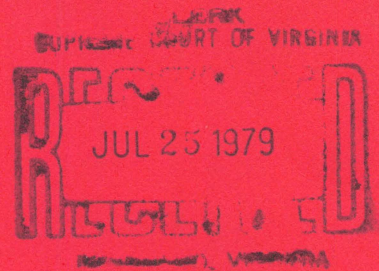


221 Va 1026

✓



IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. 790120

SOUTHERN RAILWAY COMPANY and
VIRGINIA AND SOUTHWESTERN RAILWAY COMPANY,

Appellants,

v.

FERNA DARNELL, SYLVIA DARNELL,
AND ANN DARNELL GORDON,

Appellees.

JOINT APPENDIX

H. Merrill Pasco
Hunton & Williams
P. O. Box 1535
Richmond, Virginia 23211

Robert T. Winston
Mullins, Winston & Roberson
P. O. Box 408
Norton, Virginia 24273

Counsel for Appellants

Ford C. Quillen
P. O. Box 337
Gate City, Virginia 24251

Stuart A. Sanderson
P. O. Box 337
Gate City, Virginia 24251

Counsel for Appellees

TABLE OF CONTENTS

	<u>Page</u>
Notice given pursuant to § 56-16 of the Code of Virginia	1
Petition filed pursuant to § 56-16 of the Code of Virginia	2
Demurrer	5
Motion for Bill of Particulars.	6
Bill of Particulars and Exhibits.	8
Letter from Judge Cridlin to Counsel dated February 22, 1974.	27
Letter from Judge Cridlin to Counsel dated May 22, 1974.	28
Opinion letter from Judge Cridlin dated April 5, 1975.	29
Order Overruling Demurrer	31
Answer.	32
Order Granting Relief and Appointing Commissioners	34
Defendants' Request for Findings.	36
Report of Commissioners.	37
Exceptions to the Commissioners' Report . . .	38
Letter from Judge Long to Counsel dated July 17, 1978.	40
Final Order entered October 27, 1978.	42
Assignments of Error.	44
Deposition of Ferna Darnell June 5, 1974. . .	45
Deposition of Claude Starnes June 5, 1974 . .	61

TABLE OF CONTENTS (cont'd)

	<u>Page</u>
Deposition of Frank Wolfenbarger June 5, 1974.	65
Deposition of E. E. Hackney July 12, 1974. .	70
Deposition of Robert Skeens July 12, 1974. .	74
Deposition of W. G. Fletcher November 9, 1974.	80
Deposition of Robert Peters June 5 and November 9, 1974.	90
Deposition of Richard Watkins July 12, 1974.	102
Testimony of Ferna Darnell before the Commissioners August 15, 1975.	107
Testimony of William Stuart Snodgrass before the Commissioners August 15, 1975.	120
Testimony of Claude Starnes before the Commissioners August 15, 1975.	125
Testimony of Frank Wolfenbarger before the Commissioners August 15, 1975.	127
Testimony of Clarence Lane before the Com- missioners August 15, 1975.	129
Testimony of Robert Peters before the Com- missioners August 15, 1975.	131
Testimony of William Towns before the Commissioners August 15, 1975.	138
Defendants' Exhibit No. 7	146

TO SOUTHERN RAILWAY COMPANY and VIRGINIA AND SOUTHWESTERN
RAILWAY COMPANY:

You are hereby notified to come forward and make the necessary repairs to the bridge serving the land owned by the undersigned in Estillville Magisterial District, Scott County, Virginia, said bridge being 0.6 mile west of Mile Post 36 and being a part of the wagon way across the railroad being owned and operated by you through the lands of the undersigned.

This notice is given to you pursuant to Section 55-16 of the Code of Virginia.

Given under our hands, this the 13th day of September, 1973.

FERNA DARNELL, SYLVIA DARNELL
and ANN DARNELL GORDON

BY COUNSEL

QUILLEN AND CARTER, p.q.

BY: 

GATE CITY, VIRGINIA

PETITION

SOUTHERN RAILWAY COMPANY and
VIRGINIA AND SOUTHWESTERN RAILWAY COMPANY

DEFENDANTS

TO THE HONORABLE JOSEPH N. CRIDLIN, JUDGE OF SAID COURT:

Your petitioners would respectfully represent, aver and show unto the Honorable Court as follows:

(1) That your petitioners are the owners of certain lands situate adjacent to both sides of the Southern Railway Company and Virginia and Southwestern Railway Company property, located in Estillville Magisterial District, Scott County, Virginia near the Daniel Boone Section of Scott County, Virginia; that said lands owned by your petitioners lie on both sides of the Southern Railway Company and Virginia and Southwestern Railway Company right of way, and abut thereon, on either side.

(2) That the right of way of said Southern Railway Company and Virginia and Southwestern Railway Company passes through these lands.

(3) The defendants constructed a roadway and a wagonway leading from the public road over said railroad and through the premises of the petitioners from the north side of said railway right of way, and over said tracts and said right of way to the other premises of petitioners, lying on the south side of said right of way.

(4) That, as a part of said wagonway or roadway, the defendants constructed a bridge across Little Moccasin Creek, which bridge is within the scope of the wagonway or roadway and crossing, and a substantial portion of which bridge is within the confines of the right of way of the Southern Railway Company and the Virginia and Southwestern Railway Company.

(5) That from the time of the construction of said roadway and wagonway and crossing and said bridge, the defendants have maintained said bridge without any question whatsoever being raised by the defendants.

(6) That the bridge over Little Moccasin Creek and as set out hereinbefore, has fallen into a great state of disrepair, and now presents a hazardous and dangerous problem to petitioners, and to others who may use said crossing; that petitioners have repeatedly requested the defendants to repair said bridge, as is their duty to petitioners; but that defendants have consistently refused to repair said bridge.

(7) That petitioners are greatly concerned in the use of said bridge on account of its deteriorated and dilapidated condition, and are unable to secure fuel, farm and other supplies, to be transported by trucks across said railroad right of way and across said bridge to their premises on the south side of said railroad right of way.


(8) That said bridge is 0.6 miles west of Mile Post 36 and is a part of the wagonway or roadway across the railroad and the right of way owned and being used by you, the defendants, through the lands of the undersigned.

(9) That notice has been duly given to you pursuant to Section 56-16 of the Code of Virginia to come forward and make the necessary repairs to said bridge, being a part of said roadway and wagonway. Notice was duly served upon the proper agents of the Southern Railway Company and the Virginia and Southwestern Railway Company, by you, the defendants, have wholly failed to comply with the provisions of law obtaining in the premises; and have by written advices to petitioners say they have no duty to make said repairs to said bridge.

(10) This petition is filed, and application is to be made pursuant to Section 56-16 of the Code of Virginia to determine whether said wagonway and roadway and said bridge should be repaired and kept in repair by you as provided by law.

THE PRAYER OF PETITIONERS is that the said Southern Railway Company and the Virginia and Southwestern Railway Company be made parties defendant to this petition, and be required to come forward and repair and maintain said bridge, being a part of the wagonway and roadway as aforesaid; that the Court appoint three disinterested persons whose lands do not abut on said railroad right of way to constitute a Board of Commissioners, whose duties shall be to go upon said lands to determine whether said bridge on said wagonway or roadway should be repaired, and said Commissioners shall report their findings to the Circuit Court of Scott County, Virginia, and that your petitioners may have all such other further and general relief in the premises as the nature of their case may require, or to the Court should seem proper.

Respectfully submitted:



DEMURRER

SOUTHERN RAILWAY COMPANY
AND

VIRGINIA AND SOUTHWESTERN RAILWAY COMPANY

DEFENDANTS

Your defendants demur to the petition filed in the above cause and state that it does not set out a cause of action, and for their grounds of demurrer state:

I.

The defendants are under no statutory nor contractual duty to make the repairs sought in the petition.

II.

The statute cited does not require the defendants to erect nor maintain a bridge.

III.

The statute allegedly relied on does not require the maintenance of a wagon way across a creek but by its terms only across the "road."

IV.

The statute allegedly relied on does not provide ^{for} ~~the~~ construction of a bridge from claimants' lands to a public highway nor for the purposes set out in the petition.

V.

And other grounds to be assigned at bar.

5

MOTION FOR BILL OF PARTICULARS

SOUTHERN RAILWAY COMPANY

AND

VIRGINIA AND SOUTHWESTERN RAILWAY COMPANY

DEFENDANTS

TO THE HONORABLE JOSEPH N. CRIDLIN, JUDGE OF SAID COURT:

Your defendants move this Honorable Court to require the
Petitioners to file the following particulars of their claim:

I.

State the Petitioners' source of title and their chain of title back
to a common source with the defendants' right of way.

II.

State how much land, if any, petitioners claim to own on the
North side of the defendants' right of way and state what this land is used for.

III.

State whether the bridge is used by trucks, vehicles, etc., to
carry fuel, etc., from the land North of the right of way or whether the bridge is
used to carry fuel, etc., from the public highway to the land South of the
railroad right of way.

IV.

State how much of the bridge is on Petitioners' property and off
of the railroad's right of way.

V.

State how much repair and maintenance the Petitioners have performed on that portion of the bridge that is not on the defendants' right of way.

VI.

State whether the Petitioners' claim that the portion of the wagon way that goes over the railroad tracks and the portion of the railroad that lays from end of tie to end of tie, needs repairing.

VII.

State whether a bridge would be needed across the creek in order to enable Petitioners to go from the public road to their residence in the event there were no railroad tracks or railroad right of way involved.

BILL OF PARTICULARS

SOUTHERN RAILWAY COMPANY
and
VIRGINIA AND SOUTHWESTERN RAILWAY
COMPANY.

DEFENDANTS

For bill of particulars requested by the defendants in the above-styled cause, the petitioners, Ferna Darneli, Sylvia Darnell and Ann Darnell Gordon, say as follows:

(1) Petitioners do not feel that the source of title and their chain of title back to common source of the defendants right of way is in anywise pertinent to this proceeding, but petitioners do file copies of the deeds showing their chain of title. So far as petitioners know, the common source of title of the railroad right of way and lands owned by petitioners is J. B. Richmond, et ux, and R. A. Ayers, et ux.

(2) Petitioners own a strip of land approximately 15 feet in depth on the north side of defendants' right of way, which runs a distance of 0.3 mile. This land is used primarily for the production of hay.

(3) The bridge is used by trucks, vehicles, etc. to carry supplies, food, fertilizer, etc. from the public highway to the land south of the railroad right of way; hay harvested on the strip or parcel of land on the south side of the railroad is also hauled to the north side of said railroad right of way and across said bridge. Garbage is carried out by truck from the premises owned by petitioners across said bridge and said wagonway or roadway to the north side of said railway and onto the public road.

This bridge also affords access to the premises, including the residence and the outbuildings owned by petitioners on the south side of said railroad, across said railroad and onto the public highway. Two of petitioners are now employed in the Town of Gate City, Virginia, and it is necessary for them to travel by automobile both from the north side of said railroad right of way to the south side and from the south side to the north side in getting to their places of employment in the Town of Gate City, Virginia.

(4) Approximately 4 feet of said bridge is on the railroad's right of way and the balance of said bridge or approximately 20 or 21 feet is located on premises of petitioners.

(5) From the time that said wagonway was constructed and from the time that said bridge was constructed, the Railroad Company has performed all the maintenance on the entire bridge and said wagonway, including that portion of the bridge that is not on the defendants' right of way, as well as that portion of said bridge that is on defendants' right of way.

(6) Petitioners have never at any time in the history of said wagonway, roadway and bridge, done any maintenance and repairs to said bridge; the repairs have been done altogether by defendant. At this time, the portion of the wagonway that goes over the railroad tracks needs no general repairing, but some additional ballast possibly should be added to make the roadway smoother and more even. A bridge would be needed across the creek to enable petitioners to use vehicular traffic and for vehicular traffic to come in from the public road and across the lands of the petitioners on the north side of said railroad to their residence, in the event that there was no railroad

tracks or railroad right of way involved. In this connection, petitioners say that such matters would be wholly immaterial to any issue in this case.

RESPECTFULLY SUBMITTED:

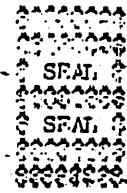
This Deed, made this the 6th day of November, 1906, by and between J. B. Richmond and Kate Richmond, his wife, parties of the first part, and H. C. Pierson, party of the second part, both of the County of Scott and State of Virginia, Witnesseth: That for and in consideration of the sum of Seven Hundred and Fifty Dollars, One Hundred Dollars of which sum is paid cash in hand, the receipt whereof is hereby acknowledged, and for the residue the said Pierson has this day executed his five several notes for the sum of One Hundred and Thirty Dollars each payable to the said J. B. Richmond and due in one, two, three, four and five years, each bearing interest from date, and to secure the payment of said notes a vendors lien is hereby retained on the land hereinafter conveyed, the said J. B. Richmond and wife doth hereby grant, bargain, sell and convey unto the said H. C. Pierson with covenants of general warranty the following described tract or parcel of land, lying and being in the County of Scott, about three miles West of Gate City, Virginia, on the waters of Little Kocasin Creek, on the South side of the Virginia & Southwestern Railway Company's track and right of way, adjoining the lands of Stephen Sampson on the East and Chris Starnes on the West, and being a part of the land purchased by the said J. B. Richmond from R. A. Ayers and is known as a part of the Old Dykes farm, and which said tract or parcel of land hereby conveyed is bounded as follows: Beginning at a stake on the top of Clinch Mountain T. J. Sampson's corner; thence N. 4 W. 10 poles to a stake, N. 16 E. 12 poles to a stake N. 25 1/2 E. 8 poles to a stake, N. 23 1/4 E. 18 poles to a stake, N. 14 1/2 E. 10 poles to a dogwood, N. 4 E. 11 poles to a stake, N. 10 1/4 E. 17 poles to a stake, N. 31 E. 12 1/2 poles to a stake N. 16 1/2 E. 12 1/4 poles to a stake on a cliff, Cedar and Hornbeam pointers, N. 4 1/2 W. 23 poles to a stake and wire fence on the South side of the said Railroad; thence with the fence N. 64 W. 64 poles to a stake in the old James Dykes line, S. 14 W. 4 poles to a Gum and Ash said Dykes old corner, S. 69 E. 39 1/2 poles to a stake, S. 1/2 E. 33 poles to a Hickory and Dogwood, S. 8 1/2 E. 34 poles to a bunch of Chestnut sprouts, S. 22 W. 23 1/2

15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100

poles to a bunch of Lynns, S. 1/2 E. 48 poles to a Chestnut at the West end of a large
rock on top of said Mountain; thence along the top of said Mountain N. 79 E. 7 2/5
poles to a stake, N. 88 E. 6 poles to a stake, East 8 poles to a stake, N. 85 E. 6 poles
to the Beginning, Containing 52 acres more or less, but is hereby expressly agreed and
understood that the above described tract of land is hereby sold by the boundary for
the gross sum of \$750.00.

Witness the following signatures and seals, the day and year first above written.

J. B. Richmond,
Kate Richmond,



Virginia, Scott County, to-wit:-

I, John M. Johnson, Jr., a Notary Public in and for the County of Scott and State
of Virginia, do certify that J. B. Richmond and Kate Richmond, his wife, whose names
are signed to the writing above, bearing date the 8th day of November, 1905, have each
acknowledged the same before me, in my County aforesaid.

Given under my hand, this the 7th day of November, 1905.

My commission expires the 31st of Aug., 1907.

J. M. Johnson, Jr. N. P.

Virginia, Scott County, Clerk's Office:

This Deed for land from J. B. Richmond, et ux, to H. C. Pierson, bearing date on
the 8th day of November, 1905, was received and together with the certificates hereon
admitted to record, on the 27th day of January, 1906, at 9:10 O'clock A. M.

Given under my hand, this the 27th, day of January, 1906.

Teste:

[Signature] Clerk.

A copy-teste:

[Signature]
Deputy Clerk

THIS DEED, Made this 14th day of October in the year , thousand
Nine hundred and Nineteen, between M. E. Jennings and Maxie May Jennings, his wife,
parties of the first part, and H. C. Pierson, party of the second part;

WITNESSETH: That in consideration of the sum of Fifty (\$50.00) Dollars,
paid by the party of the second part to the parties of the first part, the receipt
of which is hereby acknowledged, the said M. E. Jennings and Maxie May Jennings do
grant unto the said H. C. Pierson with General Warranty, all that certain strip of land
twelve feet in width situate on the waters of Little Moccasin Creek in Estillville
Magisterial District, Scott County, Virginia, and described as follows:

Beginning at a point in the public County road about two poles west of the
spring branch flowing from A. B. Jennings land, and running southwardly parallel with
said branch to a point in the edge of the right of way of the Southern Railway
to have and to hold the said land unto the said H. C. Pierson, his heirs and assigns
forever.

The said M. E. Jennings and Maxie May Jennings covenant that they have the
right to convey the said land to the grantee; that they have done not act to
encumber the said land; that the grantee shall have quiet possession of the said
land, free from all encumbrances, and that the said parties of the first part will
execute such further assurance of the said land as may be requisite.

Witness the following signature and seal:

M. E. Jennings (Seal)

Maxie May Jennings (Seal)

State of Virginia, County of Scott, to-Wit:-

I, H. M. Horton, a Notary Public for the County aforesaid in the State of
Virginia, do certify that M. E. Jennings and Maxie May Jennings, whose names are
signed to the foregoing writing, bearing date on the 14th day of October, 1919,
have acknowledged the same before me in my county aforesaid.

given under my hand this 27th day of October, 1919.

H. M. Horton, H. P.

My commission expires January 15, 1923.

Virginia, Scott County, to-Wit:-

In the Clerk's office of said county the 25th day of Nov., 1919, the fore-
going writing was presented, and with certificate annexed, admitted to record at
1:40 O'clock P.M. (D.S. 65-2p98.)

Teste:

[Signature]
Clerk.

A copy-teste:

[Signature]

Deputy Clerk

THIS DEED made and entered into this 16th day of May 1922 by and between H. C. Pierson and Emma V. Pierson his wife parties of the first part and Robert S. Smith party of the second part all of Scott County Va. WITNESSETH: That for and in consideration of the payment of twenty five hundred dollars (\$2500.00) in hand, (fifteen hundred of which is in three five hundred dollar notes on J. W. Whitt) the remainder cash, the receipt of which is hereby acknowledged the parties of the first part hereby grant, bargain, sell and convey with covenants of general warranty to the party of the second part the following described property. ~~First all that certain tract or parcel of land which was conveyed to H. C. Pierson by J. B. Richmond and wife by deed bearing date on the 6th day of Nov. 1905 and recorded in Scott County Clerk's Office Deed Book 44 page 453 to which reference is made for a complete description, from this tract however is excepted that small tract conveyed by H. C. Pierson and wife to C. C. Starnes by deed bearing date on the 25th of day of Nov. 1919 and recorded in Scott County Clerk's Office Deed Book 65 page 99 to which reference is made for a complete description. Second, that tract or parcel of land conveyed to H. C. Pierson by M. E. Jennings and wife by deed bearing date on the 14th day of October 1919 and recorded in Scott County Clerk's Office Deed Book 65 page 98 to which reference is made for a complete description. The parties of the first part covenant that they have the right to convey the two tracts of land hereby conveyed which is accordingly done free from all encumbrances.~~

Witness the following signatures and seals this day and date first above written.

H C Pierson	Seal
her	
Emma x V. Pierson	Seal
mark	

Virginia Scott County To-Wit:

I, I. C. Coley Commissioner in Chancery for the Circuit Court of Scott County Virginia do certify that H. C. Pierson and Emma V. Pierson whose names are signed to the foregoing deed bearing date on the 16th day of May 1922 have acknowledged the same before me in my county aforesaid. This 16th day of May 1922.

I. C. Coley, Commissioner in Chancery for the
Circuit Court of Scott County Virginia.

Virginia, Scott County, to-Wit:-

In the Clerk's Office of said County the 18th day of May, 1922, the foregoing writing was presented and with certificate annexed, admitted to record and duly indexed at 9:45 o'clock A. M. (D. B. 69---P 152).

Teste:

R. M. Addington
Clerk.

Acopy-teste:

Jerna Darrell
Clerk

THIS DEED made and entered into this the 6th day of March 1923 by and between
A. J. Jennings and Sallie E. Jennings, his wife, parties of the first part and
R. S. Smith, party of the second part, all of Scott County, Virginia;

Witnesseth- that for and in consideration of the sum of Eight Hundred Dollars
paid cash in hand, the receipt whereof is hereby acknowledged before the sealing
and delivery of these presents that said parties of the first part, grant, bar-
gain, sell and convey unto the said party of the second part, with covenants of
general warranty, the following described tracts or parcels of land lying and
being in Scott County, Virginia on the waters of Little Moccasin Creek, the first
tract being that tract or parcel of land conveyed to A. J. Jennings by M. E.
Jennings and wife by deed dated on the 20th day of July 1921 and recorded in the
clerk's office of Scott County, Virginia in Deed Book No. 68, page 507 and bounded
and described as follows:

Beginning at a stake in the Southern Railway Co.'s right of way at a branch,
thence N. 3 1/2 E. 208 feet to a stake, in the edge of the county road at a
culvert under the road, thence with the county road N. 86 1/2 W. 448 feet to a
stake in the edge of the road at a culvert under the road, thence S. 3/4 W. 195
feet to a stake in the Southern Railway Co.'s right of way, thence with same
S. 83 1/2 E. 435 feet to the Beginning containing containing two acres be the same
more or less;

Second tract being the tract of land conveyed to A. J. Jennings by M. E.
Jennings and wife by deed dated on the 25 day of October 1919 and recorded in
the clerk's office of said county in Deed Book No. 65, page 249 and bounded
and described as follows: Beginning at a culvert across the county road eleven
poles and thirteen feet south of the Southern Railway's right of way, thence
west with the railroad right of way thirty six poles to a stake in the railway
Company's right of way and J. C. Starnes' line, thence N 4 poles and 2 feet to
a rock in the south edge of the said county road, thence east 39 poles with
the county road leading from Gate City to Speers Ferry to the Beginning contain-
ing ----- acres be the same more or less to have and to hold unto the said party
of the second part and his heirs forever together with all its appurtenances
forever. Witness the following signatures and seals the day and year first
above written.

his
A J x Jennings
mark

(Seal)

her
Sallie E x Jennings
mark

(Seal)

Scott County, to-wit;

I, H. M. Horton Notary Public for the county aforesaid in the state of
Virginia do certify that A. J. Jennings and Sallie E. Jennings, his wife,
whose names are signed to the foregoing writine bearing date on the 6th day of
March 1923, have acknowledged the same before me in my county aforesaid. My com-
mission expires on the 12 day of Jany 1927. Given under my hand this the 6th
day of March 1923.

In
going
duly

15

Virginia, Scott County, to-wit:

In the Clerk's Office of said county the 6th day of March, 1923, the foregoing writing was presented and with certificate annexed admitted to record and duly indexed at 11:55 o'clock A.M. (D.B. 70 F. 429)

Teste:

R. M. Gillingham
Clerk.

I, R. M. Gillingham, Clerk of the County of Scott, in the State of Virginia, do certify that the within is a true and correct copy of the original as the same has been produced before me, duly sworn to, and

A copy-teste:

C. H. Craft d. Clerk

THIS DEED, made this the 3rd day of June, 1924, between Robert S. Smith and Josie B. Smith, his wife, parties of the first part, and W. F. McGee, party of the second part,

Witnesseth: That for and in consideration of the sum of Nine hundred and fifty dollars (\$950.00) cash in hand paid, the receipt of which is hereby acknowledged, and the conveyance of a certain house and lot this day made to Mary D. Grogan by the said party of the second part at the request of the said parties of the first part, the said parties of the first part have baragined and sold, and do hereby grant and convey unto the said party of the second part, with general warranty, subject to the exceptions and reservations hereinafter mentioned, all of the following

described real estate, situate, lying and being in Scott county, Virginia, in Estillville Magisterial District, on the waters of Little Hoccasin creek, and more particularly bounded and described as follows, to-wit:

First Tract: That certain tract or parcel of land which was conveyed to H. C. Pierson by J. B. Richmond and wife by deed dated November 6th., 1905, and of record in the Clerk's Office of said county, in Deed Book No. 44, page 453, to which reference is hereby made for a more complete and particular description thereof. But from and out of the said last above mentioned tract is excepted that small tract or parcel of land conveyed by the said H. C. Pierson and wife to C. C. Starnes by deed dated November 25th., 1919, and recorded in said Clerk's Office, in Deed-Book No. 65, page 99, to which reference is hereby made for a more particular description of the said excepted parcel of land.

Second Tract: That certain tract or parcel of land conveyed conveyed to the said H. C. Pierson by M. E. Jennings and wife by deed dated October 14th., 1919, of record in said Clerk's Office, in Deed-Book No. 65, page 98, to which reference is hereby made for a more particular description of the same, and both of the two above described tracts of land being the same which were conveyed to the said Robert S. Smith by H. C. Pierson and wife by deed dated May 16th., 1922, of record in the said Clerk's Office, in Deed-Book No. 69, page 152.

Third: Those two other certain tracts or parcels of land conveyed to the said Robert S. Smith by A. J. Jennings and wife by deed dated March 6th., 1923, of record in the said Clerk's Office, in Deed Book No. 70, page 429, to which reference is hereby made for a more particular and detailed description of the two last-above-mentioned tracts or parcels of land.

Witness the following signatures and seals:

Robert S. Smith (Seal)

Josie B. Smith (Seal)

County of Scott, to-wit:

I, E. H. McConnell, a notary public in and for the county aforesaid, in the state of Virginia, do certify that Robert S. Smith and Josie B. Smith, his wife, whose names are signed to the writing above, bearing date on the 3rd day of June, 1924, have acknowledged the same before me in my county aforesaid. My commission expires on the 7 day of August, 1927. Given under my hand this 5 day of June, 1924.

E. H. McConnell. Notary Public.

Stamp \$2.50

Virginia, Scott County, to-wit:

In the Clerk's Office of said county the 5th day of June, 1924, the foregoing writing was presented and with certificate annexed, admitted to record and duly indexed at 1:35 o'clock P. M. (D.B. 73 P. 17)

Teste:

M. Addington
Clerk.

A copy-teste:

C. H. Smith

This Deed made this the 10th day August, 1927, by and between W. F. McGee and Hannie McGee, his wife, parties of the first part and W. N. Barnell, party of the second part, all of Scott County, Virginia.

Witnesseth: That for and in consideration of the sum of Twenty Four Hundred (\$2400.00) Dollars, cash in hand paid, the receipt of which is hereby acknowledged, the said parties of the first part have bargained and sold, and do hereby grant and convey unto the said party of the second part, with general warranty, subject to the exceptions and reservations hereinafter mentioned, all of the following described real estate, situate, lying and being in Scott County, Virginia, in Estillville Magisterial District, on the waters of Little Moccasin Creek, and more particularly bounded and described as follows, to wit: That certain tract or parcel of land which was conveyed to H. C. Pierson by J. E. Richmond and wife by deed dated November 6th, 1905, and of record in the Clerk's Office of said county, in Deed Book No. 44, page 453, to which reference is hereby made for a more complete description thereof. But from and out of the said last above mentioned tract is excepted that small tract or parcel of land conveyed by the said H. C. Pierson and wife to C. C. Starnes by deed dated November 25th, 1919, and recorded in said Clerk's office in Deed Book No. 65, page 99, to which reference is hereby made for a more particular description of the said excepted parcel of land.

Second Tract: That certain tract or parcel of land conveyed to the said H. C. Pierson by M. E. Jennings and wife by deed dated October 14th, 1919, of record in said Clerk's Office in Deed Book No. 65, page 98, to which reference is hereby made for a more particular description of the same, and both of the two above described tracts of land, being the same which were conveyed to Robert S. Smith by H. C. Pierson and wife by deed dated May 16th, 1922, of record in the said Clerk's Office, in Deed Book No. 69, page 152.

Third Tract: Those two other certain tracts or parcels of land conveyed to the said Robert S. Smith by A. J. Jennings and wife by deed dated March 6th, 1923, of record in the said Clerk's Office in Deed Book No. 70, page 429, to which reference is hereby made for a more particular and detailed description of the two last named tracts or parcels of land.

All of the above named tracts or parcels of land being conveyed by Robert S. Smith and wife by deed dated June 3rd, 1927, to W. F. McGee, and of record in the said Clerk's Office in Deed Book No. 72, page 17.

Witness the following signatures this the day and date first above written.

W. F. McGee (Seal)

Hannie McGee (Seal)

County of Scott, to wit:

I, A. W. Johnson, a Notary Public in and for the county aforesaid, in the state of Virginia, do certify that W. F. McGee and Hannie McGee, his wife, whose names are signed to the foregoing writings bearing date of August 10th, 1927, have acknowledged the same before me in my county aforesaid.

My commission expires Jan. 7th, 1930.

A. W. Johnson, Notary Public.

19

Virginia, Scott County, To-wit:

I, A. W. Johnson, a Notary Public of the County aforesaid and state of Virginia, do certify that W. F. McGee and Mannie McGee, his wife, whose names are signed to the foregoing writing, bearing date on the 10th day of Aug. 1927, with their seals thereto, personally appeared before me in my county and state aforesaid and acknowledged the same.

Given under my hand this the 12th day of Dec. 1929.

My commission expires Jan. 7, 1930.

A. W. Johnson, Notary Public.

Virginia, Scott County, to-wit:

In the Clerk's Office of said county the 14th day of Dec. 1929, the foregoing writing was presented and with certificate annexed, admitted to record and duly indexed at 4 o'clock P. M. D. B. 82 P. 442.

Teste: Geo. W. Addington Clerk.

A copy-teste: C. H. Craft Clerk

Virginia:

Circuit Court of the County of Scott, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and thirty four.

Present: The Honorable E. T. Carter, Judge.

State Highway Commissioner

Petitioner.

Vs.

Order

W. N. Darnell

Defendant.

This case came on to be heard on the ____ day of ____, 1934, and it appearing to the court that ten days notice of the time and place of the State Highway Commissioner's intention to apply to this court, for the appointment of commissioners, to ascertain what would be a just compensation for the strip or parcel of land described in the petition in this case, proposed to be condemned in these proceedings for the uses of the Highway Commission of Virginia, as a part of State Highway No. 58, and to award the damages, if any, resulting to the adjacent or other property of the owners or to the property of any other person, beyond the enhancement in value, if any, that will accrue to said properties, respectively, from the construction, reconstruction, alteration, maintenance and repair of said road, has been given to W. N. Darnell, by personal service of notice by the Sheriff of this County copy of which is filed with the papers in this case, that on the ____ day of ____, 1934, the State Highway Commissioner filed in the Clerk's Office of this court a plat, certificate, memorandum and petition, in compliance with the provision of law for such cases made and provided and which strip or parcel of land sought to be condemned in these proceedings is wanted for the uses and purposes of the State Highway Commission, in the construction, reconstruction, alteration, maintenance and repair of the said road; that the said strip or parcel of land for said highway lies within the County of Scott, the court doth adjudge, order and decree that this case be docketed and doth appoint J. D. Franklin, Giles Gose, Creed Flanary, J. D. Wright and Montague Zion, five disinterested free holders residing in said county of Scott, any three of whom may act, for the purpose of ascertaining a just compensation for the lands described in these proceedings, and to award the damages, if any, resulting to the adjacent or other property of the owner or to the property of any other person, beyond the enhancement in value, if any, that will accrue to such properties, respectively, from the construction, reconstruction, alteration, maintenance and repair of said road, the Judge doth designate the 19 day of February, 1934, between the house of 10 A. M. and 11 A. M., for the said commissioners to meet upon said premises, near Gate City, Va.

E. T. Carter, Judge.

State Highway Commissioner-----Petitioner.

Vs.-----Affidavit

W. N. Darnell -----Defendant.

State of Virginia, County of Scott, to-wit:

I, G. L. Dougherty, a Deputy Clerk in and for the County aforesaid, in the State of Virginia, do certify that Creek Flanary, Giles Gose, Montague Zion, and ----- have this day made oath before me that they will faithfully and impartially ascertain what will be a just compensation for the strip or parcels of land for State Highway No. 58, in the County of Scott State of Virginia, through the lands of W. N. Darnell, and to award the damages, if any, resulting to the adjacent and other property of said owner and to the property of any other person, beyond the enhancement in value, if any, that will accrue to such properties, respectively, from the construction, reconstruction, alteration, maintenance and repair of State Highway No. 58, over said lands, and will truly certify the same.

Given under my hand this the 19 day of Feb. 1934.

G. L. Dougherty, D. Clk.

State Highway Commissioner-----Petitioner

Vs.-----Affidavit

W. N. Darnell -----Defendant.

State of Virginia, County of Scott, to-wit:

I, J. E. McSpadden, a Notary Public in and for the State of Virginia, at large, do certify that J. D. Wright and J. D. Franklin, have this day made oath before me that they will faithfully and impartially ascertain what will be a just compensation for the strip or parcels of land for State Highway No. 58, in the County of Scott, State of Virginia, through the lands of W. N. Darnell, and to award the damages, if any, resulting to the adjacent and other property of said owner and to the property of any other person, beyond the enhancement in value, if any, that will accrue to such properties, respectively, from the construction, reconstruction, alteration, maintenance and repair of State Highway No. 58, over said lands and will truly certify the same.

My commission expires on the 6th day of April, 1936.

Given under my hand this the 19 day of Feb. 1934.

Jas. E. McSpadden, Notary Public.

State Highway Commissioner-----Petitioner

Vs.-----Report of Commissioners

W. N. Darnell -----Defendant.

We, J. D. Wright, Creed Flanary, J. D. Franklin, Giles Gose & Montague Zion Commissioners appointed by an order entered on the 6th day of February, 1934, by Hon. E. T. Carter, Judge of the Circuit Court of Scott County, in vacation of said Court, at the court house of Scott County, Virginia, to ascertain what will be a just compensation for the strip or parcel of land for State Highway No. 58, through the lands of W. N. Darnell, in Scott County, Virginia, and for such other property as is proposed to be taken by the state Highway Commission of Virginia, and to assess the damages, if any, resulting to the adjacent or other property

of the owner, or to the property of any other person beyond the enhancement in value, if any, that will accrue to such properties, respectively, from the construction, reconstruction, alteration, maintenance and repair of said Highway No. 58, through said lands of W. N. Darnell, do certify that on the 19th day of February, 1934, at 11 o'clock A. M. the day designated in said order, we met together on the said lands of the said W. N. Darnell, and the strips or parcels of land, in fee simple, needed by the Highway Commission of Virginia in the construction, reconstruction, maintenance and repair of said highway, was shown and described to us and as follows, to-wit: Beginning at a point on the centerline of Rt. 58, from WCL of Gate City to 3.930 Mi. W. of WCL of Gate City, shown on plans as Sta. 109+13 adjoining the lands of W. F. Franklin; thence N. 82° 30' W. 1073 ft. to the lands of the C. C. Starnes Estate, being Sta. 119+86.

The land to be acquired hereunder being a strip or parcel 80 Ft. in width, 40 Ft. lying on either side of and adjacent to the hereinabove described centerline from Sta. 109+13 to Sta. 119+86.

Said strip or parcel contains 1.97 acres, more or less, of which 0.07 acre is included in the present right of way, and 1.9 acres, more or less, additional land.

And after being duly sworn, upon a view of the said land and of the adjacent and other property of the said owner and the property of other persons who will be damaged in their property by the construction, reconstruction, alteration, maintenance and repair of the said Highway; and upon such evidence as was before us, we are of the opinion and do ascertain that for the said strip or parcels of land for said Highway No. 58, through the lands of the said W. N. Darnell and for the property so taken, \$500.00 will be a just compensation; and the damages to the adjacent and other property of the said owner and to the property of other persons who will be damaged in their property by reason of the construction, reconstruction, alteration, maintenance and repair of said highway, beyond the enhancement in value that will accrue to such properties, respectively, from the construction, reconstruction, alteration, maintenance and repair of said Highway will be \$550.00.

And we are further of the opinion that it would be otherwise impracticable, without unreasonable expense, due to the conformation of the country to construct and maintain said highway on any other location.

Given under our hands this the 19th day of Feb'y, 1934.

J. D. Wright

Creed Flanary

J. D. Franklin

Giles Gose

Montague Zion
Commissioners

Virginia: In Vacation of the Circuit Court of Scott County:

State Highway Commissioner

Petitioner

Vs.

Order

W. M. Darnell, et als.

Defendants.

This day came the State Highway Commissioner by his attorney and moved the court to be permitted to pay into court the amount of the award of the Commissioners in this case and it appearing to the court that the report of commissioners was returned and filed in this case on the 19th day of Reby, 1934, and that they assessed the damages in this case at the sum of \$1050.00, it is therefore ordered that said State Highway Commissioner be and he is hereby permitted to pay into court the sum of \$1050.00 the amount of said award and thereupon the said State Highway Commissioner, by his attorney, paid to J. M. Craft, Clerk of this court, the sum of \$1050.00, which is to be held subject to the future orders of this court.

Given under my hand this 27th day of March, 1934.

E. T. Carter, Judge.

To J. M. Craft, Clerk.

Enter.

Received and entered this the 27th day of March, 1934.

G. L. Dougherty, Deputy Clerk.

Virginia: In vacation of the Circuit Court of Scott County.

State Highway Commissioner

Petitioner

Vs.

Order

W. N. Darnall,

Defendant.

This case came on again to be heard upon the papers formerly read, the former orders, and the report of J. D. Wright, J. D. Franklin, Giles Gose, Montague Zion and Creek Planary, Commissioners appointed by an order entered in this case at a former term of this court for the purpose of ascertaining a just compensation for the strip or parcel of land to be condemned in these proceedings and awarding the damages, if any, resulting to the adjacent property or other property of the owner, or to the property of any other person beyond the enhancement in value that will accrue to such properties from the construction, alteration, maintenance and repair of said highway, was duly returned to and filed in the clerk's Office of this court on the 19th day of February, 1934, together with the certificate of the officer administering the oath attached thereto and no exception having been taken or filed to said report, and it further appearing to the court that the State Highway Commissioner paid to the clerk of this court, on the ___ day of March, 1934, the sum of \$1050.00 being the amount of damages awarded to defendant by said commissioners as shown by their report, and it further appearing to the court from said report that it would otherwise be impracticable without unreasonable expense due to the conformation of the country to construct and maintain said highway on any other location, the court doth now confirm and approve said report in all respects, and the Commonwealth of Virginia, shall take and forever hold the strip or parcel of land as described in the pleadings and commissioners report in this case, and it further ordered that the order appointing said commissioners, the report of commissioners, and this order confirming same be recorded in the current deed book in the clerk's office of this county and indexed in the name of the Commonwealth of Virginia as well as in the name of W. N. Darnall.

And it is further ordered that the damages assessed in this case and which has been paid by the State Highway Commissioner into court be paid by the clerk of this court to said W. N. Darnall or his attorney on execution of proper receipt for same.

And this case is stricken from the docket.

Given under my hand this 27th day of March, 1934.

E. T. Carter, Judge.

To J. M. Craft, Clerk.

Enter.

Received and entered this the 27th day of March, 1934.

G. L. Dougherty, Deputy Clerk.

Virginia, Scott County, to-wit:

In accordance with the decree of this court a portion of the record in the condemnation
cause of State Highway Commissioner Vs. W. N. Darnell lately pending in the Circuit Court of
this county is this day recorded in Deed Book 91, Page 345.

Teste: J. M. Craft Clerk.

A copy-Teste: C. H. Craft Clerk.



THIRTIETH JUDICIAL CIRCUIT

COUNTIES OF LEE, SCOTT AND WISE
CITY OF NORTON

RECEIVED
JUL 16 1974
JUDICIAL COUNSEL

JUDGES:

JOSEPH N. CRIDLIN
JONESVILLE, VIRGINIA

M. M. LONG, JR.
ST. PAUL, VIRGINIA

February 22, 1974

Mr. Robert Winston
Attorney at Law
Norton, Virginia

Mr. Cecil Quillen
Attorney at Law
Gate City, Virginia

Re: Boy v. Southern Railway
Darnell v. Southern Railway

Gentlemen:

I would appreciate your furnishing me with a map or plat of the area of the crossing from the property of plaintiff across the railway right of way to the public road. I am particularly concerned with the area between the railway right of way and the public road. I note that in the Boy case, the plaintiff conveyed the land he owned on the north of the railway. How does he get to the public road?

Very truly yours,

Joseph N. Cridlin
Joseph N. Cridlin

THIRTIETH JUDICIAL CIRCUIT

COUNTIES OF LEE, SCOTT AND WISE

CITY OF NORTON



RECEIVED
JUL 16 1974
JUL

May 22, 1974

JUDGES:

JOSEPH N. CRIDLIN
JONESVILLE, VIRGINIA

M. M. LONG, JR.
ST. PAUL, VIRGINIA

Mr. Robert Winston
Attorney at Law
Norton, Virginia

Mr. Cecil D. Quillen
Attorney at Law
Gate City, Virginia

Re: Boy v. Southern Railway Company, et als
Darnell v. Southern Railway Company, et als

Gentlemen:

It is still not clear to me what land, if any, the petitioners own on the North side of the railway property, and between the railway and the highway. I would like this matter clarified by evidence, prior to passing on the demurrer in this case.

Very truly yours

Joseph N. Cridlin
Joseph N. Cridlin

RECEIVED

THIRTIETH JUDICIAL CIRCUIT

COUNTIES OF LEE, SCOTT AND WISE

CITY OF NORTON

APR 14 1975

L...

JUDGES:

JOSEPH N. CRIDLIN
JONESVILLE, VIRGINIA

M. M. LONG, JR.
ST. PAUL, VIRGINIA



April 5, 1975

Mr. Cecil D. Quillen
Attorney at Law
Gate City, Virginia

Mr. Robert T. Winston
Attorney at Law
Norton, Virginia

Re: Hugh L. Boy, Jr. et al v. Southern Railway Co. et al
Ferna Darnell, et al v. Southern Railway Co. et al

Gentlemen:

These cases have been submitted to me upon demurrer.

In so far as the Darnell case is concerned it appears from the pleadings and evidence that the railroad passes through the lands of the petitioners and therefore the petition constitutes a good cause of action under Virginia code section 56-16.

As to the Boy petition it appears that at the time the crossing was constructed the railroad ran through lands of common ownership and the defendant was therefore required to build and maintain the crossing. At this time petitioners do not own land on the North side of the railroad but cross the land of another party to gain access to the highway.

I am of the opinion that the right of the petitioners who now own land South of the railroad is not lost by reason of the fact that the land to the North of the railroad is now owned by another party. There

THIRTIETH JUDICIAL CIRCUIT

COUNTIES OF LEE, SCOTT AND WISE

CITY OF NORTON



JUDGES:

JOSEPH N. CRIDLIN
JONESVILLE, VIRGINIA

M. M. LONG, JR.
ST. PAUL, VIRGINIA

would be no stability in such arrangement if every time the property changed ownership, the right to have a crossing maintained would be gained or lost.

I will therefore overrule the demurrer in each case.

An appropriate order may be submitted for entry.

Very truly yours,

Joseph N. Cridlin
Joseph N. Cridlin

ORDER

SOUTHERN RAILWAY COMPANY, et al

DEFENDANTS

The Court having considered the Petition and the demurrer filed thereto in the above cause doth overrule the demurrer.

The defendants are given 21 days from this date within which to file their Answer or Grounds of Defense.

This 27 day of May, 1975.

James M. Cullin
JUDGE

Agreed
Wm. Darrell
pr

A copy-teste: Wm. Darrell
Deputy Clerk

ANSWER

SOUTHERN RAILWAY COMPANY
and
VIRGINIA AND SOUTHWESTERN
RAILWAY COMPANY

DEFENDANTS

TO THE HONORABLE JOSEPH N. CRIDLIN, JUDGE OF SAID COURT:

Your defendants state that the Petitioners are not entitled to the relief requested in the above cause and for their answer to the Petition filed herein state:

I.

The Petitioners own property that is adjacent to the right of way of the defendants, and defendants deny Petitioners' claim to ownership of property on the north side of the defendants' right of way, in the area of the bridge involved. There is no duty imposed upon the defendants by Virginia Code Section 58-18.

II.

The present roadway across the railroad right of way is used to go from Petitioners' property to the public road and is not used to go from one part of Petitioners' land to the other.

III.

The statute allegedly relied on does not provide for the construction or repair of a bridge from claimants' lands to a public highway nor for the purposes set out in the Petition.

O R D E R

SOUTHERN RAILWAY COMPANY
and
VIRGINIA AND SOUTHWESTERN
RAILWAY COMPANY

DEFENDANTS

This cause came on this day to be heard upon all the former proceedings had in said cause and was argued by counsel.

And it appearing unto the Court that, pursuant to Section 56-16 of the Code of Virginia, that petitioners are entitled to the relief prayed for in their petition with respect to the duty of the defendants to keep the wagon way or right of way in repair; and

It further appearing unto the Court that the defendants have failed and refused for more than ten (10) days, after being requested to do so, to make repairs to the bridge, a part of said wagon way across the said defendants' railroad lines; and

It further appearing unto the Court that, pursuant to Section 56-16 of the Code of Virginia, a Board of Commissioners should be appointed, the Court doth hereby ADJUDGE and ORDER that GLEN OSBORNE, C.S. DOCKERY JR., and HOWARD ELLIOT, three disinterested persons, whose lands do not abut on such railroad owned and operated by the defendants, be appointed and shall constitute a Board of Commissioners, who shall on the 15th day of AUGUST, 1975, at 10:00 a.m., go upon said premises and determine whether the said wagon way and said bridge is in need of repairs and should

be repaired by the defendants. And after going upon said premises, they may hear such evidence as either of the parties may desire to offer. The Board of Commissioners shall be duly sworn before executing the terms of this order; and they shall report their decision in writing, together with any evidence adduced before them, to be returned to, and filed in the Clerk's Office of this Court.

Until the coming in of such report, this cause is hereby continued.

ENTER THIS ORDER, this the 14th day of JULY, 1975.

J. N. CRIDLIN
J U D G E

WE ASK FOR THIS ORDER:

QUILLEN AND CARTER, p.q.

BY CECIL D. DYILLEN
GATE CITY, VIRGINIA

SEEN AND OBJECTED TO:

GREEAR, BOWEN, MULLINS & WINSTON

BY ROBERT V. WINSTON
NORTON, VIRGINIA

JUL 16 1979
DIVISION COUNSEL

Defendant requests the Commissioners
to make the following findings:

1. The width of the R.R. right of way
at the Danell property

2. Whether the Danells own any property
north of the railroad right of way.

3. How much of the bridge is on the
railroad right of way at the Danell
property

4. How much of the bridge is on the
railroad right of way at the Boy
property.

5. Whether the bridge should be repaired
by the Railroad at each property, &
if so, how much of the bridge at each
location.

Southern Railway Co.
by R.D. Winterally

AUG 15, 1975

WE THE COMMISSIONERS IN THE CAUSE OF
FERNA DARNELL, ETALS VS SOUTHERN
RAILWAY CO, ET ALS FIND THAT
THE BRIDGE & WAGON WAY IN SAID
PETITION ARE IN NEED OF REPAIR AND
FURTHER AGREE THESE REPAIRS SHOULD
BE COMPLETED BY SOUTHERN RAILWAY
CO.

SIGNED

Glen Arline
C. J. Brown
Howard K. Everett

AUG 15, 1975

WE THE COMMISSIONERS IN THE CAUSE OF
~~FERNA~~ HUGH L. BOY JR. & MARY G. BOY
VS SOUTHERN RAILWAY CO, ETALS FIND
THAT THE BRIDGE & WAGON WAY IN SAID
PETITION ARE IN NEED OF REPAIR AND
FURTHER AGREE THAT THESE REPAIRS
SHOULD BE COMPLETED BY SOUTHERN
RAILWAY,

SIGNED

Glen Arline
C. J. Brown
Howard K. Everett

EXCEPTIONS TO
COMMISSIONERS REPORT

SOUTHERN RAILWAY COMPANY
and
VIRGINIA AND SOUTHWESTERN
RAILWAY COMPANY

DEFENDANTS

TO: THE HONORABLE SAM COLEMAN, JUDGE OF SAID COURT:

The defendants hereby except to the findings of the Commissioners rendered in this cause on August 15, 1975 and for their grounds of exception state;

I.

The Commissioners had no statutory authority nor any jurisdiction to render a report in this cause.

II.

The findings of the Commissioners were not supported by the evidence or the law.

III.

The Commissioners did not restrict the duty of the Railroad to repair the bridge to that portion of the bridge on the railroads' right of way.

IV.

The Commissioners failed to ascertain what portion of the bridge was upon the railroad's right of way.

V.

Under the evidence in this case, the Railroad does not bisect the

Petitioners property and the requirements of Code Section 56-16 are not applicable. There is no duty on the defendant railroads to maintain or repair the wagon way or the bridge.

VI.

The wagon way and the bridge involved was not used for the purpose of going from one part of the Petitioners property to the other. The Petitioners have not shown that they own any land on the north side of the defendants right of way.

VII.

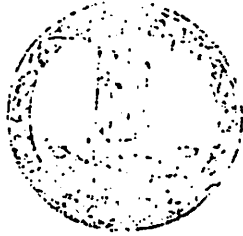
And other grounds to be assigned at bar.

Commonwealth of Virginia

JUDGES

M. M. LONG, JR.
County Courthouse
Wise, Virginia 24293
(703) 328-8653

S. W. COLEMAN, III
P. O. Box 696
Gate City, Virginia 24251
(703) 386-7322



CIRCUIT COURTS OF

County of Lee
County of Scott
County of Wise
City of Norton

THIRTIETH JUDICIAL CIRCUIT

July 17, 1978

Cecil D. Quillen, Esquire
Attorney at Law
Gate City, Virginia 24251

Robert T. Winston, Esquire
Attorney at Law
Norton, Virginia 24273

Re: Ferna Darnell et al
vs
Southern Railway Company et al

Gentlemen:

The petitioners in this case filed a petition pursuant to Section 56-16 of the Code of Virginia, praying that the defendants be required to repair a bridge which they alleged is a part of a wagon way and roadway constructed by defendants across defendant's railroad lines.

Defendants demurred to the petition. Depositions were taken by plaintiffs and defendants. The Court on May 27, 1975, overruled the demurrer. Thereafter the defendants filed answers. On July 14, 1975, the Court after considering the evidence and argument of counsel, entered an order reciting that the plaintiffs were entitled to the relief prayed for in their petition; that it was the duty of the defendants to keep the wagon way in repair; that the bridge was a part of the wagon way; and that the defendants had failed to repair the bridge after being given ten (10) days notice requesting them to do so.

Three commissioners were appointed to go upon the land and to determine whether the wagon way and bridge were in need of repair. The commissioners after viewing the premises and

Cecil D. Quillen, Esquire
Robert T. Winston, Esquire
July 17, 1978
Page 2

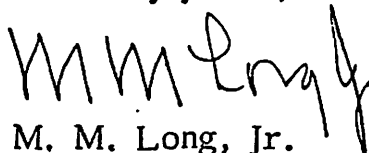
hearing evidence, filed their report stating that the bridge was in need of repair. Defendants filed exceptions to the report and the exceptions are before the Court for consideration.

The commissioners had to determine one question - whether the wagon way and bridge was in need of repairs and should be repaired. It was their finding that the bridge was in need of repairs and should be repaired by defendants. The evidence adduced supports this finding. In fact there was no evidence to the contrary.

All of the other exceptions relate to matters decided by the Court on July 14, 1975. The Court on that date decided that the plaintiffs were entitled to the relief prayed for and determined all the merits of the case with the exception of whether the bridge was in need of repairs. I do not necessarily agree with that finding, but I am of opinion that it is not incumbent upon me to review that decision, but I am limited at this time to ruling on the exceptions filed by defendants.

As stated the finding of the commissioners is supported by the evidence and the other exceptions relate to matters previously decided by the Court. For this reason, the exceptions will be overruled.

Sincerely yours,



M. M. Long, Jr.
Judge -

MMLJr/ss

ORDER

SOUTHERN RAILWAY COMPANY
and VIRGINIA AND SOUTHWESTERN
RAILWAY COMPANY

DEFENDANTS

This cause came on this day to be heard upon all the former proceedings had in said cause and was argued by counsel.

And whereas it previously appearing unto the Court that, pursuant to Section 56-16 of the Code of Virginia, that petitioners were entitled to the relief prayed for in their petition with respect to the duty of the defendants to keep the wagon way or right of way in repair; and

It previously further appearing unto the Court that the defendants have failed and refused for more than ten (10) days, after being requested to do so, to make repairs to the bridge, a part of said wagon way across the said defendants' railroad lines; and

Whereas it further appearing unto the Court that three commissioners were appointed to go upon the land and to determine whether the wagon way and bridge were in need of repair. The commissioners after viewing the premises and hearing the evidence, filed their report stating that the bridge was in need of repair. Defendants filed exceptions to the report and the exceptions are before the Court for consideration.

UPON CONSIDERATION, it is the opinion of the Court as set forth in its letter to counsel dated July 17, 1978, which is hereby made a part of the record, that the exceptions to

the commissioners' report should be overruled, there being no evidence contrary to the findings of the commissioners that the aforesaid bridge is in need of repair.

It is therefore ORDERED that such exceptions be overruled and that the defendant repair such bridge as required by law.

Southern's Assignments of Error in the Petition
for Appeal are as follows:

ASSIGNMENTS OF ERROR

1. The Court erred in overruling the defendants' demurrer.
2. There was error in finding that there was a duty on the railroads under Code §56-16 to maintain a wagonway across the railroad.
3. There was error in appointing commissioners for the purpose of deciding whether the bridge needed repairs and who should make the repairs.
4. The Court erred in entering the Order granting the Petitioners' relief and appointing Commissioners without hearing additional evidence and in not restricting the railroads' duty to that portion of the bridge located on the railroads' right-of-way.
5. The Court erred in failing to sustain the exceptions to the Commissioners' Report, and in failing to exercise its judgment over previous proceedings.

12
13
14
15
16
17
18
19
20
21
22
23
24
25

FERNA DARNELL

onf of the plaintiffs, after having first been duly sworn,
deposes and says as follows:

DIRECT EXAMINATION

BY MR. QUILLEN:

Q. You are Miss Fernal Darnell I believe?

A. Yes, sir, I am.

Q. Miss Darnell. where do you live?

A. I live approximately three miles West of
Gate City.

Q. Now I believe you are one of the Petitioners
in the Petition which has been filed in the Circuit Court

45

1 of Scott County, Virginia, styled Ferna Darnell, Sylvia
2 Darnell, and Ann Darnell Gordon against the Southern Railway
3 Company and Virginia & Southwestern Railway Company? Is
4 that correct?

5 A. That is correct.

6 Q. Now I believe these two other ladies are
7 your sisters?

8 A. That is correct.

9 Q. Now do you and your sisters own property
10 West of Gate City which is South of the railway tracks of
11 Southern Railway and Virginia & Southwestern Railway?

12 A. Yes, we do.

13 Q. Just generally where is that property
14 located, say with reference to the Town of Gate City?

15 A. Mr. Quillen, it is about 3 miles West of
16 Gate City, and very near Marble Point Church on Old Highway
17 No. 23.

18 Q. I believe we refer to that highway as Old
19 Route 23, and a new super-highway I believe has been built
20 North of the existing Old 23? Is that correct?

21 A. That is correct.

22 Q. Now, Miss Darnell, state to the Court how
23 you get into your property which is South of the railroad?

24 A. Well, there is Little Moccasin Creek flows
25

1 parallel with the railroad, and there is a bridge which
2 goes right off when you cross the railroad you are right on
3 the bridge, and that is the way we get to our property in
4 and out over this bridge.

5 Q. I believe there is a grade crossing across
6 the tracks there?

7 A. Yes.

8 Q. And then you come to the bridge?

9 A. Yes.

10 Q. Now, Miss Darnell, do you know how much
11 right of way the Southern Railway has at the point where it
12 passes through your property?

13 A. They have a 25 foot right of way through
14 our property.

15 Q. Now I want to ask you if what we now refer
16 to as Old 23 was some years back, was the location of that
17 road changed?

18 A. Yes, it was. About 1932 the highway going
19 through this property, well, I mean going by our house, the
20 highway was changed. It used to go North of the Marble
21 Point Church. In other words it ran back of the church for
22 a number of years. And about 1932, or somewhere near that
23 date, the highway re-located the highway and it now runs
24 parallel with the railroad.
25

47

1 Q. Now at that time, or I believe this land
2 came through your father, is that correct?

3 A. Yes, that is right.

4 Q. The land that we are interested in here
5 today?

6 A. Yes.

7 Q. Now at one time before this road was changed
8 did your father have land North of the railroad or up to
9 where the old road was?

10 A. Yes, he did.

11 Q. How much right of way did the State take
12 when they acquired the right of way there to re-locate?

13 A. They took 80 feet.

14 Q. And was that from your father's property?

15 A. Yes.

16 Q. And part of this property that is in con-
17 troversy here today?

18 A. Yes, that is right.

19 Q. To your knowledge, Miss Darnell, how long
20 has that bridge been in place there at that grade crossing?

21 Q. We moved there, Mr. Quillen, in 1927 I
22 believe and that bridge was there at that time. Of course
23 before that the people that my father bought the property
24 from, they used the same bridge.
25

48

1 Q. Who has done the maintenance on that bridge
2 throughout the years, Miss Darnell?

3 A. The railroad.

4 MR. WINSTON: Let's just put a con-
5 tinuing objection that that would be immateri-
6 particularly as to the point the Court wants
7 at this time.

8 MR. QUILLEN: All right.

9 Q. Have you had anyone to make measurements
10 there in your presence to determine the amount of land North
11 of the railroad right of way, and between the Southern Railway
12 I am speaking now of the railroad right of way, and the
13 Southern Railway and the present Old 23?

14 A. Yes, I have.

15 Q. Who did that?

16 A. Mr. Starnes. Mr. Claude Starnes.

17 Q. Did anyone else assist him?

18 A. Mr. Wolfenbarger, one of my neighbors, was
19 present at the time the measurement was taken.

20 Q. Do you have those figures or do you want to
21 wait and let them testify as to those figures?

22 A. I would prefer to let them testify to it.
23 I know what they are, Mr. Quillen.

24 Q. Well, just go ahead then if you know?
25

1 A. Well, there is 12 foot and 1 inches between
2 the two right of ways, between the right of way of the rail-
3 road and the right of way of the highway.

4 Q. Did you see them make these measurements?

5 A. Yes, I was present.

6 Q. Well, explain the mechanics of making that
7 measurement, or making those measurements?

8 A. Mr. Starnes had a steel tape, and I held
9 the tape. I was standing in the center of the road, I mean
10 the highway. And we measured 40 foot from the center of the
11 highway South toward the railroad and drove a stake.

12 Q. All right?

13 A. And then we went to the center of the rail-
14 road track and measured 12 foot and 1/2 Northward and drove
15 a stake. Then we measured the distance between the two
16 stakes which is 12 foot and 1/2 inches.

17 Q. Then as I catch your evidence you and your
18 sisters presently own a strip of land 12 feet and 1/2 inches
19 North of the railroad track?

20 A. Yes, that is right.

21 Q. Railroad right of way?

22 A. That is right.

23 Q. Now, Miss Darnell, did you also make some
24 measurements South now from the center line of the track
25 back to the bridge there?

50

1 A. Yes.

2 Q. Was any portion of the bridge and is any
3 portion of the bridge now on the railroad right of way?

4 A. Mr. Quillen, the best we could determine
5 there is just about a foot, or maybe a few more inches than
6 a foot, at the end of the bridge on the right of way of the
7 railroad.

8 Q. Now then prior to the time as I understand
9 it that the road was changed there, there was an 80 foot
10 strip taken by the State? What is this 12 feet and 4 inches
11 that we are talking about? That would be North of the rail-
12 road right of way?

13 A. Yes.

14 MR. QUILLEN: I believe you may ask, Miss
15 Ferna.

16
17 CROSS EXAMINATION

18 BY MR. WINSTON:

19 Q. Let's see, Miss Darnell, who did your father
20 purchase that property from?

21 A. He got it from Mr. W. F. McGee and wife.

22 Q. W. F. McGee?

23 A. Yes.

24 Q. And you state when you all bought the prop-
25 erty the bridge was there?

51

1 A. Yes.

2 Q. And you used the bridge to get to the road,
3 that is Old 23?

4 A. Yes.

5 Q. And Old 23 was changed some?

6 A. That's right.

7 Q. And did your father own any property on the
8 North side of Old 23? I mean this tract, did he have any
9 property on the North side of Old 23?

10 A. You mean before the highway was relocated?

11 Q. Yes, Ma'am?

12 A. No, none North. It all lay South. But it
13 would have been North of the railroad at that time.

14 Q. Of the railroad right of way?

15 A. Yes.

16 Q. Now you all use that road to get from your
17 house over to the highway?

18 A. That is the only way we have to get out,
19 Mr. Winston.

20 Q. Now then you say they re-located Old 23,
21 did they bring it closer to the railroad right of way when
22 they re-located it?

23 A. Yes.

24 Q. You say you were there with them when you
25

52

1 checked the railroad right of way and the state highway
2 right of way, and there was a strip of about 12 feet and
3 4 inches in between?

4 A. Yes.

5 Q. How did you locate the highway right of
6 way?

7 A. We stood in the center of the highway.
8 The highway, the center of it is marked with a white line,
9 white broken line, and we stood on that white line with a
10 tape and measured 40 feet Southward towards the railroad.

11 Q. I see. In determining the railroad right
12 of way did you assume that the railroad right of way was
13 25 feet wide, or 25 feet from the center of the track?

14 A. No, 25 feet wide.

15 Q. So you just measured 12 1/2 feet from the
16 center of the track?

17 A. That's right.

18 Q. Of course if the railroad right of way had
19 been wider, say if it had been 50 feet wide, there would
20 not have been that 12 foot strip?

21 A. That's right. But on the other hand, Mr.
22 Winston, if you measured 25 foot from the center of the
23 track Southward, that would take all of the bridge practically

24 Q. Now that little strip then that is located
25

53

1 between the railroad right of way and between the highway
2 right of way, do you do anything with that strip?

3 A. Not at this time, Mr. Winston. During my
4 father's lifetime he harvested hay off of that. It was more
5 or less a meadow and he mowed it about twice a year.

6 Q. Was that before they re-located 23?

7 A. The strip of course wasn't there. He mowed
8 all of the bottom clear over to the, before the highway was
9 re-located his property ran clear over to the railroad right
10 of way and he mowed and cultivated all of the bottom.

11 Q. Has it been several years then since that
12 little strip has been mowed for hay?

13 A. Well, let's see. My father has been dead
14 about 20 years I guess, and I would say at my father's death
15 we disposed of all of the livestock that we had and we had
16 no need to harvest it because we girls didn't have any need
17 for the hay and we just let it grow up. We couldn't get
18 anybody, I think maybe in some instances it has been mowed
19 by different people that needed the hay.

20 Q. But you owners of the property have not
21 harvested that for hay since your father's death?

22 A. Well, Mr. Winston, I couldn't say definitely
23 about that.

24 Q. Your main use of the road has been to get
25 in and out from Highway 23 to your place?

54

1 A. That's right. Now let me add this, Mr.
2 Winston, South of the railroad across the bridge near our
3 house, after you cross the bridge going into our house, we
4 have meadows and in fact a man yesterday harvested, I mean
5 he baled this hay and hauled it out. I gave it to him just
6 to get the grass and get it mowed down. We have a long
7 bottom between the railroad and, well the creek and the rail-
8 road and our house.

9 Q. Now the creek has been there a long time?

10 A. Well, it has been there ever since I can
11 remember.

12 Q. Of course you are not old enough to remember
13 when the railroad come through?

14 A. No, I don't profess to be that old, Mr.
15 Winston. You are not insinuating by any means that I am,
16 are you?

17 Q. Oh, no. Of course the creek was there
18 before the railroad?

19 A. Yes.

20 MR. WINSTON: All right. That's all.

21
22 AND FURTHER THIS DEPONENT SAYETH NOT
23 SIGNATURE WAIVED
24
25

55

18

FURTHER CROSS EXAMINATION

19

BY MR. WINSTON:

20

21

22

23

24

25

Q. Miss Darnell, when the highway came through in the early thirty's, do you remember how they acquired the right of way from your father? Was it by deed or was there a condemnation?

A. There was a condemnation suit.

56

1 Q. And at that time it was owned by your father?

2 A. Yes.

3 Q. How did you ascertain that the railroad right
4 of way was 25 feet through there?

5 A. Well, Mr. Winston, I don't know whether I can
6 answer that or not. The fence is fenced approximately 12 1/2
7 feet from the center of the railroad and the railroad company
8 some years ago came, they did some ditching right at the
9 bottom, well, just off the shoulders of the railroad. And
10 this muck and stuff was taken out of this ditch, my father
11 said that it was dumped on him and he requested them to come
12 after they got through and scrape this down but there was
13 never anything done about it until later. But they did come
14 back sometime after that and scrape this muck out, smoothed
15 it out, because my father said that it was on his property.

16 Q. In other words you don't base that on a deed
17 but just what you saw there?

18 A. That's right.

19 FURTHER DIRECT EXAMINATION

20 BY MR. QUILLEN:

21 Q. With respect to the other properties adjacent
22 to you, do you know what the widths of those rights of ways
23 are? Are they 25 feet?

24 A. I beg your pardon, Mr. Quillen.
25

57

1 Q. I say those other properties where there is a
2 right of way through, do you know the width of those right
3 of ways in the general area of your property?

4 A. Well, I have always been told it was 25 foot.
5 All the way up through there.

6 Q. All the way up through there?

7 A. Yes.

8 MR. WINSTON: We would object to what the
9 Lady has been told as being hearsay.

10 Q. Well, with particular reference, I want to
11 pursue this and you can make your objection, what have the
12 property owners or people who knew the location of that
13 railroad, what have they said to you about it?

14 MR. WINSTON: Continuing objection on the
15 same basis.

16 A. Mr. Hackney, he is a very old man and he is my
17 next door neighbor, and since this controversy has arisen
18 he has talked to me about the situation and he has told me
19 they had the 25 foot right of way.

20 MR. QUILLEN: That's all.

21 AND FURTHER THIS DEPONENT SAYETH NOT

22 SIGNATURE WAIVED
23
24
25

58

9 FURTHER DIRECT EXAMINATION

10 BY MR. QUILLEN:

11 Q. Miss Ferns, just one other question I omitted.
12 Is the right of way of the Southern Railway fenced through
13 your property there?

14 A. It is fenced on the South side.

15 Q. Have you made a measurement of the distance
16 from the middle of the track over to the fence?

17 A. Yes.

18 Q. What is that measurement?

19 A. Approximately 12 foot and a half. Now Mr.
20 Quillen, the fence is leaning. There hasn't been anything
21 done to the fence since I can remember and in the deterioration
22 of the soil and all, the fence is leaning toward the creek.
23 And in some places it is almost down. I would say East of
24 the bridge that is in controversy there is a section or two
25

59

1 of the fence that is almost in the creek.

2 MR. QUILLEN: That's all I have.

3 FURTHER CROSS EXAMINATION

4 BY MR. WINSTON:

5 Q. Do you know who built the fence?

6 A. No, I do not.

7 Q. What was your father's initials?

8 A. W. N.

9 Q. How long have you and the owners now, Sylvia
10 Darnell and Ann Darnell Gordon, you all inherited from your
11 father?

12 A. Yes.

13 MR. WINSTON: All right.

CLAUDE STARNES

1 a witness in behalf of Petitioners, after having first been
2 duly sworn, deposes and says as follows:

DIRECT EXAMINATION

3
4 BY MR. QUILLEN:

5 Q. You are Mr. Claude Starnes I believe?

6 A. Yes, sir.

7 Q. Mr. Starnes, what is your business or
8 occupation?

9 A. Well, I am a carpenter right now.

10 Q. I believe you are also a farmer?

11 A. Yes, sir.

12 Q. Now are you related to Miss Darnell by
13 blood or marriage?

14 A. Yes.

15 Q. What is that relationship? You are a
16 brother-in-law I believe, having married her sister?

17 A. Yes, sir.

18 Q. Mr. Starnes, I want to ask you if at Miss
19 Darnell's request you made measurements there with respect
20 now to the grade crossing, the bridge, and the strip of land
21 lying North of the railroad right of way and between the
22 railroad right of way and the highway right of way of Old 23?

23 A. Yes.

24 Q. First, I will ask you, Mr. Starnes, do you
25

61

1 have any independent knowledge of the construction, surveying
2 and so forth of Old 23 when it was re-located from the point
3 where it ran around behind the church?

4 A. Yes, sir, I helped survey that through there
5 when they built the new highway.

6 Q. You helped survey it?

7 A. Yes, sir.

8 Q. I believe that right of way is a total of
9 80 feet? Is that correct?

10 A. Yes, sir.

11 Q. Now back to the measurements, just go ahead
12 and tell the Court what you and Mr. Wolfenbarger, who I be-
13 lieve was helping you, did?

14 A. Well, we first measured from the highway
15 to the railroad. We measured 40 feet and then went to the
16 railroad and measured back and that left 12 feet and about
17 4 inches.

18 Q. All right, sir. Now when you measured 40
19 feet from the middle of the highway, did you place a stake
20 there?

21 A. Yes, sir.

22 Q. Then when you made the measurement now from
23 the center of the railroad track North 12 1/2 feet, did you
24 place a stake there?

25 A. Yes, sir.

62

1 Q. Then did you measure the distance between
2 those two stakes?

3 A. Yes, sir.

4 Q. And that came out 12 feet and 4 inches I
5 believe?

6 A. Yes, sir.

7 Q. And that amount of land is North of the
8 railroad tracks?

9 A. Yes, sir.

10 Q. And between the right of way of the railroad
11 and the right of way line of Old U. S. Highway 23?

12 A. Yes, sir.

13 Q. Now with respect to the bridge that is there,
14 how much of that bridge is on the 12 1/2 feet, that is the
15 Southern portion of the railroad right of way?

16 A. I would say it was about a foot and a half,
17 maybe a couple of feet.

18 MR. QUILLEN: I believe you may ask Mr. Starnes

19
20 CROSS EXAMINATION

21 BY MR. WINSTON:

22 Q. Mr. Starnes, do you remember back in the
23 early thirtys when they changed Old 23?

24 A. Yes, sir.

25 Q. They moved it closer to the railroad.

1 did they not?

2 A. Yes, sir. All the way up through there.

3 Q. That was not only near Mr. Darnell but up
4 by Mr. Boyd's property?

5 A. Yes, sir.

6 Q. They moved it closer to the railroad there?

7 A. Yes, sir.

8 Q. And do you remember what year that was?

9 A. That was back in the thirtys, '31 or '32.

10 Q. Now when you were measuring this strip there
11 at Miss Darnell's, did you measure 12 1/2 feet from the
12 center of the track to get the railroad right of way?

13 A. Yes, sir.

14 Q. In other words you were assuming that the
15 total railroad right of way was 25 feet?

16 A. Yes, sir.

17 Q. If you had measured 25 feet from the center
18 of the track, then there would not have been much or any
19 strip between the highway right of way and the railroad
20 right of way?

21 A. No, sir.

22 Q. And that little strip between the railroad
23 and highway rights of way is kind of a bunch of weeds, isn't
24 it?

25 A. Well, yes, it is now.

64

1 Q. It is now. It has been some years since
2 there has been any usage for it?

3 A. Yes. Well for one thing you can't use it
4 now. The railroad company just come in there and pulled it
5 all out on the state highway.

6 MR. WINSTON: Thank you, Mr. Starnes

7 AND FURTHER THIS DEPONENT SAYETH NOT

8 SIGNATURE WAIVED

9
10 J. FRANK WOLFENBARGER

11 a witness in behalf of petitioners, after having first been
12 duly sworn, deposes and says as follows:

13 DIRECT EXAMINATION

14 BY MR. QUILLEN:

15 Q. You are Mr. J. Frank Wolfenbarger I believe?

16 A. Yes, sir.

17 Q. Mr. Wolfenbarger, I believe you are a re-
18 tired Post Master from the post office in Clinchport? Is
19 that correct?

20 A. Yes, sir.

21 Q. Where do you live at this time?

22 A. I would say approximately 3 miles West of
23 Gate City.

24 Q. You recently acquired property in that area?

25 A. About two years ago.

65

1 Q. And moved there from Clinchport?

2 A. Yes, sir.

3 Q. Now at Miss Darnell's request, did you
4 along with Mr. Starnes make some measurements up there a
5 few days back?

6 A. Yes, sir.

7 Q. Just go ahead and tell the Court what you
8 did, Mr. Wolfenbarger?

9 A. Well, we first measured 40 feet from the
10 center of the highway. And then we measured 12 1/2 feet
11 from the center of the railroad track. And that made a
12 space of 12 feet and 4 inches between the two right of ways.

13 Q. In other words North of the railroad right
14 of way as I understand it after you made the measurements,
15 you all found that the 12 feet and 4 inches between the rail-
16 road right of way and the right of way of Old 23? Is that
17 correct?

18 A. That's correct.

19 Q. Now did you make a drawing of what you did
20 there, Mr. Wolfenbarger?

21 A. Yes, sir.

22 Q. I hand you here a drawing which I will ask
23 that you make Exhibit No. 1 to your depositions?

24 (Drawing was marked Exhibit No. 1, J. Frank
25 Wolfenbarger, for identification, and filed
herewith.)

66

1 Q. I will ask if this drawing reflects what
2 was done up there by you all?

3 A. Yes, sir, it does.

4 Q. Now I note in red that you have lines.
5 What do those lines mean?

6 Q. That is part of the main road that is used
7 from the highway over to this property here.

8 Q. This property here? I am speaking now of
9 the red ink? That is the road they use to go over the grade
10 crossing?

11 A. That's right.

12 Q. Now with respect to the bridge, have you
13 indicated anything on the drawing there that shows it?

14 A. Well, this mark right here.

15 Q. That where it is shaded?

16 A. Yes, that represents the portion of the
17 bridge that is on the railroad right of way.

18 Q. About how wide is that portion of the
19 bridge?

20 A. Well, the way I remember it, approximately
21 two of those cross ties or whatever they call them.

22 Q. And do you know what the width of a cross
23 tie is?

24 A. No, I didn't measure those.
25

1 Q. Could you estimate that distance?

2 A. I would say it is around a foot and half
3 or two foot.

4 Q. There is a foot and half or two feet of the
5 bridge that is on the railroad right of way?

6 A. Yes, sir.

7 MR. QUILLEN: You may ask Mr. Wolfenbarger.

8 CROSS EXAMINATION

9 BY MR. WINSTON:

10 Q. Mr. Wolfenbarger, how long is the bridge
11 itself?

12 A. You mean after you cross over.

13 Q. Cross over Moccasin Creek, yes, sir?

14 A. Well, I would say 20 to 25 feet in all of it.

15 Q. Did you measure the bridge?

16 A. No, I didn't measure the bridge.

17 Q. When you made this sketch and made these
18 measurements, did you measure 12 1/2 feet from the middle of
19 the railroad to determine where the railroad right of way was?

20 A. Yes, sir.

21 Q. Now if you had measured 25 feet from the
22 middle of the railroad, that would have put you over to the
23 highway right of way would it not?

24 A. Yes, sir.
25

68

1 Q. Now that little strip is not being used
2 for anything there is it,sir, that you could tell?

3 A. Grass.

4 MR. WINSTON: I think that is all.

13
14
15
16
17
18
19
20
21
22
23
24
25

E. E. HACKNEY

a witness called in behalf of Petitioners, after first being duly sworn, deposes and says as follows:

DIRECT EXAMINATION

BY MR. QUILLEN:

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

A. Well, I will just give it the way I always sign it, I sign my name E. E. Hackney. Elmer Estel is my name.

Q. How old are you, Mr. Hackney?

A. I was 84 the 10th of March past.

Q. Now where do you live, Mr. Hackney?

A. I live West here. Exactly 3 miles from the

1 Court House here.

2 Q. You own property there I believe?

3 A. I do.

4 Q. And is that property South of the Southern
5 Railway tracks there?

6 A. Yes. All of it is South of the railroad tracks.

7 Q. Now state if your property adjoins the Darnell
8 Property?

9 A. Yes. That is a tract of land I believe is on
10 the book 26 1/2 acres.

11 Q. All right, sir. Mr. Hackney, are you acquainted
12 with the location now of the fence which the railroad has
13 in front of your property and also in front of the Darnell
14 Property?

15 A. I do, and also my wife's property.

16 Q. Now state whether or not that fence to your
17 knowledge in front of both properties has always been in the
18 same location?

19 A. I do. I solemnly do swear that is in the same
20 location. The fence has been repaired. The railroad re-
21 paired it once my place because I used it for pasture.

22 Q. Is that a straight fence between the two prop-
23 erties? Does it run straight is what I am getting at?

24 A. You mean between mine and Ferna's?
25

71

1 Q. Right?

2 A. Well, it runs straight from the Southern Railway,
3 actually my property is to the railroad and then up to the
4 crossing. It used to be on both sides. W. A. Ruth, and
5 also my property there on the East is the Old Mountain
6 Crossing which is public. It is on the deed, and it is
7 used as going across the mountain, and across the ridge,
8 and all in there.

9 Q. All right. Now, Mr. Hackney, how much right of
10 way does the railroad have in front of your property and in
11 front of the Darnell Property there?

12 A. Well, it was always counted.....

13 MR. WINSTON: We object and state that the
14 records would be the best evidence.

15 Q. Go ahead and make your answer, Mr. Hackney?

16 A. It was always 25 foot, 12 1/2 foot from the
17 center of the road running on up there, through there.

18 MR. QUILLEN: I believe you may ask Mr. Hackney.

19

20 CROSS EXAMINATION

21 BY MR. WINSTON:

22 Q. Mr. Hackney, you are making that statement and
23 is that based on where the fence line is?

24 A. How's that?

25 Q. Is the old fence on the railroad right of way?

72

1 A. It is on the line between me and the railroad.
2 It is the line or supposed to be, and Darnells' too. That
3 is the best of my knowledge the way it has always been as
4 long as I can remember.

5 Q. Have you checked the records to see what the
6 width is?

7 A. No, sir, I haven't checked them. That is just
8 what they always said.

9 Q. That is what they always said?

10 A. Yes, sir.

11 MR. WINSTON: Objection to what they always
12 said.

13 A. And the railroad built the fence, repaired the
14 fence, and they used to keep all of their track fenced.
15 You know that, as well as I do.

16 Q. How far does that 25 foot right of way run?

17 A. The best of my knowledge or remember it runs
18 on up through there at mine, Darnells', and used to be down
19 this way coming back East and Walter Cled's heirs gave them
20 the right of way to drop back a little you know. And also
21 up through Starnes next joining Ferna's, and I think maybe
22 they moved that back. And John P. Carter's place and all
23 of that was 25 foot right of way. And I don't know but
24 just most all of it in there. I wouldn't say how far and
25

1 all, you see I worked the highway. The highway and the rail-
2 road got along all right because we had to cooperate together,
3 and the highway follows right along the Southern Railway all
4 the way through might near to Big Stone Gap. You know that
5 too as well as I do.

6 MR. WINSTON: I believe that is all. Thank
7 you, Mr. Hackney.

8 We would state that Mr. Hackney's evidence is
9 immaterial because it is not based on the records.

10 AND FURTHER THIS DEPONENT SAYETH NOT

11 SIGNATURE WAIVED
12
13

14 ROBERT SKEENS

15 a witness called in behalf of the Petitioners, after first
16 being duly sworn, deposes and says as follows:

17 DIRECT EXAMINATION

18 BY MR. QUILLEN:

19 Q. What is your name, please, sir?

20 A. Robert Skeens.

21 Q. Mr. Skeens, what is your business or occupation?

22 A. I am a representative of the Virginia Department
23 of Highways.
24

25 Q. In what capacity are you employed by the

1 Virginia Department of Highways?

2 A. I am a highway construction inspector.

3 Q. And as such you have had engineering experience
4 I take it?

5 A. Yes, sir.

6 Q. Now there are two maps which have been introduced
7 into evidence as Defendants Exhibit No. 3 and Defendant's
8 Exhibit No. 4. I wish you would look at those maps and tell
9 the Court just what those maps are first of all. By that I
10 mean are they the Department of Highway's maps or not?

11 A. They are maps of the Department of Highways but
12 they have been reduced to different scales.

13 Q. In other words the original scale I believe
14 was an inch to 100 feet?

15 A. Right.

16 Q. And you don't know the scale it has been re-
17 duced to?

18 A. No.

19 Q. But anyway it is reduced?

20 A. Right.

21 Q. What do those two maps, Exhibits Nos. 3 and 4
22 represent?

23 A. The locations of the highway, the railroads
24 station wise, and so forth.
25

25

1 Q. Now are those the maps the highway uses, first
2 of all in acquiring right of way and later in construction
3 and so forth?

4 A. Yes, sir.

5 Q. Now with particular reference to the area which
6 we refer to as the W. N. Darnell Area, I wish you would look
7 at this map and point out to us the dotted line which in-
8 dicates the railroad right of way, if you will, Sir? Do
9 you want to take a pencil and mark that for the Court?

10 A. What I can go by is the reference of the letter-
11 ing which the arrows pointing to the right of way which
12 shows this position here pointing to that line there and
13 also here.

14 Q. You have marked on Exhibit No. 3 a straight
15 line under "R. R. Right of Way," or "R. R. W?"

16 A. That's right. Railroad Right of Way.

17 Q. Now I am not asking you to speak from your own
18 knowledge, I am just asking you to state to the Court what
19 those maps show with reference to a strip of land running
20 through there?

21 A. I can state according to the highway right of
22 way it states a 40 foot right of way which to my knowledge
23 of this map shows a strip between State right of way and the
24 railroad right of way.
25

1 Q. And that is true with reference to the Darnell
2 Property as shown on the map?

3 A. That's right.

4 Q. Now on Exhibit No. 4 you have underscored
5 "R. R. W." at two places I believe?

6 A. Right.

7 Q. Now in making up these maps just what was the
8 Engineering Department of the Virginia Department of Highways
9 do in the way of field, survey, location, and so forth?

10 A. You mean the starting points.

11 Q. Just how you arrive at a map for a given piece
12 of proposed construction?

13 A. Of course they have to have a proposed right of
14 way. They have points pinpointed, previous locations they
15 reference from.

16 Q. And would a center line of a railroad track be
17 such a point, such a reference point?

18 A. It is a possibility.

19 Q. That the highway would use?

20 A. Right. That is a possibility. They may have
21 a station on that railroad that they would reference from,
22 an elevation established there. And of course they have
23 TVA Markers and different forms of markings.

24 Q. I believe these maps were shown to you by Mr.
25 Winston this morning?

1 A. Right.

2 MR. QUILLEN: That's all I want to ask Mr. Skeens

3 CROSS EXAMINATION

4 BY MR. WINSTON:

5 Q. Mr. Skeens, in making up the maps do they
6 sometimes follow old fence lines?

7 A. Yes.

8 Q. In other words it is very possible the highway
9 made up this map by following an old fence line?

10 A. What do you mean?

11 Q. I mean in determining where the railroad right
12 of way would have been?

13 A. Now in determining the railroad right of way
14 I couldn't say.

15 Q. You don't know how that is determined?

16 A. No. It is the highway right of way that I am
17 referring to.

18 Q. You could not say how the highway determined
19 where the railroad right of way was?

20 A. No. I don't know whether they referenced it
21 from the railroad center line or not.

22 Q. Let's see, you have got some property here,
23 W. N. Darnell, does it show the property line?

24 A. Yes, sir.
25

1 Q. Does it show the Southern boundary line of the
2 Darnell Property?

3 A. The line comes directly to the State Highway
4 right of way according to this here.

5 Q. According to the map does the Darnell Property
6 extend beyond the highway right of way, that is in a Southern
7 direction?

8 A. It doesn't show on this map.

9 Q. Doesn't show?

10 A. It comes to the highway right of way and there
11 is an open gap there according to this map.

12 Q. Does the map indicate who owns the land in the
13 open gap?

14 A. No, it doesn't.

15 Q. Now have you seen the fence down there or not?

16 A. No, sir.

17 MR. WINSTON: I believe that is all.

15
16
17
18
19
20
21
22
23
24
25

W. G. FLETCHER

a witness for the plaintiffs, after having first been duly sworn, deposes and says as follows:

DIRECT EXAMINATION

BY MR. QUILLEN:

Q. Please state your name?

A. W. G. Fletcher.

Q. How old are you, Mr. Fletcher?

A. Seventy-one.

Q. Where do you reside?

A. Weber City.

80

1 Q. Are you presently engaged in any kind of
2 work, Mr. Fletcher?

3 A. I am in construction work right now.

4 Q. Prior to your retirement from the Southern
5 Railway, what was your position with the Southern Railway,
6 Mr. Fletcher?

7 A. I was supervisor when I retired.

8 Q. What were your duties with the railroad?

9 A. Take care of the right of way and the property
10 and maintain tracks.

11 Q. Now, Mr. Fletcher, are you familiar with that
12 portion of the right of way leading from Gate City to the
13 Daniel Boone Area of Scott County?

14 A. I am pretty well acquainted with that situation
15 there.

16 Q. About how long had you worked on that part-
17 icular area of the right of way?

18 A. I was supervisor in there for fourteen years.

19 Q. Now I want to ask you if you are acquainted
20 with the property there known as the Darnell Property where
21 Miss Ferna, Sylvia and Ann make their home?

22 A. Yes, I have done quite a bit of work through
23 there.

24 Q. Now are you also familiar with that bridge
25 that goes into their property there at the railroad crossing?

1 A. Yes, I am acquainted with the bridge.

2 Q. Now during the time you were supervising the
3 right of way and maintenance, and so forth for the Southern
4 Railway, did you all, that is the Southern Railway, maintain
5 and keep that bridge in a state of repair?

6 A. Yes, we used to maintain it all of the time.

7 MR. WINSTON: We state that is immaterial
8 to any issue in the case.

9 Q. All right, sir. On one particular occasion
10 do you recall having rebuilt the bridge there for any reason?

11 A. Well, a truck load of coal turned over on it,
12 fell through with it, and the Division Engineer and Supervisor
13 told us to repair it.

14 Q. And pursuant to those instructions you all
15 did repair it?

16 MR. WINSTON: This will be a continuing
17 objection as to the immateriality of what the
18 railroad has done in the past.

19 Q. Now, Mr. Fletcher, with reference to the right
20 of way there going through the Darnell Property, I want to
21 ask you if the Darnells at that time and now for that matter
22 have land on both the North side and the South side of the
23 right of way and the track.

24 MR. WINSTON: We would object to that if
25 it is based on hearsay unless he has run it out
himself.

82

1 A. On the right of way through there we used to
2 have a work train and the ditch through that property there
3 we were permitted to take it back one time to take a bulldozer
4 to level it down. Other times we had to haul it out of there
5 and were not allowed to put it back on the bank.

6 Q. Now with whom did you have any discussion or
7 any arrangement as to what you were doing there? Was that
8 with Mr. Darnell?

9 A. That was with Mr. Darnell, yes.

10 Q. The father now of Miss Ferna, Miss Sylvia
11 and Ann?

12 A. Yes, sir.

13 Q. How much right of way did you maintain there
14 for the Southern Railway, Mr. Fletcher?

15 A. Well, I worked through that territory there
16 back when I was a Section Foreman and then was promoted to
17 Supervisor, but we were very particular working through
18 there to stay on that 25 feet according to the engineering
19 map and the supervisor that I was working under at that time.
20 And Mr. Darnell watched us very closely, I will tell you
21 that.

22 Q. In other words you endeavored to keep within
23 the right of way limits of a total of 25 feet?

24 A. That's right. He told me to stay on the
25 right of way.

1 Q. And that was 12 1/2 feet from the center line
2 I believe?

3 A. Yes.

4 Q. Now was there a fence or is there a fence
5 now on the South side of that railroad right of way?

6 A. That is on 15 feet right now. We built the
7 fence. It is on 15 feet. It is on the pole line. In other
8 words the telephone line, or the Western Union line at that
9 time was 15 feet from the center of the tracks and we were
10 allowed to put the fence behind the poles.

11 MR. QUILLEN: I believe you may ask Mr. Fletcher

12
13 CROSS EXAMINATION

14 BY MR. WINSTON:

15 Q. Mr. Fletcher, when did you retire?

16 A. I retired in '68.

17 Q. You have not done any work on it then since
18 '68?

19 A. Sir?

20 Q. I say you retired in '68?

21 A. I retired in '68 from the Atlanta Division.
22 I was here 14 years before I went to the Atlanta Division.

23 Q. When did you go to the Atlanta Division?

24 A. I went to Dalton, Georgia, in '62.

25 Q. Now you stated you repaired the bridge or

84

1 re-built the bridge on a Saturday. Why did you do it on a
2 Saturday?

3 A. Well, we was tied up. That was the only time.
4 It turned over on Friday, Thursday or Friday one, and as
5 soon as we got the timber in there we repaired the bridge.

6 Q. Do you know how far the bridge is from the
7 center of the track?

8 A. It is 12 feet.

9 Q. Well, most of the bridge then is on Mr.
10 Darnell's property then, isn't it?

11 A. Yes, that is what it is. The bridge sets
12 12 feet from the center of the track.

13 Q. Now you were stating that you had a 25 foot
14 right of way. Now the right of way would go 12 1/2 feet
15 from the center of the track, wouldn't it?

16 A. That's right.

17 Q. From your figures then only 6 inches of the
18 bridge would be on the railroad right of way?

19 A. Yes, but we got our fence 15 feet.

20 Q. Now the fence is 15 feet from the center of
21 the track, isn't it?

22 A. That's right.

23 Q. The fact is the fence is kind of on top of
24 the fill. isn't it? Is that why it is 15 feet?

25 A. No, it is setting over the fill.

85

1 Q. The next is if you go 25 feet from the center
2 of the track. that would put you in the creek, wouldn't it?

3 A. Yes, half way of the creek.

4 Q. That would put you in the creek, wouldn't it?

5 A. Yes, sir.

6 Q. You don't put fences in the creek, do you?

7 A. No.

8 Q. Now you say the Western Union line....

9 A. The Western Union lines and the phone lines
10 are on the same poles. You understand that?

11 Q. Yes, sir. And the Western Union line is 15
12 feet from the center of the track?

13 A. That's right.

14 Q. Well, the Western Union line is built on the
15 railroad right of way, isn't it?

16 A. Not every place.

17 Q. Well, isn't it supposed to be?

18 A. It is supposed to be but it is not.

19 Q. It is supposed to be and it is 15 feet from
20 the center of the track. Have you ever surveyed out the
21 width of that right of way yourself?

22 A. No, I never surveyed it out. All I had was
23 the reevaluation map to go by. I had the map for that entire
24 Appalachian basin which calls for Bulls Gap, Bristol, Mountain
25 City.

86

1 Q. Evaluation map? What do you mean by an evaluation
2 map?

3 A. It shows the property lines from one end of
4 the railroad to the other.

5 Q. Whose map is that?

6 A. Southern Railway's.

7 Q. Now I show you a map which has previously
8 been introduced, a right of way and track map. Is this the
9 type of map that you had? This is Exhibit No. 1?

10 A. Yes, sir. Right here is the Scott County Poor
11 Farm. It shows 25 feet all the way down through there.

12 Q. Now is that 25 feet on each side?

13 A. It might be on each side there, but out here
14 it has got 12 1/2 here.

15 Q. That is farther down the track though, isn't
16 it?

17 A. Yes, that goes to Daniel Boone.

18 Q. Does this look like the map that you had?

19 A. Let me see the date on it.

20 Q. The date on this one is December 31, 1927.

21 A. That don't show but one break in that right
22 of way and I know of three in it down through there.

23 Q. If you state the right of way is just 25 feet,
24 then it is 12 1/2 feet on each side, you were getting off?
25

87

1 the railroad property to make repairs when you repaired the
2 bridge, weren't you?

3 A. That was the Division Engineer that repaired
4 the bridge and I helped him.

5 Q. Oh, the Division man prepared the bridge?

6 A. Yes, the Division Engineer, the man that was
7 over my boss. He was the one that repaired the bridge.

8 Q. How many times did he repair it?

9 A. I remember the bridge being rebuilt at one
10 time, and then when this truck load of coal turned over there,
11 it was repaired. I recall that much on it.

12 Q. The bridge of course is over the creek?

13 A. Yes, sir.

14 Q. And there would have had to been a bridge
15 over the creek regardless whether there was a railroad track
16 there or not, wouldn't there?

17 A. Well, naturally there would.

18 Q. You had to have a bridge regardless of whether
19 or not you had a railroad track?

20 A. Yes. Naturally.

21 Q. You say you had to haul some dirt out of the
22 ditch?

23 A. Yes, we ditched it on the North side.

24 Q. Ditched it?

25 A. On the North side there is a ditch 15 feet

1 from the center of the track. And grass grows in it and
2 in order to drain the track we have to keep it ditched out.

3 Q. Is the ditch still there?

4 A. The ditch is still there.

5 Q. And how far is it from the center of the
6 track?

7 A. It is 15 feet from the center of the track.

8 Q. Was the ditch on the railroad right of way?

9 A. No, it wasn't. We had to get permission to
10 ditch it from Mr. Darnell at that time.

11 Q. They weren't growing any crops over there
12 where the ditch was, were they?

13 A. They kept it mowed. They mowed it for hay
14 and that was the reason we had to keep it leveled up in
15 there.

16
17 MR. WINSTON: I believe that is all.

18 AND FURTHER THIS DEPONENT SAYETH NOT

19
20 SIGNATURE WAIVED
21
22
23
24
25

ROBERT PETERS

a witness in behalf defendants, after first being duly sworn,
deposes and says as follows:

DIRECT EXAMINATION

BY MR. WINSTON:

Q. Please state your name and position to the
Court?

A. Robert Peters, and I am Claim Agent for Southern
Railway Company.

Q. Mr. Peters, I believe that at my request you
have gotten a copy of a railroad map, dated December 31,
1927, which apparently covers the area of the Darnell and
Boyd Property? Is that correct?

A. That's right. I have.

Q. Now from your knowledge of the area you have
located on the map the approximate location of the Darnell
Property and the Boyd Property?

A. Yes, I have.

Q. I hand you a Xerox excerpt and ask you if that
is a Xerox of a portion of this map?

A. Yes, it is.

Q. Does it show where the Darnell Property and
the Boy Property are?

A. Yes, approximately.

90

1 Q. I believe you have written on there "Darnell"
2 and "Boy", haven't you?

3 A. Yes.

4 Q. Now from this railroad map does it indicate
5 the width of the right of way?

6 MR. QUILLEN: Is it on my copy? Where
7 is it?

8 MR. WINSTON: I think so. Let's do this.
9 I have one copy of the big map.

10 Q. First, let me ask you this, on this copy of
11 this bigger map I believe you have written in red the "Boy"
12 and "Darnell," haven't you?

13 A. Yes, that is correct.

14 Q. And where was this map kept?

15 A. This particular one came out of the engineering
16 office in Atlanta.

17 MR. WINSTON: We offer the Big Map as
18 Defendant's Exhibit No. 1.

19 (Big Map was marked Defendant's Exhibit No. 1
20 for identification, and filed herewith.)

21 Q. I made excerpts, but this is the big map?

22 A. Yes, it is.

23 Q. What does it indicate is the width of the right
24 of way in the area of the Boy Property?

25 A. A total of 50 feet, measuring 25 feet from the

91

1 center of the track.

2 Q. And coming down near the Darnell Property what
3 does it indicate the width of the right of way is?

4 A. It is the same, 25 foot from the center all the
5 way through there.

6 Q. Now on this 1927 map does it have the location
7 of Old 23 that you can see?

8 A. Yes. It does.

9 Q. And does it also have a crossing across the
10 railroad in the apparent location of the Darnells?

11 A. Yes, it does.

12 MR. WINSTON: I want to state to the Court
13 that yesterday I obtained some highway maps
14 from the District Office in Bristol, that is
15 Xerox or photo copies and I had Mr. Peters to
16 look at them this morning and give us the benefit
17 of what correlation he can do on them.

18 Q. Mr. Peters, I believe this morning I have shown
19 you some highway maps?

20 A. Yes, that is correct.

21 Q. And asked you to check them against the railroad
22 maps to see if you could identify the highway map as covering
23 the particular areas? Is that correct?

24 A. Yes.
25

92

1 Q. I first show you a highway map identified as
2 Route 58, Project 473 A, Sheet 5 of full Sheet 10, Right
3 of Way Y 71334, and I will ask you to look at that and if
4 you can determine about where the Boy Property is, that is
5 from your correlation of that with the railroad map?

6 A. I can determine in the approximate vicinity
7 because that crossing is not shown specifically on this map.

8 Q. How did you determine, I mean how were you able
9 to determine where it is?

10 A. Correlating from the J. M. and J. B. Snodgrass
11 property which is across from, the original property was
12 across from the property which Mr. Boy owns.

13 Q. Would you take a pencil then from your study
14 of the two maps and circle where from your study the Boy
15 Property appears to be on the highway map.

16 A. It is somewhere in this vicinity here.

17 Q. Put a "B" there for Boy?

18 A. (Witness places marking on map as requested.)

19 MR. WINSTON: We will offer this highway
20 map as Defendant's Exhibit No. 2.

21 (Highway Map was marked Defendant's Exhibit
22 No. 2 for identification, and filed herewith.)

23 Q. Now have you also been able to look at these
24 highway maps that I showed you this morning and located
25 approximately where the Darnell Property is?

1 A. The W. N. Darnell Property is labeled on these
2 maps.

3 Q. Does it show Old Route 23 and 58?

4 A. Yes, it does.

5 Q. And does it apparently show where the new
6 route is?

7 A. Yes.

8 Q. Now I will identify these as State Route 58,
9 Project 478 A, Sheet No. 6, Revised 1-8-34, and State
10 Route 58, Project 478, Sheet No. 7, Revised 1-8-34, and
11 ask you if these two sheets show the Darnell Property?

12 A. Yes, it lists the property of W. N. Darnell.

13 Q. I realize you are not a highway map man but
14 from your looking at it does it appear that the new Route
15 58 coincides with the railroad map?

16 A. Yes, it does.

17 (Sheets 6 & 7 of highway map were marked Def-
18 endant's Exhibits Nos. 3 and 4 respectively,
for identification, and filed herewith.)

19 MR. WINSTON: I believe that is all.

20 CROSS EXAMINATION

21 BY MR. QUILLEN:

22 Q. Now, Mr. Peters, have you been on the property
23 up there and actually seen this situation on the ground?

24 A. Yes, I have.
25

94

1 Q. Did you make a measurement from the center
2 line of the railroad tracks South to the fence?

3 A. No, I did not.

4 Q. You don't know what that distance is then?

5 A. No.

6 Q. The railroad right of way is fenced along
7 there, isn't it, through the Darnell Property?

8 A. There is an old fence that runs through there.
9 I do not know what its correlation with the right of way
10 would be. Assuming there was a 25 foot right of way the
11 fence would have to be built down in the edge of the creek.

12 Q. And you didn't consider it necessary then to
13 measure that distance?

14 A. No, I did not make any measurement from the
15 fence to the track.

16 Q. Do you know the length of that bridge?

17 A. No, I have not measured the entire length of
18 the bridge.

19 Q. Assuming that bridge is 25 feet, then practically
20 all of that bridge would be on the railroad right of way,
21 wouldn't it?

22 A. No, sir. Less than half of it would be on
23 the 25 foot portion of the railroad.

24 MR. QUILLEN: All right. That's all.
25

95

15
16
17
18
19
20
21
22
23
24
25

ROBERT PETERS

a witness recalled on behalf of the defendants, after first
being duly sworn, deposes and says as follows:

DIRECT EXAMINATION

BY MR. WINSTON:

Q. Mr. Peters, I believe you previously gave
evidence in this case?

A. Yes, sir.

Q. Now at the time of the last hearing we had
in this case I believe we went down to the Darnell Bridge
and you made some measurements and made a sketch?

96

1 A. Yes. I did.

2 Q. Now I hand you a sketch and ask you if you
3 made that sketch and if there is on there certain measurements
4 you made?

5 A. Yes, I did.

6 Q. Now looking at the sketch I believe you have
7 North in the right hand corner?

8 A. Yes.

9 Q. And looking on the sketch you show coming
10 from the Darnell Property crossing the creek onto the rail-
11 road and on to Highway 23?

12 A. That is correct.

13 Q. Now did you make measurements from the center
14 of the track to the center of the highway?

15 A. Yes, sir.

16 Q. What was the distance between the center of
17 the track and the center of the highway?

18 A. From the center line of the railroad to the
19 white line of the highway is 61 foot and 10 inches.

20 Q. Now there has been evidence here that the
21 highway had a right of way of 10 feet from the center.
22 Assuming a 25 foot right of way from the center of the rail-
23 road, how does that figure total distance?

24 A. That makes the two right of way lines overlap
25 approximately 2 inches.

97

1 Q. Now did you also measure from the center
2 of the railroad to where the bridge begins?

3 A. Yes, sir.

4 Q. And what is that distance?

5 A. To the very edge of the first timber?

6 Q. Yes, sir?

7 A. That is 11 feet and 5 inches.

8 Q. What is the distance from the center of the
9 railroad track to the fence line that has been testified to?

10 A. At the present time it measures 14 feet.

11 Q. What about to the telephone line?

12 A. From the center line of the railroad to the
13 North edge of the telephone pole measures 13 foot and 6 inches

14 Q. Now what is the fence built on?

15 A. The fence is built very close to the top
16 edge of the fill on which the railroad bed is situated.

17 Q. What is the distance from the center of the
18 track to the creek bed?

19 A. The creek is kindly uneven down through there
20 but taking an average measurement at four or five different
21 places it is approximately 22 feet from the center line of
22 the railroad out to the edge of the fill. There are places
23 that the creek runs right up against the railroad fill
24 itself where the track has been built.
25

1 Q. If the fence had been put 25 feet from the
2 center of the track, where approximately would it have run?

3 A. Through the center of the creek.

4 Q. But the fence was put up on the edge of the
5 fill?

6 A. Yes. Very close to the edge of it. The
7 railroad through that entire area is built on a fill. It
8 has been built up.

9 Q. Now if as the Petitioners maintain the right
10 of way is only 25 feet wide, that is 12 1/2 feet from the
11 center of the track, on their premises how much of the bridge
12 would be on the railroad right of way?

13 A. One foot and 1 inch, or 13 inches.

14 Q. Of course assuming it is 50 feet wide, 25 feet
15 on each side, then it would be more, wouldn't it?

16 A. It would be approximately the center of the
17 creek.

18 MR. WINSTON: You may ask him.
19

20 CROSS EXAMINATION

21 BY MR. QUILLEN:

22 Q. Now, Mr. Peters, I believe you show on this
23 sketch from the center of Highway 23 to the center of the
24 railroad track 64 feet and 10 inches? Is that correct?

25 A. Yes, sir.

99

1 Q. Now with reference to the area South of the
2 Highway right of way there is land there that is between
3 the railroad right of way and the right of way of the high-
4 way, is there not? On the North side I am speaking of?

5 A. No, sir, not with a 25 foot right of way
6 from the center line.

7 Q. In other words you are stating that if the
8 right of way is measured 25 feet from the center of the
9 Southern Railway there is no land left there?

10 A. That is right.

11 Q. I believe you said there was an overlap of
12 how much?

13 A. Two inches. And that could be in the width
14 of the white line on the highway or the way it is laid out.
15 The right of ways should meet.

16 Q. Now did you locate the exact right of way of
17 Highway 23 there when you were making those measurements?

18 A. I measured from the center or the white stripe
19 in the highway back 40 feet.

20 Q. In other words your thought is that the right
21 of way is 40 feet on either side of the center line of the
22 highway?

23 A. That is the previous evidence that was in-
24 troduced here from the highway maps and that is the
25 information I used in determining that.

100

1 Q. Now then if you measured 12 1/2 feet from
2 the center of the railroad track, there would be what amount
3 of land on the North side of the railroad?

4 A. Measuring 12 1/2 foot from the center that
5 would leave 12 foot and 1 inch ditch line.

6 Q. There is a ditch line on the North side of
7 the railroad?

8 A. That is correct. And that is a drainage
9 ditch that has water running in it at the present time.

10 Q. I believe you stated if you projected 25 foot
11 from the center line of the railroad you would go how many
12 feet on the bridge?

13 A. It is approximately the center of the creek.
14 I don't have that exact measurement shown on here.

15 Q. This sketch is not to scale?

16 A. It would be about one-half of the bridge.

17 Q. Half of the bridge?

18 A. That is correct

19 Q. In other words about half of it would be on
20 the right of way? That's all.

21 MR. TAYLOR: We enter this sketch as Defendants'

22 Exhibit No. 7.

23 (Sketch as marked Defendants' Exhibit No. 7
24 and filed herewith.)

25 AND FURTHER THIS DEPOSENT SAYETH NOT

SIGNATURE WAIVED

101

RICHARD WATKINS

a witness called in behalf Defendants, after first being duly sworn, deposes and says as follows:

DIRECT EXAMINATION

BY MR. WINSTON:

Q. State your name, Sir?

A. Richard Watkins.

Q. What is your position with the Southern Railroad?

A. Division Engineer of the Appalachian Division.

Q. And as Division Engineer are you familiar with the right of way of the Southern Railway through Scott County, Virginia?

A. Yes, sir.

Q. There has been introduced these maps here, dated 1927, called "Right of Way and Track Map, Virginia and Southwestern Railway Company, operated by the Southern Railway Company." I believe you have looked at that map this morning, is that correct, Sir?

A. Yes, sir. I have.

Q. Now on this particular map, if you would come around here, Sir, there is notations here in red "Darnell" and "Hackney" and there is a notation "Boy." I will ask you according to this map what is the width of the right of way of Southern Railway, first in the area of the Darnell

102

1 property, according to the map?

2 A. According to our right of way map, which would
3 be 1 over 9 evaluation map, we would have 25 feet on either
4 side of the track from the center of the track as designated
5 at this point right here.

6 Q. What about in the area of the Boy Property,
7 what is the width of the right of way?

8 A. In the area of the Boy Property you have the
9 same distance which is 25 feet from the center line of the
10 track on either side.

11 Q. Do you know of any track you have less than
12 50 feet width, I mean of your own knowledge in Scott County?

13 A. Yes, sir, we have some on this map right here.
14 You have at this point right here 12 1/2 feet from the center
15 line of the track.

16 Q. That is near the Scott County Poor Farm?

17 A. Yes, sir.

18 Q. That is up the tracks West of the Darnell Area?

19 A. Yes, sir. And we also increase to a 50 foot
20 right of way from the center line of the track just beyond
21 the Boy Property.

22 MR. WINSTON: I believe that is all, Sir.

23 MR. QUILLEN: I want to ask you a question or
24 two.
25

103

CROSS EXAMINATION

BY MR. QUILLEN:

Q. Point out if you will what you base the 12 1/2 feet on?

A. All right. 12.5 is designated right here if you will watch your right of way lines, this is the center line of your track and this is the right of way on the other side of the track. You come down to this survey point right here 18 17 plus 00, at that point it decreases from 25 feet from the center line of the track to 12.5 on either side. Coming back this way you have got 25 feet coming all the way through, all the way up to Boy's Property, and then it comes up to 50 feet at this station right here 18 97 plus 0.95.

Q. Have you gone on the premises before testifying this morning and viewed the premises?

A. Yes, sir.

Q. Did you make any measurements from the center of the track there at the crossing into the Darnell Property the center line of the railroad?

A. No, sir, I made no measurements.

Q. Over to the fence?

A. No, sir.

Q. Why didn't you measure that?

104

1 A. I had no need to measure it. Our right of way
2 map shows what our right of way is there.

3 Q. How long have you known this particular prop-
4 erty and this particular area and this particular piece of
5 track?

6 A. I have only been here a little over a year.

7 Q. A little over a year?

8 A. Yes.

9 Q. Well, in fencing right of ways don't railroads,
10 and particularly doesn't the Southern and Virginia and
11 Southwestern place their fences on the right of way line?

12 A. I couldn't answer that because I am not positive
13 how they used to place them. I don't really know.

14 Q. Well, if the Virginia and Southwestern Railway
15 Company and Southern Railway Company had 25 feet from the
16 center line, wouldn't they have fenced the entire 25 feet
17 on the South side of the center line of that track?

18 A. I couldn't answer that, Sir, because you have
19 got a creek over here and that 25 feet may have been in the
20 creek on this side over here.

21 Q. Assuming it wasn't a creek, wouldn't you have
22 fenced it?

23 A. I don't know. I have only been in Virginia
24 for a year and as I say I am not that familiar with fencing.
25

105

1 Q. And of course you know nothing of the authentic-
2 ity of this map? You simply have a map from the files of
3 the Virginia and Southwestern Railway?

4 A. No, Southern Railway map.

5 MR. QUILLER: That's all.

1 FERNA DARNELL, the complainant, after having
2 first been duly sworn deposed as follows:

3 DIRECT EXAMINATION

4 BY MR. QUILLEN:

5 Q. You I believe are Miss Ferna Darnell?

6 A. Yes.

7 Q. Where do you live, Miss Ferna?

8 A. I live about three miles west of Gate City.

9 Q. I believe you are deputy clerk of the Circuit
10 Court of Scott County?

11 A. Yes, I am.

12 Q. Now, are you one of the owners of the property that
13 is involved in this crossing and bridge repair?

14 A. Yes sir, I am.

15 Q. Miss Darnell, who erected that bridge?

16 A. The Southern Railway.

17 MR. WINSTON: We would object to that unless this lady
18 saw them erect the bridge. We believe it must be
19 hearsay.

20 Q. Well, anyway there's a bridge there, that's
21 correct, isn't it?

22 A. Yes, Mr. Quillen, there is.

23 Q. And there's a grade crossing there?

1 A. Yes.

2 Q. Now, I want you to tell the members of the commission
3 just what has been the general condition of that
4 bridge for the last two or three years or
5 thereabouts?

6 A. Well, the bridge has been in need of repair for
7 two or three years. And I called an official of
8 the railroad company. I can't recall the gentleman's
9 name but he was stationed in Big Stone Gap, I
10 believe, or Appalachia. But it's my understanding
11 that he's no longer with the railroad company at
12 this time. But he informed me that the bridge
13 did not need any repair done at that time and
14 then I contacted him again. In fact I think I
15 wrote a letter.

16 MR. WINSTON: Could I ask who this gentleman was?

17 A. No, Mr. Winston, I can't recall his name but he
18 had charge of the bridge repair for the railroad
19 company. And then he did tell me one time that he
20 would take it up with the officials in Atlanta
21 and that if we could produce some written evidence
22 that they were required or obligated to keep the
23 bridge in repair that then they would go ahead and

108

1 do so.

2 MR. WINSTON: We state an objection of the conversation of
3 this lady with the gentleman unless she --.
4 Of course, it wouldn't be binding on the defendant
5 and he hasn't been identified. And let that be a
6 continuing objection.

7 Q. Well, this was a man associated with the Southern
8 Railway?

9 A. Yes, it was. He was a young man. I talked with
10 him I think twice.

11 Q. Now, Miss Ferna, what has been the situation there
12 with reference to use of that bridge by say a
13 truck getting in supplies and garbage truck and so
14 on. Are they able to go over that bridge?

15 A. No, now we had a garbage truck coming over to pick
16 our garbage up, had had, for two or three years.
17 And those trucks are rather heavy when they are
18 loaded and we became uneasy that they might break
19 the bridge down and we stopped that and, of course,
20 now we are carrying our garbage out ourselves.

21 Q. What kind of fuel do you have there, what do you
22 use to heat now?

23 A. I didn't understand you.

109

1 Q. Your heat in your home, what do you have now?

2 A. We have electric heat.

3 Q. At one time you had oil?

4 A. No, we had coal. We burned coal.

5 Q. Coal, right. Now, have you had to do any work on
6 that bridge yourself in order to get over it?

7 A. The only work that we have done on the bridge is
8 just nailing those two by sixs that track that is
9 on the bridge now and those are put on there last
10 fall and we discovered after we put them on there
11 that when it would snow and freeze that they were
12 very dangerous. In fact one morning I came out
13 over the bridge and almost slid off into the creek.

14 Q. I believe the railroad has refused to repair that
15 bridge?

16 A. Yes, they have.

17 Q. And that's the reason for this suit?

18 A. Yes.

19 Q. I believe you may ask Mr. Winston.

20 CROSS EXAMINATION

21 BY MR. WINSTON:

22 Q. I will state that we will cross-examine but we
23 will not waive our previous objections to the order

110

1 has been entered setting up this and I might state
2 at this time that we would also want the
3 commissioners to find among the other findings the
4 width of the railroad right of way at the Darnell
5 property and whether the Darnells own any property
6 north of the railroad right of way. And how much
7 of the bridge is on the railroad right of way and
8 the Darnell property. And how much bridge is on the
9 railroad right of way at the Boy property. And,
10 of course, whether the bridge should be repaired
11 by the railroad in each property and if so how
12 much of the bridge at each location. Now, I have
13 written the request that we want the commissioners
14 to look at and I will file this with the
15 commissioners with the report.

16 MR. QUILLEN: Well, we, of course, would object to it any
17 filing because the Court has already said that
18 we complied with the statute and that the only
19 findings be made by the commissioners is whether
20 or not the bridge needs repair and is to be
21 repaired by the defendant.

22 Q. Now, not waiving objections, Miss Darnell, this
23 bridge goes across the creek, doesn't it?

Sharon B. Welch

Court Reporter

Gate City, Virginia 24251

1 A. Yes.

2 Q. And you use the bridge to go to your property
3 and across the railroad to the public road?

4 A. Yes.

5 Q. Now, I believe it's your position in the suit
6 that the railroad right of way is twenty-five
7 feet at that point?

8 A. Yes.

9 Q. In other words it's twelve and a half feet from
10 the center of the - according to your position -
11 is from the center of the railroad each way?

12 A. That's right.

13 Q. Now, if the railroad right of way is just twelve
14 and a half feet from the center how much of that
15 bridge is on the railroad right of way?

16 A. Well, Mr. Winston, I would say probably from
17 two and a half to three feet.

18 Q. Of course, the creek was there before the railroad?

19 A. Yes.

20 Q. Now, Mr. Quillen in his bill of particulars as
21 far as a common source of title I think he tracked
22 your property back to J. B. Richmond and R. A.
23 Ayers. Do you know who owned the property before

113

1 Richmond and Ayers?

2 A. No, I don't.

3 Q. Do you know whether it was Van Dyke property?

4 A. I beg your pardon?

5 Q. Do you know whether it was Van Dyke property,
6 part of it?

7 A. No, I do not.

8 Q. And you, of course, did not see or recall the
9 initial construction of the bridge, did you,
10 yourself that is?

11 A. You mean the present structure. Mr. Winston if
12 you will permit me to relate an accident that
13 happened on that bridge. The bridge, the one
14 before the present one, the railroad had neglected
15 to keep it in repair and at that time I had a
16 coal furnace in my home and Mr. Sampson who is a
17 coal dealer here in town was bringing me about
18 seven or eight tons of coal to my home. And when
19 he crossed the bridge two-thirds of the way over
20 the bridge it collapsed and the truck turned over
21 and spilled the coal, part of it in the creek and
22 the major part of it I think was on the bank.
23 And Mr. Russ at that time who was over the bridge

113

Sharon B. Welch

Court Reporter

Gate City, Virginia 24251

703-386-9443

1 end of the railroad in this section, I think he
2 was stationed in Bristol. And he came down to
3 see me about replacing the bridge. I had notified
4 them that the bridge had collapsed and we were
5 without any way to get in and out and he came.
6 And, of course, he talked about it and he - to
7 start with, he tried to convince me that it wasn't
8 the duty, their duty, to replace the bridge and I
9 told him that --.

10 Q. Well, I don't -- what my question was the original
11 bridge do you remember it being built there?

12 MR. QUILLEN: Well, you're asking her and she's trying to
13 answer you.

14 A. I'm leading up to that, yes. And anyway he came
15 and he was here about noon and that afternoon right
16 after five o'clock when I got home there was a
17 bridge timber placed there on the entrance where
18 we had our cars parked this morning. And the next
19 morning the railroad people came and built the
20 bridge back and that's been about - I'd say
21 approximately sixteen years ago.

22 Q. Well, we might state the answer be objected to.

23 It wouldn't be responsive. I mean my point is the

114

Sharon B. Welch

Court Reporter

Gate City, Virginia 24251

1 original bridge, do you know that of your own
2 knowledge?

3 A. Well, the railroad company built it?

4 Q. I mean of your own knowledge?

5 A. So far as my knowledge is concerned.

6 Q. You didn't see it though?

7 A. Oh, no. Because we moved there in '27 and the
8 bridge was there. And they built bridges after
9 that and kept from time to time kept them in
10 repair up until the last fifteen to eighteen
11 years.

12 Q. I believe that's all.

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

116

703-386-9443

703-386-9443

1 the 58 now. I believe that land that's north of
2 58 was part of your father's property?

3 A. That's exactly right.

4 MR. WINSTON: We have a continuing objection, as to
5 ownership.

6 Q. Alright, so he owned everything there from the
7 line back to your home clear through to the old
8 road and behind the church.

9 A. Right, behind the church, that's right. We owned
10 all that bottom land in there.

11 Q. And then the highway came through and how much
12 land did the right of way after the right of way
13 was taken leave you all on the north side of the
14 railroad track?

15 A. About a twelve foot strip.

16 Q. Did your father use that in his lifetime?

17 A. My father harvested hay off of that for years
18 and after he passed away and me and my sisters
19 came into possession of the property I let Mr.
20 Bledsoe, a neighbor of mine, mow it and get the
21 hay off of it. And if you will permit me to say
22 that when the railroad did their ditching down
23 through by our property my father forbid them to

117

1 dump the muck that was lifted out of the ditch
2 onto him and they respected his wishes. That's
3 been testified to in --.

4 Q. In the main record, yes. That's all.

5 RECROSS EXAMINATION

6 BY MR. WINSTON:

7 Q. Just a minute, Miss Darnell. You said a twelve
8 foot strip, you're basing that on the assumption
9 that the railroad only has a twenty-five foot
10 right of way?

11 A. Yes.

12 Q. Of course, if they have a fifty foot right of way
13 there wouldn't be any strip there?

14 A. It would be very little I would say.

15 Q. You haven't cultivated that strip for several years
16 have you?

17 A. No, because Mr. Winston, my sisters and I we have
18 gone out of the farming business altogether.

19 Q. Alright.

20 REDIRECT EXAMINATION

21 BY MR. QUILLEN:

22 Q. Now, when that new highway was built through there,
23 what year was that, Miss Ferna, if you remember?

118

1 A. I believe it was in 1932.

2 Q. Now, at that time your father owned all that strip
3 of land as I understand it.

4 A. He owned all that from the church on up the
5 highway. I'd say probably a quarter or a half
6 mile.

7 Q. And that bridge was in place and that crossing --.

8 MR. WINSTON: Let's state the same continuing objection.

9 Q. -- before 58 is now located there was built.

10 A. Oh yes.

11 Q. That's all.

12 MR. WINSTON: We will state again our continuing objection
13 as to the evidence and the documents of title
14 would be the best evidence.

15 MISS DARNELL: Mr. Quillen, if you will permit me. I would
16 like to say that the bottom directly in front of my
17 house to the north of the highway there where the
18 new house has been built recently we owned that
19 up until about two years ago. I sold that to Mr.
20 Reed, my sisters and I.

21 MR. QUILLEN: That's all.

22 MR. WINSTON: That's all.

23 MR. QUILLEN: We rest.

119

15

DIRECT EXAMINATION

16

BY MR. QUILLEN:

17

Q. What is your name please sir?

18

A. William Stuart Snodgrass.

19

Q. Mr. Snodgrass, where do you live?

20

A. Two mile west of Gate City.

21

Q. Now, are you familiar with the Ferna Darnell

22

premises which is owned by her and some of the

23

other members of her family?

120

1 A. Yes, I am.

2 Q. Are you familiar with that bridge which is part of
3 that crossing over the railroad there?

4 A. Yes sir, I'm familiar with the bridge.

5 Q. Have you made an examination of that bridge as to
6 the condition of the timbers and so forth in it?

7 A. Yes, I did.

8 Q. Just go ahead and tell the commission what your
9 findings were.

10 A. Well sir, I went and looked at the bridge. And
11 I found that the bridge needed some repair such
12 as the flooring in it. The flooring is pretty
13 bad.

14 Q. Yes sir. What's the condition of the bridge
15 in reference to decay and so forth as to those
16 timbers.

17 A. Well, I find that the timber underneath is in good
18 shape and the crossing across the railroad is in
19 fair shape but the flooring on the bridge is in
20 bad shape.

21 Q. Yes sir. You consider then that your examination
22 and inspection that the bridge is in need of repair?

23 A. Yes sir.

121

Sharon D. Welch

Court Reporter

Gate City, Virginia 24251

1 Q. You may cross-examine.

2 CROSS EXAMINATION

3 BY MR. WINSTON:

4 Q. Do you know how much of the bridge is on the
5 railroad right of way, sir?

6 A. No sir, I don't know.

7 Q. You don't know how much.

8 A. No sir.

9 Q. What would you say needs repair?

10 A. Well, it looks to me about all the flooring
11 needs repairing.

12 Q. I believe that's all.

13 MR. QUILLEN: To expedite this thing let me call him back
14 and put on evidence in reference with the Boy
15 property and that way we will not have to --
16 is that okay with the commission.

17 MR. WINSTON: Yes.

18 REDIRECT OF MR. SNODGRASS

19 Q. You made inspection of the other bridge, too?

20 A. Yes.

21 Q. If it's alright with the members of the
22 commission we will go into both cases with the
23 same witnesses in all of them. It will save

132

1 your time. Did you notice there at the end of the
2 bridge there whether or not the water had
3 dislodged some of the supports there?

4 A. Well, I noticed that the end next to the railroad
5 the water has begun to dig out behind it.

6 Q. Well, with reference to the Boy bridge, did you
7 make an inspection of that too, Mr. Snodgrass?

8 A. Yes sir.

9 Q. Go ahead and tell the commission what you found
10 there?

11 A. Well sir, I went and looked at Mr. Boy's bridge
12 and I find that his bridge has just about completely
13 rotted down. It's just about gone. The water
14 has washed the abutments out on both ends and the
15 bridge has dropped way down. And the crossing on
16 the railroad is in bad shape, the material that is
17 put across the railroad.

18 Q. Yes sir.

19 A. Such as the asphalt.

20 Q. You may cross-examine.

21 MR. WINSTON: We would object to the statement about the
22 crossing on the railroad because there's no dispute
23 as to the railroad itself.

123

1 MR. QUILLEN: You have a duty under the statute to maintain
2 that grade crossing and the grade crossing at the
3 bridge are all one in the same. And certainly
4 under the Supreme Court ruling the duty to build
5 the crossing in the first place --.

6 MR. WINSTON: Of course, we would object to your statement
7 as to the one in the same.

8 MR. QUILLEN: Well, I want to put this in the record.

9 MR. WINSTON: It would be defined by the width of the right
10 of way.

11 MR. QUILLEN: Well, you couldn't just put a crossing in
12 and leave the crossing hanging with no way to get
13 across the creek unless you flew over.

14 MR. WINSTON: We object to Mr. Quillen's arguing the
15 case at this time.

16
17 CROSS EXAMINATION

18 BY MR. WINSTON:

19 Q. Mr. Snodgrass, you don't know how much of the bridge
20 of the Boy property is on the railroad right
21 of way, do you sir?

22 A. No sir, I do not know.

23 Q. That's all. Thank you, sir.

124

1 CLAUDE STARNES, a competent witness, after having
2 first been duly sworn, deposed as follows:

3 DIRECT EXAMINATION

4 BY MR. QUILLEN:

5 Q. You are Mr. Claude Starnes, I believe?

6 A. Yes sir.

7 Q. Claude, are you any relation to Miss Ferna by
8 blood or marriage?

9 A. No sir.

10 Q. She's your sister-in-law, isn't she?

11 A. Yes.

12 Q. But you're no relation by blood but by marriage
13 you are?

14 A. Yes.

15 Q. What's your occupation, Claude?

16 A. I'm a carpenter, plumber and a little of everything.

17 Q. Alright sir. Now, are you familiar with this
18 bridge there that goes across Miss Ferna's
19 property there?

20 A. Yes sir.

21 Q. State if you have examined that bridge on more than
22 one occasion?

23 A. Yes sir.

Sharon B. Welch

Court Reporter

Gate City, Virginia 24251

703-386-9443

125

1 Q. Tell the commission just what the condition of that
2 bridge is?

3 A. It needs a top on it in places.

4 Q. It is in need of repair?

5 A. Yes sir.

6 Q. Have you also examined the Boy bridge?

7 A. Yes sir.

8 Q. What's the condition of that bridge?

9 A. It's pretty bad. It's about all rotted out.

10 Q. About all rotted out. I believe you may cross-
11 examine.

12 CROSS EXAMINATION

13 BY MR. WINSTON:

14 Q. You don't know how much of the Starnes bridge is
15 on the railroad right of way, do you sir?

16 A. Well, no not right off. It's partly on the rail-
17 road.

18 Q. But you don't know how much. And you don't know
19 how much of the Boy bridge is on the railroad
20 right of way?

21 A. No sir I haven't measured it. I'd say it's about
22 eleven feet.

23 Q. I believe that's all.

126

FRANK WOLFENBARGER, a competent witness, after having first been duly sworn, deposed as follows:

DIRECT EXAMINATION

BY MR. QUILLEN:

Q. You are Mr. Rufus Wolfenbarger, I believe?

A. Frank.

Q. Frank, I'm sorry. I do apologize. Where do you live now, Mr. Wolfenbarger?

A. Three miles west of Gate City.

Q. Where do ^{you} live in reference to where Miss Ferna Darnell lives?

A. Just across the street not very much. I'd say fifty to one hundred feet.

Q. Are you familiar with that property there?

A. Yes sir.

Q. Are you also familiar with that bridge?

A. Yes sir.

Q. Have you looked at that bridge more than one time?

A. Yes sir, several times.

Q. Several times. State to the members of the commission just what the condition of that bridge is with reference to need of repairs at this time?

A. Well, the floor on it seems to be pretty well

Sharon A. Welch

Court Reporter

Gate City, Virginia 24251

1 decayed and the abutments, what I call, or piers
2 at the end of the bridge they're all, look to me
3 like they're almost washed out. So that would
4 make the bridge pretty dangerous.

5 Q. Yes sir. Now, have you also looked at Mr. Boy's
6 situation there?

7 A. Yes sir.

8 Q. State with the reference to his situation.

9 A. Well, his bridge is just about the same condition
10 as --. The flooring and everything is decayed
11 pretty bad and the ends of the bridge where
12 they're setting on the abutments there are washed
13 out. Of course, I talking about the crossing I
14 don't know anything about that but the crossing is
15 bad, very bad. And it seems to me like it's too
16 low. It should be raised coming up to the bridge
17 in order for it to be more easier to get on and
18 safer.

19 Q. I believe you may ask Mr. Wolfenbarger.

20 CROSS EXAMINATION

21 BY MR. WINSTON:

22 Q. Mr. Wolfenbarger, you don't know how much of the
23 Starnes bridge is on the railroad right of way, do

128

Sharon D. Welch

Court Reporter

Gate City, Virginia 24251

you sir?

A. No, I didn't measure that. But I would say it's at least four to five feet the way I understand the right of way there.

Q. And you don't know how much of the Boy bridge is on the railroad right of way?

A. No, I don't.

Q. And of course the Boy's and the Starnes use these bridges to go over their property across the railroad to the public road?

A. That's right.

Q. That's all.

CLARENCE LANE, a competent witness, after having first been duly sworn, deposed as follows:

DIRECT EXAMINATION

BY MR. QUILLEN:

Q. I believe you are Mr. Clarence Lane?

A. Yes sir.

Q. Where do you live, Mr. Lane?

A. Approximately two and a half miles west of Gate City.

Q. Are you now working or have you retired?

A. I'm retired.

- 1 Q. What was your former occupation?
- 2 A. Salesman for a grocery company.
- 3 Q. Kingsport Grocery, I believe.
- 4 A. (Nods head yes)
- 5 Q. Do you live in the general vicinity of Mrs. Ferna
- 6 Darnell and her folks?
- 7 A. Yes.
- 8 Q. Are you familiar there with that bridge Mr. Lane?
- 9 A. Yes, I've known about that bridge for several
- 10 years and recently I was there to look at the
- 11 bridge a short time ago, couple of weeks ago.
- 12 Q. Now, with reference to the need for repair, state
- 13 what you found?
- 14 A. Well, I saw that the top of the bridge, the floor,
- 15 in my opinion needed repair and that the railroad
- 16 side of the end of the bridge the water seemed to
- 17 be eating away pretty much at the foundation, the
- 18 abutment or what have you.
- 19 Q. Yes sir. Now, did you also look at the Boy bridge?
- 20 A. Yes.
- 21 Q. State what your findings are there?
- 22 A. Well, I found in my opinion that the bridge is in
- 23 a bad state of repair, needs repair very badly.

Sharon D. Welch

Court Reporter

Gate City, Virginia 24251

703-386-9443

130

6 DIRECT EXAMINATION

7 BY MR. WINSTON:

8 Q. You are Mr. Robert Peters?

9 A. Yes sir.

10 Q. What is your position with the railroad?

11 A. Claim agent.

12 Q. And Mr. Peters I believe you are familiar with
13 the various maps and so forth of the Southern
14 Railroad?

15 A. Yes sir.

16 Q. I'll show you a map that has been heretofore
17 entered in evidence and ask you if you can identify
18 what this map is? It's been entered into evidence
19 as Defendant's Exhibit One.

20 A. Yes sir, this is a map of the right of way through
21 the area in question where the Darnell property
22 and the Boy property ^{are} is located.

23 Q. Would you come before the commissioners sir?

131

1 MR PETERS AND MR. WINSTON GO BEFORE COMMISSION

2 Q. Is this the map of the Southern Railroad showing
3 their trackage?

4 A. Yes it is.

5 Q. Now, have you ascertained on this map the location
6 of the Darnell property?

7 A. Yes, the Darnell property is approximately where
8 the red line is marked across here.

9 Q. Darnell?

10 A. Darnell, yes.

11 Q. What is the width of the railroad right of way at
12 that point?

13 A. It's twenty-five feet from the center of the track
14 for a total of 50 feet.

15 Q. Now, where is the Boy property? Can you ascertain
16 on the map.

17 A. It's right here where the red mark is with Boy
18 written in and it's also twenty-five feet which is
19 shown just to the right of that from the center
20 for a total of fifty feet.

21 Q. Alright sir. Now, of course, you have been on the
22 Darnell property. We would reoffer this to the
23 commissioners. It's already filed Exhibit one and

132

Sharon B. Welch

Court Reporter

Gate City, Virginia 24251

703-386-9443

1 you can just put Reoffered, if you please ma'me.
2 Now, you have also been on both the Darnell and
3 Boy property, have you not, sir?

4 A. Yes, I have.

5 Q. And I believe you have made certain measurements
6 there at the property?

7 A. That's correct.

8 Q. And you've already made one sketch, I believe,
9 and filed with the record already. Does this appear
10 to be a copy of a sketch that's already filed?

11 A. Yes it is.

12 Q. Would you come up before the Commissioners?

13 MR. PETERS AND MR. WINSTON GO BEFORE COMMISSIONERS

14 First sir, I'll ask if you measured from the center
15 of the railroad property towards the Darnell
16 property to the southern edge of the railroad right
17 of way.

18 A. I measured out to the bridge toward the Darnell
19 property which is eleven feet and five inches to
20 the approximate edge of the first timber is the
21 measurement I took. And the actual twenty-
22 five foot then would be on somewhere toward the
23 center of the bridge which I don't have shown on

133

1 the map.

2 Q. Be the center of the bridge.

3 A. Approximately.

4 Q. Now, that is based on the fifty foot right of
5 way which the railroad claims?

6 A. Yes sir, that's right.

7 Q. Now, Miss Darnell has indicated that it's a
8 twenty-five right of way or twelve and a half feet
9 from the center of the tracks. How much of the
10 bridge would be over in the right of way if it's
11 just twelve and a half feet from the center.

12 A. According to the measurements I made it would be
13 seven inches, approximately one timber.

14 Q. Have you also measured the Boy railroad right of
15 way?

16 A. Yes, I have.

17 Q. How far is it from the center of the track to the
18 middle of highway 23?

19 A. I measured sixty-four feet and ten inches to the
20 edge of the line in the center of the road. I
21 did not measure the actual width of the pavement
22 but I went to the line in the center of the road.

23 Q. Line in the center of the road?

134

1 A. Yes.

2 Q. And the road width of the highway right of way --.

3 A. The map that the highway engineer had here
4 previously showed forty foot from the center.

5 Q. How far does the highway right of way come towards
6 the railroad right of way?

7 A. It comes forty feet.

8 Q. Does it meet the railroad right of way?

9 A. Forty and it would be two inches difference there
10 and that would possibly be in the width of the
11 white line and my variation from the center of the
12 highway.

13 Q. You mean two inches there.

14 A. Within two inches of it.

15 Q. In other words then the highway right of way
16 would meet the railroad property by two inches.

17 A. That's right.

18 Q. And there would not be any strip in between?

19 MR. QUILLEN: We object to that. The Court has already found
20 that the Darnell folks still have land north of
21 the railroad right of way. It's finding is made
22 for the record.

23 Q. Well, these are your measurements?

135

Sharon B. Welch

Court Reporter

State Ct. Reporter 24251

1 A. Yes.

2 Q. That's all. We would offer this again. Let me
3 ask you one other thing sir. Between, I believe you
4 have sketched in here a telephone line, is that
5 correct sir?

6 A. Yes.

7 Q. Now, what is there between the railroad and the --
8 what is the ground and terrain like between the
9 railroad and Highway 23?

10 A. There's a ditch just north of the track which the
11 top width of it is approximately twelve feet
12 with three or four feet at the bottom of the ditch.

13 Q. Did you detect whether any crops are grown between
14 the railroad right of way and --.

15 A. I saw no evidence of any crops of any type being
16 grown there.

17 Q. What is the terrain?

18 A. It's a ditch.

19 MR. QUILLEN: We make the same objection. All that's
20 already been set out.

21 Q. Offer that as Defendant's Exhibit Two before the
22 Commissioners. I believe you may ask.

23

136

CROSS EXAMINATION

BY MR. QUILLEN:

Q. Now, Mr. Peters if what you are saying is true then over half of that bridge is on the railroad right of way. That's right, isn't it. You used the twenty-five feet from the center of the track.

A. What is the total length of the bridge before I can answer that?

Q. About twenty-five feet by measurement.

A. May I see the map, Mr. Winston.

MR. PETERS LOOKS AT MAP.

I don't have the -- I did not make a measurement of the width of the bridge on this drawing. And, therefore, I said it was approximately one-half on the right of way and I don't know whether it's more or less.

Q. Well, if twenty-five feet from the center would throw it about two and a half feet and you had another twelve and a half feet then you would have fifteen feet of the bridge on the right of way, wouldn't you?

A. I said there was seven inches according to my measurements.

137

Sharon B. Welch

Court Reporter

Gate City, Virginia 24251

703-386-9443

1 Q. You don't concede there's two and a half to three
2 feet there?

3 A. No sir, I didn't say that.

4 Q. But you do say there's at least --.

5 A. Less than one foot.

6 Q. And that's the twenty-five foot, now I'm talking
7 about the fifty foot overall, twenty-five from
8 the center line. Well over half of that bridge
9 is in the right of way of the railraod.

10 A. No sir, it is not. I said approximately --.

11 Q. Well, would you say about.

12 A. I said approximately half of it and I said I did
13 not measure the entire length so I could not say
14 that it was more or less.

15 Q. But you would say approximately half of that bridge
16 then is on the railroad right of way?

17 A. Yes sir, that's the statement I made.

18 Q. That's all.

19 WILLIAM TOWNS, a competent witness, after having
20 first been duly sworn deposed as follows:

21 DIRECT EXAMINATION

22 BY MR. WINSTON:

23 Q. Mr. Towns, what is your occupation sir?

138

Sharon B. Welch

Court Reporter

Gate City, Virginia 24251

1 A. Land surveyor.

2 Q. I believe that you have made certain surveys for
3 Southern Railroad and among them you have surveyed
4 the area of the bridge to the Darnell property and
5 the Boy property?

6 A. Yes sir.

7 Q. Now, I believe you have prepared some sketches.

8 A. Yes sir.

9 Q. Would you be able to take from your sketches or
10 surveys those portions that cover the two pieces
11 of property. I might state that he has other
12 areas surveyed here but we suspect the Court is
13 just concerned with these two areas.

14 A. This is the Darnell property.

15 MR. QUILLEN: We want to lodge a general objection to any
16 evidence along this line because the Court has
17 already decided this case except for the commission
18 to go there and decide whether repairs are needed.
19 We're not trying this lawsuit all over again,
20 Mr. Winston.

21 MR. WINSTON: We want to get the exact measurements in the
22 record sir, particularly if it goes to whether or
23 not the railroad should and also how much of the

139

1 bridge would be on the railroad right of way.

2 MR. QUILLEN: We say you've got to do it all.

3 MR. WINSTON: What do you mean sir.

4 MR. QUILLEN: The entire bridges in each case. They were
5 part of the original grade crossing. That's our
6 position in this case. Always has been, couldn't
7 just put two cross ties up there or three and say
8 this is a bridge.

9 MR. WINSTON: We understand that sir.

10 Q. First, I believe you have been upon the area
11 of the Darnell property?

12 A. Yes sir.

13 Q. And at that point have you measured the width of
14 the railroad right of way and also measured where
15 the State Highway 23 and 58 is?

16 A. Yes sir.

17 Q. Would you come before the jury please sir? I mean
18 Commissioners. You've got this between stations
19 1840 and station 1860, is that correct sir?

20 A. That covers this sheet.

21 Q. And where on this particular sheet is the bridge
22 to the Darnell property?

23 A. Right here, approximately Station 1844.

140

Sharon B. Welch

Court Reporter

Gate City, Virginia 24251

703-386-9443

- 1 Q. Is that right here, sir?
- 2 A. Yes sir.
- 3 Q. Now, have you measured the distance between the
4 center of the railroad track ^{and} in the center of the
5 highway?
- 6 A. Yes sir.
- 7 Q. What is that distance?
- 8 A. 65.05 feet.
- 9 Q. What is the terrain between the railroad and
10 the highway?
- 11 A. Okay. I show this from the railroad, bed of the
12 railroad it goes out approximately six feet and
13 falls into a ditch.
- 14 Q. Ditch?
- 15 A. Right. There is approximately eleven and a half
16 foot wide entrance into the bridge that is gravel.
17 From the top of it it falls off down into a
18 drainage pipe which crosses under the entrance.
- 19 Q. Did you ascertain the width of the highway right
20 of way?
- 21 A. Forty foot from center, to total of 80 foot right
22 of way on the highway.
- 23 Q. Then from your measurements is there any strip of

141

- 1 land between the railroad right of way and the
2 highway right of way?
- 3 A. Yes sir. Determining to the best of my ability to
4 the center of the road they would be five-eighths
5 of an inch between the two right of ways.
- 6 Q. That is north of the railroad?
- 7 A. Right, with a twenty-five foot right of way.
- 8 Q. Well sir, with the twenty-five foot right of way
9 how much of the bridge is on the railroad right of
10 way?
- 11 A. Okay, over to the bridge it was eleven -- I brought
12 this down and made a bigger sketch of it.
- 13 Q. What is the distance from the center of the rail-
14 road --.
- 15 A. Eleven point forty-eight (11.48) feet. That
16 twenty-five foot right of way would leave 13.52
17 feet to the southern edge of the railroad right
18 of way.
- 19 Q. You mean that is with twenty-five feet on each side?
- 20 A. Right.
- 21 Q. Now, if it's just 12 1/2 feet on each side how much
22 of the bridge would be on the railroad right of way?
- 23 A. A foot and a quarter of an inch.

1 Q. And this is in reference to the Darnell property?

2 A. Yes.

3 Q. We would like to introduce this as Exhibit Three
4 before the Commissioners, that is the sketch showing
5 the area of the Darnell property.

6 MR. QUILLEN: Same objection is made all the way through.

7 Q. Now sir, I believe you also surveyed in the area
8 of the Boy property?

9 A. Yes sir.

10 Q. Where is the --.

11 A. Here is the Boy property.

12 Q. You're showing that on the left upper portion?

13 A. Right.

14 Q. And what is the width of the railroad right of way
15 at that point?

16 A. Twenty-five (25) feet from the center.

17 Q. What's the distance from the center of the railroad
18 to the bridge of the Boy property?

19 A. To the bridge?

20 Q. Yes.

21 A. It's 13.80 feet.

22 Q. Running 25 feet from the center of the railroad
23 how much of the Boy bridge is on the railroad

143

1 property?

2 A. Eleven point two (11.2) feet.

3 Q. I believe the road goes over the bridge and then
4 onto the public highway.

5 A. Right, there's approximately 11 to 11 1/2 foot
6 wide gravel entrance.

7 Q. This thing here is the creek, is that correct?

8 A. Yes sir.

9 Q. We would offer this as Defendant's Exhibit Four.
10 I believe you may ask sir.

11 CROSS EXAMINATION

12 BY MR. QUILLEN:

13 Q. Your name is Towns?

14 A. Yes sir.

15 Q. Where do you live?

16 A. Jonesboro, Tennessee.

17 Q. Your profession then is surveying?

18 A. Yes sir. I'm a fulltime surveyor.

19 Q. Did you check the right of way of the State there
20 on Old 58 when you did your surveying there?

21 A. Yes sir.

22 Q. Where did you get that information?

23 A. I found a right of way monument, concrete right of

Sharon A. Welch

Court Reporter

Gate City, Virginia 24251

703-386-9443

144

- 1 way monument and checked the distance.
- 2 Q. Don't you know there's about twelve feet there
- 3 north of the railroad right of way on the Darnell
- 4 property.
- 5 A. I don't understand the question.
- 6 Q. You are saying to the Commission there's no land
- 7 north of the railroad right of way?
- 8 A. No sir, I didn't say that.
- 9 Q. That belongs to the Darnells.
- 10 A. I did not say that.
- 11 Q. What did you say?
- 12 A. I said there was $5/8$ ths. of an inch.
- 13 Q. $5/8$ ths. of an inch, that's practically no land,
- 14 isn't it?
- 15 A. $5/8$ ths. of an inch.
- 16 Q. I think you may stand aside.

HWY 23.

