT: I think with the burden
11 of -- and I know how plaintiffs would want to try
12 their case. It isn't fair to keep, you know, to
13 purposely delay anything, but under these
14 circumstances with someone being ill that's a
15 material witness to a side, in fact, may be the only
16 witness the way you've presented it, in addition to
17 now having an independent medical examination that's
18 necessary, plus --

19 MR. RICHARDSON: This issue.

20 THE COURT: -- this jurisdictional issue
21 that we have, I'm inclined to -- well, not, I'm going
22 to grant the continuance. You can note your
23 exceptions.

24 MR. SANDS: I appreciate that.

25 THE COURT: Under these circumstances,

1 I'm going to grant you your continuance.

2 MR. RICHARDSON: Thank you.

3 MR. SANDS: As I understand it from our
4 discussion on the telephone the other day, if this
5 were to happen we could have your permission to
6 attempt to set it outside of docket call.

7 THE COURT: Oh, no question about that.
8 I'd be more than happy to set it outside of docket
9 call to accommodate everyone so you won't have to --

10 MR. SANDS: I have some available dates
11 with me. We can do that.

12 THE COURT: -- go through that. But I
13 want to decide this jurisdictional matter. The case
14 is set now for what date?

15 MR. RICHARDSON: October 14th. Two
16 weeks.

17 THE COURT: All right. If it's set for
18 October the 14th. And today's the 26th.

19 Would you all like to -- if it's on your
20 diaries, then you must have some time that day.
21 Would you like to --

22 MR. RICHARDSON: Present that --

23 THE COURT: -- bring the photographs,
24 bring any -- if you so desire any further testimony,
25 or would you prefer I can make a ruling with what 208

1 have.

2 MR. SANDS: I have an alternative
3 suggestion, Judge. If there is another IME scheduled
4 for Mr. Patterson, which means --

5 MR. RICHARDSON: There is not yet.

6 MR. SANDS: I thought --

7 MR. RICHARDSON: We told Mr. Spears the
8 first date Dr. Cantin had available, October 7th.

9 THE COURT: Ira Cantin can't do anything
10 till then?

11 MR. RICHARDSON: We had to -- the only
12 reason we got the date we did is because another one
13 settled. We dumped --

14 THE COURT: I don't want to put you to
15 the expense, you don't have to bring anybody here for
16 the Court.

17 MR. SANDS: I think Mr. Patterson -- I
18 was just thinking if he was going to be here anyway.

19 THE COURT: Oh, if he's going to be here
20 it would be great.

21 MR. SANDS: What we might be able to do
22 is schedule it at around the same time as his IME.

23 MR. RICHARDSON: That might be. We
24 didn't schedule it because we didn't know what the
25 ruling would be, frankly.

1 MR. SANDS: Can we for the next couple
2 of days leave your trial date open on the morning in
3 case we need it? But we'll strive industriously to
4 get your calendar and get a hearing date for Mr.
5 Patterson to come in and tell you the story at the
6 same time as his IME.

7 MR. RICHARDSON: Right.

8 MR. SANDS: That will also give us
9 enough time to --

10 THE COURT: Well, I don't want you to go
11 to the expense of bringing anybody here. I didn't
12 mean that with --

13 MR. SANDS: Well, if he's going to be
14 here anyway.

15 MR. RICHARDSON: If he's going to be
16 here anyway, that's my point, if he's got to be here
17 for the IME.

18 THE COURT: I'm going to leave that
19 decision up to you. Do you feel like you would
20 prefer having him?

21 MR. SANDS: I think there are enough
22 questions about what happened and maybe he's the only
23 person that can answer them for you.

24 THE COURT: Do you also feel like you
25 want to have either live or by deposition the

1 testimony of this gentleman, the material witness who
2 is ill, do you want to put that on record for the
3 jurisdictional argument? You can, or if you don't
4 feel that's necessary, you don't have to.

5 MR. RICHARDSON: My guess is I won't
6 dispute a lot of what Mr. Patterson says on the
7 longshoreman plea. The geographics can be handled by
8 pictures.

9 THE COURT: I just feel like what you've
10 shown me, when I asked you you didn't know which end
11 was the water and which -- do you know what I'm
12 saying?

13 MR. SANDS: I understand. I mean, I
14 have --

15 THE COURT: And if I'm making -- all
16 decisions are important, but this --

17 MR. RICHARDSON: This is a case that's
18 dispositive of the case.

19 THE COURT: Right.

20 MR. SANDS: Well, we'll do whatever is
21 required to get the most dispositive direction
22 possible.

23 MR. RICHARDSON: I think Bill and I are
24 going to call our people. I mean, I can get some
25 pictures and plats.

1 MR. SANDS: Somebody has to fly over
2 there in the plane to do it. It can be done.

3 MR. RICHARDSON: There may be some on
4 record.

5 THE COURT: Maybe you don't even need an
6 aerial.

7 MR. RICHARDSON: I asked for a plat.
8 This is crazy. I asked for a plat some time ago and
9 we couldn't find one, so --

10 MR. SANDS: I asked for one as well,
11 Judge. I was told there wasn't one available.

12 MR. RICHARDSON: It's an interesting
13 technical, you know, legal argument, and both Bill
14 and I have spent some time. I think you and I have
15 had some cases when you were practicing where this
16 was an issue, and it's certainly one we feel strong
17 about.

18 THE COURT: Well, with all the cases
19 that there are, the factual situations always are
20 just a hair different.

21 MR. RICHARDSON: Exactly.

22 THE COURT: So, therefore, how do you
23 apply the law to --

24 MR. SANDS: The law is settled.

25 THE COURT: -- this scenario?

1 MR. SANDS: I think Congress, when you
2 look at what they did in '72 and '84, they said
3 that. They said, "We understand it's a mess. You're
4 just going to have" -- they just left it to you guys,
5 and they said as much.

6 THE COURT: Since I've been on the
7 bench, I'm reading more law now than I did when I
8 went to law school.

9 MR. RICHARDSON: Probably enjoying it,
10 though.

11 THE COURT: I love it.

12 MR. RICHARDSON: Thank you, Judge. I'll
13 prepare an order on the continuance, and Bill and I
14 will get together.

15 THE COURT: You can note your exceptions
16 on the continuance, too, sir.

17 MR. SANDS: I've got that on the
18 record. I thank you. So noted.

19 MR. RICHARDSON: If you want an order.

20 MR. SANDS: We've got the transcript.
21 If you want to, yeah.

22 THE COURT: I would prefer for the court
23 records that you have an order prepared and you all
24 sign it.

25 MR. RICHARDSON: I'll state the reasons

1 you've stated.

2 THE COURT: Right. And we'll leave the
3 trial date on with the possibility but not for the
4 trial purposes, but that day possibly to be available
5 for further argument. In other words, you can't do
6 anything in 15 or 30 minutes with something of this
7 magnitude and not that simplistic, by any means.

8 MR. RICHARDSON: No, I want to get on
9 that right now.

10 MR. SANDS: Is this case now assigned to
11 you, Judge?

12 THE COURT: I don't know.

13 MR. SANDS: I just wonder if we have to
14 work with your trial calendar in setting is what I'm
15 thinking about.

16 THE COURT: I don't know how that
17 works. Well, my secretary is on her honeymoon this
18 week, Mrs. Jensen. She'll be back this coming
19 Monday. She has my book. I can tell her that you
20 all want to reset this outside of the docket, because
21 I'll be gone next week. I'm going to Arizona for a
22 week.

23 MR. SANDS: Okay. Going to judge
24 school?

25 THE COURT: No, I'm going to -- I need

1 that. I'm going to the Living Desert and I'm going
2 up to the Grand Canyon.

3 (Discussion off the record.)

4 (Whereupon, the proceedings concluded at
5 9:45 a.m.)

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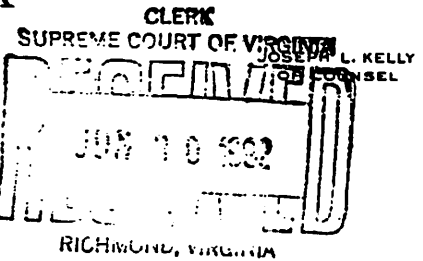
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November 12, 1991

The Honorable Norman Olitsky
Portsmouth Circuit Court
601 Crawford St.
Portsmouth, VA 23704

Re: Terry Patterson v.
CSX Transportation, Inc.
Docket No. L-90-458

Dear Judge Olitsky:

Based upon our representations to you at the hearing on the Longshoremen Plea in this matter, I have developed some additional information which may or may not be important to your decision. I have discussed with opposing counsel my intention to supplement the record with this information and am copying him so that he may respond if necessary. Most of this information though I believe will be undisputed. Attached for your reference are the following:

Exhibit A - A map showing Decatur and with reference to the Tennessee River. X marks the approximate spot of the boat track facility.

Exhibit B - A photograph of the Tennessee River and the Keller Memorial Bridge looking east. The bridge consists of a high rise and an older bridge which is a draw bridge to accommodate river traffic.

Exhibit C - A rough survey of the respective areas. It is not intended to be to scale. The industries along the river are served by five tracks, collectively known as the industry storage yard tracks, which dead end just east of the area in question. The main storage yard track is the one closest to the river. The storage yard tracks run basically west to east,

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The Honorable Norman Olitsky
November 12, 1991
Page 2

parallel to the river and a paved road that serves the industries. The boat tracks of which there are two, are off a "lead" (track) which also serves the Bunge plant and two other CSX storage tracks. There are two boat tracks designed to handle rail cars going on to and off of the boat slip and a waiting barge. A barge holds eight cars on each side. The boat tracks are about ten car lengths in length or 500 feet (10 times 50 feet). It is about another ten car lengths from the beginning of the boat tracks to the switch on the main industry storage track. The typical procedure for loading and unloading at the boat tracks is for the crew to remove from the waiting barge any "loads" (loaded rail cars) from the barge and place them on the industry storage yard tracks. The crew then uncouples the empties (up to 16) to go onto the boat tracks and then on to the barge. The empties are then "pushed" on to the barge by use of the engine and older rail cars kept on the two adjoining CSX storage tracks to the east of the boat tracks. These older rail cars are called "spacers." The "spacers" allow the engine to push the empties on to the barge without the necessity of the engine going on to the boat slip. The crew handling this operation is generally a three man crew including an engineer (who operates the engine) and two trainmen. One trainman handles the barge where coupling and uncoupling is done and one handles the field work which includes uncoupling cars designated for the barges and handling the switches. On the day in question, apparently Mr. Patterson was doing the field work and another gentleman was on the barge itself.

Within the last year, the boat tracks and the barge slip have been taken out of service by the CSX which owns, operates and maintains the two boat tracks and the boat slips.

In addition, I have attached the following photographs which show the respective locations.

Exhibit D - is a photograph of the main industry storage yard track looking east with the four other storage tracks to the right and the "lead" into the boat tracks and Bunge going off to the left with the main switch in the foreground. This switch is approximately twenty car lengths or 1,000 feet from the boat slip and the river's edge.

Exhibit E - is a photograph looking west on the main industry storage yard track with the boat slip and Bunge lead going to the right.

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The Honorable Norman Olitsky
November 12, 1991
Page 3

Exhibit F - is looking towards the river from the main industry storage yard track; Bunge to the left, the two CSX storage tracks to the right and the two tracks to the boat slip in the middle. The switch for the boat slip is in the middle of the picture. Only the switch ties remain in that the switch has been taken out of service. It is approximately ten car lengths (500 feet) from the switch ties to the river's edge.

Exhibit G - is also looking towards the river. The two towers at the boat slip are to the left of the picture and the beginning of the two boat tracks in the middle of the picture. As you can see, the boat tracks have been mostly taken up and are out of service at this time. The two storage tracks where the "spacers" used to be stored are on the right and hopper cars are stored there at present.

Exhibit H - is the end of the boat tracks at the boat slip showing tracks on each side.

Exhibits J and K - are just closer photographs of the boat slip.

Exhibit L - is looking south away from the boat slip towards the main storage track. Bunge is on the right, the storage tracks are on the left and you can see rail cars located on the five industry storage yard tracks (approximately 1000 feet away) in the middle between the two. These are the same cars you see on the industry storage yard tracks in Exhibits D and E.

I hope this clarifies the situation for you.

Respectfully submitted,



John Y. Richardson, Jr.

JYR/sml

enclosure

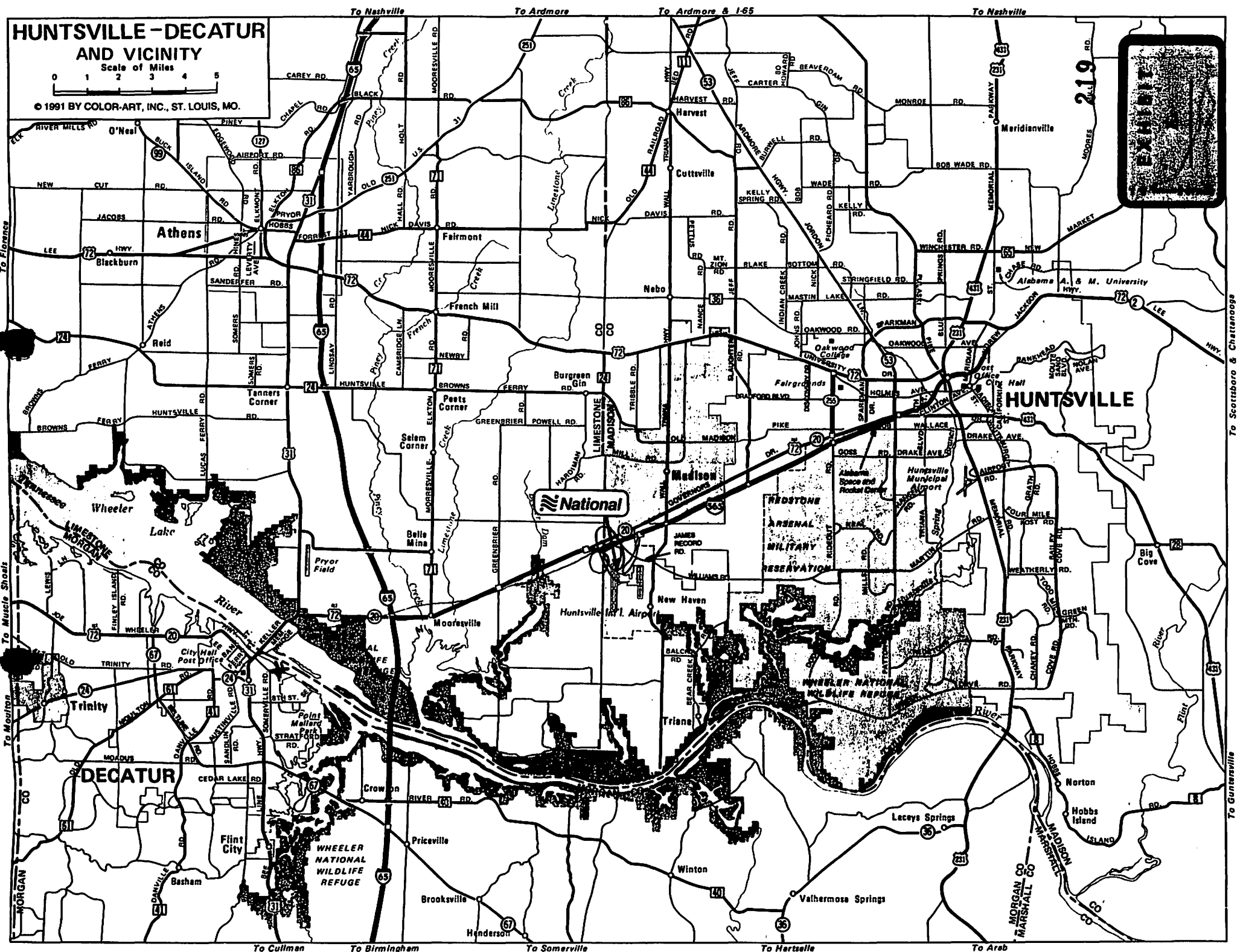
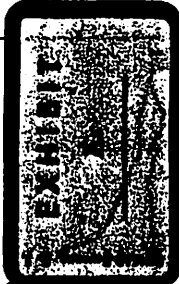
cc: William Sands - w/enclosure

HUNTSVILLE-DECATUR AND VICINITY

Scale of Miles



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DOWNTOWN HUNTSVILLE

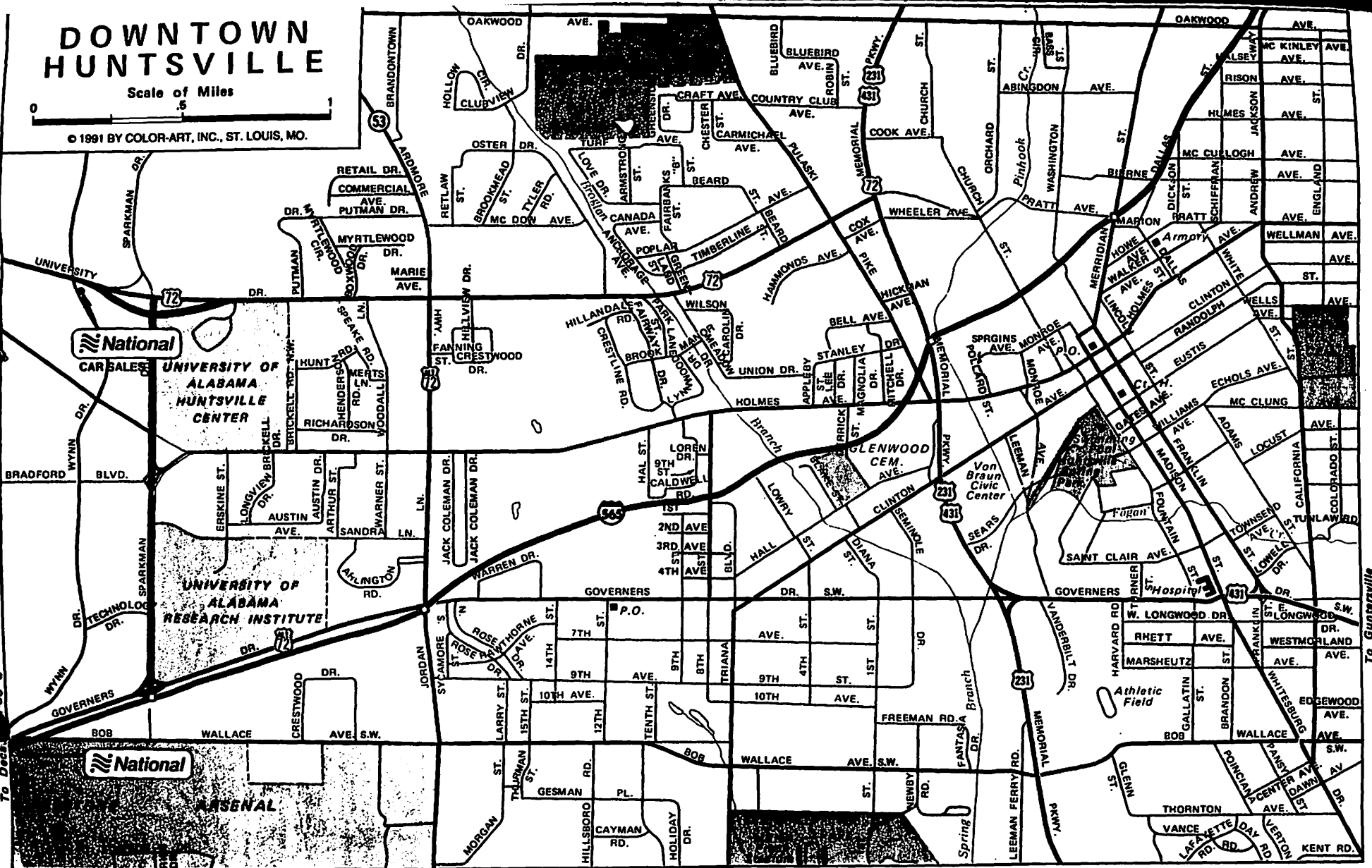
Scale of Miles



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To Fairgrounds Coliseum To Athens, I-65

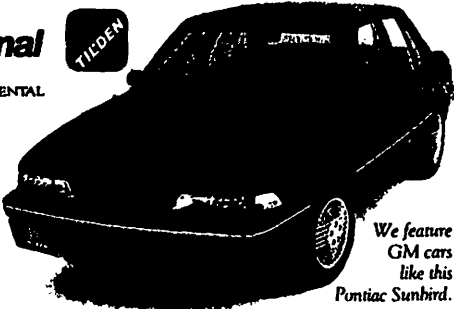
To Decatur I-65 S



To Guntersville

Europcar **National**

LEADING THE WAY IN GLOBAL CAR RENTAL

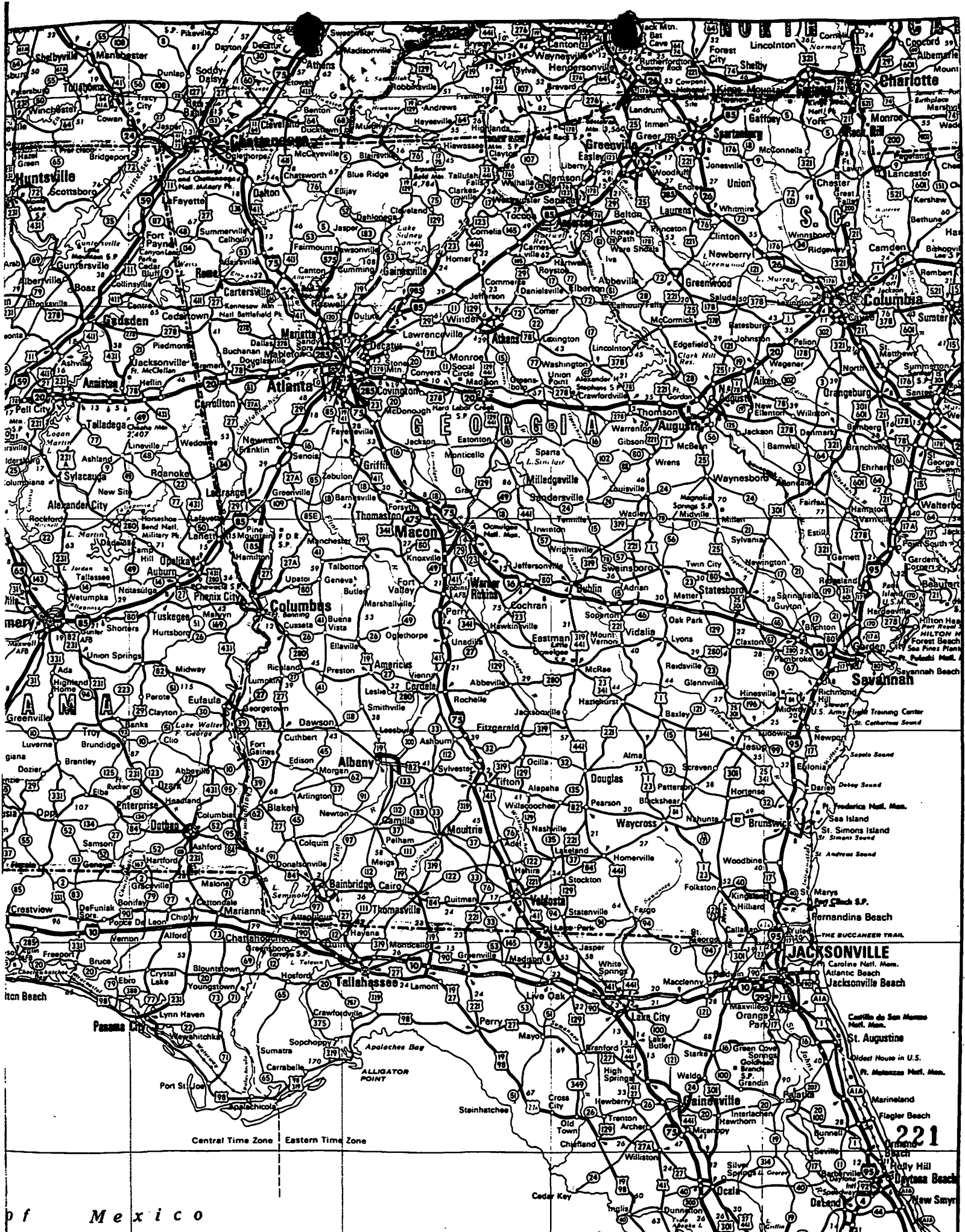


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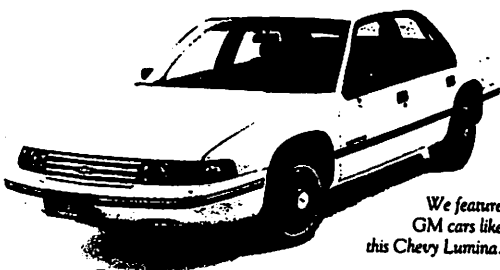


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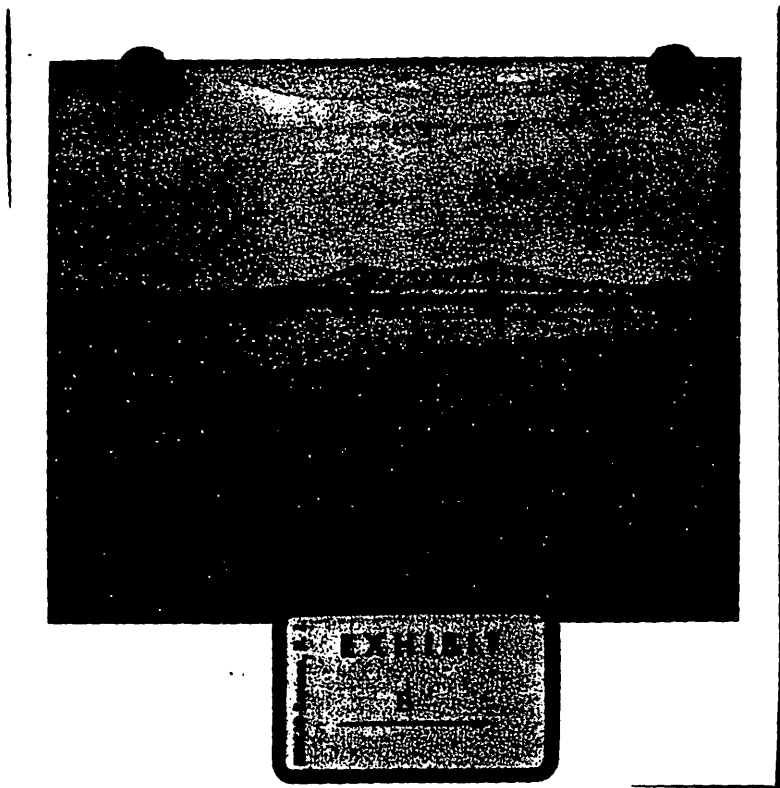


LEADING THE WAY IN GLOBAL CAR RENTAL



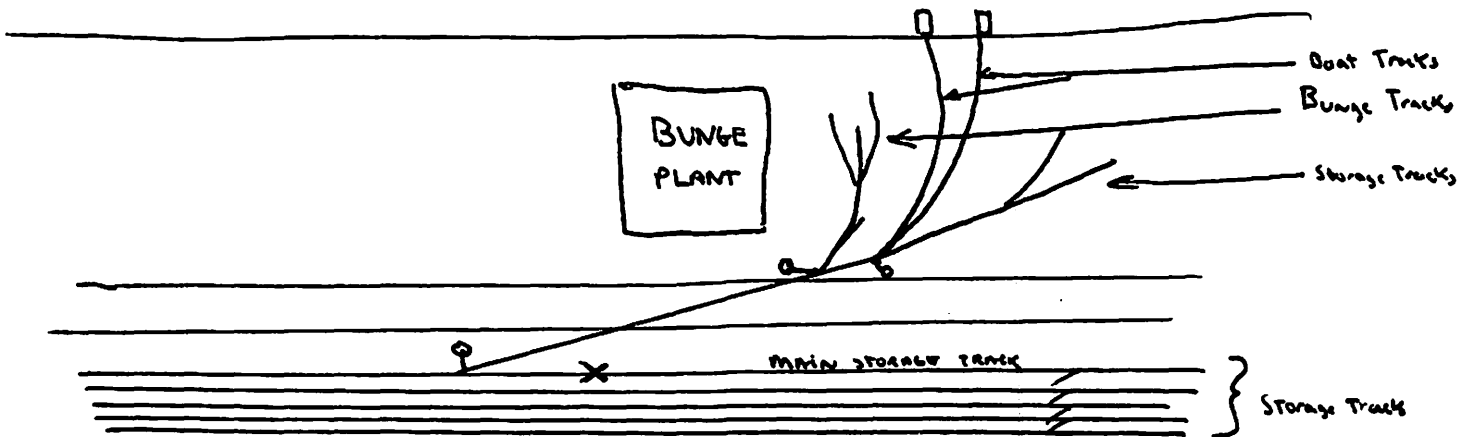
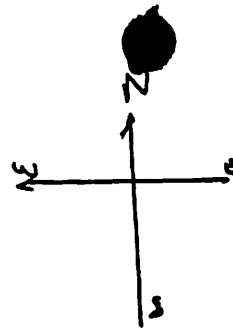
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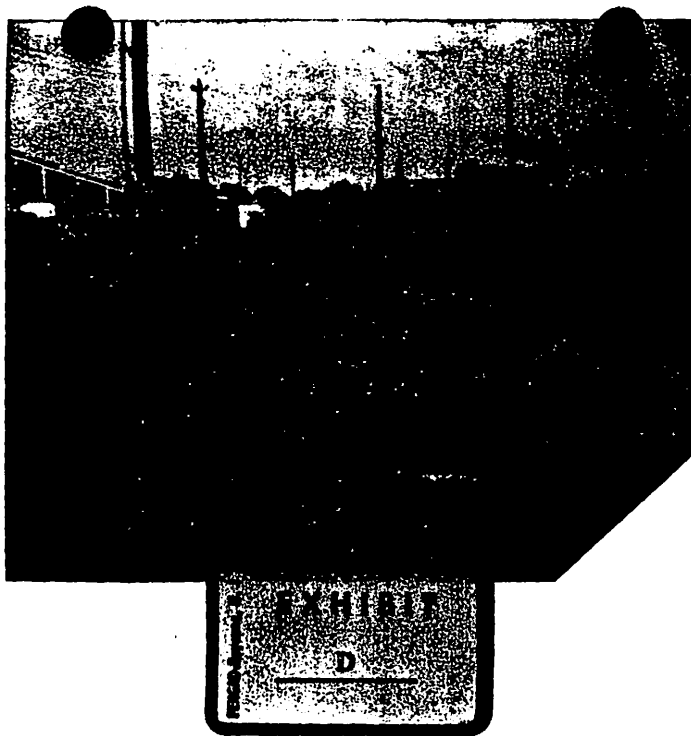
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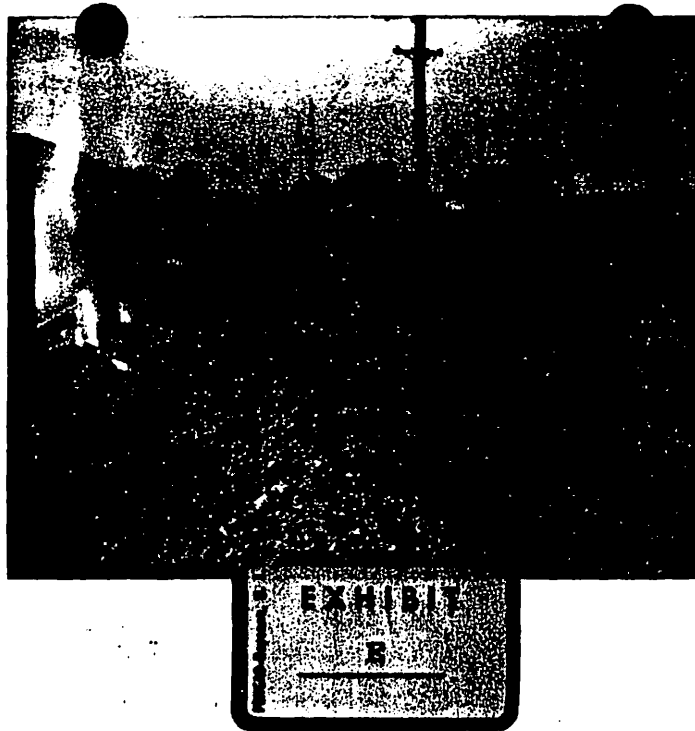


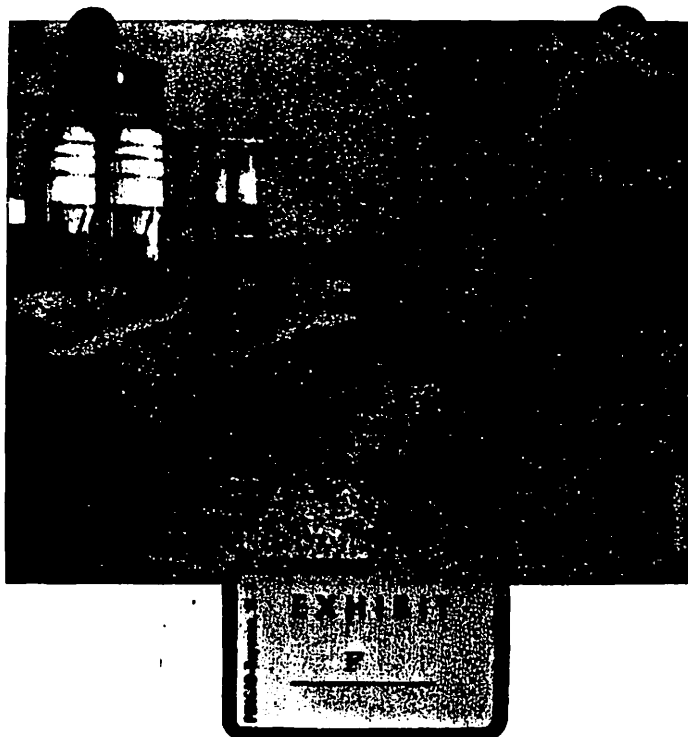
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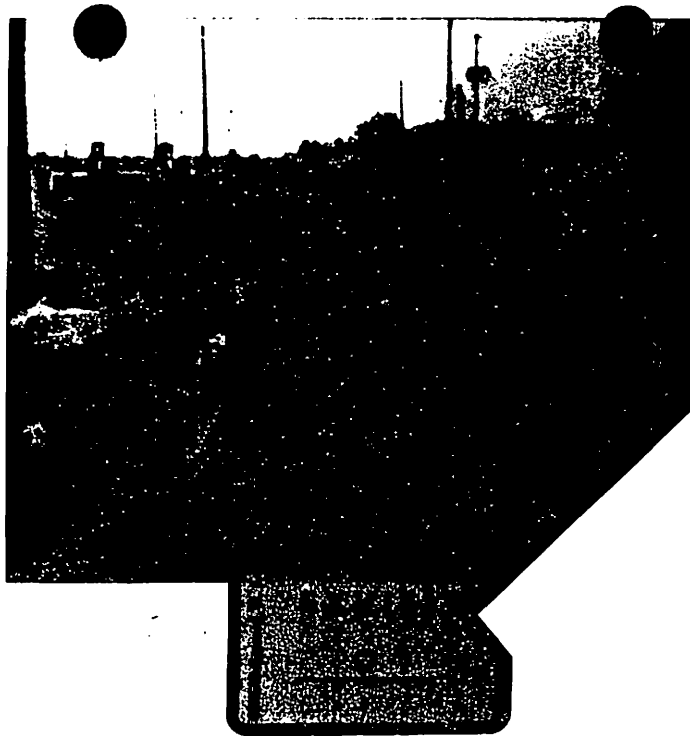
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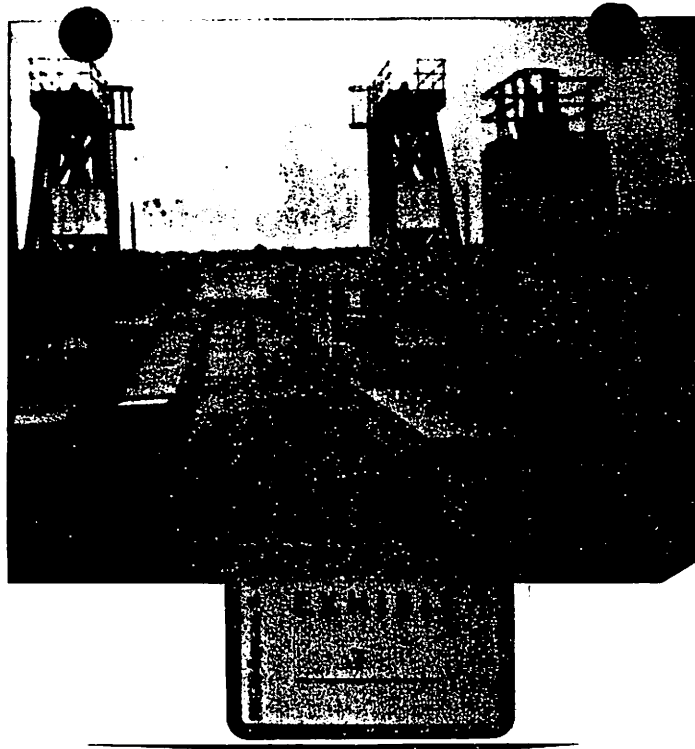


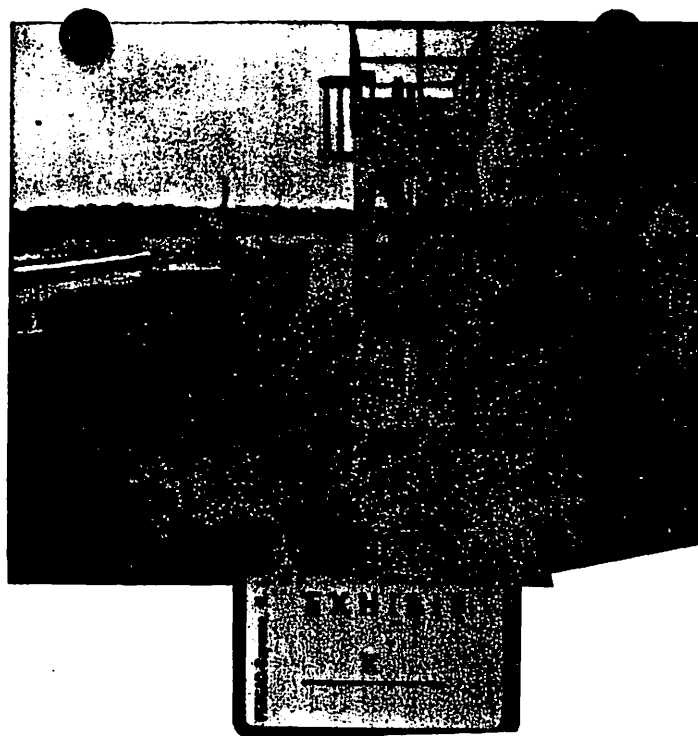


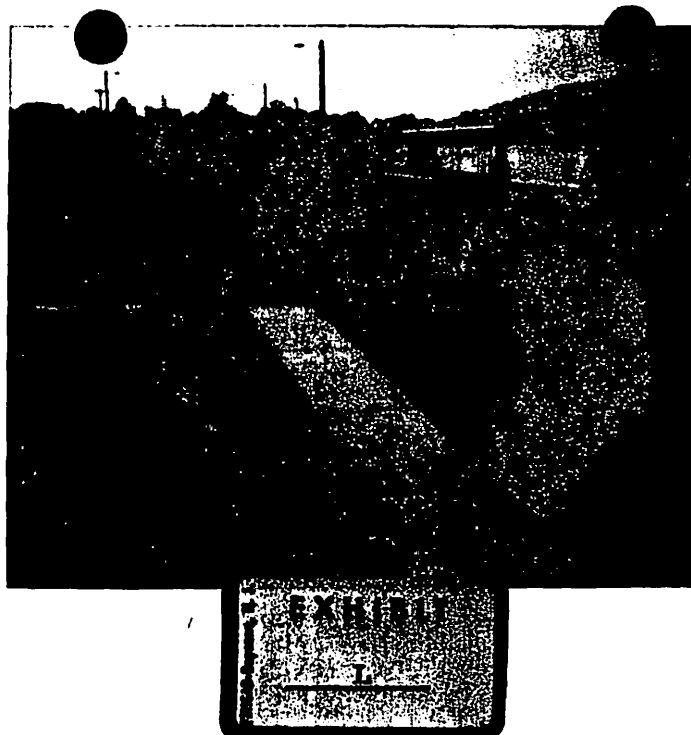












McCHESNEY, DUNCAN & DALE, P.C.

ATTORNEYS AT LAW

SUITE 810

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WASHINGTON, D.C. 20036

(202) 872-8411

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JOHN C. DUNCAN, III^{*}

WILLIAM P. DALE^Δ

WILLIAM S. HOPKINS^Δ

WILLIAM P. DAISLEY^Δ

MARY ANN MANCINI

CHARLES F. FULLER^Δ

DAVID A. CONNOLLY, JR.

WILLIAM S. SANDS, JR. +

HANNO I. RITTNER+

TERESA BOLET KUHN +

^ΔALSO MEMBER OF MARYLAND STATE BAR

^{*}ALSO MEMBER OF VIRGINIA STATE BAR

+ MEMBER VIRGINIA STATE BAR ONLY

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(703) 273-9094

OF COUNSEL
PAUL P. VANGELLOW*

December 12, 1991

The Honorable Norman Olitsky
Portsmouth Circuit Court
601 Crawford Street
Portsmouth, VA 23704

Re: Terry Patterson v. CSX Transportation, Inc.
Docket No.: L-90-458

Dear Judge Olitsky:

I am enclosing for your consideration in connection with CSX's Special Plea to Jurisdiction an affidavit from the plaintiff, Terry Patterson, and four aerial photographs depicting the location of Mr. Patterson's May 20, 1988 accident. The exact spot of the accident has been marked by Mr. Patterson with a red X on each of the photographs.

As Mr. Richardson has indicated, the barge tracks appear to have been largely removed since the accident. Aerial photograph number four shows the course of the barge tracks from the Main Line to the barge slip. You can see path of that track as it approaches the slip in the lower-right-hand corner of the photograph -- it is the track or path between the two tracks with train cars on them.

As indicated in Mr. Patterson's affidavit, the exact location of his injury was some distance beyond the point at which the Barge/Bunge track veers off the Main Line. After Mr. Patterson was injured attempting to throw a cut-leaver, the engineer brought the cars in an easterly direction on the Main Line to a point where the train cleared the switch for Barge/Bunge track. The engine then pushed the cars down to the Barge Track.

As you know, it is our contention that the spot on which Mr. Patterson was injured was not a situs covered by the Longshore and Harbor Workers' Compensation Act, and also that he was not engaged

The Honorable Norman Olitsky
December 12, 1991
Page -2-

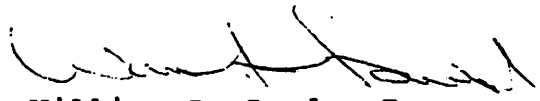
in maritime employment at the time of the accident. We ask that you overrule the defendant's Plea.

Thank you for allowing us to submit these additional materials and I hope that you will find them helpful in making your decision. We look forward to receipt of your ruling on the defendant's Special Plea to Jurisdiction.

Very truly yours,

McChesney, Duncan & Dale, P.C.

By



William S. Sands, Jr.

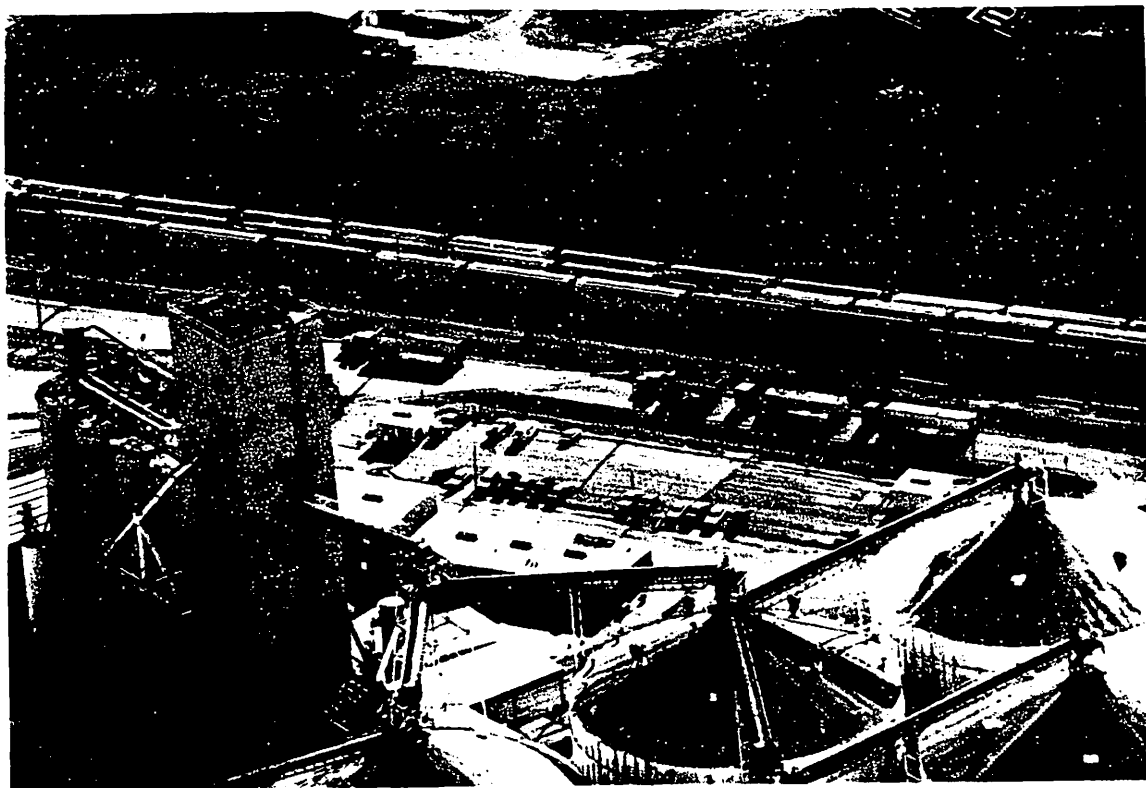
WSS/lb
Encl.

cc: John Richardson, Esq.
Howard Spier, Esq.

West

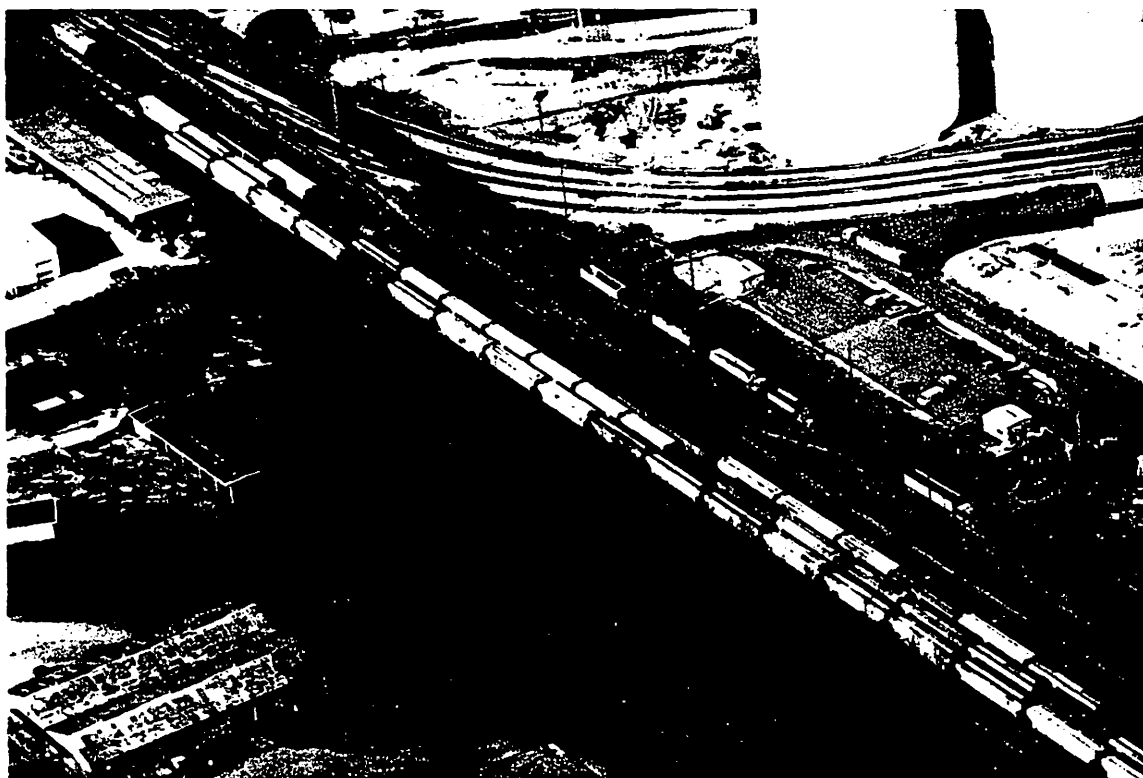
East

(1)



East

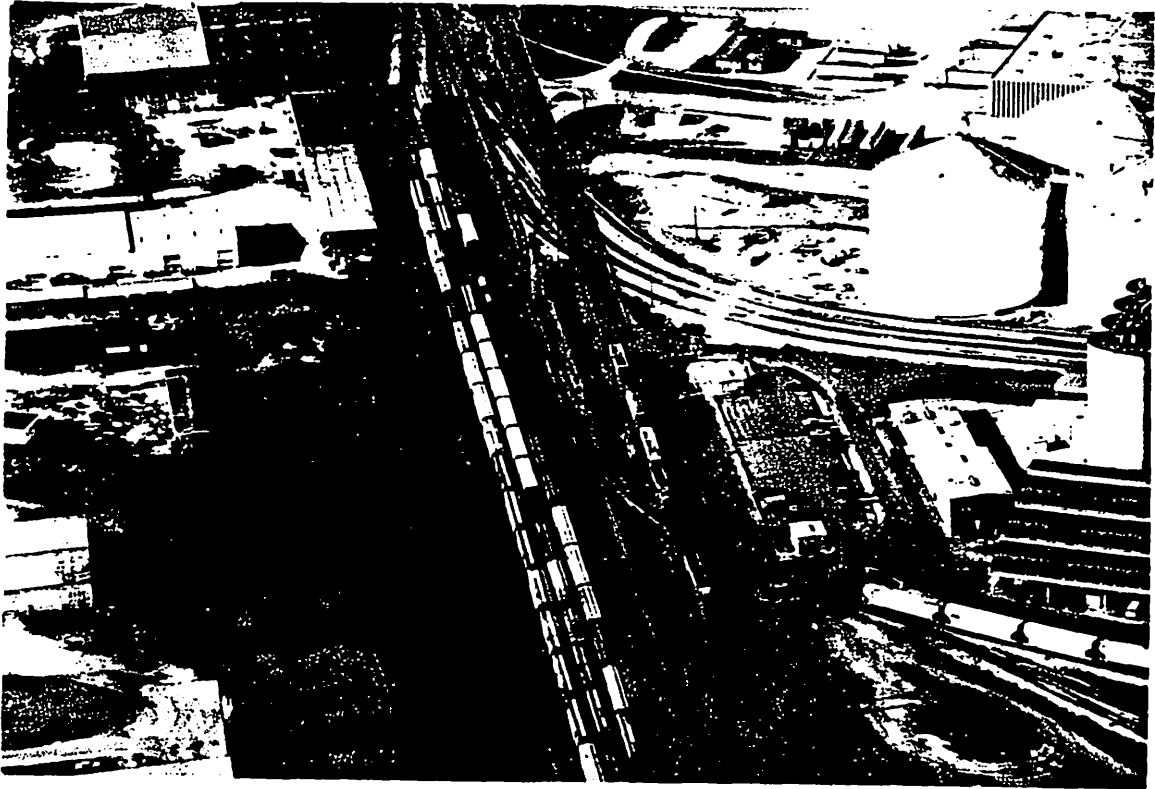
(2)



West

east

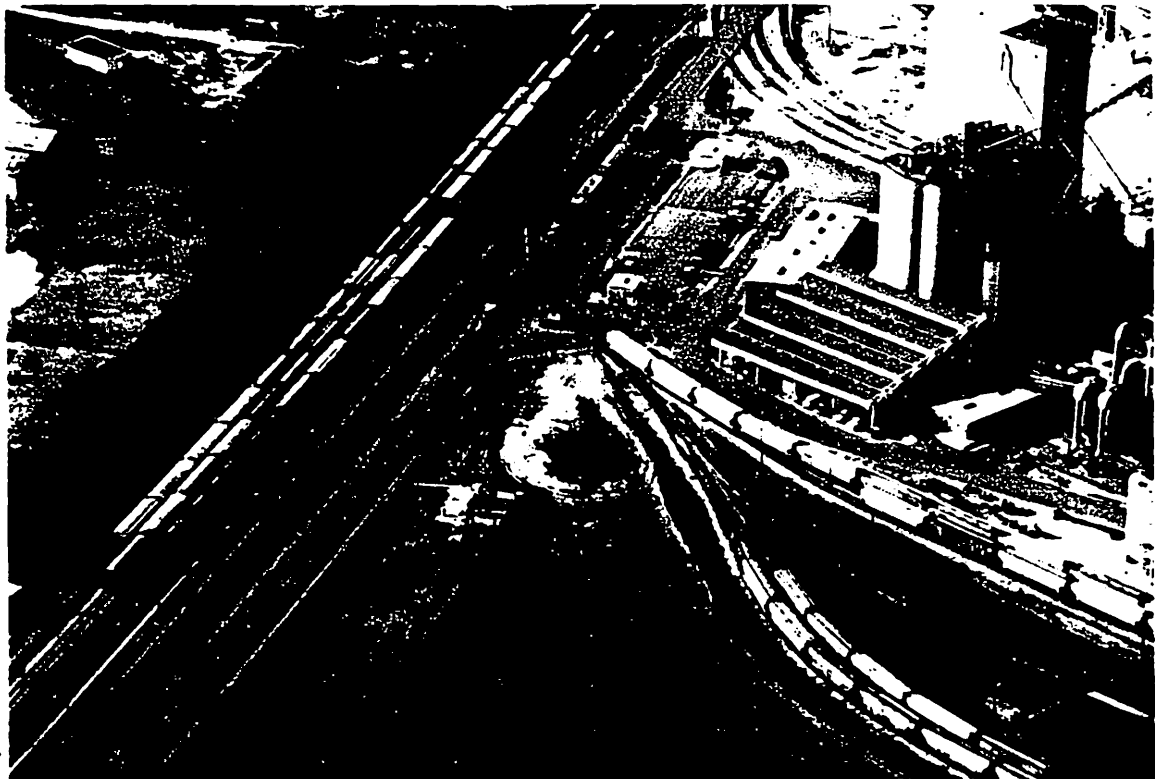
2



west

east

4



236

west

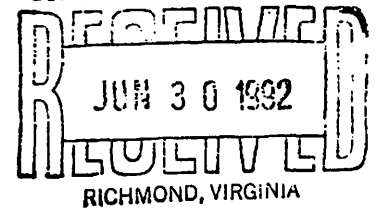
VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

SUPREME COURT OF VIRGINIA

TERRY LEE PATTERSON,
Plaintiff,

vs.

CSX TRANSPORTATION, INC.,
a Virginia Corporation,
Defendant.



AFFIDAVIT OF TERRY LEE PATTERSON

STATE OF ALABAMA)
COUNTY OF _____) SS.

BEFORE ME, the undersigned authority, duly authorized to administer oaths and take acknowledgements, personally appeared TERRY LEE PATTERSON, who, after being first duly sworn, deposes and says:

1. That my name is Terry Lee Patterson and I am the Plaintiff in the above-entitled action.

2. That on May 20, 1988, I sustained personal injuries while working within the course and scope of my employment as a railroad yard switchman with defendant, CSX Transportation, Inc. At the time of my injury I was assigned to Yard Job No. 201, which required me and my two co-workers, Locomotive Engineer G.E. Williams and Conductor/Foreman Jerry Johnson, to assemble a train at defendant's Oakworth Yard, situated in Decatur, Alabama, and then to bring the train to various local industries for the purpose of setting off loaded cars and picking up empty cars ("switching activities").

3. As the train's switchman, I was responsible for, among other things, coupling cars, separating cars and throwing switches. I was employed as a railroad yard switchman for approximately 14 years prior to my accident.

4. After reporting to Oakworth Yard at 4:00 p.m. on May 29, 1988, my train crew and I rode our train to the main line track which is depicted on the attached drawing, identified as Exhibit "C", and incorporated herein by reference.

5. The next local industry scheduled for switching activities was Champion Paper, which company utilized a floating barge for the loading and unloading of rail cars. The barge was situated at the River. It was my job to couple and uncouple cars from the train and operate switches. The locomotive engineer was then required to bring the remainder of the train onto the lead track and then proceed to either the east barge track or west barge track for the purpose of placing several cars on the barge and taking cars off the barge. Conductor/Foreman Johnson went to the barge, from which position he supervised the loading and unloading of some rail cars onto the barge.

7. The cars from the barge were then taken to a set off track parallel to the mainline track. The engineer next brought the train back onto the main line track.

8. While working on the main line track, I attempted to uncouple several cars from the train by pulling on a certain car's uncoupling device known as a "cut lever". I pulled on the cut lever, it failed to operate, thereby causing me to suffer serious

injuries to my back. The location where my injury occurred is marked with an "X" on Exhibits "C", "D", "E" and "F".

9. Although injured, I managed to crossover the car on which I was hurt and then pulled the cut lever on another car which resulted in the desired uncoupling of cars from the train. The engineer then moved the train back down the main line track (west) to clear the switch so cars could be pushed down to the barge tracks. Several cars were ~~unloaded~~^{uncoupled} through the switching efforts of Conductor/Foreman Johnson. *T.H.P.*

10. Following the train crew's switching activities at the barge, the train again returned to the main line track from where we proceeded to switch cars at several other local industries including Jim Dandy Dog Food Plan, Con Agra Flower Mill, Wolverine Tubing and G.E. Electric. None of the cars placed at these industries were intended to be loaded on any floating dock, barge or vessel of any kind associated with the Tennessee River.

11. The main line track, on which I was working when I sustained my injuries does not adjoin the Tennessee River.

FURTHER AFFIANT SAYETH NAUGHT.

Terry Patterson

AFFIANT

SWORN TO AND SUBSCRIBED before me this 4th day of December, 1991

James E. Patterson

NOTARY, PUBLIC, State of Alabama

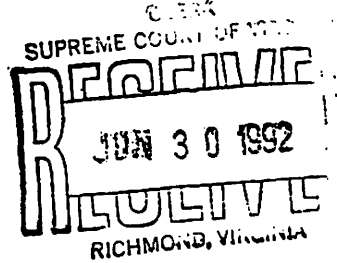
My commission expires: 5-13-95

Commonwealth of Virginia



DENNIS F. McMURRAN
L. CLEAVES MANNING
JOHNNY E. MORRISON
NORMAN OLITSKY

Judges



P. O. Drawer 1217
Portsmouth, Virginia 23705-1217

FAX: (804) 393-5110

THIRD JUDICIAL CIRCUIT
CIRCUIT COURT OF THE CITY OF PORTSMOUTH

February 13, 1992

John Y. Richardson, Jr. Esquire
Post Office Box 3416
Norfolk, Virginia 23514-3416

William S. Sands, Jr. Esquire
Suite 810
One Thousand Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Terry Patterson v.
CSX Transportation, Inc.
Docket No. L-90-458

Gentlemen:

The above-referenced matter is now before the Court on defendant's Plea to Jurisdiction, with related memoranda of law submitted by counsel.

The Court has carefully reviewed the record in this cause, including the pleadings, depositions, documentary proofs, exhibits and argument of counsel.

The issue before the Court is whether plaintiff, injured while working as a brakeperson for the defendant railroad, was engaged in "maritime employment," i.e. work that is essential to the loading or unloading of a vessel, thereby precluding his FELA claim.

The United State Supreme Court in Chesapeake and Ohio Railway Co. v. Schwalb, 110 S. CT. 381 (1989) stated that the status of maritime employment is properly determined by looking at the overall loading and unloading process of the vessel and the employee's role within that process.

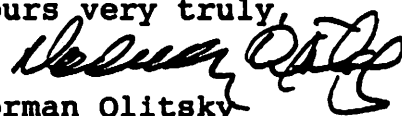
John Y. Richardson, Jr., Esquire
William S. Sands, Jr., Esquire
February 13, 1992
Page Two

As noted in the deposition of the plaintiff taken in Norfolk, Virginia October 30, 1990, while working as a switchman along with a conductor and an engineer (three-man crew) he was preparing railway cars for placement on a barge which was to deliver the cars by water to Champion Paper Company. The plaintiff was injured while attempting to uncouple a car in preparation for having cars pushed down to the barge. The cars being prepared for placement on the barge were thus a part of the loading process of which plaintiff was an integral part. And accordingly plaintiff's injuries are compensable solely under the jurisdiction of the LHWCA, and plaintiff's action herein under FELA is hereby dismissed.

The Court requests that counsel for the defendant prepare and circulate for endorsement an Order consistent with this ruling.

With best wishes to you both, I remain.

Yours very truly,


Norman Olitsky
Judge

NO/dlj

50
VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

TERRY LEE PATTERSON,

Plaintiff,

v.

Docket No. L-90-458

CSX TRANSPORTATION, INC.,

Defendant.

ORDER


This day came the parties by counsel pursuant to the defendant's motion to dismiss the plaintiff's claim under the FELA, and the same was argued by counsel.

WHEREFORE, as the Court is of the opinion that the decision of the Supreme Court of the United States in Chesapeake and Ohio Railway Company v. Schwalb, 110 S.Ct 381 (1989) is controlling and that after due consideration of the memoranda and evidence filed herein and the argument of counsel it finds that plaintiff was engaged in "maritime employment", as reflected in the Court's opinion letter of February 13, 1992 which is incorporated herein by reference, that he was injured on a situs covered by the Longshore and Harborworkers Compensation Act, 33 USC §901 et. seq; and finds further that plaintiff's injuries are compensable solely under the jurisdiction of the LHWCA, it is hereby ORDERED that the plaintiff's action under the FELA is dismissed, with prejudice. The plaintiff's exception to this ruling is noted. The Court further ORDERS that the memoranda of law, the depositions, the documentary proof and exhibits filed with the Court are made a part of the record of this cause.


Enter this Order: 4/11/72

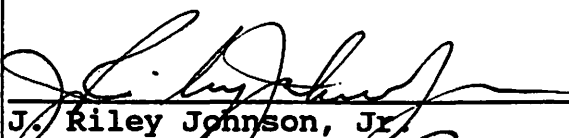
N.D.

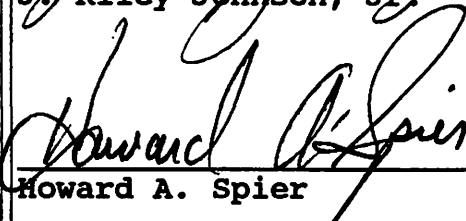
I ask for this:

 p.d.
John F. Richardson, Jr.

Seen and excepted to:

 p.q.
William S. Sands, Jr.

 p.q.
J. Riley Johnson, Jr.

 p.q.
Howard A. Spier

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

TERRY PATTERSON,

Plaintiff,

v.

At Law No. L-90-458

CSX TRANSPORTATION, INC.,

Defendant.

O R D E R

THIS DAY came the parties, by counsel, requesting entry of this Order making certain materials a part of the record of this case, both parties having agreed that these materials should be part of the record. The materials to be included in the record are as follows:

1. Transcript of the deposition of Terry L. Patterson taken on October 30, 1990;
2. Transcript of the deposition of Jerry Johnson taken on February 26, 1991;
3. Affidavit of Terry L. Patterson executed on December 9, 1991, with exhibits;
4. Plaintiff's Memorandum of Law in Opposition to Defendant's Special Plea to Jurisdiction filed on September 25, 1991;
5. Defendant's Brief in Support of Motion to Dismiss filed on September 25, 1991;
6. Defense counsel's correspondence dated November 12, 1991, to Judge Norman Olitsky with Exhibits A through L, and

7. Plaintiff's counsel's correspondence dated December 12, 1991 to Judge Norman Olitsky with attachments.

WHEREFORE, it is ORDERED that the documents referenced as 1 through 7 with exhibits, be, and they hereby are, made a part of the record of this action.

ENTERED: *5/20/92*

By *N.D.*

Judge

We ask for this:

Timothy E. Keener, p.d.
John Y. Richardson, Jr.
Williams Kelly & Greer

William S. Sands, Jr., p.q.
William S. Sands, Jr.
McChesney, Duncan & Dale, P.C.
2645ORDER