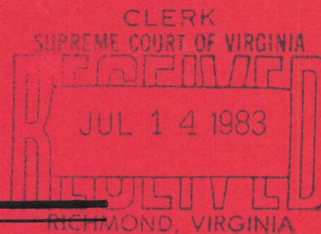


226 VA 352



IN THE  
**Supreme Court of Virginia**  
AT RICHMOND

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RECORD NO. 830492

JAN 31 1984

WINCHESTER AND WESTERN  
RAILROAD COMPANY

Appellant,

v.

COMMONWEALTH OF VIRGINIA  
and  
STATE CORPORATION COMMISSION  
DIVISION OF PUBLIC SERVICE TAXATION

Appellee.

JOINT APPENDIX

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COMMONWEALTH OF VIRGINIA

AUG 10 4 27 PM '81 STATE CORPORATION COMMISSION

IN THE MATTER OF

WINCHESTER AND WESTERN RAILROAD COMPANY,  
A Virginia Corporation

APPLICATION FOR REVIEW AND

CORRECTION OF TAXES

Comes now the applicant, Winchester and Western Railroad Company, and applies for a review and correction of taxes assessed against it on May 20, 1981, pursuant to Code of Virginia, as amended, 1974 Replacement Volume, Section 58-672.

1. The applicant is a Virginia corporation.

2. On May 20, 1981, it received an assessment in the amount of Ninety Eight Thousand, Seven Hundred Sixty One Dollars and Twenty Two Cents (\$98,761.22) as rolling stock tax and Two Hundred and Thirty Five Dollars and Fifty Cents (\$235.50) as a special tax.

3. On May 27, 1981, the applicant paid Five Thousand Ninety Eight Dollars and Eighty Cents (\$5,098.80) consisting of a payment of Four Thousand, Eight Hundred Sixty Three Dollars and Thirty Cents (\$4,863.30) of rolling stock tax and the entire Two Hundred and Thirty Five Dollars and Fifty Cents (\$235.50) special tax.

4. On July 30, 1981, applicant received a notice of delinquent state taxes due for the year 1981 in the amount of Ninety Three Thousand, Eight Hundred Ninety Seven Dollars and Ninety Two Cents (\$93,897.92) and a penalty assessment of Four Thousand Six Hundred Ninety Four Dollars and Ninety Cents (\$4,694.90).

5. Petitioner takes exception to the remaining Ninety Three Thousand, Eight Hundred and Ninety Seven Dollars and Ninety Two Cents (\$93,897.92) in taxes and Four Thousand, Six Hundred Ninety Four Dollars and Ninety Cents (\$4,694.90) in penalty on the grounds set forth below.

6. Such tax is not authorized pursuant to Code of Virginia, as amended, 1974 Replacement Volume, Sections 58-515 and 58-524(5), or any other section thereof.

7. Such tax is not permitted in the absence of statutory authorization.

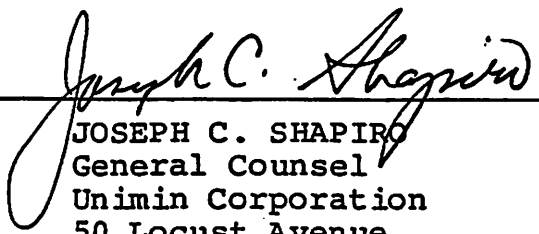
8. Such tax is impermissible under the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution.

9. Since such tax is not permitted, such penalty is not owed by the applicant.

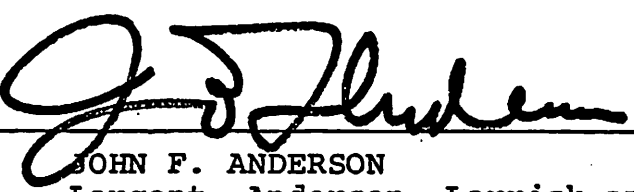
WHEREFORE, your applicant respectfully prays that the aforesaid assessment be corrected.

WINCHESTER AND WESTERN RAILROAD COMPANY

By: \_\_\_\_\_

  
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STATE CORPORATION COMMISSION

PETITION OF:

CASE NO: PST810005

WINCHESTER AND WESTERN RAILROAD COMPANY

For review and correction of tax assessed  
pursuant to Code Section 58-672

PETITIONER'S MORE DEFINITE  
STATEMENT FOR RELIEF

Winchester and Western Railroad is a subsidiary of Unimin Corporation. It hauls sand from Unimin's mine in Gore, Frederick County, Virginia, the origin of the line, for eighteen miles to Winchester, Virginia, the terminus of its track. At Winchester the cars are transferred to the B & O Railroad for delivery in Virginia and adjacent states. The entire trackage of Winchester and Western Railroad is eighteen miles.

Winchester and Western Railroad Company filed an Application for Review and Correction of Taxes pursuant to Code of Virginia, as amended, 1974 Replacement Volume, Section 58-672.

(The Code refers to an application. The State Corporation Commission denominates it a petition and refers to the applicant as the petitioner. Hereinafter for conformity, the railroad will be referred to as the petitioner and the application for relief, the petition).

The Attorney General, pursuant to Rule 5:16 (d) (ii) of the Rules of Practice and Procedure of the State Corporation Commission, filed a Motion for a More Definite Statement.

In response thereto the petitioner particularizes its claim:

I

STATUTES

The Code Sections at issue are in the Virginia Tax Code, Section 58 et seq. Chapter 12 of the Tax Code provides for taxes on public service corporations. Article 2 of Chapter 12 specifies the method and amount of taxes for railway companies. (Section 58-515 through 58-539).

Section 58-515 fixed the rate at one dollar for each one hundred dollars of the value of the rolling stock.

Section 58-524 requires each railway company to file an annual report of the fair cash value of its real and tangible property.

The report requires that the company's assets be divided into nine categories:

"§58-524. Annual Property report required. Every railroad company doing business in this State shall report on or before the fifteenth day of April, to the State Corporation Commission, its real and tangible personal property of every description as of the thirty-first day of December preceding, the fair cash value thereof, and the county, city, town or magisterial district in which it is located. The lien of the State or subdivision thereof for taxes levied on such property for all purposes shall attach to such property on the thirty-first day of December next preceding.

The report shall classify such property under the following heads:

\* \* \* \*

(5) Rolling stock, which shall include all locomotives, of whatever motive power, autocars, cars of every kind and description, and all other equipment which it is reasonably proper to class as rolling stock; provided, that they shall

report and be assessed on the average amount of rolling stock habitually used by them in this state." (Emphasis supplied.

The statute is clear that the tax applies only to that rolling stock habitually used in Virginia.

### THE ISSUE

In 1980 the petitioner owned three locomotives and one flat car and leased twenty-five box-cars and three hundred covered hopper cars under two eighteen-year leases. This dispute is confined to the twenty-five box-cars and three hundred covered hopper cars.

The State imposed the tax on all three hundred and twenty-five cars. This is wrong because not all of the three hundred and twenty-five cars were habitually used in the State of Virginia. (One box-car and one covered hopper were totally destroyed prior to December 31, 1980).

Thus the issue joined between the State and the petitioner is as follows:

The State assessed the 58-515 tax on all three hundred and twenty-five cars of the petitioner regardless of their place of use. This is error.

The petitioner says that the State can only tax the forty-five cars habitually used in Virginia and the State is apparently saying they can tax all cars of the petitioner whether habitually used in Virginia or not.

The petitioner avers and will prove that of the three hundred and twenty-five cars only forty-five are "habitually used" in the State. The other two hundred and eighty cars

are not habitually used in the State.

Stated otherwise, can Virginia, under the railway companies' tax code, assess a tax against rolling stock owned by petitioner but not habitually used in Virginia? The answer is no.

The reasons for the answer are found below:

#### REASONS FOR THE ANSWER

The tax is imposed on the average amount of rolling stock "habitually used" in the State.

It would not be illogical to believe that the two words "habitually used" would have a clear meaning and not be subject to question.

Webster's Third International Dictionary, 1971, Page 1017, defines the adverb as follows:

1: by habit: CUSTOMARILY, UNTHINKINGLY

2. CONSISTENTLY, PERSISTENTLY,  
REPEATEDLY, USUALLY. "

(The punctuation and capitalization is as it appears in Webster's.)

In Peltz v. Printz, 186 Pa. St. 347, 40 Atl. 486, (1898), the court, undoubtedly using an earlier addition of Webster's, said:

"The word "habitual" is defined by Webster as 'constant, customary, accustomed, usual, common, ordinary, regular, familiar'; and this is certainly the common understanding of the meaning of the word."

Webster's at page 2524 gives the third definition of "used".

"ACCUSTOMED, HABITUATED,  
EXPERIENCED"

(Again the capitalization is Webster's).



544, defines "habitually" as:

"By habit, customarily. By frequent practice. "

Black's Law Dictionary, Fifth Edition, (1979) Page 640, defines "habitually" as:

"Customarily; by frequent practice or use. It does not mean entirely or exclusively. "

#### THE CONSTRUCTION OF THE TAX STATUTE

Virginia in 1846, recognized a well established rule of law.

"Before proceeding further, I refer to some rules of construction, as applicable to the matter before us. 1. 'The words of a statute are to be taken in their ordinary and familiar signification and import, and regard is to be had to their general and popular use; for jus et homa loquendi, is governed by usage; and the meaning of words, spoken or written, ought to be allowed to be as it constantly has been taken; loquendum est ut vulgus. Dwar. Stat. 702. 2. It is a well settled rule of law, that every charge upon the subject must be imposed by clear and unambiguous language. Acts of Parliament, which imposed a duty upon the public, will be critically construed with reference to the particular language in which they are expressed. When there is any ambiguity found, the construction must be in favor of the public; because it is a general rule, that where the public are to be charged with a burden, the intention of the legislature to impose that burden, must be explicitly and distinctly shown. Dwar. Stat. 709. 3. A penal law is not to be extended by construction; and revenue laws are of that character. In like manner, in the revenue laws, when clauses inflicting pains and penalties, are ambiguously or obscurely worded, the interpretation is ever in favor of the subject 'for this plain reason', said Heath, Justice, in Hubbard v. Johnson, 'that the Legislature is ever at hand to explain its own meaning, and to express more clearly what has been obscurely expressed. Dwar. Stat. 737, 743. "

This is Judge Joseph L. Fry in Plummer v. Commonwealth, 44 Va. (3 Gratt) 645, (1846). The issue was whether the State income tax applied to ministers.

In 1978, the Virginia Supreme Court stated:

" We held in Commonwealth v. Appalach. El. Power Co., 193 Va. 37, 46, 68 S. E. 2d 122, 127 (1951) that 'it is well settled and familiar law that laws imposing taxes are to be construed most strongly against the government, and in favor of the citizen, and are not to be extended by implication beyond the clear import of the language used. Whenever there is a just doubt, 'that doubt should absolve the taxpayer from his burden.' Com. Nat. Res. v. Commonwealth, 219 Va. 219 Va. 529, 248 S. E. 2d 791 (1978). "

For over one hundred and thirty years, and to the date of this writing, Virginia has stayed by the rule that tax laws are construed against the government and they will not be extended by implication.

#### CONCLUSION

Since only forty-five of the Winchester and Western Railroad cars, which are at issue, were habitually used in Virginia in 1980, the tax should be assessed only on those cars; not on the remaining two hundred and eighty cars not habitually used in Virginia, two of which were totally destroyed prior to December 31, 1980.

Respectfully Submitted,

WINCHESTER AND WESTERN RAILROAD COMPANY

By: 

Counsel

  
JOHN F. ANDERSON

Largent, Anderson, Larrick and Groves  
Graichen Building  
25 East Boscawen Street  
Winchester, Virginia, 22601

Counsel for Winchester and Western Railroad Company

CERTIFICATE

I hereby certify that a copy of the foregoing Petitioner's  
More Definite Statement for Relief, was mailed, postage,  
prepaid, to:

Kenneth W. Thorson, Esq.  
Assistant Attorney General  
Commonwealth of Virginia  
101 North Eighth Street  
Richmond, Virginia, 23219

Lawrence R. Ambrogio, Esq.  
Commonwealth Attorney for Frederick County  
321 South Loudoun Street  
Winchester, Virginia, 22601

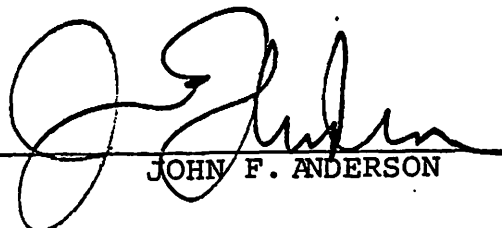
S. Roger Koontz  
Chairman of the Board of Supervisors  
Frederick County  
Route #5, Apple Pie Ridge  
Winchester, Virginia, 22601

Charles Zuckerman, Mayor  
City of Winchester  
911 Isaac Street  
Winchester, Virginia, 22601

Wendell Seldon, City Manager  
City of Winchester  
Rouss City Hall  
Winchester, Virginia, 22601

Dabney W. Watts, Esq.  
Attorney for the City of Winchester  
201 East Boscawen Street  
Winchester, Virginia, 22601

this 2nd day of April, 1982, pursuant to Rule 5:13 of the  
Rules of Practice and Procedure of the State Corporation  
Commission.



JOHN F. ANDERSON

JAN 21 1 42 PM '83

PETITION OF

WINCHESTER AND WESTERN  
RAILROAD COMPANY

CASE NO. PST810005

For review and correction of  
tax assessment pursuant to  
Virginia Code §58-672

OPINION AND FINAL ORDER

On August 10, 1981, the Winchester and Western Railroad Company (hereinafter "Company" or "Winchester and Western"), pursuant to Code §58-672, applied for review and correction of taxes on the Company's rolling stock assessed by Commission order dated May 20, 1981. Assessment was made pursuant to Title 58, Article 2 of the Code of Virginia.

By order dated December 23, 1981, a hearing was scheduled for March 18, 1982, and notice directed to interested parties. By order dated February 25, 1982, at the request of the Winchester and Western, the hearing date was rescheduled for May 21, 1982. Present at the hearing were Flournoy L. Largent, Esquire, John F. Anderson, Esquire, and Joseph S. Shapiro, Esquire, for the Winchester and Western. Kenneth W. Thorson, Esquire, appeared for the Attorney General and Edward C. Tosh, Esquire, appeared for the Commission's Staff. No protestants or interveners participated in the proceeding.

On August 12, 1982, the Hearing Examiner filed his report with the Clerk of the Commission. After a discussion of the facts and issues of the case, the Hearing Examiner made the following findings:

(1) Winchester and Western Railroad Company is a wholly-owned subsidiary of Unimin Corporation.

(2) The entire 18 miles of Winchester and Western Railroad Company track is located within Virginia.

(3) That Railroad was the lessee of 325 rail cars under a long-term lease prior to 1980.

(4) All 325 cars bore the Railroad's markings during 1980.

(5) 209 of the 325 cars were not used in Virginia at any time during 1980.

(6) 42 of the 325 cars were used in Virginia less than, or equal to, two months during 1980.

(7) 14 of the 325 cars were in Virginia between two and six months during 1980.

(8) Unbeknownst to the Commission's Division of Public Service Taxation, two of the 265 cars that were used in Virginia less than six months during 1980 were destroyed before December 31, 1980.

(9) 60 of the 325 cars were used in Virginia for more than six months during 1980.

(10) None of the 325 cars were subject to taxation in any State other than Virginia for the calendar year 1980.

(11) The Railroad used cars on its track in Virginia during 1980 that did not bear its markings and which were not assessed against the Railroad.

(12) The Commission's Division of Public Service Taxation assessed the 325 cars for the calendar year 1980 pursuant to Virginia Code §58-515, §58-524 and an Administrative Order of the Commission dated May 25, 1928.

(13) That method of assessment used by the Division of Public Service Taxation in this case has been uniformly applied in Virginia since 1928.

(14) The words "habitually used," within the context of Virginia Code §58-524, do not preclude assessment of the Railroad's rolling stock using the Division of Public Service Taxation's methodology for the calendar year 1980.

(15) The 1980 assessment was based on the number of cars owned or operated by the Railroad on December 31, 1980.

(16) The railroad owned or operated 323 cars on December 31, 1980.



(17) Assessment of 323 of the 325 cars was proper.

The Hearing Examiner recommended that the Commission adopt his findings and his conclusion that the assessment of 323 cars for the calendar year 1980 was proper.

The Winchester and Western filed exceptions to the report and requested an opportunity to argue its case orally before the Commission.

By order dated September 8, 1982, argument was scheduled for September 27, 1982, and was thereupon heard by the full Commission, Commissioner Shannon presiding. Counsel appearing were John F. Anderson, Esquire, for the Winchester and Western, Kenneth W. Thorson, Esquire, for the Attorney General of Virginia and Edward C. Tosh, Esquire, for the Commission's Staff.

Code §58-524 provides for every railroad operating in Virginia to report "...its real and tangible personal property... as of the thirty-first day of December preceeding..."; included in the report is a classification for "... Rolling stock, which shall include all locomotives, of whatever motive power, . . ., cars of every kind and description . . . provided, they shall report and be assessed on the average amount of rolling stock habitually used by them in this State . . . ."

The Winchester and Western's undisputed evidence shows that of the 325 cars assessed by the Commission for taxation for 1980, 209 did not enter Virginia during that year; the remaining 116 did. The Winchester and Western contends that none of the 209 cars are amenable to Virginia taxation because they were never used in Virginia during 1980. While the statutory language, "habitually used, is not

defined in the Code, the Company contends that "habitually used" means "used in Virginia for six months or more". Therefore, argues the Company, that of the 116 cars which entered Virginia, only 60 were "habitually used" since only 60 cars were "used for six months or more". Logically, if the Company's definition is accepted, it should be assessed on only those 60 cars.

It is obvious that the "habitually used" concept is incorporated in the statute in recognition of the federal proscription against multistate taxation of the same property used in interstate commerce without first making an appropriate proration of the tax base. In the case of Virginia, this proration is accomplished by the use of total Virginia car miles travelled, calculated as a percentage of total system car miles travelled over the reporting railway. This percentage is then applied to the depreciated value of all rolling stock owned, or under long term lease, by the reporting line, and bearing that Company's markings - regardless of the physical whereabouts of the cars throughout the taxable year.

It is a matter of common knowledge, and this record indicates, that the supply of railroad rolling stock available to railroads operating in this country is a constantly moving, changing mix. Cars freely move from the tracks of one railroad onto the next, and from one state to another. Cars of "foreign" railroads are constantly being used in Virginia in both interstate and intrastate movements over lines operating in and out of the State. Similarly, portions of the rolling stock of all Virginia railroads are in constant use outside Virginia in train movements of both foreign

and domestic companies. In the case of the Winchester and Western, any use of its cars outside Virginia could only be over the line of another company which, of course, could be a company not operating in Virginia (a foreign corporation), or a domestic company having out of state lines as part of its system operations. Of course, it can be expected that Winchester and Western cars will be operated continuously within Virginia over the lines of other companies.

The question to be resolved is whether Virginia can tax all railroad rolling stock of a railroad which operates solely in Virginia even though some portion of that rolling stock never enters Virginia, or does so only sporadically.

The taxation of railroad rolling stock in Virginia dates back to before the turn of the century and was specifically provided for by the 1903 Constitution of Virginia Sec. 176. It appears that until the enactment of Chapter 358, 1926 Acts of Assembly, the language of the taxing mandate was essentially that the State Corporation Commission assess annually, "[T]he value of rolling stock of all corporations operating railroads by steam and doing business in the State, so far as the same is taxable in the State, ..." (See §2207 Code of Virginia, 1919). The last clause of the foregoing, again, was in recognition of the federal constitutional limitation affecting interstate commerce.

With the enactment of the aforesaid Chapter 358 of the 1926 Acts of Assembly, the pertinent language of §58-524, Code of 1950, evolved, namely:

Fifth. - Rolling stock, which shall include all locomotives...; provided, that foreign railway

and canal corporations doing business in this State shall report and be assessed on the average amount of rolling stock habitually used by them in this State. (1926 Acts of Assembly, Chapter 358)

It is noted that the "proviso clause", above, was limited to foreign corporations doing business in Virginia. Again, the law recognized the constitutional limits upon the taxing of companies engaged in multi-state operations. No such limitation was imposed upon an operation limited to an intrastate system.

A comparison of the foregoing 1926 enactment with the language of present Code §58-524, prior to amendment in 1972, will show the two to be indetical. In 1972, the subject "canal boats" (previously considered to be rolling stock) was deleted, and in the proviso clause the word "they" was substituted for "foreign railway and canal corporations doing business in this State". The Commission was fully informed at the time §58-524 was amended, along with many other related tax sections, and participated in that effort, the purpose of which was to delete outdated language.

Given the nature of the use of railroad rolling stock in the United States, it was obviously necessary at an early date for the Commission, as the agency charged with the assessment of the State tax on railroad rolling stock, to develop an appropriate methodology to perform that function in a legal manner. At least as early as 1928 we find the adoption of an "Administrative Order" providing such methodology. Paraphrased, as here pertinent, that order required each railroad operating lines in Virignia (whether or not

the company's lines extended into other states) to report car miles operated within Virginia and, when appropriate, car miles operated over the lines of the taxpayer lying outside Virginia. In each case, the total depreciated value of all cars owned or leased by each reporting carrier (as opposed to foreign carriers' cars operating over such lines) was then assessed by applying to the total depreciated value the percentage of total car miles operated in Virginia. Car miles are nothing more than the total miles travelled by all cars over the tracks of the reporting company - regardless of who owns the cars and regardless of whether loaded or empty. Car miles during any period may actually have been logged by cars foreign to the reporting company.

A railroad operating exclusively within Virginia, as is the case here, could only report intrastate car miles. Therefore, in assessing its rolling stock, the percentage to be applied to the value of its car fleet is 100 percent. This basic procedure has been unchanged at least since 1928. In the case of some small companies which lack an accurate recording of car miles, the apportionment is determined by the ratio of Virginia track miles to total system track miles. In the case of an exclusively intrastate line it could make no difference how the ratio is determined - it remains 100 percent.

We are cognizant of the principle which recognizes the possibility that particular cars can acquire a "tax situs" outside the state of domicile which otherwise would tax them as domiciliary property. However, that issue is not before the Commission and the evidence establishes that no other jurisdiction is taxing, or threatening to tax, the property here in issue.



While the Winchester and Western appears to acquiesce in the correctness of the above-described methodology as it was applied from 1928 until 1972, it argues that the 1972 amendment to Code §58-524 (hereinafter described) voids that methodology in the case of all intrastate lines - including, of course, the Winchester and Western. The Company contends that before 1972 the term "habitually used" applied only to foreign companies operating lines in Virginia. Therefore, according to the Winchester and Western, purely intrastate rail systems were properly taxed on all rolling stock. However, it is contended, since the term "habitually used" is no longer restricted to foreign corporations doing business in this State, its limitation must apply equally to all operators, including the intrastate operation of Winchester and Western.

We agree that no distinction is now made in Code §58-524 between "...foreign railway corporations doing business in this State..." and any other companies conducting such business. Therefore, the "habitually used" provision must be applied equally to all railroads subject to the tax.

In fact, we find that the Winchester and Western has been treated precisely as all other railway companies operating in Virginia, both interstate and intrastate lines. Cars "habitually used" by all such companies are calculated by the use of reported car miles (or track miles in limited instances.) A company with no tracks outside Virginia can report no out-of-state car miles.

The amendment to Code §58-524 was adopted over ten years ago. A number of railway companies were strictly

intrastate operations prior to 1972 and six of those remain in operation today. All of these companies have rolling stock subject to the tax in question, and all are assessed 100 percent by Virginia just as they were prior to 1972. Included in the list of such companies is The Richmond, Fredericksburg and Potomac Railroad Company, a portion of whose cars are constantly scattered across the nation's railroads, subject to the "per diem" rules of the Association of American Railroads.

The amendment in 1972 to Code §58-524 was not intended to change the law on rolling stock taxation. In practice, as has been outlined above, no distinction has been made, at least since 1928, between foreign and domestic railroad companies operating within Virginia in the reporting and assessing of railroad freight train cars. The "habitually used" language, or words of similiar intent, have, for over fifty years, been effectuated by the use of the car mileage yardstick being applied in like manner to all railroads. The 1972 amendment codified that long-standing practice, as is clearly evidenced by the unbroken and continuing assessment procedures since the amendment, and the acceptance thereof without challenge by all other companies affected.

It is clear to the Commission that the Winchester and Western never intended to operate the cars in question as rolling stock in the discharge of its common carrier obligations. In fact, the arrangement appears to be a device to enable Unimun Corporation (the parent of Winchester and Western) to control the cars in question for its corporate purposes - generally outside Virginia - as opposed to the usual purpose of car acquisition by a railroad company, i.e., to be used in every day interchange service. Nevertheless,

the cars, in fact, are leased to a Virginia railway company and bear the markings of that operating railroad. By so doing, those cars are taxable by Virginia, regardless of the underlying business motives of the parties.

The interpretation of "habitually used" urged by petitioner is totally without statutory or historical support. To try to apportion car values in relation to "time used" would, in itself, create a reporting nightmare for legitimate operating railroads. No doubt, any such scheme could be expected to reduce, significantly, the rolling stock tax assessment because of the historical, unrestricted use of "foreign" cars in Virginia by carriers having only intrastate mileage as well as those with interstate system mileage.

We have been given no sound reason for abandoning, or modifying, our present assessment of the State's rolling stock tax, which we find totally consistent with the present and past provisions of Code §58-524.

The Winchester and Western's testimony indicates that, unknown to the Staff, two of the 325 cars assessed were destroyed prior to December 31, 1980 (the statutory date of determination). Therefore, the assessment will be corrected so as to eliminate the value of the two destroyed cars.

Accordingly, in light of the record in this case, the report of the Hearing Examiner, and the applicable law;

IT IS ORDERED:

(1) That the Staff's assessment of the value of Winchester and Western rolling stock as of December 31, 1981, be changed to reduce it from \$9,876,122 to \$9,818,128, thus removing the assessed value of the two cars destroyed prior to December 31, 1980;

(2) That attested copies of this order be mailed to Flournoy L. Largent, Esquire, and John F. Anderson, Esquire, P.O. Box 444, Winchester, Virginia 22601; to Kenneth W. Thorson, Esquire, Office of the Attorney General of Virginia, 101 North 8th Street, 5th Floor, Richmond, Virginia 23219; and to the Commission's Division of Public Service Taxation.

(3) That nothing remaining herein to be done, this case is hereby dismissed and the papers shall be passed to the file for ended causes.

MAR 18 3 40 PM '83

AT RICHMOND, MARCH 18, 1983

PETITION OF

WINCHESTER AND WESTERN  
RAILROAD COMPANY

CASE NO. PST810005

For review and correction of  
tax assessment pursuant to  
Virginia Code §58-672

BRADSHAW, Commissioner, dissenting

It is my opinion that the tax in issue only applies to railroad cars "habitually used" in the Commonwealth of Virginia. Therefore, the paramount issue for decision is the meaning of the statutory words "habitually used in this State."

First, examine finding No. (5) made by the Hearing Examiner: (5) 209 of the 325 cars were not used in Virginia at any time during 1980. Logic dictates that under no circumstance could non-use be defined as habitual use. The situs of these cars could possibly be the taxing duty of another state, but clearly not Virginia. Therefore, I find no tax liability accruing for the 209 cars not used in Virginia at any time during 1980.

Second, examine finding No. (6) made by the Hearing Examiner: (6) 42 of the 325 cars were used in Virginia less than, or equal to, two months during 1980. The task of attempting to define "habitual use" becomes more difficult when the use in Virginia is shared with another jurisdiction.

Counsel for the Petitioner has provided in his brief



an exhaustive search for guidance in attempting to define the words "habitually used." I shall reserve or leave to higher authority the task of an all-embracing definition of habitual use. It would appear on first blush that during 1980 when 42 cars were used in Virginia two months and ten months in another jurisdiction, that the habitual use of these cars was beyond the boundaries of the Commonwealth of Virginia. However, this would be equating 'substantial use' with 'habitual use.'

I am of the opinion habitual use does not necessarily mean allocation of time between two or more jurisdictions. For example, suppose 42 cars are used by the Winchester and Western Railroad Company in Kansas ten months of the year, and used annually two months in Winchester, Virginia, to transport the apple harvest to market — one could argue these 42 cars are habitually used during the apple season in Virginia and therefore subject to Virginia taxation. However, the evidence of use in this record for the 42 cars is confined to a single year, 1980. No habit has been established. Since Virginia has stayed by the rule that tax laws are construed against the Government and will not be extended by implication, no tax should attach to the 42 cars referred to in finding number six.

I concur with my majority colleagues in not assessing any tax to the two cars (finding [8] ) destroyed prior to the statutory date of determination, December 31, 1980.

If the majority view is that no tax attached by virtue of destruction — meaning they are no longer in Virginia - would not the same reasoning apply to the 209 cars never in Virginia?

I respectfully disagree with the majority in some of their findings beyond the scope of a habitual use. Examine Finding No. 12 which they support:

(12) The Commission's Division of Public Service Taxation assessed the 325 cars for the calendar year 1980 pursuant to Virginia Code §58-524 and an Administrative Order of the Commission dated May 25, 1928.

I find no basis, need, or reason for reliance upon any administrative order, regardless of its age, when you have clear statutory direction from the Legislature. No administrative order should add, subtract, or modify any taxing statute enacted by the Legislature. It is my opinion that the staff, for the purpose of administrative ease, has relied too long on this 1928 administrative order.

The majority supports (finding [13] ) whereby the method of assessment has been uniformly applied since 1928. I too have respect for precedent and administrative practice. However, administrative practice in violation of clear statutory language is not sound precedent to follow. Administrative practice 'habitually mis-used' for fifty-two years does not make it right.

The majority states on page nine: "To try to apportion car values in relation to 'timed used' would, in itself,

create a reporting nightmare." This was probably true in 1928 - an age of pads and pencils. It was also probably the reason the staff by administrative order developed an easier yardstick for assessment purposes. Taking judicial notice of the fact that today over 200 private railroad car companies operating in Virginia submit annual computer printouts of 'actual use,' I respectfully disagree with their finding as to the possible reporting difficulty. I would like to think that our lawmakers consider reporting difficulties when enacting any and all tax laws.

Lastly let me pose two suppositions which I feel support the logic of this dissent. Reference is made to §58-556.

"The President or other chief officer of every car company, car trust, mercantile company or corporation or individual not domiciled within this State owning any stock cars, furniture cars, fruit cars, refrigerator cars, meat cars, oil cars, tank cars or other similar cars, other than a railroad operating a line of railroad, shall annually, on or before the fifteenth day of April in each year, report to the Commission a true, full and accurate statement, verified by the affidavit of the officer or person making the same, showing the aggregate number of miles made by their several cars over the several lines of railroad in this State during the year ending the thirty-first day of December next preceding and a further statement showing the average number of miles traveled per day by the cars of the particular class or classes covered by the statement, in the ordinary course of business during the year."

Suppose the Petitioner organized a leasing company in the state with the lowest tax rate and let the cars bear the markings of the leasing company. The leasing company would

then be taxed per 'actual use' as a private car company under §58-556. The tax rate is the same for private car companies as legitimate railroads - \$1.00 per hundred. However, the assessment for private car companies is computed by the Commission staff on an average (statutory direction §58-558) unlike legitimate railroad assessments computed on actual cost per car (administrative practice) resulting always in favor of lower assessments for private car companies. A railroad car is a railroad car. Title to a railroad car should not cause any difference in the taxing methodology for assessment purposes. Here again the staff has relied on unchallenged practice which I find no logic for - certainly no equity.

Now suppose a leasing company is formed in Virginia. Would any tax be due the State Corporation Commission? In line two of §58-566 only companies "not domiciled within the State" are required to file an annual report. Is this a loophole whereby the tax to the Commission could be avoided for private car companies domiciled in Virginia? I suggest it is.

Accordingly I find:

(1) The 1980 assessment for Winchester and Western Railroad Company should be corrected.

(2) Copies of this opinion should be mailed to Flournoy L. Largent, Esquire, and John F. Anderson,

Esquire, P. O. Box 444, Winchester, Virginia 22601; to  
Kenneth W. Thorson, Esquire, Office of the Attorney  
General of Virginia, 101 North 8th Street, 5th Floor,  
Richmond, Virginia 23219; and to the Commission's  
Division of Public Service Taxation.

1. The State Corporation Commission is taxing rolling stock in the Commonwealth of Virginia pursuant to an administrative order dated May 25, 1928, providing that the tax on freight cars shall be apportioned by the car miles "made" in Virginia to the car miles "made" on the entire system. The assessment based on the 1928 administrative order is erroneous for the reason that Section 58-524(5) of the Code of Virginia, as amended, provides that the assessments shall be based on "rolling stock habitually used in this state" and not on Virginia mileage as compared to system mileage.

This assignment of error is based upon the fact that Section 58-524(5) takes precedence over the administrative order of May 25, 1928.

2. The Deputy Director of the Division of Public Service Taxation, State Corporation Commission, testified that the administrative order has been followed since 1967 and perhaps since 1928 in order to simplify and ascertain the fair amount of rolling stock for taxation. Virginia railroad corporations that have one hundred per cent (100%) of its track in Virginia are taxed on 100% of the assessed value of their freight cars without regard whether the freight cars were habitually used in Virginia during the taxable year.

If the Virginia railroad had track in Virginia and outside Virginia, the assessment would be based upon the proportion of the Virginia track to the out-of-state track.

The appellant assigns as error the assessment on miles of track, rather than the habitual usage standard, mandated by Section 58-524(5).

3. Virginia companies that own freight cars in Virginia, and own no track in Virginia, are not taxed despite the fact that these cars are habitually used in Virginia. The appellant assigns as error this discrimination in basing the tax on miles of track, and not on the habitual use provision of Section 58-524(5).

4. All railroads that are not Virginia corporations and have no track in Virginia, but do operate their freight cars in Virginia are not taxed even though these freight cars are habitually used in the Commonwealth of Virginia.

The appellant assigns as error this discriminate taxation.

5. The appellant submitted evidence that of the 325 cars owned by the appellant, 209 of the said cars were not used in Virginia during anytime in 1980. The location of these cars was established by testimony of the appellant and was not refuted by the appellees.

Forty-Two (42) of the 325 cars were used in Virginia less than or equal to two (2) months during the year. This was supported by evidence of the appellant and not refuted by the appellees. The appellant assigns as error the refusal of the State Corporation Commission to accept this evidence that the said freight cars were not habitually used in the Commonwealth of Virginia hence were not subject to any tax liability under Section 58-524(5).

The Commonwealth unjustly discriminates by taxing appellant for rolling stock not habitually used in Virginia when it does not tax rolling stock of Virginia companies and non-Virginia corporations, that own no track in Virginia, for cars habitually used in the state.

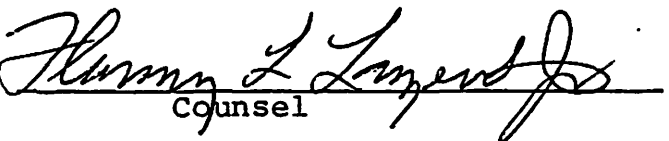
The Director of Public Service Taxation, State Corporation Commission, testified that the state's taxation of rolling stock is based upon mileage of track in the state of a Virginia corporation and does not base such assessment on habitual use as required by the law, for the reason that it is too difficult to administer.

The appellant assigns as error the fact that the Commission is ignoring the provisions of the statute and following a 1928 administrative order which is in conflict with the said law.

Based upon the foregoing assignments of error the appellant petitions this court to reverse the order of the State Corporation Commission dated January 21, 1983, and direct the Commission to assess the rolling stock of the appellant based on the cars which were habitually used in the Commonwealth.

This 2nd day of June, 1983.

WINCHESTER AND WESTERN RAILROAD  
COMPANY

By:   
Counsel

ELOURNOY L. LARGENT, JR.  
LARGENT, ANDERSON AND LARRICK  
25 East Boscawen Street  
P. O. Box 444  
Winchester, Virginia 22601  
(703) 662-0321



MAY 21 1 18 PM '82

CASE NO. *PDJ-810005*

EXHIBIT NO. *Staff #12*

FILED MAY 21 1982

*Lee J. Bryan*  
Witness  
*R. Harrison*  
Deputy

COMMONWEALTH OF VIRGINIA	
DEPARTMENT OF THE STATE CORPORATION COMMISSION	
State Corporation Commission,	
FILE No	<i>21-9</i>
CORRESPONDENCE.	

May 25, 1928

IN RE: ASSESSMENT OF ROLLING STOCK OF STEAM RAILROAD  
COMPANIES - ADMINISTRATIVE ORDER.

IT IS HEREBY ORDERED that for the year 1928 and thereafter, to the further order of this Commission, the rolling stock of steam railroads assessable in Virginia shall be determined as follows:

1 - LOCOMOTIVES:

(a) All locomotives used exclusively in the State of Virginia shall be allocated to, and assessed in the State of Virginia.

(b) Locomotives used in Virginia and other States shall be apportioned, apportioning to Virginia that proportion which the locomotive miles made in Virginia is of the total locomotive miles made.

(c) Locomotives not in use and stored in Virginia shall be assessed in Virginia.

2 - PASSENGER CARS:

(a) All passenger train cars used entirely within the State of Virginia shall be allocated to and assessed in the State of Virginia; and

(b) All passenger train cars used in Virginia and other States shall be apportioned, apportioning to Virginia that proportion which the car miles made by such equipment within the State of Virginia is of the total car miles made by such equipment on the entire system; or

(c) At the option of the carrier, in lieu of the allocation and apportionment provided for under "a2" and "b" above, the carrier may apportion its entire passenger train cars, apportioning to Virginia that proportion which the car miles made by such equipment in Virginia is of the total car miles made by such equipment on its entire system.

3 - FREIGHT TRAIN CARS:

(a) All freight train cars (except caboose cars) shall be apportioned, apportioning to the State of Virginia that proportion which the car miles made by such equipment in Virginia is of the car miles made by such equipment on the entire system.

(b) Caboose cars shall be apportioned, apportioning to Virginia that proportion which the caboose car miles made in Virginia is of the caboose car miles made on the entire system.

4 - WORK EQUIPMENT:

(a) All work equipment of the carrier shall be apportioned, apportioning to Virginia that proportion which the track miles (including yard and side tracks) in Virginia is of the track miles (including yard and side tracks) of the entire system. Track miles for the purpose of such apportionment shall not include trackage operated under trackage rights.

5 - Where locomotive miles or car miles used for the purposes of apportionment herein provided are different from those given in the annual operating reports of the carrier, a full explanation and reconciliation of the difference shall be furnished with the tax report of the carrier.

STATE CORPORATION COMMISSION

Lester Hooker CHAIRMAN

Wm. Macade F. B. B. B. COMMISSIONER

Louis S. Egan COMMISSIONER

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION  
RICHMOND

ASSESSMENT OF ROLLING STOCK OF RAILROAD COMPANIES  
OPERATING IN VIRGINIA

EXAMPLE 1. ASSESSMENT OF ABC RR CO. WHICH OPERATES FROM POINT A TO POINT B IN VIRGINIA.

<u>Kind of Equipment</u>	<u>Number of Units</u>	<u>Date</u>	<u>Total Cost</u>	<u>% Cond.</u>	<u>Assessed Value</u>
Freight Cars	27	Prior to 1966	86,069	25	21,517
	147	1966	2,527,500	25	631,875
	35	1971	562,310	50	281,155
	100	1972	1,607,564	55	884,160
	75	1973	2,224,014	60	1,334,408
	298	1974	5,973,024	65	3,882,466
	9	1975	218,424	70	152,897
	41	1979	1,794,082	90	1,614,674
	20	1980	912,887	95	867,243
	<hr/> 752		<hr/> \$15,905,874		<hr/> \$9,670,395

Freight Car Miles Va.  $\frac{1,600,000}{1,600,000}$  = 100% Va.  
Freight Car Miles System

$9,670,395 \times 100\% = 9,670,395$  at \$1.00/100 = \$96,703.95 Tax

CASE NO.	PJ-810005
EXHIBIT NO.	Staff # 13
FILED MAY 21 1982	
Lee O'Brien	
Winters	
Baird	

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION  
RICHMOND

CASE NO. <u>PSJ-8/0005</u>
EXHIBIT NO. <u>Staff # 14</u>
FILED MAY 21 1982 <i>Lee O'Byrne</i>
Witness <i>[Signature]</i>
Bein <i>[Signature]</i>

ASSESSMENT OF ROLLING STOCK OF RAILROAD COMPANIES  
OPERATING IN VIRGINIA

EXAMPLE 2. ASSESSMENT OF XYZ R.R. CO. WHICH OPERATES FROM POINT A  
IN VA. TO POINTS OUTSIDE VIRGINIA.

<u>Kind of Equipment</u>	<u>Number of Units</u>	<u>Date</u>	<u>Total Cost</u>	<u>% Cond.</u>	<u>Assessed Value</u>
Freight Cars	27	Prior to 1966	86,069	25	21,517
	147	1966	2,527,500	25	631,875
	35	1971	562,310	50	281,155
	100	1972	1,607,564	55	884,160
	75	1973	2,224,014	60	1,334,408
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	9	1975	218,424	70	152,897
	41	1979	1,794,082	90	1,614,674
	20	1980	912,887	95	867,243
<hr/>			<hr/>		<hr/>
	752		\$15,905,874		\$9,670,395

Freight Car Miles Va.	2,000,000	=	50%	Va.
Freight Car Miles System	<u>4,000,000</u>			

$\$9,670,395 \times 50\% = \$4,835,198$  at  $\$1.00/100 = \$48,351.98$  Tax.

Send mileage or per diem reports, including The Western Railway of Alabama and Atlanta & West Point Rail Road on one per diem report, to G. L. Watson, Manager Car Accounting, 908 W. Broadway, Louisville, KY 40201.

Send one bill for repairs to the Western Railway of Alabama and Atlanta & West Point Rail Road cars to P. R. Winn, General A.A.R. Supervisor, Louisville & Nashville R.R. Co., 908 W. Broadway, Louisville, KY 40201.

Address exceptions to car repair bills to P. R. Winn, General A.A.R. Supervisor, Louisville & Nashville R.R. Co., 908 W. Broadway, Louisville, KY 40201.

### FREIGHT CONNECTIONS AND JUNCTION POINTS

Central of Georgia  
Montgomery, AL  
Opelika, AL  
Chattahoochee Valley  
Lanett, AL  
West Point, GA

Gulf, Mobile & Ohio  
Montgomery, AL  
Louisville & Nashville  
Montgomery, AL  
Selma, AL

Seaboard Coast Line  
Montgomery, AL

Southern  
Selma, AL

## WEST VIRGINIA NORTHERN RAILROAD COMPANY

Reporting Marks and ACI Nos.—

Uniform Alphabetic and Numeric Code—"WVN"—866

GENERAL OFFICES: Kingwood, WV 26537 (304)329-1050

### GENERAL OFFICERS

J. D. Everly, President—General Manager  
M. E. Hull, Secretary

Kingwood, WV 26537  
Bellefonte, PA

G. M. Everly, Treasurer  
A. F. Giger, Auditor

Kingwood, WV 26537  
Kingwood, WV 26537

Miles of road Operated, 17. Equipment: Locomotives—diesel-electric, 3.

Freight cars owned: None.

Car hire balances settled with B. & O.R.R. Co.

### FREIGHT CONNECTIONS AND JUNCTION POINTS

Baltimore & Ohio  
Tunneton, WV

## WINCHESTER AND WESTERN RAILROAD COMPANY

Reporting Marks and ACI Nos.—"WW"—0 850

Uniform Alphabetic and Numeric Code—"WW"—850

GENERAL OFFICES: P.O. Box 264, Winchester, VA 22601 (703)662-2000

### GENERAL OFFICERS

W. J. Woods, Jr., President  
J. R. Fraser, Vice-President—Traffic

Winchester, VA 22601  
Winchester, VA 22601

R. I. Grass, Vice-President—Operations  
P. Light, Manager

Winchester, VA 22601  
Winchester, VA 22601

Miles of road Operated, 18. Equipment: Locomotives—diesel-electric, 4.

### FREIGHT EQUIPMENT

Cars are marked "WW" and are numbered and classified as follows:

Line No.	A.A.R. Mech. Desig.	DESCRIPTION	A.A.R. Car Type Code	NUMBERS	DIMENSIONS												CAPACITY		No. of Cars
					INSIDE			OUTSIDE						DOORS		Cubic Feet Level Full	Lbs. (000)		
					Length	Width	Height	Length	Width		Height from Rail	Side							
									To Eaves or Top of Sides or Platform	Extreme Width		To Extreme Width	To Eaves or Top of Sides or Platform	To Extreme Height	Width of Open'g			Height of Open'g	
ft. in.	ft. in.	ft. in.	ft. in.	ft. in.	ft. in.	ft. in.	ft. in.	ft. in.	ft. in.	ft. in.	ft. in.	ft. in.	ft. in.	ft. in.	ft. in.	ft. in.			
See Explanation Pages for Abbreviations & Symbols																			
1	LO	Covered Hop.	L153	1001-1075	35	9 11		44.5	10	7 11	13 2	14 2			3000	200	75		
2	XP	Box	A200	2001-2010	50 6	9 6	11 1	57 3		10 8	13 3			10	10 5	5355	154	10	
3	XM	Box	B208	2011-2025	50 6	9 6	11 1	57 3		10 8	13 3			10	10 5	5355	154	15	
4	LO	Covered Hop.	L153	3001-3225	52 7	9 10		57 5	10 6	10 5	12 9	12 9	14 9			4200	200	225	
Total																			

Limit of load allowed to pass over this line in excess of marked capacity 10 per cent, and not to exceed 263,000 pounds gross.  
Address embargo notices, embargo claims and notices of cars held under Car Hire Rules to P. Light, Manager, P.O. Box 264, Winchester, VA 22601.

Report requisitions for materials for repair of cars, damage reports, inspection forms, and requisition for disposition of damaged or destroyed cars to Manager of Maintenance, Winchester and Western Railroad Company, Two Embarcadero Center, Suite 2310, San Francisco, CA 94111.  
Send bills for repairs to cars to Maintenance Accounting, Winchester and Western Railroad Company, Two Embarcadero Center, Suite 2310, San Francisco, CA 94111.  
Remit mileage and car hire reports to Winchester and Western Railroad Company, Car Hire Accounting, Two Embarcadero Center, Suite 2310, San Francisco, CA 94111.  
For application of embargoes under Car Hire Rule 16 see Embargo Regulations and Instructions issued by Association of American Railroads.

### FREIGHT CONNECTIONS AND JUNCTION POINTS

Baltimore & Ohio  
Winchester, VA

Consolidated Rail  
Winchester, VA (Via B. & O.)

July 1980

CASE NO. *PS-810005*  
EXHIBIT NO. *Co. # 11*

FILED MAY 21 1982

*David F. Williams*  
*J. Harrison*

Williams - direct

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keeping track of that rail, running that rail, and so on,  
am I correct?

A The administrative part of the railroad,  
yes, I'm in charge of the regulatory procedures and any and  
all paper work, and all that sort of thing.

Q Now, Mr. Williams, I wonder if you have  
a map--

MR. ANDERSON: I wonder if we might have  
a map of the railroad. I think it might be helpful.  
If you will give it to me, I'll give one to the  
Bailiff for the Judge.

Mr. Tosh.

MR. TOSH: Thank you.

MR. ANDERSON: Mr. Attorney General.

MR. THORSON: Thank you.

MR. ANDERSON: Mr. Bailiff.

What we will be talking about,  
Mr. Hearing Officer, the Winchester and Western  
Railroad, and that's our 18 miles of track(indi-  
cating). Gore is a small village northwest of the  
City of Winchester. It has probably two main  
industries, the area Boy Scout Camp and Unimin Sand  
Mine; used to be called the Gore Sand Mine. It's  
been in operation many, many years, has many old

time employees. And it goes from Gore to Winchester, and you will see the 18 miles of track; and then all cars, all traffic are transferred to national railroads, the C&O, the B&O, Conrail, whatever it may be.

And that just gives you an outline, and that's what we're talking about today, when we refer to our 60 cars habitually used in Virginia, we're talking about the sand that's coming from that mine and, of course, shipping the cars to the customers in Virginia.

Q Now, Mr. Williams, have you, at our request, in the year or so we have been working on this case, have you had prepared and supervised the preparation of preparing the various statistics for us to arrive at a decision how many of the 325 cars of W&W are used habitually in the State of Virginia?

A Yes, indeed.

MR. ANDERSON: All right. Now, I'd like to present my first exhibit, which is a list of our cars habitually used in the State of Virginia.

EXAMINER HUNDLEY: Mr. Anderson, the map that you referred to earlier, you do not desire to have that marked as an exhibit?

MR. ANDERSON: Yes, I do. Yes, I do, and I neglected to do that.

EXAMINER HUNDLEY: Would that be all right if we mark that Company Exhibit 1, sir?

MR. ANDERSON: That would be fine.

EXAMINER HUNDLEY: All right.

Q Now, Mr. Williams--

MR. ANDERSON: Judge, so you can follow my presentation of evidence, I have two classifications, the cars habitually used in the State of Virginia, 60; and the cars not habitually used in the State of Virginia, the balance of 325. This is the summary, and I'm going to present the documentary evidence to support this summary.

Q Now, tell me what this is, Mr. Williams.

A This is the list of the cars that we have determined to be habitually used in the State of Virginia in 1980.

Q All right. Handing you the list of cars not habitually used, please-- which will be No. 3.

MR. ANDERSON: I'd like to offer each one of these, Mr. Hearing Officer.

EXAMINER HUNDLEY: The document "Cars Habitually Used in Virginia" will be marked Company



Exhibit 2?

MR. SHAPIRO: Yes. Thank you.

MR. ANDERSON: Judge, if you're making the map No. 1, then I think this will be 3.

EXAMINER HUNDLEY: The document entitled "Cars Not Habitually Used in Virginia" will be Company Exhibit 3.

BY MR. ANDERSON:

Q Now, Mr. Williams, explain this No. 3, if you will, to me. I notice you have some tabs here, and I'd like to have you explain that to me. You go right through to the cars and start with your first page, please.

A Okay. The first tab is a listing of 209 W&W cars that never entered the State of Virginia in 1980. Now, I give you an example, if you'll turn to Page 1, you have the W&W 2001, is a free-running boxcar, and it has moved in the States of Minnesota, Illinois, Missouri, Utah, Nebraska, California, Wyoming, North Dakota, Texas, and Iowa, et cetera.

Q That car has not been in this State?

A Never.

MR. ANDERSON: Judge, we're confining it to 1980.

A (Continuing) Followed behind the 2002 boxcars are the hopper cars that are on Page 2 of 3002, and,

Williams - direct

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again, it's a continuous listing, the same thing. It shows the cars, the 209 cars which never were in Virginia, and where they went, by state, throughout the year 1980.

Now, Tab 2 is cars occasionally in the State of Virginia; and by my definition, "occasionally" applies to those cars that were in there inadvertently, incidentally, only briefly, and that is for less than two months, two months or less.

Q Give me an example of an inadvertent entry of a W&W car from Minnesota or some place into the State of Virginia.

A A car that is to be used in Minnesota and is being habitually used there occasionally will get on a railroad somewhere; and while the cars are stenciled and waybound, the document that travels with it indicates that it should be returned to the agent serving our Minnesota plant. Somewhere some railroad yard clerk will not pick up on that, and he sees it's a Winchester and Western car; he looks in his tab, he sees that's in Gore, Virginia, or Winchester, Virginia, and he sends the car home, that is, home railroad, so the car will show up in Virginia empty. It should not be there. The local operating people call us; and they say, "We've got XYZ car here; it belongs to Minnesota." We then send it back to Minnesota.

Q So that would be a clerical error causing by inadvertence, the cars to enter Virginia by mistake, and then go to its Minnesota plant?

A Right.

Q And that's what you're saying is inadvertent. All right. Now, what is your next classification?

A The last classification of cars that were used in the State of Virginia or came into the State of Virginia for one reason or another for a period of three, four, or five months that we have been able to identify.

Q All right, sir. Now, the basis for your classification of these cars, you have used certain records of your company and certain records of the Association of American Railroads and certain records of ITEL, an accounting, record keeping outfit for short line railroads, is that correct?

A Right.

Q Now, I'd like to have you demonstrate to the Court and to opposing counsel--

MR. ANDERSON: And I'd like the Junction Move History By Car, January 1st of 1980 through March 31st, 1980, please.

EXAMINER HUNDLEY: The document entitled

"Junction Move History By Car," would it be permissible to mark that Company Exhibit 4, sir?

MR. ANDERSON: Please. Your Honor, Mr. Williams--I spend my life in court; I keep saying "Your Honor." Excuse me.

Mr. Hearing Officer, we have presented these, and where the evidence we're submitting has been abstracted from records supplied to us by-- record keepers, we have supplied an affidavit that the records-- that they are notarized, and that these are the accurate records.

Q Now, Mr. Williams, tell me what this No. 4, Junction Move History By Car from January 1st, 1980, is. Tell the Court what this is, please.

A This is a computer print-out furnished to us by ITEL Corporation of San Francisco. ITEL manages our cars for us. The Winchester and Western is a very small operation. We're not sophisticated or fancy enough to have a computer or having jillions of people doing accounting work for us, so what we have done is we have leased these 325 cars; we have an agreement with ITEL Corporation for them to manage them as far as keeping up with where the cars are, the settlement of per diem, payments when the other railroads pay us for the use of the cars. They do that accounting function

1 Williams - direct

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2 and record keeping function for us in an agreement.

3 Q And they do it for other short line  
4 railroads. Is this their specialty?

5 A They do it for other short line railroads.  
6 ITEL primarily is a transportation leasing company; that's  
7 their primary business, and they're set up to do this kind of  
8 thing. These records-- I'm going to have to back up and  
9 explain a little bit, out of where the records come from.

10 The Association of American Railroads  
11 has a computer in Washington, D.C. All railroads in the  
12 country that are capable of interlocking with that computer  
13 in Washington do so, and there is an agreement-- essentially,  
14 it's called UMLER, U-M-L-E-R, and it stands for Universal  
15 Machine Language Equipment Register. Now, what happens is  
16 that all railroads in the country and private car owners list  
17 their cars with UMLER through AAR, the American Association  
18 of Railroads, who, in turn, keep a record on the computer.  
19 Then, as cars move around the country and interchange from  
20 one railroad to another railroad and they cross a border  
21 point, a major junction point, the various railroads report  
22 the movement of all cars at that point.

23 Let's assume it's a junction point or  
24 border point. As trains move across the border point, all  
25 cars on the train are reported into that railroad's computer.

Williams - direct

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It is linked to the AAR computer, which, in turn, keeps a record of movement of all the cars.

The reason for this is that railroads pay each other per diem of car hire for the use of another railroad's car while it's on its line. The only way that railroads can settle up between each other on who owns who what for the use of somebody else's car is through the centralized UMLER-AAR computer record.

ITEL subscribes to the AAR computer, and they have access to it for providing that information to the W&W Railroad. So when we want to know whether or not our cars in the Union Pacific Railroad in Wyoming, if we're being paid for the time those cars are in the Union Pacific in Wyoming, the only way we can do it is find the AAR records through ITEL, which is what we are introducing in evidence today.

I tried to make it short and simple, but it's probably confusing.

Q Mr. Williams, if the Norfolk and Western or Winchester and Western has a car in California, somebody must be paid if that car is on the Southern Pacific tracks, is that right?

A Right.

Q And this is the way the record is kept

by the record computer section of the American Association of Railroads, is that correct?

A True.

Q All right. And this document shows what-- the location?

A This document shows the time-- the date that the Winchester and Western cars were interchanged from one rail carrier to another rail carrier, and in most cases, it shows the junction point where that interchange was made. It also shows the numbers of days and hours that the car was on that particular railroad, again for per diem purposes.

Q All right. There are some abbreviations in that thing that aren't clear to some non railroad man. Do we have a list of those?

A The very first section of this, The Official Railway Equipment Register, that is a copy of a cover page, and where these things are set out inside, that is Section 2, which is an explanation of the junction abbreviations that show up on the computer.

Q So that helps you read this book-- that's the thing in front-- correct?

A Right.

Q Now, Mr. Williams, you can look at that and tell where W&W cars are-- you can look at those and tell

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where any cars are, but you can look in what we're showing here and tell where W&W cars are throughout 1980, is that correct?

A That is correct.

Q And this record you have now, which we have marked No. 4, covers the period January 1st, 1980, through March 31st, the first quarter of 1980, right?

A That's correct.

Q And do you have one for the next quarter?

A Yes, we have one for the second quarter.

MR. ANDERSON: All right. Can I have the Junction Move from April 1st to June 30th?

EXAMINER HUNDLEY: Mr. Anderson, would it be all right to mark that Company Exhibit 5?

MR. ANDERSON: Yes, Your Honor--  
Mr. Hearing Officer.

Q What is it?

A This is the same thing as we just went through except it covers the period of the second quarter of the year, March through April-- April through June. I beg your pardon.

Q June 30th?

A Yes.

Q And from this, you determine the location



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of Winchester and Western cars, is that correct?

A That's correct.

Q And you can ascertain whether they were in the State of Virginia or the number that were in the State or habitually used. This is a part of your documentary evidence, is that correct?

A That's correct.

MR. ANDERSON: All right. And then I'd like to have you mark my next one No. 6, which is the same thing, but for the final two quarters, starting July 1st.

EXAMINER HUNDLEY: So marked.

BY MR. ANDERSON:

Q Now, Mr. Williams--

MR. ANDERSON: --and, Mr. Hearing Officer, this is exactly the same thing, and the records were kept on a quarterly basis, as I understand it, for the first two quarters, and then for a half year basis, and that's why we have, rather than four quarters, two first quarters and a half year.

Q (Continuing) Is that correct, Mr. Williams?

A Essentially, except the last half, the format changes. It's in a different format than the first

two. Exhibits 4 and 5 are junction moves when they go from one railroad to another. They do not report intermediate junction points as I stated.

This one is a bit more extensive in that it reports not only the junction, when it goes from one railroad to another, but it will report certain passing points or junctions along a particular railroad route. So it's a little more detailed. ITEL, in trying to improve their reporting, changed the format in mid year, and they started this in July, so that's the reason we have two different formats. But as far as the information is concerned, it actually gives the same thing, except it gives it a little bit better.

Q And so these exhibits, 4, 5, and 3, we have referred to as location or history moves, show us the location during 1980 of Winchester and Western rail cars, is that correct?

A That's correct.

Q And you used this, in part, to make your summary to show 60 cars habitually used in Virginia, and the balance of the 325 not habitually used in Virginia, is that correct?

A I, personally, and my staff went through these three documents car by car to determine exactly what

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states they were in during the year 1980, and from that analysis came the other exhibits showing the cars habitually used, the other cars that were not used, and the states they did move in.

MR. ANDERSON: All right. Now, I'd like to have the Winchester & Western Revenue Records, if I may, from--

This is the original, Mr. Bailiff.

Mr. Hearing Officer, these records-- and we just have three or four more-- I'm using to support where the cars are to show 60 habitually used in Virginia, and the balance not habitually used. This will be No. 7.

Q. Now, Mr. Williams, what is this? You titled this "Winchester & Western Revenue Records." Now, tell me what this is. I'm sure some of the technical staff can read these; I certainly can't. Just tell us what this is, and take us through it.

A The Winchester and Western Railroad, when it originates loaded cars on its line going anywhere, we get as our earnings, our income for the Winchester and Western, a division of revenue, the revenue being that freight rate that's charged from origin, Gore, Virginia, to wherever it's going. The through freight rate times the

number of tons that's in the car equals a set amount of money and the resulting revenue. That revenue is divided among all the railroads that participate in the move, and that would include the Winchester and Western.

This is an internal document, prepared at our Winchester office. This shows our portion of the revenues that we're entitled to for all cars originated loaded, inbound loaded on the Winchester and Western Railroad,

This document should support the 60 cars and the other evidence that we have put in because it's the income; it's the W&W P&L. That's the only way we know whether we're making any money or not, whether we're entitled to make any money for the railroad operations.

It's a very accurate document, and it is checked by connecting railroads. They do pay us, but they are not going to pay us money to which we are not entitled, and so it's verified by connecting carriers. Any W&W car that was into Virginia and loaded will show up on this record.

Q Each and every car going out of the Gore sand plant, loaded in Virginia, is shown on this record?

A Yes.

Q Now, Mr. Williams, give me an example. You know, just take a car on the first page, and so you can

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explain a little bit about railroads to me. I don't understand.

A Let me clarify the date order on this thing a little bit, because it starts out January 16th. We do this by half months; every 15 days a report is made, so there are two reports in here for each month. And when we pulled the file and asked for it to be copied, unfortunately, they were not separated in date order. The last half of the month shows first.

Q Mr. Williams, let's load a car of sand up in Gore, and let's ship this sand to Philadelphia, or some place.

A We've got one on the first page.

Q All right.

A On January 16th, there is-- well, wait a minute. Maybe there is another Winchester and Western-- okay.

Q 188.

A On January 17th, the waybill-- that's "W/B" at the top of the page-- that moves with the car, Waybill 188 shows WW 2019, the carrier that it's going to, the ultimate carrier, the N&W; the destination is Romulus, Michigan. Over on the right-hand side you'll notice under "Box Weight," it shows the weight of the car, which is

91,600 pounds, and the last column is the W&W revenue that we would earn from the movement of that car.

Q So that was your portion of the revenue, and the other railroads, as it passed through this place in Michigan, got a portion for transporting the sand?

A That's correct.

Q All right. And these are the records for 1980, is that correct?

A That's right, the entire year.

MR. ANDERSON: Now, I'd like to have the-- first, I want to take a minute here-- I think Mr. Shapiro alluded to this, but before I'm going to next introduce, Mr. Hearing Officer, the car shipment records of our plant in Minnesota--

Q --I want you to tell me, tell the Court a little bit about the plants, what they produce, and where they ship, if you will.

A Okay. The Gore, Virginia, plant has two commodities basically. One is silicate sand, which is used in the glass industry. The other is a silicate flour, which is nothing more than pulverized sand, which is used in various applications.

The price of sand is not very much. It's a rather low commodity, and cheap. Transportation costs are

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usually anywhere from 200 to 300 percent of the cost of the product on a first-time basis.

There are dozens and dozens of other sand producing companies located throughout the United States. Consequently, to ship silicate sand from Gore, Virginia, you simply do not do that to Illinois, for example.

The distance, the geography, the freight rate precludes you from being anywhere near competitive on a pricing basis in shipping Gore, Virginia, sand much farther than about 150, 200 miles, perhaps 250 miles. Anything beyond that, that's unreasonable; it can't be done.

The Illinois plant-- well, let me back up and cover New Jersey. The New Jersey plant is also a glass sand producing plant. That's all they mine and produce is glass sand for the glass industry. Again, the geography, territory, for them is very limited.

The Crystal City, Missouri, plant is the same. It is a glass sand plant and has very limited geography.

The Illinois plant produces essentially two kinds-- three kinds of sand. Primarily, it is a glass sand producing plant and ships within a close area. About 10 or 15 percent of the production of that plant is used in the oil and gas industry.

Now, the sand that's used in the oil and gas industry has a higher price on it, and it is more difficult to find. It has been, up until this year, a seller's market, if you will. There has been a tremendous demand for the sand. So, consequently, the sand for the oil and gas industry moves rather long distances. From Illinois to California is not uncommon at all.

They also produce a foundry sand there, which is used in the foundry industry for forming molds, and that's a very, very tight shipping distance.

The Minnesota plant is basically the same except that their primary sand that they put out of Minnesota is for the oil and gas industry, and their secondary sand is for the glass industry, which is all shipped within the State of Minnesota.

Q So, therefore, because of competitive price reasons, Gore doesn't ship into the customer territory of the New Jersey plant?

A That's right.

Q And Gore doesn't ship into the customer territory of the Illinois plant? Gore doesn't ship into the customer territory of the Missouri plant? Is that correct?

A Even more important than that, the Illinois plant does not ship into the Gore, Virginia,



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territory, which is basically, Virginia, Maryland,  
Pennsylvania-- eastern Pennsylvania.

Q Do any of your other four plants have  
any Virginia customers at all?

A None at all, including the oil and gas  
industry. The oil and gas industry that we ship to for the  
purposes they use it for, it will come out of the Illinois  
and Minnesota plants to West Virginia. It does not come  
into Virginia. There are no applications for sand in the  
oil and gas industry in Virginia.

Q So the cars, then, assigned to those  
plants that are shipping the oil and gas sand do not come  
into Virginia?

A No.

Q They travel in other parts of the  
country?

A Yes.

MR. ANDERSON: All right. I'd like to  
have the Minnesota plant, if I may, please.

Mr. Hearing Officer, to follow what I'm  
endeavoring to demonstrate is that the cars are  
assigned to these plants and do not come into  
Virginia, so they're not under that phrase,  
"habitually used."

All right, this will be No. 8. .

Q Now, you've been calling this the Car Shipment Records of Unimin's Minnesota plant, is that right, Mr. Williams?

A Yes.

Q All right. Now, explain to the Court, the Hearing Officer, what this is, and help us read it so we'll understand what these pages show.

A Okay. The Hearing Examiner has the originals on 3 x 5 cards. We all have copies.

Q The Bailiff has the originals.

A Those are the originals. It's just simply a document that we keep at our plant-- in this case, the Minnesota plant-- to keep track of the W&W cars and other cars and where they're going. That's really all it shows, and all that's reproduced here are the W&W cars that came out of the Minnesota plant, and it essentially shows the date the car was loaded and the destination, where the car was going.

Unfortunately, the record was not-- they didn't think they would be here today, so they didn't put down states behind them. I have personally gone through these, and I can state most are duplications of 15 states that these records indicate these cars moved in, and Virginia

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is not one of them.

Q Those cars did not move in Virginia?

A No.

MR. ANDERSON: All right, sir. Now, I'd like to have my car shipment records of the Illinois plant, please. This will be No. 9, if it may be so marked, Mr. Hearing Officer.

This is the original, Mr. Bailiff.

Q Now, tell us how we read this and what this is, please. You have entitled it "Car Shipment Records of Unimin Corporations's Illinois Plant."

A Correct.

Q Does this show the cars that were assigned and working out of the Illinois plant?

A It does. It shows all W&W cars-- again, on cards, index cards.

Q You mean, like, little 3 x 5 cards?

A Right.

Q All right.

A All W&W cars that were loaded into the Illinois plant. This record is not as extensive. All it shows is the date the car was loaded. It does not show any kind of a destination, but it should substantiate the other documents we've put in, that the cars were in Illinois,

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2 without checking them.

3 Q This is in support of the cars by number  
4 at the Illinois plant, is that correct?

5 A Yes.

6 MR. ANDERSON: All right. Then, I'd  
7 like to go to my next, the New Jersey plant. I'd  
8 like to have this admitted as No. 10, Mr. Hearing  
9 Officer.

10 Q Mr. Williams, you have entitled here the  
11 Daily Shipping Logs of your Unimin New Jersey plant. Tell  
12 us how to read this and what this is.

13 A Okay. This is, as it says, a daily  
14 shipping log. In this particular case, the way the New  
15 Jersey plant keeps their records, it shows not only rail  
16 cars, all rail cars, including W&W, but it shows trucks and  
17 everything else; in other words, all shipments out of the  
18 plant on a particular day.

19 If you look at January 2nd, for that  
20 day, and look at the top half of that page, down to where  
21 there are several blank lines, are all truck movements.  
22 The next section on that page are rail car movements. The  
23 very first column is the customer's name.

24 Q Who is that-- National Bottle?

25 A National Bottle.

Q Where are they?

A In New Jersey, and I can't tell you offhand. I don't recall their location.

Q Proceed. I just wanted you to go across the line.

A National Bottle. The next, under "Slip #" is "CNJ," Central and New Jersey, Car No. 529. The number in parentheses is the tare weight of the car. That's the weight which we're trying to get into it. The New Jersey plant at that time did not have a scale, so what is stenciled on the car is the weight.

The name "Larry," and whatever that is, are their bulk people who load the cars for us. It's a record kept showing who loaded it so if there are any problems, we know who the people were that loaded the car.

The next is the actual weight in pounds, 145,000 pounds, after the car was weighed on Conrail.

Q Now, Mr. Williams, by examining the daily shipping logs of your New Jersey plant, you can ascertain the cars that were not moved to Virginia and did not come into Virginia, is that correct?

A Yes. Any W&W car loaded in Virginia-- I mean, in New Jersey, would show up on here.

MR. ANDERSON: All right. Now,

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Mr. Hearing Officer, I believe my last is the Official Railway Equipment Register for July. Now, we don't have originals of these. We had to take photographs of them. I'll tell you what they are. I'd rather have Mr. Williams tell you what they are. This is, as I understand it, a record of all railroads and all cars so everybody knows how many cars the railroad has.

Q Tell us what this is and where this information was abstracted from.

A Okay. This is a page copied out of the Official Railway Equipment Register, which I referred to earlier when I was talking about UMLER and the Association of American Railroads and how cars were listed and reported. It is that tariff, which is approved by the Interstate Commerce Commission, and as well as the Virginia Commerce Commission, that those are listed as an official record of cars. It also has other information.

But all railroads have their cars listed by series, by types of cars, and with some explanation of their length and width, and so on. That's what this is for the Winchester and Western out of that tariff, effective July 1980.

Q The one we have now is for July of '80,

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is that correct?

A Yes.

Q And does that show that Winchester and Western had 323 cars?

A 325 cars. They're broken down. Line 1 there are the covered hopper cars in a series 1001 to 1075. The very last column shows that there are 75 of them.

The next two are boxcars, 25, by description of the boxcar. And the last one is the other covered hopper cars, which are 225.

Q Now, Mr. Williams, your first two exhibits were a list of the cars habitually used in Virginia, and the second were the cars not habitually used in Virginia. Are those conclusions based on the documents that we have submitted here, the remaining of the evidence, and is that the basis for your conclusion?

A That's true.

Q And have you prepared these, and have you examined these, as an officer of the company, to see if they reflect that only 60 of your cars were habitually used in the State of Virginia?

A Yes.

MR. ANDERSON: Mr. Hearing Officer, would you give me a moment, please?

CROSS EXAMINATION

BY MR. TOSH:

Q Mr. Williams, do all the cars that are leased here bear the markings of the Winchester and Western?

A Yes, they do.

Q Do they bear the markings of any other railroad?

A No.

Q And I take it because you sponsored Company Exhibit 11 that you have no quarrel or dispute with those cars assigned to the Winchester and Western Railroad according to the Official Railway Equipment Register?

A No.

MR. ANDERSON: I didn't understand that question, Mr. Tosh. Exhibit 11?

MR. TOSH: My question is-- he answered the question. The question is whether he has any quarrel with this listing of Winchester and Western's cars on the Official Railway Equipment Register.

Is that the way you understood my question?

THE WITNESS: Yes.

MR. ANDERSON: Excuse me.



BY MR. TOSH:

Q Were any of the 325 cars subject to property taxes in any state other than Virginia?

A Not to my knowledge.

Q And no such taxes have been paid in any state by the Winchester and Western?

A I don't know of any.

Q Were any cars bearing markings of other railroads located on the Winchester and Western track during 1980?

A Yes, very many.

Q Do you have any records to indicate which?

A Yes, the Exhibit No. 7, Winchester & Western Revenue Records. That will show all railroad cars of any ownership loaded on the Winchester and Western in 1980.

Q Take an example of one such car so we may follow the methodology used in your records.

A All right, sir. On January 16th, very first entry, is the C&O, Chesapeake and Ohio Railroad car. Its number is 605733. It is going from the W&W to the Baltimore and Ohio Railroad, to connect with the B&O, connecting carrier. Its ultimate destination is Baltimore, Maryland, and the weight of the commodity of the car is 196,600 pounds.

Q One can ascertain, if I understand you correctly, one can ascertain all of the foreign cars located on the W&W at any time during the year by reference to the column labeled "Car?"

A That's right.

Q Anything other than a W&W listing, then, is a foreign car on the Winchester and Western track, is that right?

A That's correct.

Q Now, your Exhibit 7, then, will tell us the date which those cars were loaded at Gore?

A Yes-- shipped, if you will.

Q Shipped. They're not shipped the same day they're loaded?

A Maybe not. There is a chance that it's loaded one day and shipped the next.

Q But your Exhibit 7 will not show the Commission exactly what days that equipment was physically located on W&W track, will it?

A Repeat your question.

Q Will your exhibit show exactly which days that piece of equipment was located on W&W track?

A No.

Q Do you have any other records that would

reveal that information?

A No.

Q Do you have any records which would reveal the value of those foreign cars?

A The value of the foreign cars?

Q Yes, sir.

A No.

Q Mr. Williams, your Exhibits 2 and 3-- excuse me-- let me correct that. Your Exhibit 3 groups various bits of data and describe them in terms of incidentally, inadvertently, and briefly.

A Yes.

Q And, also, throughout your testimony you have used the word "habitually" in representing what the Company's view of what "habitually" means. For purposes of those terms in your exhibit, please define exactly what the Company means in using those terms.

A Well, habitually-- my definition is anything over half. The way it's been set forth in here is that cars in Virginia for a half a year or more are reported as habitual.

Q Half a year then?

A Half or more than half; for six months or longer. Any car in Virginia for less than six months, it

gets broken down into two categories, and one is sometimes-- or let me get the exact here. The last tab in this is for less than a half a year. The incidentally or inadvertently are for two months or less.

Q But if one were to assign, say, a different definition to the word "habitually," then, this data would not be helpful in identifying exactly which cars would be included under another definition?

A If you were to redefine the word "habitually," I would probably have to change my answer on this.

Q Mr. Williams, with reference to your Exhibit 6, I believe you testified that the company that prepares this data for the Winchester and Western changed their methodology for the second half of 1980, is that correct?

A That's correct.

Q And I believe you stated that certain junction points are shown in Exhibit 6 that were not shown on the exhibits for the first half of 1980, is that correct?

A That's correct.

Q Does Exhibit 6 reflect all moves that might have been between one state and other states? In other words, is it possible that your data might reflect a movement,

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say, between states A, B, and C-- let me restate my question. If they were moving between states A, B, and C, would, in all cases, all states be-shown in your exhibit?

A Yes.

Q Mr. Williams, what is the Company's purpose in identifying all of this rolling stock with W&W markings?

A Well, the reason for it is because with short line or railroad markings, you have the per diem on your car as opposed to a mileage charge, and per diem is much more attractive.

MR. TOSH: May I have one moment, Your Honor.

EXAMINER HUNDLEY: Yes.

MR. TOSH: That's all we have on cross, Mr. Hundley.

EXAMINER HUNDLEY: Mr. Thorson.

MR. THORSON: Thank you.

CROSS EXAMINATION

BY MR. THORSON:

Q I take it from your testimony, Mr. Williams, that the other Unimin plants do not have short line railroads?

A It's the only short line railroad that we own.

Q Are the other plants served directly by railroad carriers?

A Yes, they are, national railroad carriers.

Q In your Exhibit 7, which is a list of all the revenues on the Winchester to Gore division, I notice that the waybill number that appears on January 3 of that month, the number 30, and that the waybill number ending the period January 31 is 343. It also appears to me that the waybill numbers are consecutively numbered, is that correct?

A That is correct.

Q Would you agree with me that the difference between 30 and 343 is 313 shipments, is that right?

A No, that's not right.

Q How would you correct that statement?

A I can't explain why the waybill numbering is not sequential, but I can state that every shipment out of Gore, Virginia, with a W&W load is on this report.

Q Well, it appears to me-- unless I missed

LEE O'BRYAN, a witness called by and on behalf of the Commission Staff, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TOSH:

Q Please state your name and your position with this Commission.

A My name is Lee O'Bryan. I'm Deputy Director of the Public Service Taxation Division in Richmond.

Q And in your connection as such, are you familiar with this Commission's methodology for assessment of taxes on rolling stock of railroad companies in Virginia?

A Yes, sir. Since January of 1967, I primarily have been responsible for the assessment of the rolling stock, as well as all other property of railroads in Virginia.

Q And are you quite familiar with the facts and circumstances surrounding this particular petition?

A Yes.

Q Would you, please, proceed to indicate what the Commission's methodology is in general, and particularly as that methodology was applied to these.

A First of all, I would like to cite the chapters, of course, which we assessed under, Title 58 of

1 O'Bryan - direct

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2 the Code, Chapter 12, Article 2, Section 58-515(b) through  
3 58-539. Those are the primary sections for assessing  
4 property, as well as rolling stock.

5 Also, I would like to introduce at this  
6 time an Administrative Order that was given to us-- not to  
7 me, but the Division-- dated May 25, 1928. This is an  
8 Administrative Order from the Commission. I would pass  
9 those out.

10 EXAMINER HUNDLEY: Mr. Tosh, would you  
11 like those marked Exhibit 12?

12 MR. TOSH: If you would, please, sir.

13 A (Continuing) Since I wasn't available  
14 on May 25, 1928, I would have certain information, but as  
15 the Code is written now, contains wording, as previously  
16 stated, "habitually used." This information basically is  
17 tremendously hard to arrive at as the previous witness has  
18 explained. It's hard to tell what cars are in Virginia,  
19 particularly, foreign cars, and so--

20 Q Mr. O'Bryan, would you explain what you  
21 mean by foreign cars as opposed to other cars?

22 A Foreign cars would be one that is not  
23 owned by the railroad, would be not a private car line, a  
24 company car; it would be one of another railroad.

25 Q In Virginia?



A In Virginia.

Q On the line?

A Actually, it would be a car that does not belong to the Winchester and Western on their line; it would be a foreign car to them.

Q Please proceed.

A And we assume in our office that this Administrative Order was to clarify or get to the root of simplifying the tax report in order to ascertain or allocate the Virginia fair amount of rolling stock for taxation, and we have gone on the presumption since 1928, through this Administrative Order, and have used such since that time. I have used it since 1967.

Railroads in Virginia fall into two categories, railroads that operate totally within the state and railroads that operate within and without the state. Examples of that being we have eight(sic) carriers in the state that operate 100 percent in the state, and they are the Chesapeake Western, the Haysi Railroad, the Interstate, Norfolk Portsmouth Belt Line, the RF&P, Virginia Central, and Winchester and Western. They are 100 percent Virginia carriers.

We also have a total of 26 railroads in the state in which these eight(sic) are included. The remaining

2 companies operate interstate.

3 Our basic methodology in assessing these  
4 cars for tax purposes might be better termed in an exhibit.  
5 The first one would be 100 percent railroad operation. It's  
6 very similar to what the Winchester and Western might be.

7 Q Mr. O'Bryan, let me interrupt you one  
8 more time. You say we have in Virginia 18 railroads that  
9 operate interstate. By that, you mean you have 18 railroads  
10 that own trackage located both in and out of Virginia?

11 A That is correct.

12 Q Thank you.

13 A The first exhibit-- actually, second  
14 exhibit-- first example of our methodology, this is the way  
15 the information would appear on the tax return. We ask for  
16 the type of equipment. In this instance, I took an example  
17 of freight car. It doesn't necessarily have to show the  
18 type of car, but just the fact that it is a freight car, the  
19 number of units, the date that it was built, and purchased,  
20 the total cost of those units; and then from this, we apply  
21 a percentage that we arrive at in the office and come up with  
22 an assessed value for each year of cost. The total assessed  
23 value is then added, and it comes to a total for the total  
24 class of car.

25 In Virginia, the Winchester and Western,

for instance, their total value of their cars was not allocated to any other state since they have no track outside the state, and the Winchester and Western does not own track. They physically have no operation outside the state as to the Winchester and Western.

So under our terminology and under the Order which was issued in 1928, if we follow under Section 3 of that Order, which states "freight cars," it says that we would apportion to Virginia that portion that the total miles bear to the system miles, total miles in Virginia bear to system miles.

Q If we may take a look at that point with reference to Example 1. There, the total assessed value entered for this hypothetical ABC Railroad Company was \$9,670,395.

A That's correct.

Q Now, the mileage ratio formula, which is then applied to that figure, compares the number of Virginia miles of that road to its total system miles, is that correct?

A That's correct.

Q In this state, since the company operated-- well, since the company has trackage only in Virginia, then the ratio equals 1 or 100 percent, so the total amount was liable to the \$1.00 per hundred tax imposed by the statute?

A That is correct. Of course, an important point to point out here is that the Winchester and Western is identical in operation to this particular example; that they are a 100 percent carrier in Virginia, and their freight car miles in Virginia would equal freight car miles in their system.

The second example would be assessment of a carrier that operated both within Virginia and without Virginia.

EXAMINER HUNDLEY: Mr. Tosh, would it be all right if we marked the document previously referred to as Staff's Exhibit 13?

MR. TOSH: Yes, sir. And Example 2 would be Staff's Exhibit 14.

EXAMINER HUNDLEY: So marked.

A (Continuing) The second example, XYZ Railroad, has basically-- in fact, it has the same, the only difference being this particular company operated a total of 4,000,000 miles on its system and operated 2,000,000 miles in Virginia, so we would allocate a 50 percent factor to Virginia. Half of the freight cars mileage was in Virginia. Then, again, the dollar per hundred tax rate would be extended, and the tax would be half of what the 100 percent of the railroad would be.

Q Mr. O'Bryan, there are, in fact, two methodologies by which the apportionment ratios can be derived, is that correct?

A Yes.

Q Would you explain the two methodologies and explain under what circumstances each would be used and which were used in connection with the Winchester and Western example?

A Going back to the Administrative Order, the Administrative Order calls for freight car miles. Sometimes if it's small roads, that information is not available or burdensome upon them to file that information, so we do allow some roads to give us a road mile allocation. We don't really think that is quite as accurate, but if nothing else is available at the time, we will accept that. We would compare road miles in Virginia to road miles in the system. In most cases-- in fact, in all cases on the larger roads, actual equipment miles is used, equipment miles in the system and equipment miles in Virginia.

Q By "equipment miles," you mean--

A One mile for each piece of equipment. If it's 500 cars on the train and they move one mile, it's 500, 500 miles.

Okay. Now, in the case of the Winchester

and Western for the year in question, you really don't have to look at the prorated factor because in looking at their reports, operating reports, and so forth, I know that they're a 100 percent operation in Virginia, so I know that their equipment miles in Virginia is going to equal equipment miles in the system, so I automatically put a 100 percent factor on it. There is no other calculation needed because their operation, 18 miles, is all in Virginia. There would be no other factor that would be needed to be applied in my interpretation of this Administrative Order.

Q Can you explain whether this method of assessment applied to the Winchester and Western is consistent with that applied to other companies similarly situated in Virginia?

A Yes, the eight railroads that I mentioned, particularly the 100 percent railroads were all assessed identically, Chesapeake Western, Haysi, Interstate, Norfolk Portsmouth Belt Line, RF&P, which is the largest of the group, Virginia Central, the smallest, and Winchester and Western. All of these companies were assessed 100 percent of the total rolling stock they own and operate with their markings.

We did not assess any foreign cars on any of these lines. Foreign cars are habitually used on

these lines, but in lieu of assessing the habitually used foreign cars, which we have no control over, have no way to tell how much these cars cost, year built, or condition or anything else, we have used this Order, which the Commission sought fit to put through in order to support the cars just that the company owns with their markings on them. It's really almost a physical impossibility for the company to probably maintain costs, costs of what all these foreign cars would be, and I think possibly-- and the Code agrees-- that says habitually used; it doesn't necessarily say own.

This Order was made to clarify all we would do would be to apportion what they actually owned or had under their control based on a mileage basis as a simple way to do it. And this has been done since at least 1928; nothing new.

Q And it has been done consistently with companies such as the Winchester and Western which operates over the trackage exclusively in Virginia, as well as consistently applied with reference to railroads operating over trackage in Virginia and other states?

A Interstate carriers are assessed on a pro rata basis because they do have mileage outside the state. We take the total miles that those cars operated outside Virginia with the total miles within Virginia and

2 come up with total miles. And some of the percentages are  
3 quite small. The B&O is real small. It's, like, one-tenth  
4 of a percent probably, total operations, just that one little  
5 fraction of cars.

6 And this is done consistently with every  
7 company that we assess. And it's very consistent. It hasn't  
8 changed, and it's been that way since 1928.

9 Q Now, in your assessment of this company,  
10 can you explain to Mr. Hundley and to the Commission exactly  
11 what substance you want to develop?

12 A The Winchester and Western filed their  
13 tax return prescribed by statute. In going through and  
14 examining the return and comparing it with the operating  
15 report that they filed, plus comparing it with the Railway  
16 Register, I came across the listing of cars in the Railway  
17 Register that was not included in the tax return. In fact,  
18 the original tax return, I think, probably did not include  
19 hardly any cars at all. And once I called the company and  
20 brought it to their attention, they gave me the information  
21 that I needed.

22 Now, originally, I got the car information  
23 from a Mr. Crippen, who is with ITEL Corporation. He furnished  
24 the cost of each car, the types of cars, and the number of  
25 cars, and the year built. I also had some other information

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that I needed from the Locomotives Association, which is not in question, which they furnished additional information on, which I also assessed.

The assessment procedure was exactly like the examples that I have submitted, the number of cars times the unit value of the car came up with the total value for the cars. A 90 percent factor was applied because at the time I believe the cars were one year old. We start out at 95 percent, depreciation 5 percent a year down to a base of 25 percent. We used 90 percent of the original cost times the total value of the cars; came up with an appraised value of 9,649,035 as the assessment for those cars.

Since it was a hundred percent Virginia, we assessed 100 percent of that figure and taxed it at \$1.00 per hundred, and this is consistent with the other railroads that were assessed, method of assessment.

MR. TOSH: That's all we have on direct.

EXAMINER HUNDLEY: I'd like to interject a few questions here, Mr. O'Bryan. Does the habitually used language, which appears in the statute, predate the date of the Order, which we have marked as Staff's Exhibit 12?

THE WITNESS: To the best of my knowledge-- and you can check back-- is the statute as it is

written right now in Section 5, which says "habitually used," has not been changed. We trace it back to '28 and did not have a copy that went back beyond that. But the wording was the same in 1928 as it is for Section 5. I believe the last change was 1926 when the change was made in that particular section, not necessarily that paragraph, but there was a change in that particular section in 1926. I don't know if it affected the wording "habitually used," but it was in effect in 1928, "habitually used."

EXAMINER HUNDLEY: Is the May 25, 1928, Commission Order the most recent one interpreting?

THE WITNESS: I went through the files, and that is the only one that-- in fact, I think-- I could not find a case that we have had or the Commission has had on rolling stock that had to deal with this type thing.

EXAMINER HUNDLEY: Has there ever been a case since the 1928 Order was issued that we know of?

MR. ANDERSON: None to my knowledge. There has not been a case. There are three ways of assessing these that railroads use and Commissions

CROSS EXAMINATION

BY MR. THORSON:

Q Is it your testimony, Mr. O'Bryan, that, in fact, the Commission was applying the ruling of this 1928 Order to Winchester and Western prior to 1972?

A Yes, we did.

Q And that, in fact, the Commission has applied this Order since 1928?

A To all companies.

Q To all companies, without regard to whether they were domestic or foreign corporations?

A Well, we have an exception. To my knowledge, any company that was not a domestic corporation-- there is one case that is sort of fuzzy. The Penn Central had some property on the Eastern Shore that they eventually formed the Penndel Corporation, and they did that and operated in Virginia, but the only companies are Virginia companies that I am aware of that are authorized to do business in the state.

Now, possibly the only other may have been Amtrak, which is a Federal type entity, and that might not be listed as a Virginia corporation. But the other corporations, to the best of my knowledge, are Virginia corporations.

Q Well, then, is it your testimony that

the words which Mr. Shapiro identified that were stricken-- I'm assuming that his representation is correct-- that the word "foreign," which appeared in there had never been applied within the context of railroads?

A We had never, to my knowledge, discussed foreign railroads that did not have-- I assume you're talking there either domestic corporation or a railroad that did not have track in Virginia. I think those are the two items that we would have to look at that we would assess, a Virginia corporation or corporation that had rail operations in this state, track.

Q That would be a foreign corporation, though, would it not? Isn't B&O a foreign corporation?

A I think they probably have to be listed as a Virginia public service company. I could check with the Clerk's office to make sure, but I think in all cases the Virginia companies that we assess are supposed to be Virginia corporations.

Q Well, would that mean, from your testimony, then, that the phrase "foreign corporation" had no meaning?

A Foreign corporation, in my way of thinking, would be corporations, railway corporations that had no facilities in this state, and their cars possibly could come here, but were not operated by that particular railroad but

were operated by a Virginia company.

MR. THORSON: I have no further questions.

FURTHER CROSS EXAMINATION

BY MR. SHAPIRO:

Q May I raise another question on that point. Are you saying, Mr. O'Bryan, that the way the State Corporation Commission interprets this, a corporation incorporated in Maryland, for example, you do not consider that a foreign corporation necessarily?

A It might be a foreign corporation as far as a charter is concerned; but if they had no track in Virginia, we would not assess it. If they did have track in Virginia and the Clerk's office did not require them to incorporate as a Virginia Corporation, we would still assess them because they would have track, and so forth, in the state.

My statement before, that the best of my knowledge, most of these companies are Virginia corporations; that they have domestic authority in this state.

Q So when you say "domestic authority," you mean they may be a foreign corporation, with the right to do business in Virginia?

A Yes.

Q But, nevertheless, a foreign corporation?

A I think most of them are going to be Virginia corporations. I haven't checked the charters on them. My rule of thumb says if they have property in the state, operate a line railroad, then I'm going to assess them.

Q Now, Mr. Thorson brought up the point that the prior business law before 1972 applied to Winchester and Western, including what was then a long standing practice. In 1972, did Winchester and Western own these 325 rail cars that are at issue?

A Checking back to the records prior to this case, I didn't go back that far, but I did go back to where your company started the operation, and possibly you might have owned the company then, but it was in '77, and then I think at that time Winchester and Western showed no freight cars except for a few pieces of work equipment, and I think for that year we did not assess any tax against the Winchester and Western, although looking through their operating report, they had 200 and some odd thousand dollars of tonnage on the line, all of which was earned by foreign cars. We did not assess any of those cars.

Q Is the first year, then, in which Winchester and Western reported any of these 325 cars 1980?

A I think there were a few cars reported in 1979. I think you all started leasing in '79, and that's when I picked them up the first time. My first knowledge of that came probably in '78. Mr. Crippen from ITEL called and inquired how we would assess the cars under different circumstances, and I told him at that time if the cars bore a private car line marking, I would assess against the private car line company; but if it bore a Winchester and Western marking, I would assess it against Winchester and Western, and that was the way I left it until you reported them. I did exactly what I told him I was doing.

EXAMINER HUNDLEY: Now, Mr. O'Bryan, the methodology which your Division used is based upon number of miles and track located in Virginia?

THE WITNESS: Well, basically, we would like to use the freight car miles rather than mileage because we feel it gives a better idea of the density of operation in the state. It could be that if you used the track mileage in Virginia-- now, you have two or three real good coal carrying railroads that have quite a bit of density of operation that run from the mines to the coast; and if you use just the actual road miles, or whatever, it might not reflect that density of

operation in the state. So a truer picture, I believe, would be equipment miles. That would give you more equitable distribution to Virginia based on mileage rather than road mileage, equipment mileage.

EXAMINER HUNDLEY: In this case, you used road mileage?

THE WITNESS: In this case I used a hundred percent because they had no track outside the state, so I really wasn't looking for either road miles or equipment miles because their cars operated on the Winchester and Western, did not operate outside the state. It operated a hundred percent in Virginia, even though their cars went outside the state.

At the same time, foreign cars were on their line, which we did not assess. Possibly, if those foreign cars were not on their line, they would have had to take their own cars out of service someplace else to make them available for their mine, so we're using this equipment that they own or lease to assess.

And it's more like a big pool really. All railroad cars are running up and down the track in



2 a pool-type arrangement; and as the previous  
3 witness stated, it's kind of hard to control.  
4 If the railroad gets hold of one, he wants to use  
5 it, then they do that. It might be a while before  
6 it gets back to the home port.

7 So they use foreign cars on their line;  
8 they use their own cars, and it's extremely diffi-  
9 cult to try to determine what cars are there at  
10 what time.

11 EXAMINER HUNDLEY: Does actual use affect  
12 either of these two methodologies that you have  
13 discussed?

14 THE WITNESS: Actual use as far as  
15 mileage, or what they are being used for, the  
16 amount of time, or-- you said "use."

17 EXAMINER HUNDLEY: Actual use in the  
18 location of the car.

19 THE WITNESS: Well, we feel that the  
20 mileage factor itself, particularly, on an inter-  
21 state railroad, would fairly distribute the value  
22 of the cars where the operation is, assuming that  
23 the cars are going to be in the spot where the  
24 operation-- major operations are located.

25 For instance, the N&W-- it would be

foolish not to have adequate number of cars between the coal mines in Virginia and to their terminal at Norfolk. They're going to supply enough cars or have enough cars available to make sure that their operation is going smoothly. So we would assess based on this mileage factor.

Really, where the cars are, what they're being used for is really not that critical. It's prorated based on equipment mileage factor.

EXAMINER HUNDLEY: Then, the response to the question is actual use as it concerns location of the freight rolling stock, is that a factor in either of the two methodologies that you have discussed? What would be your response to that question? ...

THE WITNESS: I don't think the physical location of the cars would have a direct bearing on my assessment. What I'm going to look at is mileage.

EXAMINER HUNDLEY: Thank you.

Mr. Tosh.

Q So, basically, what you have described is one method of arriving at the total value of a system-wide rolling stock fleet and two methodologies of prorating that between Virginia and other states?

A That's correct.

MR. TOSH: Thank you. I believe that's all I have.

MR. ANDERSON: He brought a question up.

RECROSS EXAMINATION

BY MR. ANDERSON:

Q Mr. O'Bryan, assume that the Winchester and Western Railroad bought from a railroad car manufacturer, who has a plant in San Francisco, California, one hopper car on January 1st, 1980, and suppose we use that one hopper car from January 1st, 1980, until December 31st, 1980, running only from San Francisco to Los Angeles-- it never left the State of California and never got to Winchester-- you would assess that as one of their habitually used cars?

A Would that be the only car that you own?

Q No. I want to make the question fair to you. Would that car be considered in my fleet as habitually used in Virginia?

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A It would be assessed against your company.

Q It would be assessed as an habitually used car as a mandate of the statute, is that correct?

A Mandate of the statute and the Administrative Order.

Q It would be assessed under the statute and the Order?

A The Administrative Order because that's basically what we use when we're using the freight car miles.

EXAMINER HUNDLEY: I'm sorry, sir; I didn't completely hear your last statement.

THE WITNESS: We're using,-- really, in our interpretation, this Order was made to clarify the statute, and, really, we're adhering to this Administrative Order which we feel clarifies the section.

EXAMINER HUNDLEY: Mr. Anderson.

BY MR. ANDERSON:

Q Mr. O'Bryan, does this Administrative Order use any "habitual use?" Does it use the words "habitual use," or any phrase anywhere in that Order? It was just handed to me now.

A Not that I know of.

Q I have to rely on you.

A It all deals with proration by mileage.

Q And it does not use "habitual use?"

A No.

Q Mr. O'Bryan, you say in answer to Mr. Tosh and Mr. Thorson, I think you said-- Well-- "We feel that this is the proper method." When you say "we," who do you mean, "we"-- Mr. O'Bryan or--

A The Public Service Taxation Division, which has been the policy that our office has followed at least since '67 and, I assume, back through '28. It has been the policy that our Division has followed. Again, whether it's right or wrong, that's what we have done, and this is the process that we go through in making our assessment.

Q You don't know whether it's right or wrong?

A I assume that since the powers that be, and it hasn't been questioned for that long, we assume that it is correct.

Q Mr. O'Bryan, I want to ask you again, who is "we?"

A Public Service Taxation Division.

Q Who is that? Is that you?

A I am Assistant Director, Deputy Director