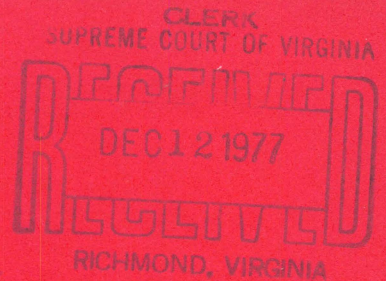


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In the
SUPREME COURT OF VIRGINIA
At Richmond

Record No. 770800

STATE HIGHWAY AND TRANSPORTATION
COMMISSIONER OF VIRGINIA,

Appellant,

v.

C. B. EDWARDS COMPANY, INC.,

Appellee.

APPENDIX

Volume II

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BY MR. MILLNER:

Q Now, when -- have you said that a --
that this notice has gone to Edwards?

A Are you on 23-A.

Q Yes sir.

A "C", under "C"?

Q Yes sir.

A Yes sir, it has.

Q All right, now. Has that ninety
day notice been sent?

A Yes, it has.

Q All right, sir, and what was the
date of that -- when that notice was sent?

A By letter from Mr. A. S. Mattox,
State Right of Way Engineer --

COURT REPORTER: Ex-

cuse me, I didn't understand
you.

A By letter from Mr. A. S. Mattox,
who was State Right of Way Engineer at the time, dated November
17, 1975, 120 day vacation notice was given to Mr. Edwards.

Q Now, that was -- that was then after
the condemnation occurred, isn't that correct?

A Beg pardon?

Q What -- what was the date of the --

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1 of the relocation -- I mean the notice -- the ninety day
2 notice?

3 A November the 17th.

4 Q All right, sir, of what year?

5 A 1975.

6 Q All right; isn't the notice to
7 vacate predate the condemnation proceeding?

8 A Does it predate?

9 Q Yes, in a normal situation?

10 A Generally, we will not send a vaca-
11 tion notice until such a time as the certificate is filed
12 or about that same time.

13 Q All right, sir, on page 23-B;
14 this speaks of notice of right to appeal.

15 A All right, sir.

16 Q All right, sir. And there's --
17 there's been nothing -- there's been no determination made
18 by Edwards in reference to the relocation benefits, isn't
19 that correct?

20 MR. BEALE: What --
21 what was the question, I'm sorry.

22 MR. MILLNER: Has any
23 determination been made by the
24 State Highway Department as to
25

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1 relocation benefits? There's
2 nothing for Edwards to appeal
3 at this point.

4 MR. BEALE: That's
5 a question of law too.

6 COURT: No sir, I
7 think that would be a question
8 of fact, whether they've done
9 anything or hadn't done anything.

10 MR. BEALE: Well, his
11 question, though, he said, there
12 would be nothing to appeal at
13 this stage. I think that's a
14 question of law.

15 COURT: Well, he says --
16 he's talking about the right to
17 appeal under this section on 23-B,
18 and he says -- he asked him if
19 there's been any determination
20 so far, by the Highway Department
21 relative to the Edwards Company
22 relocation. He says no, is my
23 understanding.

24 MR. BEALE: He didn't
25 answer it.

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1 A I haven't answered it.

2 COURT: I as-
3 sumed he said no. I prob-
4 ably thought he was going
5 to say, "No". We've been
6 arguing about it all morn-
7 ing.

8 A There has been no determination
9 because one has not been required at this point.

10 BY MR. MILLNER:

11 Q All right, sir. Can you tell us
12 when you estimate that some -- when the determination will
13 be required?

14 A At the request of Mr. Edwards
15 when he gets his replacment site ready for the move.

16 Q Referring to the letter that
17 we sent back on May the 10th, 1976; did we not tell you
18 that the property was there and we were ready to go?

19 A It was my understanding, when
20 I talked with Mr. Edwards that --

21 COURT: Answer
22 about his letter first.

23 BY MR. MILLNER:

24 Q Didn't we say, you know, we've
25 got the new site, come on and move us?

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1 MR. BEALE: In

2 a letter?

3 MR. MILLNER:

4 Yes.

5 MR. BEALE: What --

6 what letter is that?

7 MR. MILLNER:

8 That's the letter of May

9 the 10th, 1976.

10 A Could you tell me specifically

11 what paragraph you're referring to?

12 BY MR. MILLNER:

13 Q All right, sir. The third para-

14 graph from the end says that, "As we advised you verbally,

15 and we now wish to confirm in writing, we request that the

16 relocation entitlement be to move Edwards in its entirety

17 from the old location to the new location."

18 A Yes sir, you did, but in the pre-

19 ceding paragraph you said that you would accept the -- the

20 move on the business itself rather than the moving of the

21 personal property from the area of acquisition. You could

22 only receive one move.

23 Q Did we not suggest, "this is

24 obviously an area of mutual co-operation to effectuate such a

25 move. We request that you contact Mr. Edwards for any

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1 additional information that you need"?

2 A At the time I contacted Mr. Edwards --
3 during the time that I talked with him, there had been nothing
4 finalized on his acquiring a replacement site.

5 Q All right, sir. Now, there --
6 then the letter -- the subsequent letter refers to the Bircher
7 Road site. Do you have a copy of that?

8 A I do but I -- it might be a whole
9 lot less taxing if I could get the copy that's already been
10 introduced as evidence.

11 COURT: Are they
12 my exhibits you've got over
13 there laying on the table?

14 MR. MILLNER: No
15 sir. I think we did not in-
16 troduce -- I think we just
17 read this letter, I believe.

18 BY MR. MILLNER:

19 Q Referring to the letter of May
20 the 10th again.

21 A Yes sir.

22 Q This language, "Without limita-
23 tion, it is our position that the following items should
24 be moved, constructed and installed in a good and work-
25 manlike manner at the new Edwards location at Industrial

1 Park Road in the City of Newport News", and then we list the
2 items. I just ask you what more we could have told the
3 State Highway Department that, you know, we want the move
4 to be made?

5 MR. BEALE: I don't
6 think that's proper, your Honor.

7 COURT: I think
8 you're arguing with him now.

9 MR. MILLNER: All
10 right, sir.

11 BY MR. MILLNER:

12 Q Now, isn't it true, Mr. Fowler, that
13 in the -- at one stage, you told Mr. Edwards that the ques-
14 tion was, what was personalty and what wasn't personalty.
15 And that as soon as that was resolved, that he would be
16 entitled to benefits, to have anything that was personalty
17 moved?

18 A It's not true. It wasn't --

19 COURT: I don't -- I don't know --

20 MR. BEALE: If your
21 Honor please, we're going to
22 object to that too, becuzase
23 whether it's true or not
24 makes no difference. The
25 question is what he's actually

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1 entitled to under the law,
2 not what Mr. Fowler told
3 him he was entitled to.

4 COURT: Well, he
5 can ask Mr. Fowler if Mr.
6 Fowler told him that certain
7 things were true.

8 MR. BEALE: All
9 right, sir; well, our objec-
10 tion goes to it being im-
11 material because it's a
12 question of what he's en-
13 titled to under the law.

14 COURT: But it
15 isn't immaterial because
16 Mr. Fowler was representing
17 the Commonwealth in this
18 matter, and if -- if he
19 actually told him what he
20 was entitled to, then he
21 was representing the --
22 the Commonwealth in attempt-
23 ing to explain to this man
24 what he could or could not
25 do. And he can ask him if

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1 he explained certain things
2 to him.

3 MR. BEALE: All
4 right, sir.

5 COURT: So,
6 whether -- whether he was
7 wrong as to that or not
8 that's a horse of another
9 color.

10 MR. BEALE: Yes
11 sir, and it's our position
12 that whether he was wrong
13 or not, that the question
14 goes to the question under
15 the law of what he's entitled
16 to, and what he represented
17 to him, no matter what it
18 was, then it has nothing to
19 do with the outcome of this
20 proceeding. The question --
21 the question of law --

22 COURT: Well, I --
23 I don't agree that that's
24 true, Mr. Beale.

25 MR. BEALE: Well;

1 that -- that's our objection
2 for the record.

3 COURT: Yes
4 sir, and I've already
5 ruled on that in another
6 case where the --

7 MR. BEALE: We'll
8 note an exception.

9 COURT: The City
10 Inspectors told a man he could
11 do thus and so and he did it.
12 And then they went in and had
13 him arrested on a criminal
14 warrant for not obeying the
15 law. He said, "Well, he had
16 no business to rely on me"
17 head of the Inspection Office,
18 whoever it was. And I said,
19 well, that's not true.

20 MR. BEALE: Well,
21 if you will recall the Segaloff
22 case, the contrary was ruled
23 by the Supreme Court on that
24 very -- on that very matter,
25 where a City Inspector approved

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the plans for the construction of the canopy.

COURT: I didn't say what they ruled in Richmond; I said what we ruled down here.

MR. BEALE: All right, sir.

COURT: All right.

MR. BEALE: As long as we understand what the Court is telling us.

COURT: All right.

A Let me -- let me say this.

BY MR. MILLNER:

Q But actually you and the Edwards' folks have had a very harmonious relationship; isn't -- wouldn't you say that to be true?

A We have, yes sir.

Q All right. And I think that you've tried to cooperate --

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1 COURT: I'm glad
2 he's not had any trouble,
3 but it seems like to me he's
4 been messing with this thing
5 for a long time.

6 A I'm speaking from a personal
7 standpoint, not in behalf of the Highway Department, sir.

8 COURT: Oh, all
9 right.

10 BY MR. MILLNER:

11 Q And isn't it true that you told
12 Mr. Edwards that the various items, that if they were per-
13 sonalty, then they would be moved?

14 A Let me say this. Quite frankly,
15 sometimes I can't remember what I said yesterday.

16 Q All right, sir.

17 A It's general procedure, Highway
18 policy --

19 COURT: Well, sir,
20 he's not asking you about that.
21 If you don't recall that you
22 told him that, that's the
23 answer.

24 BY MR. MILLNER:

25 Q But you recall --

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1 A I could -- I could have told him
2 that items of personalty would be moved by the Highway
3 Department.

4 Q All right, sir. And wasn't it
5 true that the initial area of dispute is whether it was
6 realty or personalty, and that we were going to await the
7 Judge's decision, as to which was personalty and which
8 was realty? That was the initial hang up?

9 A That was what we were trying to
10 determine.

11 Q All right, sir. And you told us
12 that as soon as that was determined, then you'd proceed with
13 relocation, isn't that correct?

14 A Probably I did. I -- I don't
15 recall, really.

16 Q All right, sir.

17 A I'm not trying to be evasive,
18 I'm just telling the truth.

19 Q And do you know now --

20 COURT: Mr. Millner,
21 your lawyer wants you.

22 MR. MILLNER: Yes

23 sir.

24 (At this time,

25 Mr. Millner and Mr. Garner

1 conferred.)

2 BY MR. MILLNER:

3 Q And earlier you testified that
4 you'd move all of the -- their personal property?

5 A Yes sir; right.

6 Q Now, we come up to today, and I'll
7 come back to the question, when will Edwards know, you know,
8 what they're entitled to under the Relocation Act?

9 A Mr. Edwards will know when he
10 advises us that he has got his replacement site ready
11 for the personal property to be moved from the old site,
12 to the new site.

13 Q All right, sir. I hereby advise
14 you that the Edwards site is up there --

15 MR. BEALE:
16 We object to his advising
17 him of anything, if the
18 Court please. I think he's
19 supposed to ask him ques-
20 tions.

21 COURT: I agree
22 with that.

23 BY MR. MILLNER:

24 Q But assuming that Edwards writes
25 you today and tells you everything is in place --

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COURT: Let's put
it this way. Assuming Mr.
Millner tells you, now.

MR. MILLNER: All
right, sir.

BY MR. MILLNER:

Q All right, assuming that you are
advised forthwith that Edwards has the new site, and that
we ask you to proceed with relocation, when will a deter-
mination be made?

A First of all, I question whether
the buildings are available to receive the personal property.

Q All right, sir. Let's talk
about the railroad track for a minute. Now, we -- we don't
need a building for the railroad tracks. You know, the
site is there, and our position is you restore rail service.
Now, when will you, you know, -- when will you make a
determination as to whether you're going to do it or not.
And if you are -- say you're going to do it, when will you
do it?

A I cannot answer that question
other than this: The Highway Department has taken the
position that it could be that these items might not be
personalty.

Q All right, sir. Well, Mr. Fowler,

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1 and I think you've been very fair. But don't you think that
2 we're in the same position today, that we were two years ago?

3 A I don't think we've made a
4 whole lot of progress, no sir.

5 Q All right, sir; and so, in Mr.
6 Edwards standpoint --

7 COURT: I think
8 that's a gross understatement.

9 BY MR. MILLNER:

10 Q So, Mr. Edwards really doesn't know
11 where he stands, does he?

12 MR. BEALE: Now,
13 we object to that, if the
14 Court please. He doesn't
15 know what Mr. Edwards knows.

16 MR. MILLNER: Well --

17 COURT: He doesn't
18 know where he --

19 MR. MILLNER: All right.

20 COURT: He
21 doesn't know if Mr. Edwards
22 knows where he stands or not.

23 MR. MILLNER: May
24 I have a moment, your Honor?

25 (At this time,

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1 Mr. Millner and Mr. Garner
2 conferred.)

3 BY MR. MILLNER:

4 Q Now, let me under -- if the Court
5 determines -- what other tribunal ultimately decides it, that
6 these items that are in dispute are personalty, as you
7 understand the regulations and the statute, the position
8 of the State Highway Department is they will relocate
9 them?

10 A The only thing that I can say, if I'm
11 advised by a legal staff that these items will be paid
12 for under the Relocation Program, I will proceed from
13 there, yes sir.

14 Q All right, sir. Now, there was
15 reference made in the letters to some -- an opinion; that
16 Mr. Mattox or Mr. Culbertson or you were waiting for an
17 opinion to be rendered by the Attorney General's office.
18 Do you recall the letters back in the -- the May, June,
19 1976 period?

20 A I remember vaguely those letters,
21 yes sir.

22 Q All right, sir. All right, well
23 let's -- just to refresh your memory, let me show you again
24 the -- the letter of Mr. Culbertson, in both cases, to me
25 of June the 10th and June the 14th. Does he not make

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1 reference to an opinion, which would be received from the
2 Attorney General, and then he would act; isn't that correct?

3 A This is what the letter would
4 indicate, yes sir.

5 Q All right, sir. Now, my ques-
6 tion is has the Attorney General rendered such an opinion?

7 A As far as I know, he has not.

8 MR. MILLNER: That's
9 all the questions we have.

10 MR. BEALE: Do
11 you have a projected lunch
12 time?

13 COURT: Yes sir,
14 one o'clock. Now, how long
15 will you be, Mr. Beale?

16 MR. BEALE: I
17 think we're going to be some
18 time.

19 COURT: Yes sir,
20 I guess I shouldn't have
21 asked. All right, gentlemen,
22 let's recess until 2:15.

23 (At this time,
24 the Court declared a
25 recess.)

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78-A

(The Court reconvened and
Morris Schneider was sworn
as Court Reporter.)

CROSS-EXAMINATION

BY MR. BEALE:

Q Mr. Fowler, do your files reflect
the date of the recordation of the original certificate in
this matter in the deed books and page number?

A Yes sir, they do.

Q What was the date of the filing --
there have been two filed; is that correct?

A Yes, there have.

Q What was the date of the filing
of the original certificate of taking?

A November the 18th, 1975.

Q Do you have the deed book and
page record?

A Deed Book 905, Page 650.

Q Now, Mr. Millner talked to you
about the filing of a later certificate, on July 12, 1976.
Do you know the purpose of filing that second certificate?

A No, I'm sorry, I don't.

Q Now, that certificate was Deed
Book 925 at Page 333; is that correct?

A That's right, sir.

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78-B

1 Q Now, with reference to the
2 filing of the certificate and the establishment of the price
3 to be asserted or inserted in that certificate, was an ap-
4 praisal made by a real estate appraiser for the Highway
5 Department?

6 A Would you ask that question again,
7 please?

8 Q Did the Highway Department have the
9 property appraised?

10 A Yes, it did.

11 Q All right, sir. Now, with
12 reference to the appraisal that the Highway Department had
13 made of the property, was there prior to the date of filing
14 of this certificate, attempts at negotiation for the bona fide
15 purchase of the property without condemnation?

16 A Yes.

17 Q And was -- the negotiation and
18 the offer made, was that offer based upon the appraisal?

19 A Yes, it was.

20 Q Now, do your records reflect
21 whether or not the landowner in this matter was notified of the
22 intent of the Highway Commissioner to file the certificate?

23 A Yes sir, they do.

24 Q When was that notification given?

25 A May I have just a minute to check

1 the file?

MR. BEALE: Yes.

3 (At this time,
4 the witness perused
5 the file.

6 A The letter was dated November
7 fifth, 1975.

8 BY MR. BEALE: Q

9 Q All right, sir, over whose signa-
10 ture?

11 A Mr. Alvah S. Mattox, State
12 Right-of-Way Engineer.

13 MR. BEALE: Can I have
14 that, Mr. Fowler?

15 (At this time,
16 the document was handed
17 to Mr. Beale, after
18 which it was handed to
19 Mr. Millner for his
20 perusal.)

21 MR. MILLNER: We have
22 no objection. We can stipulate,
23 Mr. Beale, to a lot of this.
24 Mr. Beale, we will be pleased
25 to oblige.

1 COURT: All right,
2 sir.

3 MR. BEALE: All right,
4 sir, if we can just stipulate,
5 then, if the Court please, that
6 notification was given of the
7 intention to file the certificate
8 by letter of November 5, 1975
9 by Mr. Mattox, State Right-of-Way
10 Engineer, and also confirmed
11 that an offer at that time had
12 been made for the point 23 acres
13 of land and the damages in the
14 amount of sixty-nine thousand,
15 eight hundred dollars, which is
16 the amount of the certificate.

17 Is that all right,
18 Billy?

19 MR. MILLNER: Very
20 fine.

21 BY MR. BEALE:

22 Q Now, Mr. Fowler, are you aware
23 whether or not the landowner has been notified to vacate
24 that portion of the property that the certificate was filed
25 on, which is in the take area?

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1 A Yes sir.

2 Q I hand you a letter dated November
3 17, 1975, addressed to Mr. B. M. Millner, and ask you is that
4 the notification (indicating)?

5 A Yes sir, it is.

6 Q And does that notify the -- the
7 property owner to remove his property and vacate that area
8 within one hundred twenty days, or on or before March 20,
9 1976?

10 A Yes sir, it does.

11 MR. MILLNER: We'd
12 like to offer that in evidence,
13 if the Court please.

14 COURT: All right,
15 sir.

16 BY MR. BEALE:

17 Q Now, with reference to that --

18 COURT: Excuse me,
19 Mr. Beale. Mark that -- Plain-
20 tiff's Exhibit Number One, in-
21 junctive proceedings.

22 (At this time,
23 the document referred
24 to by the Court was
25 received into evidence

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1 and marked as Plaintiff's
2 Exhibit Number One, in-
3 junctive proceedings.)

4 COURT: What is the
5 date of that letter, Mr. Beale?

6 MR. BEALE: November
7 17, '75.

8 BY MR. BEALE:

9 Q Subsequent to that letter, Mr.
10 Fowler, was a request made by the landowner to extend
11 vacation date?

12 A Yes sir, he requested that --
13 extension be granted.

14 Q As a result of that, was the time
15 expanded to May the first, 1976 when he would be required
16 to vacate?

17 A Yes sir.

18 Q I hand you a letter addressed
19 to Mr. Millner dated March 16, 1976 and ask you if that's
20 the extension letter (indicating)?

21 A Yes sir, it is.

22 MR. BEALE: We offer
23 that in evidence, if the Court
24 please.

25 COURT: All right.

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1 Receive it.

2 (At this time,
3 the letter referred
4 to by the Court was
5 received into evidence
6 and marked as Plain-
7 tiff's Exhibit No. 2.)

8 BY MR. BEALE:

9 Q Subsequent to that, Mr. Fowler,
10 did you receive, the Highway Department receive a request
11 from the landowners, through its attorney, to extend its
12 stay on the property to August the first of 1976?

13 A Yes sir.

14 Q Now, was that granted or denied?

15 A I'm not sure. I'd like to see
16 that.

17 (At this time,
18 a document was handed
19 to the witness for
20 his perusal.)

21 A It was denied.

22 MR. BEALE: We offer
23 this in evidence, if the Court
24 please.

25 (At this time,

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1 the request from
2 landowner for ex-
3 tended stay was
4 received into evi-
5 dence, and marked
6 as Plaintiff's
7 Exhibit No. 3.)

8 BY MR. BEALE:

9 Q Has there been any other indication
10 from the landowner, other than the written documentation
11 just given, of their desire to stay on the property?

12 A None that I know of.

13 Q So that the last request that you
14 are aware of was that they desired to stay there until
15 August the first of 1976?

16 A Yes sir.

17 Q Now, Mr. Fowler, directing your
18 attention to the meeting in Richmond in the Assistant Attorney
19 General's office wherein Mr. Millner was present, I under-
20 stood you to indicate to Mr. Millner you were not aware of
21 any attorney General's opinion that was given with reference
22 to the denial or granting of relocation benefits in this
23 case. Was that meeting in Mr. Southall's office?

24 A Yes, it was.

25 Q Did Mr. Southall preside over the

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1 meeting?

2 A Yes, he did.

3 Q Did you hear Mr. Southall give
4 to Mr. Millner any indication of the position of the
5 Commonwealth, orally, as it relates to his rights to benefits
6 under the relocation act?

7 MR. MILLNER: If it
8 please the Court, I think Mr.
9 Beale is leading the witness.

10 COURT: Go ahead.

11 A Yes, he did.

12 BY MR. BEALE:

13 Q What is your recollection what
14 Mr. Southall told Mr. Millner as to the rights of the
15 Edwards Company as to relocation benefits?

16 A He stated to Mr. Millner that
17 the items that he was considering to be a part of the real
18 estate would not be eligible under the relocation program.

19 Q At that time, had any determination
20 been made by the Highway Department, with reference to
21 whether or not the in-place value of the property would
22 exceed the cost of moving it?

23 A No sir.

24 Q That determination had not been
25 made when that meeting was conducted?

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1 A It had not been made.

2 Q Do you remember the date of the
3 meeting, Mr. Fowler?

4 A No, I do not.

5 MR. BEALE: Do you
6 remember it?

7 BY MR. BEALE:

8 Q Now, Mr. Fowler, subsequent to
9 that meeting in Mr. Southall's office, are you aware that
10 this Court conducted a hearing and made a determination as
11 to certain items as to whether they were personalty or
12 realty?

13 A Yes sir.

14 Q Now, have you received any
15 instructions or advice from the Attorney General's office
16 with reference to the position for you to take under the
17 relocation act as it relates to that determination?

18 A Yes sir, we did. We received
19 word that -- if these items were to be considered as part
20 of the real estate, then very possibly we would have the
21 right to condemn those items as personalty.

22 COURT: Repeat that.

23 A Yes sir, let me rephrase that.

24 COURT: Because it
25 wasn't accurate. It didn't

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1 sound right.

2 A If the Court had ruled which the
3 items which it did, were personalty, then we would have the
4 right, the Highway Department might have the right to con-
5 demn personalty, based on the fact that if the cost of
6 moving the items would exceed their depreciated value.

7 BY MR. BEALE:

8 Q So that it was later that the
9 Attorney General -- the Attorney General's office indicated
10 to you it had determined that the in-place cost, the moving
11 cost exceeded the in-place cost or depreciated value of the
12 items; is that correct?

13 A Yes sir, right.

14 Q And the Attorney General's office
15 indicated to you it was the Attorney General's office
16 opinion that the Commonwealth, Highway Commission was
17 authorized to condemn personal property in certain in-
18 stances; is that correct?

19 A Yes. True.

20 MR. MILLNER: I believe
21 the date of the meeting in Rich-
22 mond was June 29, 1976.

23 COURT: Did I under-
24 stand you to say that -- you had
25 determined that the in-place

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1 value exceeded the cost of
2 the re -- the removal exceeded
3 the cost of in-place value?

4 MR. BEALE: Yes sir.

5 COURT: I asked him
6 if I understood him to say
7 that.

8 A Yes sir, we have an estimate
9 to that effect.

10 COURT: All right.

11 MR. MILLNER: I'm sorry,
12 your Honor?

13 COURT: He said he has
14 an estimate to that effect. He
15 says he has an estimate to that
16 effect.

17 MR. MILLNER: What was
18 the end result. I didn't under-
19 stand --

20 COURT: That the cost
21 of removal exceeded the in-place
22 value.

23 MR. MILLNER: Okay.

24 BY MR. BEALE:

25 Q Now, Mr. Fowler, you mentioned,

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1 in your direct examination, some problem about whether or
2 not one move or two moves -- whether or not if two moves
3 resulted that the second move would not be covered under
4 the relocation act. Do you recall that?

5 A Yes, I do.

6 Q Now, in the negotiations, in the
7 meetings Mr. Millner asked you about in my office and at
8 subsequent negotiations, you are aware, are you not, that the
9 landowner was advised that in the event some resolution
10 of the move -- removal of those items out of the right-of-way
11 could be made that the Highway Department was not going to
12 take the position that that counted as a move?

13 A That's true, yes sir.

14 Q And the landowner has been advised
15 of that; is that correct?

16 A Yes sir.

17 Q Now, you mentioned also in your
18 direct examination, a brochure. I think, actually, you were
19 talking about two brochures, what is the -- I'll call it
20 the booklet, the little booklet on relocation that's generally
21 given to the landowner.

22 A Right. This is.

23 Q What is the general rule as it
24 applies as to how that is done?

25 A This right-of-way brochure is --

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1 generally given to all displacees upon their initial contact.
2 The good will contact. Once we have approved plans, each
3 affected owner is contacted for the purpose of being made
4 aware of exactly how his property is going to be affected.

5 At this time, we leave this
6 right-of-way brochure.

7 MR. BEALE: Your Honor,
8 I wonder if I could see the cover
9 letter from Mr. Southall on your
10 rules and regulations. Actually,
11 I want the date of it.

12 COURT: Which is the --

13 MR. BEALE: The big,
14 thick rules and regulations.

15 COURT: Oh.

16 (At this time,
17 the requested docu-
18 ment was handed to
19 Mr. Beale.)

20 MR. BEALE: We just
21 want to be certain that it's
22 clear in the record that Mr.
23 Millner had the full rules and
24 regulations as it relates to
25 appeal procedures, and the same

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1 type items that would have been
2 in the small summary brochure
3 that we were talking about as
4 of shortly after October the
5 first, 1976.

6 BY MR. BEALE:

7 Q What is this, Mr. Fowler (in-
8 dicating)?

9 A This is a copy of an estimate
10 that I obtained from Cochran Construction Company in regard
11 to moving of certain items.

12 Q Was that required at the request
13 of the landowner after his Honor has ruled on the items
14 that were in dispute in October of last year?

15 MR. GARNER: If your
16 Honor please, it's a leading
17 question and -- the question --
18 I know the answer to it and it's
19 -- it's just a leading question
20 and so we object to it.

21 He can ask him when
22 that was obtained and what have
23 you.

24 COURT: Well, it's
25 a leading question, but I don't

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1 see whether it makes any difference
2 whether he leads him into it or
3 doesn't lead him into it. A
4 fact is a fact.

5 What did he say?

6 A Yes sir.

7 MR. GARNER: This was
8 before the hearing.

9 MR. MILLNER: He's got
10 the date of October first, '76.

11 BY MR. BEALE:

12 Q This is dated October one. I
13 think the hearing was sometime in the middle of October.
14 At any rate, this was done at the request of the landowner;
15 is that correct (indicating)?

16 A Yes sir.

17 Q And the items that are listed
18 in this estimate, they are the items that the landowner
19 had previously indicated to you was their position they were
20 entitled to compensation on; is that correct?

21 A Yes, it is.

22 COURT: Wait a minute.

23 Wait a minute. Let me get this
24 straight. What do you mean by
25 "compensation"?

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1 MR. BEALE: Well, actually,
2 I'm talking about relocation benefits.

3 COURT: All right.

4 MR. BEALE: Could we have
5 just a minute, your Honor.

6 Now, we offer this in
7 evidence, if the Court please.

8 (At this time,
9 the document referred
10 to by Counsel was re-
11 ceived into evidence
12 and marked as Plain-
13 tiff's Exhibit No. 4.)

14 BY MR. BEALE:

15 Q Mr. Fowler, are you aware whether
16 or not a dispute as to whether or not those items are entitled
17 to relocation has been ongoing since that time between the
18 landowner and Highway Department?

19 A It has, yes sir.

20 Q Are you aware whether or not the
21 landowner has insisted that these items in their entirety
22 be relocated, listed on that estimate?

23 A He has insisted they be relocated,
24 yes.

25 Q Have you investigated, or has the

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1 Highway investigated to determine whether or not the items
2 on this listing, whether or not if they be entitled to it,
3 the cost of moving them is in excess of the purchase of new
4 items?

5 A Yes, we have.

6 Q In particular --

7 A Excuse me just a moment. I don't
8 want to -- to say anything wrong. I don't know what we
9 have actually gone out and gotten cost, new figures on
10 all of these items that are listed. The only thing I want
11 to qualify --

12 Q No sir, I'm going to direct your
13 attention to --

14 COURT: That was
15 my question to him before, whether
16 he had -- I understood him to say
17 he had.

18 BY MR. BEALE:

19 Q With reference to the relocation
20 of the two ten-thousand gallon underground oil storage
21 tank listed as a cost of moving at forty thousand, seven
22 dollars, and Item Six, which is remove and relocate a five-
23 thousand gallon underground gas tank, and including the
24 pumps, sixteen thousand, four hundred twenty-three dollars.
25 Has the Highway Department made a determination as to

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1 whether or not actual new tanks could be purchased for
2 lesser figure than that?

3 A We had looked into the possibility,
4 yes sir.

5 COURT: The question
6 is: Had you ascertained it?

7 A Without reviewing the files,
8 I couldn't answer yes or no, your Honor.

9 BY MR. BEALE:

10 Q Let me ask you whether or not
11 you -- you were present at a meeting -- Mr. Edwards, seated
12 at the end of the table, was there -- when he conceded that
13 was a fact, that the new tanks could be purchased for
14 approximately a third of that?

15 A Yes, I believe the meeting
16 was in your office.

17 Q Mr. Fowler, if you will look
18 at these two documents and tell me what they are (in-
19 dicating)?

20 A These are two items that I --
21 from the information that I had, one taken from the ap-
22 praisal, one of them is entitled, "Depreciated Value of
23 Items Within the Acquisition Area." The other item is en-
24 titled, "Cost to Remove and Relocate Items Within Right-of-Way
25 Acquisition." And these -- cover the cost of moving certain

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1 items.

2 MR. BEALE: All right,
3 sir. Do you have objection to
4 this?

5 MR. MILLNER: No.

6 MR. BEALE: If your
7 Honor please, we'd offer these
8 into evidence to show to the
9 Court the difference in price
10 of the depreciated value of the
11 items within the right-of-way
12 and the cost of relocating
13 those items.

14 COURT: What items
15 are involved?

16 MR. BEALE: I would
17 call to your attention on one
18 that very possibly that ought
19 to be excluded because at least
20 for purposes of this proceeding,
21 because my recollection is that
22 -- the ruling of this Court was
23 that the fence was realty.

24 Now, those comparisons
25 are made in here, so insofar as

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1 the removal of that, you would
2 disregard that at least for this
3 proceeding we would think.

4 The items listed are
5 coal conveyor control house;
6 20 feet of wood fencing and
7 280 feet of chain link and wire
8 fencing; 200 feet of railroad
9 siding, and 38 feet of coal
10 conveyor and coal unloading pit.

11 MR. GARNER: What is
12 the purpose of the introduction
13 of these?

14 MR. BEALE: The purpose
15 is to show to the Court the dif-
16 ference of the in-place value and
17 the cost of moving; and the cost of
18 moving them exceeds the depreciated
19 in-place value.

20 MR. GARNER: We can't
21 stipulate unless Mr. Fowler is
22 an expert and is in a position
23 to say that -- he has made this
24 expert appraisal. We can't
25 stipulate as to its accuracy.

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If the Court wants to see it, it's all right with us, but we certainly can't say that this is an accurate estimate to be introduced through his testimony unless he's an expert appraiser.

MR. BEALE: This is what, Mr. Fowler, your file reflects and you made your decision not to make the -- the relocation payment upon; is that correct?

A That's right, sir.

COURT: Where did he get those figures?

MR. BEALE: Where were the figures acquired by the Highway Department on the cost of relocation?

A The cost of relocation of the items is the estimate we received from Cochran Construction Company. The depreciated value of the items was taken from the appraisal that was made on the property.

MR. BEALE: These are indicative, what he is saying, I

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1 think is 20 feet is ten percent
2 as shown on here, so they took
3 ten percent of that value of
4 item as you'll see on here, and
5 280 feet of chain link is 88
6 percent of the value that's in
7 the appraisal, so they took 88
8 percent of that. Two hundred
9 feet of railroad siding is in the
10 appraisal, and 38 feet or 22
11 percent of the coal conveyor and
12 coal unloading pit. So they have
13 taken a percentage of those
14 items.

15 MR. GARNER: If your
16 Honor please, if these are intro-
17 duced to prove the truth of the
18 matter, for which they state,
19 we object.

20 COURT: Yes sir, I
21 sustain you.

22 MR. BEALE: All right,
23 sir, well, we would submit --

24 COURT: If they're
25 introduced for that purpose, I

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1 sustain that.

2 MR. GARNER: Yes sir.

3 MR. BEALE: We would
4 submit that they are admissible
5 on that basis. However, since
6 the Court has already ruled on that
7 point, to which we would except,
8 we would offer them for the purpose
9 of showing that that's what Mr.
10 Fowler's basis of not paying the
11 relocation cost was based upon,
12 that the in-place value was far
13 less than the relocation value,
14 and that these -- his file re-
15 flects these items. That's a
16 fact, is it not, Mr. Fowler?

17 A Yes, it is.

18 MR. GARNER: I might
19 add to that, what section of the
20 relocation act is he talking
21 about?

22 MR. BEALE: Not talking
23 about any section.

24 MR. GARNER: When he
25 bases that opinion. He said he

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1 elected not to pay it because of
2 that. Under what provision of
3 the relocation act did he base his
4 decision?

5 COURT: You can ask
6 him when you get around.

7 MR. GARNER: I think
8 it would have to -- to do with
9 admissibility. If he said ar-
10 bitrarily because of this piece
11 of paper here, that I'm not going
12 to pay it, then I think --

13 COURT: I don't think
14 it would affect its admissibility.
15 He said this is why he didn't pay
16 it.

17 MR. GARNER: Yes sir.

18 MR. BEALE: It is our
19 position, if the Court please,
20 the construction of the act calls
21 for reasonable moving cost --
22 not if it's personal we move it,
23 and no matter what the price is,
24 and it talks about reasonable
25 moving prices. And the

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1 comparison of these two goes to
2 that question, whether or not it
3 was a reasonable moving cost.
4 And of course our position is
5 it was not.

6 MR. GARNER: It also
7 talks with replacement cost, at
8 the replacement site, and installing
9 something that is of comparable
10 quality. So I am -- I guess we'll
11 get to that on cross.

12 The point is, there's
13 nothing in the act -- of the re-
14 location act that says that if
15 it costs more to move it than
16 it's worth in place, you get de-
17 preciated cost in place. The
18 whole purpose, I submit, the re-
19 location act is, as the Court
20 pointed out in the last hearing,
21 that they have to replace it at
22 the new site with a comparable
23 type of equipment. And of
24 course if they can go out and get
25 a replacement cost of this kind

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1 and put it on the new site and in-
2 stall it like it was on the old
3 site, that's something else.

4 There's nothing in
5 the act that gets depreciated
6 act in place.

7 COURT: I'll listen
8 to your argument later.

9 MR. BEALE: Without
10 trying to rebut any of that, I
11 would like to say we disagree
12 with anything he said. In
13 particular, we don't think the
14 Court made any such ruling as
15 he said.

16 This Court specifically
17 refused to rule on anything
18 within the relocation act and
19 said it was a separate pro-
20 ceeding. Certainly didn't rule
21 what he was entitled to at the
22 site of relocation.

23 I thought you astutely
24 avoided getting into that.

25 COURT: I think I

1 made some comments about what I
2 thought the relocation act meant.
3 I did not rule on it.

4 MR. GARNER: That's
5 what I am referring to.

6 MR. BEALE: You
7 specifically said you weren't
8 going to rule on it. It was
9 a separate proceeding.

10 MR. GARNER: I don't
11 mean to say the Court ruled on
12 it. The Court made comments
13 along those lines and I agree
14 that is the purpose of the act.
15 I don't want to get too far
16 afield.

17 BY MR. BEALE:

18 Q Mr. Fowler, do you know whether
19 or not -- have you been notified by the landowner at any
20 stage that the site has been prepared for any items to be
21 moved to it?

22 A It has not. They have not.

23 Q As a matter of fact, the site
24 is not prepared today, is it?

25 A As far as I know, it is not.

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1 Q Are you aware whether or not the
2 landowner just purchased the property by deed in November
3 of 1976?

4 A It was my understanding that he
5 just purchased the property. I don't know the exact dates.

6 Q Do you know from whom he purchased
7 the property?

8 A No, I don't.

9 Q You are aware, are you not,
10 though, that there was a contract for the property in
11 existence prior to the deed?

12 A It was my understanding, in
13 talking with Mr. Edwards, that he -- he had contracted to
14 buy a parcel of land, yes sir.

15 MR. BEALE: No further
16 questions, your Honor.

17
18 REDIRECT EXAMINATION

19
20 BY MR. MILLNER:

21 Q Mr. Fowler, would you refer to the
22 Cochran estimate for one minute?

23 A Yes sir.

24 Q I notice the first thing is:
25 Remove and relocate 200 feet railroad siding to new location.

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1 A All right, sir.

2 Q Now, what 200 feet are you talking
3 about?

4 A The 200 feet that -- that the man
5 that prepared the estimate, referring to the 200 feet of
6 railroad siding on the existing property.

7 Q All right, sir. And then ap-
8 proximately what distance is it from Edwards' property to
9 the main line of the C&O?

10 A I have no idea.

11 Q Would it be about 550 feet?

12 A I have no idea.

13 Q You have seen the property?

14 A I have no idea.

15 Q Mr. Fowler, have you been on
16 the site?

17 A Yes sir.

18 Q And you're experienced, now, in
19 going out and looking at property, in your duties with
20 the Highway Department?

21 A The reason that I did not ob-
22 serve was because I did not realize -- and still don't think
23 it relevant to this relocation matter.

24 Q All right, sir. Well, if you
25 just moved 200 feet of railroad track from the Edwards

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1 property to the new location, it's useless, isn't it?

2 A Not knowing the site, I can't
3 answer.

4 Q Well, would you know that if you
5 had a 200 foot of railroad siding running down the hallway
6 it would be useless for railroad purposes, wouldn't it?

7 A Let me say this: It's not the
8 intent, in my opinion, of the relocation act, to make a
9 person whole again.

10 Q It's not the purpose to make him
11 whole again?

12 A Right. It's the intent to move
13 the personalty from one location to the other.

14 Q All right, sir. Couldn't the
15 purpose be stated to restore a landowner from one location
16 in the same position that he is in the new location?

17 A In the case of a business, this
18 would not be true.

19 COURT: Let me
20 understand you. You mean to
21 tell me that -- it is not the
22 intent of the relocation act
23 to save a landowner harmless
24 where his business is being
25 taken for the public good?

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1 You mean to tell me that's not
2 the -- the purpose of the act?

3 MR. BEALE: If your
4 Honor please, --

5 COURT: Just a minute.
6 I'm asking him.

7 MR. BEALE: We'd like
8 to object to your question.

9 COURT: You have no
10 right to object to the question.

11 MR. BEALE: We'd like
12 for the record to show we think
13 we do and we object to it.

14 COURT: Answer my
15 question.

16 MR. BEALE: It is a
17 conclusion of law.

18 A Well, it was my understanding,
19 or is my understanding, in the case of a family --

20 COURT: I'm not talking
21 about a family.

22 A I realize that.

23 COURT: Read my
24 question back to him.

25 (At this time,

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1 the pending question
2 was read by the
3 Court Reporter.)

4 A The way I interpret the act,
5 in regard to a business, our obligation to a displacee,
6 is to move the personal property or pay him in lieu, or
7 payment between twenty-five hundred or ten thousand dollars,
8 that's right, sir.

9 COURT: You haven't
10 answered my question yet.

11 A No sir, we do not make them whole.

12 COURT: It is not
13 your intent to make them whole,
14 is this what you're telling me?

15 A It is my opinion.

16 MR. BEALE: I don't
17 understand your question. You --

18 COURT: My question?

19 MR. BEALE: Mr.
20 Fowler's intent or the Highway
21 Department intent.

22 COURT: He's here
23 representing the Highway Department.

24 MR. BEALE: He's here
25 as an employee of the Highway

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1 Department.

2 COURT: I understood
3 he was the man that was doing
4 all the negotiation.

5 MR. BEALE: I think
6 that's true, on the advice of
7 the Attorney General, but his
8 conclusions certainly aren't
9 binding on the Highway Department.
10 And that would be our position,
11 that -- that's --

12 COURT: Whose con-
13 clusions are binding on the
14 Highway Department?

15 MR. BEALE: I think
16 certainly higher up people than
17 the agent who goes out to ne-
18 gotiate, under instructions from
19 the Attorney General's office.

20 COURT: When -- when
21 does the landowner know he's at
22 the epitome of the ladder now?

23 MR. BEALE: I'm afraid
24 I don't understand that question.

25 COURT: When does he

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1 know with whom he's negotiating;
2 that is, on who he can rely as a
3 negotiator? That's what I want
4 to know. If he can't rely on
5 this man, who can he rely on?

6 MR. BEALE: I think he
7 can rely on this man's position,
8 but his interpretation of this
9 act and the purpose thereof has
10 nothing to do with this pro-
11 ceeding and his responses to
12 those questions, --

13 COURT: I'm asking
14 him, --

15 MR. BEALE: Could not
16 affect the outcome of this
17 proceeding.

18 COURT: He said it
19 was not the intent of the act;
20 therefore, I assume it is not
21 the intent of the Highway Depart-
22 ment to make the landowner whole,
23 under the relocation act.

24 MR. BEALE: That's
25 what he said. His legal

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1 interpretation of it was.

2 COURT: Then I asked
3 him -- if I understood him to
4 say it was not the intent of the
5 Highway Department to save the
6 landowner harmless and he has
7 said that he does not believe it
8 is their intent to save the
9 landowner harmless.

10 MR. BEALE: I think
11 we need to understand in this
12 proceeding, when you say "save
13 a person harmless," to a person
14 not educated in the law, it
15 might mean something different
16 than it means to you, who has
17 been on the Bench so many years
18 and legally trained. I do not
19 believe anybody believes -- does
20 not intend to save somebody
21 harmless. Mr. Millner's question
22 deals with unowned property,
23 outside of the right-of-way, and
24 I believe what Mr. Fowler -- and
25 we need to be fair to him -- he's

1 saying to you, since they didn't
2 own the track that was on the
3 right-of-way, even though he had
4 a right to roll a train across it,
5 he doesn't have to give him the
6 additional track to set it up at
7 the new place.

8 I don't think that
9 means he hasn't saved him harmless.
10 Mr. Fowler obviously thinks it
11 does. I think --

12 COURT: That's right,
13 Mr. Beale, at this stage of the
14 proceeding I'm not concerned what
15 you believe. I'm concerned what
16 the witness believes. You can
17 argue your case at a later time.

18 MR. BEALE: I understand
19 that, but you're asking him
20 questions that call upon him to
21 make conclusions of law and that's
22 what we're here asking you to make.

23 COURT: I did not ask
24 him for any conclusion of law.
25 I asked him what he thought the

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1 intent of the Highway Department
2 was, under the relocation act.

3 A Your Honor, could I say something?

4 COURT: No sir, you
5 just answer the question.

6 A Yes sir.

7 BY MR. MILLNER:

8 Q All right, then, Mr. Fowler,
9 as to the Edwards' property, to get to the main line of the
10 C&O, there's no -- element shown, either in the relocation
11 or in the condemnation itself for any either damages or re-
12 location benefit as to that portion of the tract; is that
13 correct?

14 MR. BEALE: Now, if
15 your Honor please, I'm going to
16 object to that. That's inaccurate.
17 You conducted the hearing previously
18 and have indicated in the condem-
19 nation proceeding that we must
20 show and must include the appurtenant
21 easement going across all the other
22 properties to the main line, and
23 must show compensation in that
24 case, and value for that. So
25 that's an inaccurate statement.

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1 When the condemnation case is heard,
2 we agreed after your ruling on
3 that, that appraisals of the
4 value of this easement, and the
5 right to cross that property
6 would be decided in the condem-
7 nation proceeding.

8 MR. MILLNER: My point
9 is, Judge, that Mr. Fowler has
10 said he got from these two ex-
11 hibits, I don't see them marked
12 with the numbers, it has two
13 hundred feet of railroad siding.
14 He gleaned these from the ap-
15 praisals that had been made as
16 a part of the condemnation pro-
17 ceeding.

18 Now, these show 200
19 feet of railroad siding, and I
20 assume there's some per foot,
21 per lineal foot figure to arrive
22 at the 200 foot of railroad
23 siding. So this is what we have
24 maintained all along, is that
25 now, that not in the condemnation

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1 case or in the relocation aspect of
2 it, or is the State of Virginia,
3 through the State Highway Commissioner,
4 compensating or relocating Edwards
5 as to that portion of the railroad
6 track from its property to the
7 main line. I think it is just
8 obviously right here.

9 MR. BEALE: We'll
10 stipulate that. It's not his
11 track. The only place it's his
12 track is the 200 feet on his
13 property.

14 COURT: I understand
15 your position.

16 MR. BEALE: And our
17 position is that's all he's
18 entitled to have for relocating,
19 if that at all.

20 COURT: I understand.

21 BY MR. MILLNER:

22 Q Are you familiar with the siding
23 agreements we furnished to the State Highway Department?

24 A No sir, I am not.

25 Q Are you familiar with the various

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1 switches and turnarounds, et cetera, to get from railroad
2 siding that you use to unload the coal cars to get to the
3 main line?

4 A In this particular case?

5 Q Just in general.

6 A I'm familiar with switches, yes.

7 Q You know that you just can't
8 run a railroad track into a main line with just normal
9 track. It requires switches, turnarounds and similar type
10 apparatus?

11 A Yes sir.

12 Q And to your knowledge, then, from
13 your investigation of the -- either the relocation aspect or
14 the condemnation aspect, that hasn't been taken into con-
15 sideration?

16 A As far as relocation, I have not
17 taken it into consideration.

18 Q You haven't taken anything into
19 consideration so far as apparatus needed to make the new
20 railroad line usable?

21 A That's correct.

22 Q When do you intend to do that?

23 A I wish I can answer your question.
24 I don't have any idea.

25 Q Let's go back to the meeting.

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1 Mr. Garner was there, I was there, I think Mr. Beale was
2 there, and you were there. And this was prior to the hearing
3 before Judge Garnett as to realty and personalty. Do you
4 recall that meeting?

5 A You're referring to the meeting
6 in Richmond, or Mr. Beale's office?

7 Q Mr. Beale's office.

8 A Yes.

9 Q Mr. Chapman was there and Mr.
10 Edwards was there. Now, wasn't, in essence, what was said
11 is that -- that your hands were tied until the Court de-
12 cided whether it was realty or personalty, as to the disputed
13 items?

14 A That's partially true, yes sir.

15 Q Well, now, tell me what -- tell
16 me what is the rest of it, then?

17 A The rest of it is that -- we
18 must receive some concrete word from a higher source in
19 order for me to act on this matter.

20 Q Do you deny now, Mr. Fowler,
21 that -- that you made the statement?

22 COURT: This is what
23 I want to ask him. This is what
24 I didn't understand. What higher
25 source are you waiting for, or

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1 were you waiting for?

2 A We were waiting for the people
3 in the central office to give us approval to either go
4 ahead with the items insofar as relocation or as to --
5 exactly what we're supposed to do.

6 BY MR. MILLNER:

7 Q You denied at that time now that
8 -- that you stated if it was personalty, as soon as the
9 Court held it, that you would move it?

10 A I don't recall everything that
11 was said. I can't say that I said it. I can't say that I
12 did not say it.

13 Q Okay. Then you can't deny that --
14 that you know from the remarks that were said that certainly
15 Mr. Edwards got the impression that's what you said; that
16 is --

17 A I should not think I would have
18 given him the impression, knowing the position of the Attorney
19 General's office.

20 Q Wasn't it really the purpose in
21 coming to Court to get the issue decided as to realty and
22 personalty?

23 MR. BEALE: Now, I'm
24 going to object to that, if your
25 Honor please. I don't see how

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1 he can possibly determine what the
2 purpose --

3 COURT: I heard that
4 case.

5 MR. GARNER: I can say
6 -- I mean, the reason I would sub-
7 mit to you, because there was a
8 meeting and these things were
9 discussed and I think it is fair
10 to ask him why they went to Court
11 to have this determination made
12 as to whether it was realty or
13 personalty. And I think this
14 bears on the representations
15 that he made and that were made
16 by the State Highway Department
17 and hence Commissioner.

18 So I mean, if Mr.
19 Beale says he objects to it,
20 but I think it is very pertinent
21 if this man was told that if
22 he goes to Court and it is de-
23 cided to be personalty then we
24 can move it under the relocation
25 act.

1 COURT: You can ask him
2 that. You can ask him that.

3 MR. BEALE: If your
4 Honor please, we still object to
5 that, too, because the issue was
6 a question of law here. We came
7 here at the insistence, as you
8 recall, of Mr. Millner, to have
9 that question determined. We
10 took the position we knew the
11 answer to that question. We
12 didn't need to have the Court
13 to determine that question. In
14 fact, it was realty. It so
15 happens that the Court disagreed
16 with us on that and we still
17 disagree with the Court on that.

18 I'm sure you're very
19 interested in that, but at any
20 rate, the purpose of it was Mr.
21 Millner to have that question
22 determined, assumingly to determine
23 when we go forward in the con-
24 demnation case whether or not
25 some items needed to be removed

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1 from it by virtue of them being
2 personalty.

3 COURT: Mr. Beale,
4 I understand that, but he can
5 still ask him the question.

6 MR. GARNER: Yes sir,
7 Mr. Beale keeps saying "us," and
8 I would like to know when he says
9 "us" he's talking about himself?

10 COURT: The problem
11 I'm having with this case, we got
12 people meeting and statements
13 being made, and he says at one
14 time he's waiting on word from
15 the central office. Then he says
16 he's waiting on word from the
17 Attorney General. I really don't
18 know on whom we're waiting. And
19 -- and I really don't understand
20 Mr. Beale, everything that is
21 going on and I'm trying my best
22 to follow this.

23 MR. BEALE: I think
24 we're waiting on the landowner,
25 is our position.

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1 MR. GARNER: Not waiting
2 on the landowner. The landowner has
3 done everything we can do. When
4 Mr. Beale says "us," he's talking
5 about himself as Attorney for the
6 State Highway Commissioner in the
7 condemnation. He's not talking
8 for Mr. Fowler, who is the agent
9 in the relocation case. We say
10 they take inconsistent positions
11 and we'll get into that in argu-
12 ment, but that's what we're faced
13 with.

14 COURT: All right.

15 MR. MILLNER: We have
16 no further questions.

17 Your Honor, in view
18 of Mr. Beale's comment, he's
19 waiting on the landowner to do
20 something, perhaps if he would
21 tell us what he's waiting on
22 or what we're supposed to do
23 we honestly don't know.

24 MR. BEALE: I will
25 certainly tell you. I don't

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1 know if the Judge is interested
2 in it. We're waiting for you to
3 get the items off the right-of-way
4 so this public project won't be
5 continually be held up like it
6 is now for months because you
7 won't move the items. That's
8 what I thought this hearing was
9 about, to find out whether or
10 not we were authorized to go
11 on the property.

12 MR. MILLNER: Our
13 response, Judge, is it's --

14 COURT: I don't want
15 to hear all that now. Let's
16 finish the case. I'm not here
17 to listen to your arguments.

18 MR. MILLNER: I don't
19 think we have any further
20 questions, your Honor.

21 COURT: All right,
22 sir.

23 - - -
24

25 JAMES B. EDWARDS, called as a

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1 witness, in his own behalf, being duly sworn, testified
2 as follows:

3
4 DIRECT EXAMINATION

5
6 BY MR. MILLNER:

7 Q Would you state your name.

8 A James B. Edwards.

9 Q And where do you live, Mr. Edwards?

10 A 22 Barkley Road, Newport News.

11 Q All right. What business are you
12 engaged in?

13 COURT: We're doing this
14 for the record, that's one thing.

15 BY MR. MILLNER:

16 Q All right.

17 COURT: I know Mr.
18 Edwards. I know where he lives,
19 too. Nice home.

20 A Thank you.

21 COURT: Nice car.

22 BY MR. MILLNER:

23 Q Let's move up to what businesses
24 is the Edwards Company in?

25 A Primarily heating oil and coal.

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1 We also do termite control, pest control, ornamental spraying,
2 industrial solvents. That will cover most of it.

3 Q All right. The size of your
4 parcel is 200 by 200?

5 A What's that?

6 Q The size of your parcel is 200
7 by 200?

8 A Is 200 by 200.

9 Q You're one of the corporate
10 owners, stockholders?

11 A Yes.

12 MR. BEALE: We don't
13 have any problem with that.

14 BY MR. MILLNER:

15 Q When were you first -- when did the
16 matter of condemnation first come up?

17 A Years ago. Mr. Karam, prior to
18 his death, made an appraisal for the City and the project
19 has seemed to have come and gone for a number of years.

20 Q What year was that?

21 A I have a clipping that goes prior
22 to 1970, and I would say that was -- five years ago.

23 Q All right, sir. Then the things
24 sort of died down insofar as condemnation was concerned and
25 didn't hear anymore for a while?

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1 A Yes.
2 Q When was the first time you were
3 approached by the representative of the State Highway
4 Department?

5 A Say early '74, probably.

6 Q All right, sir. And was the term
7 relocation mentioned to you at that time?

8 A Yes, I think so.

9 Q All right. Now, was -- wide
10 public notice that 23rd Street would be widened and you
11 knew you were in the path of it?

12 A Yes.

13 Q Did you begin looking for a new
14 business site?

15 A Yes, we did.

16 Q When did you begin looking for
17 the new business site?

18 A Prior to -- well, between the
19 time that it died down and it was reinitiated I would say
20 in '73 probably.

21 Q All right, sir. And were you
22 succesful in locating a site?

23 A Yes, we were.

24 Q Who was the owner of the site?

25 A City of Newport News.

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1 Q Where was -- where is that
2 property located?

3 A On Burcher Road, between
4 Jefferson Avenue and Warwick Boulevard, adjacent to the C&O
5 Railway tracks, across from Brunk Mechanical. You turn
6 left and go under the interstate at Lumber 84.

7 Q Was this a part of the old water
8 shed property?

9 A Yes.

10 Q Was it necessary the property be
11 rezoned because you anticipated oil storage, coal yards,
12 et cetera?

13 A Yes.

14 Q Did we go through a long --

15 A It took at least a couple of
16 years; at least two years, I believe.

17 Q Did you finalize the contract
18 with the City in July of 1974?

19 A No. Approximately, I would say.

20 Q You agreed to buy it at that
21 time; is that correct?

22 A Yes.

23 Q All right. And then is it true
24 that the formal closing took place, I believe, in November
25 of '76?

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1 A October is in my mind, but it's
2 approximately that date.

3 Q It was under contract all during
4 that time?

5 A Yes.

6 Q All right. And are you expending
7 -- did you have cash invested, paying interest?

8 A Yes.

9 Q On your investment up there?

10 A Yes.

11 Q Now, when did -- do you recall a
12 meeting on April the 14th, 1976 wherein Mr. Chapman,
13 Rubenstein and Annas were present?

14 A Yes.

15 Q And I think I was there.

16 A This was at your office, I
17 believe.

18 Q All right, sir. What was -- would
19 you tell the Court what transpired at that meeting in
20 reference to what was said about relocation?

21 A Well, I recall I had asked for
22 a number of items and listed and stated the items that --
23 we wanted relocated, to include the sign, the scales, the
24 rail, the conveyor, the fence, the -- the air stand and gas
25 pump. A number of items that we listed, I think you listed

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1 at that time.

2 Q All right. And what -- what
3 commitment was made or what information was given to you as
4 to what would happen?

5 A I don't know that we ever had a
6 commitment, other than an understanding that personalty
7 would be moved and items that weren't personalty wouldn't
8 be moved and some items were in contention and some items
9 were not in contention.

10 Q All right. Did you have many
11 conversations with Mr. Fowler?

12 A Many?

13 Q Did you have many -- several
14 conversations with Mr. Fowler?

15 A Well, I have been in at least
16 one meeting with Mr. Fowler. Mr. Fowler came to our office
17 and discussed the clearing of the right-of-way and that --
18 that meeting I particularly remember.

19 Q All right, sir. What, in essence,
20 did he tell you what would happen on relocation, or what
21 was the holdup, if there was a holdup?

22 A We sat in the office for -- 15
23 to 20 minutes, I suppose, and I think we recognized at
24 that point that the rail and the conveyor were in contention
25 and it was very pleasant, but very pointedly -- and I think

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1 he'll recall that I asked him very pointedly, "Who do you
2 sue? I know we're in disagreement, but who do you sue"?
3 I asked him that question very directly. We walked the
4 property and he showed me where he wanted the coal back
5 to, you know, the right-of-way lines and we discussed the
6 removal of the shed building, and I particularly asked him
7 if he wanted me to remove the track and the conveyor, was
8 that up to me at that point. And he said, "No, not at that
9 point." I assumed they were going to move it if it was to
10 be moved.

11 Q All right, sir. Did Mr. Fowler
12 tell you that the decision hung on whether it was realty
13 or personalty?

14 A Yes.

15 Q And -- what was -- what did he say
16 in respect to it?

17 A That personalty was to be moved
18 and realty wasn't to be moved and I think at that point he
19 considered that to be realty. And we thought it was
20 personalty and it had to be determined which it was before
21 it would be moved. But -- it was my definite understanding
22 that if it was personalty, it would be moved.

23 Q That was the understanding at
24 the outset; is that correct?

25 A Substantially, yes.

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1 Q All right, sir. And would this,
2 referring to the letters that we were writing to Mr.
3 Culbertson and his reply, was not the question then whether
4 it was realty or personalty?

5 A That has been the question for
6 several years.

7 Q All right, sir. And was it your
8 understanding that as soon as the Court decided that, they
9 would then get on with relocation?

10 A I thought when the -- the Court
11 had determined that, that was the end of it. That it would
12 be taken care of from there.

13 Q Now, Mr. Edwards, what is your --
14 have you continued to operate?

15 A Yes.

16 Q All right. Now, can you just tell
17 the Court the status you're in, in respect to either the
18 condemnation or the relocation?

19 A We're able to continue to do
20 business. We have sold coal and resupplied ourselves this
21 past heating season. We have done some land planning and
22 engineering and placement of buildings and -- and planning
23 of buildings for the new location, and we're just in the
24 middle. We can't go one way, and we can't go the other,
25 because we don't know how much money we're going to get or

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1 what items are to be moved so that we can proceed with
2 the move and -- if we don't continue in the situation that
3 we're in to be resupplied at the current location, then we
4 won't have any product to sell. We're just in the middle.
5 We worked some both ways. We're continuing to work at
6 this location. We're doing work on the other location, but
7 we're not in the position to move forward.

8 Q What would happen if the -- if
9 the line of the C&O leading to the siding, leading into
10 your property were terminated or destroyed, removed or if
11 the State were to come in and remove the conveyor system?
12 How would it affect your business?

13 A We couldn't get coal in and
14 we couldn't sell coal. And if we couldn't sell the coal,
15 of course, we would lose the customers, either to another
16 fuel or another fuel dealer. Of course, if that went on
17 for any period of time, we would be out of business. That's
18 why time is of some importance.

19 Q All right, sir. Is there --
20 the opportunity then that you could lose your coal business
21 if you're not in a position to unload coal, and store it
22 and so forth?

23 A Yes.

24 Q All right. What about other
25 facets of your business?

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1 A The other portions of the business
2 are -- continuing in a fairly orderly manner.

3 Q Have you tried to cooperate with
4 the State Highway Department?

5 A I don't consider that we have had
6 any problem with the State Highway Department except that
7 we can't get the information. We can't get anything definite.
8 If we had some definite information, then I think that we
9 could plan, but we can't get a commitment from the Highway
10 Department, period. That's my feeling on it.

11 Q Well, Mr. Edwards, in reference --
12 what position does Mr. Fowler present to you? What does he
13 in essence say?

14 A Mr. Fowler has been -- has not
15 bothered us. He's been very nice. And my understanding
16 is that -- it's personalty he'll move and real estate he
17 won't, and it's just as simple as that with him, as I under-
18 stand it.

19 Q Have you also talked with Mr.
20 Chapman, who is seated on the front row, also of the State
21 Highway Department?

22 A Yes.

23 Q What position does he take? He's
24 more concerned with the condemnation aspects of it; right?

25 A I would assume the same position,

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1 but I think he's probably -- more noncommittal -- I'll put
2 it that way -- he doesn't seem to --

3 Q What does the certificate attempt
4 to do, the amended certificate?

5 A Well, in my view of course the
6 amended certificate attempts to take things that they didn't
7 take in the first place without any compensation, but then
8 that may be my -- one-sided view.

9 Q Under the certificate, isn't the
10 State really trying to take personalty from you? They're
11 trying to mix personalty and realty together?

12 A Yes.

13 Q So they're trying to put condem-
14 nation so as to completely eliminate any relocation benefits,
15 isn't that true?

16 MR. BEALE: If your
17 Honor please --

18 COURT: I think
19 that's a little leading. I'm
20 going to ask all you lawyers
21 to stand a little closer to
22 the Bible.

23 MR. MILLNER: I have
24 no further questions.

25 CROSS-EXAMINATION

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1 BY MR. BEALE:

2 Q Mr. Edwards, starting with the
3 certificate to which Mr. Millner was referring, you're aware,
4 are you not, that in the original appraisal made by the
5 Highway Department as to the original certificate, that the
6 depreciated value of all the items, there is a dispute as
7 to whether they are realty or personalty, such as the con-
8 veyor, and the railroad tracks, and those type of items,
9 were actually evaluated and included in the amount of the
10 original certificate?

11 A I think it is my understanding
12 that has been the State's original position, but I don't
13 have any knowledge of the appraisal at all.

14 Q And when -- when the second cer-
15 tificate was filed, the same amount was in the second
16 certificate that was in the first one; is that correct?

17 COURT: The same amount
18 as what?

19 MR. BEALE: Dollars.

20 A It's true; then, you put items
21 in the second certificate that didn't exist in the first
22 certificate which made you wonder, if they were covered in
23 the first certificate, why you filed the second certificate.

24 BY MR. BEALE:

25 Q My question was: You were aware

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1 those items were in the first certificate and your answer
2 was yes; is that correct?

3 A The only thing that clouded
4 that was the second certificate.

5 Q You were aware of it?

6 A That's my understanding. I
7 wasn't aware but it was my understanding.

8 Q That's the one Mr. Millner re-
9 ferred to that was filed in July of '76.

10 MR. BEALE: July 12th
11 of '76. That was, I think, to
12 bring us to issue on the question
13 of whether or not the realty --
14 those items were construed as
15 realty. And the second certificate
16 specifically stated that they
17 were appraised and included as
18 realty.

19 BY MR. BEALE:

20 Q So you are aware, though, from a
21 dollar standpoint, that the certificate, the two certificates
22 had precise the same figure which was, I believe, sixty-nine
23 thousand dollars?

24 A I think it was the same figure,
25 yes.

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1 Q And you are also aware that
2 subsequent to the hearing conducted by his Honor, on the
3 question of realty and personalty, you through your counsel,
4 and the Highway Department through me, have now lowered
5 that amount by virtue of the amounts that were eliminated
6 for personalty. Are you aware of that?

7 A No. And that would be in-
8 consistent with your position.

9 Q Well, I don't want you to argue
10 with me, Mr. Edwards. I want you to answer it.

11 A I'm not aware of that, no.

12 Q That's the answer, then. Now,
13 let's deal, if you will, with your site that you closed,
14 you said somewhere around October of '76, on the property
15 that you intend to relocate your business.

16 A All right.

17 Q Would it be a fair statement to
18 say that you have done no site preparation?

19 A No physical preparation.

20 Q No site preparation whatever?

21 A Yes, we have plot plans and we
22 projected track, and I can produce plans for you, buildings,
23 if that's what you're asking.

24 Q No, I'm asking you whether or not
25 you prepared the site for the items that you are saying the

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1 Highway Department won't move up there?

2 A We have done nothing physical on
3 the property.

4 Q Do you know -- putting aside
5 how much track you would be entitled to -- do you know at
6 the new site how much track that would be needed for your
7 new operation?

8 A I have it plotted and I can
9 produce it for you, if you would like.

10 Q Do you have it here?

11 A No, but it's at the office. I
12 can have it in a very few minutes.

13 Q Are you aware that your counsel
14 has suggested to the Highway Department --

15 A As a matter of fact, I think I
16 do have an old projection of the C&O, that the C&O did on
17 the track. I believe I have that probably in my notes here.

18 Q Is that how much track you intend
19 to utilize?

20 A Yes.

21 Q Have you represented, through
22 your counsel, that if it takes two hundred feet, to get in
23 so you can unload the coal, 200 feet is all right. If it takes
24 six you want six. If it takes a thousand you want a
25 thousand. Is that -- accurate of your position as to what

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1 you're entitled to as relocation of rail?

2 A That would be -- yes.

3 MR. MILLNER: In fair-
4 ness to Mr. Beale, we think it will
5 only take 250 to 300 feet as op-
6 posed to -- to 700.

7 COURT: The answer is
8 he thinks he's entitled to whatever
9 it takes, even if it's five miles.

10 A This is substantially comparable
11 to what we have, I think you'll find. I don't --
12 BY MR. BEALE:

13 Q You have 200 feet as it is that
14 you own; is that correct?

15 A That's correct. But it's sub-
16 stantially the same as what we have available to us or the
17 use of currently, I'll put it that way.

18 Q Have you at any time indicated
19 to the Highway Department where you want the track located
20 at the new site?

21 A They have never asked me for a
22 plot plan or anything, but it's available if they would like
23 to have it.

24 Q Let me try it again, Mr. Edwards.

25 A All right.

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1 Q Have you, at any time, indicated
2 to the Highway Department where you want the track at the
3 new site?

4 A Are you asking me if I ever
5 presented them with a plan?

6 Q What I am really asking you, Mr.
7 Edwards, is this: Isn't it a fact the site is not ready for
8 the items to be moved there right now, today?

9 A There has been no physical
10 preparation of the site on site.

11 Q Well, is it your position that
12 the Highway Department should have already relocated the
13 items from your current property?

14 A All I ever asked for from the
15 Highway Department, through my attorneys or otherwise, was
16 a commitment as to what they were going to do. That's the
17 situation we're in. We can't plan anything because we don't
18 know anything.

19 We have asked them, yes, to --
20 we have stated to the Highway Department we did want them
21 to move the track and the conveyor. We have stated that.

22 Q Mr. Edwards, if the Highway
23 Department went over there right now and move it, you could
24 not tell them where it went, could you, on your property?

25 A Yes, I could.

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1 Q How would you do that?

2 A By presenting with a plan done
3 by an engineer that -- has the track laid out on it. I
4 mean, how would you tell them where any building went? The
5 same way.

6 Q And if they went up there now,
7 you're saying they could install your conveyor, even though
8 there's no site preparation; is that correct?

9 MR. MILLNER: Site
10 preparation is included in the
11 relocation. That's the obligation
12 of the State Highway Department.

13 MR. BEALE: You and I
14 both know that's not true.

15 MR. MILLNER: No sir.

16 BY MR. BEALE:

17 Q It could not be done.

18 A I'm not trying to indicate we
19 have done any work whatsoever at the new site; we have not.

20 Q When do you intend to do it?

21 A When I get a commitment that
22 will allow me to do it. A commitment as to whether or not
23 you will move or how much money is involved. Then we can
24 proceed.

25 Q You mean that the question of

1 whether or not you are desirous of moving certain items is
2 dependent upon how much money you get from the Highway
3 Department?

4 A We can't move without money,
5 you know.

6 COURT: As I under-
7 stand what they're saying, Mr.
8 Beale, is that nobody from the
9 Highway Department has told
10 them how much they're willing
11 to pay for the relocation, and
12 therefore, they can't make their
13 plans because they don't know
14 how much money they've got to
15 deal with. Is this your position?

16 A Yes, your Honor.

17 COURT: That's what
18 I understand him to say.

19 MR. BEALE: Well, of
20 course -- I don't think there's
21 any question in this case, maybe
22 it's going to have to come later,
23 that the position of the Highway
24 Commission is clear, that we
25 disagree with the Court's ruling

1 on the personalty and don't intend
2 to pay the moving fee items that
3 were listed. And I think the land-
4 owner knows that, and Mr. Millner
5 knows that, and we had negotiations.

6 COURT: That sort of
7 solves the whole problem.

8 MR. GARNER: This is
9 the problem.

10 COURT: Let me ask Mr.
11 Beale, let me get this straight.
12 You disagree with the ruling of
13 the Court; is that right? And
14 you have no intention of moving
15 the articles that this Court has
16 ruled to be personalty; is that
17 what you said?

18 MR. BEALE: What I am
19 saying --

20 COURT: Is that what
21 you said?

22 MR. BEALE: I'm not
23 going to be tied to just one
24 thing.

25 COURT: Read that back.

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(At this time,
a portion of the
prior testimony was
read by the Court
Reporter.)

COURT: That's what
I understood you to say.

MR. BEALE: All right,
sir. What we're saying is this,
if I can make it clear -- and I
don't think there's any question
they'll agree with this: That
order of the Court in all prob-
ability which, incidentally, we
received today, we have been
trying to get from the land-
owner, so in the event that was
appealable we could move forward
with it, but we don't think it's
appealable until the end of the
condemnation case, so what we're
really saying is, until we get a
final ruling on that question,
then the Highway Department
position is that it's not required

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1 to pay for the removal of those
2 items.

3 Now, it's very possible
4 in the exhaustion of his ad-
5 ministrative remedies and in the
6 case of relocation it could be de-
7 cided we were required to pay that
8 at a later stage, but until that
9 is decided that we're required to
10 pay that, we don't intend to do
11 it.

12 If we did do it we would
13 be out-of-pocket that money, be-
14 fore a final resolution of that
15 point is made.

16 We think that's a
17 separate proceeding. That's
18 what we said at the outset, you
19 recall, this morning, the
20 question what's entitled to be
21 relocated. And they have not
22 exhausted their administrative
23 remedies in that area. That
24 is not a question before this
25 Court.

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1 COURT: What ad-
2 ministrative -- what do you
3 suggest they do? This is what
4 I am trying to find out. What
5 are they supposed to do?

6 MR. BEALE: Like I'm
7 saying, I don't think there's
8 any question Mr. Edwards knows
9 that's our position. I don't
10 think there's any question,
11 either, of these attorneys,
12 that's our position.

13 MR. GARNER: If I
14 may address --

15 MR. BEALE: Excuse
16 me. If your Honor please, I
17 think they know our position
18 on that point and -- since that
19 in essence is a denial of what
20 they say they are entitled to,
21 then they must meet the require-
22 ment which is to demand an ad-
23 ministrative hearing on this
24 point. That is not for this
25 hearing. They need to demand

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1 an administrative hearing. And
2 it's in the rules and regula-
3 tions on the question of whether
4 or not they're entitled to re-
5 location for those items.

6 Then ultimately, in the
7 event that they do not win at
8 that particular proceeding, they
9 would be in Court on the re-
10 location question in the City of
11 Richmond, and could have a final
12 resolution of that. And -- that,
13 as I see it, is a side question
14 as it relates to -- to this pro-
15 ceeding today. And of course
16 we'll get to -- those items later
17 on.

18 Now, if the public
19 funds were utilized to move
20 those items, which we say is --
21 that the items are personalty,
22 but even if they are personalty
23 we disagree with the Court's
24 ruling that we could not condemn
25 them, but that will be resolved

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1 in the condemnation proceeding,
2 but the question of relocation
3 and entitlement is an entirely
4 different proceeding. I don't
5 think there's any question they
6 know our position on it. And
7 that's -- the main point that I'm
8 making, as it relates to the
9 condemnation case. And they
10 simply have not exhausted their
11 administrative remedies.

12 You disagree -- you
13 started to say you disagree with
14 that?

15 MR. GARNER: Yes sir.

16 COURT: We all through
17 with this witness?

18 MR. BEALE: No sir.

19 COURT: If we are
20 going to argue the case that's
21 all right, but let's get along
22 with the witness.

23 MR. GARNER: The problem,
24 if your Honor please, is this:
25 When Mr. Beale says they all know

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our position, we know the position
of the State Highway Commissioner
in the condemnation case, but
that's not the position of the
State Highway Commissioner in
the relocation aspect and has
not been from the inception,
based upon the evidence that has
been put before your Honor
today. The State Highway Com-
missioner and the State Highway
Department take care of both as-
pects of this and in the re-
location proceeding, as has been
evidenced by Mr. Fowler's testi-
mony and Mr. Edwards' testimony,
the understanding there and Mr.
Fowler could speak, we submit
for the State Highway Commissioner
and the State Highway Department
in that aspect of it, was that if
the property was personalty, then
they were going to relocate it.
Now, Mr. Beale represents the
same parties, so to speak, the

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1 State Highway Commissioner in
2 the condemnation proceeding, but
3 his position, yes, I understand
4 his position, but when he says
5 "us," that has to be split, because
6 there are two separate proceedings
7 and the State Highway Commissioner
8 as you might have, is taking in-
9 consistent positions and has, or
10 has taken inconsistent positions
11 with this landowner.

12 Mr. Beale's position
13 in the condemnation case is that
14 he doesn't care whether it's
15 realty or personalty. If the
16 Court says it's personalty he's
17 still going to take it, so
18 therefore they can't move it
19 under the relocation act.

20 And Mr. Fowler has
21 already indicated to Mr. Ed-
22 wards that if it was personalty,
23 it would be moved.

24 Under the -- appeal
25 rules there's nothing for us to

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1 do yet because there's been no
2 determination. On Page 76 it
3 says, "When a relocatee is
4 aggrieved by the Department's
5 determination of eligibility
6 or of the amount offered under
7 relocation assistance in payment
8 statutes he must advise district
9 right-of-way engineer in writing
10 within 90 days."

11 They haven't even got-
12 ten the bids yet. It goes back
13 to the other section which says,
14 "Once he says he wants a com-
15 mercial move, the State Highway
16 Department gets two sealed bids
17 and they would accept the lowest
18 acceptable bid."

19 They haven't gone that
20 far yet. There's nothing to ap-
21 peal; and if you read it further,
22 the person who makes the final
23 decision, anyway, is the Plaintiff
24 in the condemnation case.

25 If we exhaust our remedies

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1 it says you end up before the
2 commissioner who review it and
3 render his decision and which
4 will be final, and advise the
5 relocatee in writing.

6 We're being put in
7 an impossible situation between
8 a rock and the hard place, be-
9 cause the same party, the State
10 Highway Commissioner is taking
11 one position in the condemnation,
12 when before he had taken another
13 position in the relocation.

14 So that's why I say I
15 disagree with Mr. Beale's state-
16 ment when he says, "You know
17 what our position is." It
18 depends on which State Highway
19 Commissioner he's talking about,
20 the one in the condemnation
21 or the one in relocation.

22 MR. SOUTHALL: Your
23 Honor, if I may say a word, I'm
24 Valentine Southall.

25 COURT: Yes sir.

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1 This is Attorney General
2 day down here.

3 MR. SOUTHALL: I under-
4 stand that's the case. I would
5 like to speak to that and I
6 know you're not ready for argu-
7 ment, but I think it should be
8 rebutted the Highway Commissioner
9 has not taken inconsistent posi-
10 tions with regard to the status
11 of these items.

12 We do take the position
13 there are two separate and distinct
14 proceedings which must be gone
15 through if there are issues: one,
16 with respect to the value of the
17 property taken, and two, with the
18 items which must be relocated,
19 or the moving expenses for relocating
20 those items.

21 COURT: Mr. Southall,
22 let me ask you this question.
23 This is something no one seems
24 to have answered yet, neither
25 the Edwards people nor the Highway

1 people. What do you all -- what
2 is your course of action now?
3 What do you expect Edwards to
4 do?

5 MR. SOUTHALL: I think
6 that -- our position is this: Mr.
7 Edwards -- and in our meetings
8 with Mr. Millner in Richmond was
9 advised we considered the items
10 in question which are listed in
11 the enumeration in the record
12 are real property.

13 This Court has ruled
14 most of those items are personalty.

15 This Court has ruled
16 that in the condemnation pro-
17 ceeding and that -- the Court has
18 further ruled that the Highway
19 Department, or the Highway
20 Commissioner cannot condemn
21 those items. That's fine. We
22 have excepted to that and we
23 have a right of appeal if we
24 so desire.

25 Nevertheless, the

Highway Commissioners' position with respect to those items in the relocation matter remains the same. That those items are realty, and do not fall within the scope of the real property and relocation assistance -- relocation assistance act. Therefore, they don't fall within it. It is not inconsistent. We have taken the same position all along; the issue of whether they were realty or personalty has not been finally determined, even in the condemnation proceeding, but with respect to the relocation assistance payment, two things must be gone through. One, it has got to be determined they're personalty for the purpose of their hearing. Our position was made clear in the meeting with Mr. Millner, the landowner indicates he knows, he just testified that

1 he knew that we said we would move
2 personalty, although I will take
3 issue with that in a second, and
4 we wouldn't move realty. And he
5 understood there was a dispute as
6 to certain items, whether they
7 were realty or personalty. He
8 also knew our position hasn't
9 changed on that.

10 So he indicates he has
11 received notice and he could have
12 gone through the administrative
13 procedure, which is set out in
14 the rules and regulations.

15 COURT: We have ruled that
16 certain items are personalty.

17 Now, until the Supreme
18 Court sets that aside, assuming
19 that they will, they remain
20 personalty. And as between the
21 parties that's res judicata, isn't it?

22 MR. SOUTHALL: I have one
23 more point --

24 COURT: Is that not right?

25 MR. SOUTHALL: Only as

1 to the condemnation.

2 COURT: It's the same
3 parties.

4 MR. SOUTHALL: It is
5 two separate causes of action.

6 COURT: The same issue
7 is involved.

8 MR. SOUTHALL: No sir.

9 COURT: The issue: Are
10 they personalty or not personalty.

11 MR. SOUTHALL: The issue
12 is whether or not he will be
13 compensated.

14 COURT: Let me ask you
15 what you expect this man to do?
16 Do I understand that the High-
17 way Department now has a con-
18 demnation suit against Edwards,
19 now, in that there have been
20 certain rulings adverse to the
21 Highway Department, and certain
22 rulings adverse to -- Edwards?
23 In the meantime you all want
24 to come through his land.
25 You want to cut that trestle

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1 in two over there, take that off,
2 which is going to, in effect, put
3 him out of business until he can
4 move his plant.

5 In the meantime, you all
6 may appeal my ruling as to whether
7 what I -- ruled was personalty
8 might in fact be realty. Probably
9 is. But anyway, I ruled it was
10 personalty.

11 Now, this man, do you ex-
12 pect him to move his business,
13 build a new trestle or whatever
14 he has to do up there, while you
15 all are appealing this case, this
16 condemnation case, and he may be
17 two or three years before he
18 knows what your intention is going
19 to be in the relocation? This is
20 what you expect?

21 MR. SOUTHALL: The law
22 says --

23 COURT: I'm asking what
24 you expect.

25 MR. SOUTHALL: He will be

1 reimbursed for moving expenses.
2 That means he has to incur them
3 before he can be reimbursed. We
4 expect him to move.

5 COURT: He doesn't know
6 yet what you're going to reimburse
7 him for.

8 MR. SOUTHALL: We told him
9 that those items are real property
10 and do not fall within the act.

11 COURT: I have ruled they
12 are personalty.

13 MR. SOUTHALL: You have
14 ruled only with respect to the
15 condemnation proceedings.

16 COURT: It's between the
17 parties -- the same issue is be-
18 tween the parties. And we've ruled
19 it's personalty until the Supreme
20 Court sets it aside. I don't think
21 anyone has a right to treat it
22 otherwise.

23 MR. SOUTHALL: Well, your
24 Honor, I might say this, further.
25 I was going to add a second element

1 to determine whether he is eligible
2 for payment. The second element is
3 he's entitled only to reasonable --
4 actual, reasonable expenses in re-
5 locating his property.

6 COURT: I agree with that.

7 MR. SOUTHALL: The decision
8 upon which the Highway Department
9 was based to the cost of removing
10 thirty thousand dollar property is
11 one hundred nine thousand dollars.
12 Our position is that's not reasonable
13 and it's not reimbursable under the
14 law. Therefore, we have taken the
15 position consistently: first, that
16 it was realty. When the Court ruled
17 it wasn't realty we thought we could
18 condemn personalty. The Court ruled
19 we couldn't condemn personalty. But
20 those rulings were with respect
21 to the --

22 COURT: Hasn't anybody told
23 this man how much they're willing
24 to pay him for moving.

25 MR. SOUTHALL: We're willing

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1 to pay him no more than the actual
2 in-place value of those items.

3 And I -- I know this is not law
4 but I would like to read you --
5 the Court, in Nichols on eminent
6 domain with respect to this very
7 point. It says, "A person dis-
8 placed from a business or farm
9 operation may be compensated for
10 actual, direct property losses,
11 whether he discontinues or re-
12 establishes his operation. How-
13 ever, the maximum amount of any
14 such payment may not exceed the
15 reasonable expenses that would
16 have been required to relocate the
17 property."

18 Of course, that's converse
19 of the next point. "And in the
20 case of heavy machinery, equipment
21 or other property involving sub-
22 stantial sums, also should not ex-
23 ceed the in-place value of the
24 property."

25 Now, that's been our position.

1 I grant you this is not -- this
2 is an interpretation of the law.
3 And it's one man's interpretation.
4 But we feel that is completely
5 unreasonable, impractical for the
6 Highway Department to spend one
7 hundred nine thousand dollars to
8 move thirty thousand dollars
9 worth of personal property.

10 We attempted to compensate
11 the landowner for the in-place
12 value of those items. He refuses.
13 He says he's entitled to one hundred
14 ten thousand dollars worth to move
15 it and I say to you, the Commonwealth
16 would be a fool to spend that money
17 to move that amount of property.
18 And that's our position, and we
19 have made it clear, I think.

20 COURT: You all do, move
21 it cheaper?

22 MR. SOUTHALL: That's the
23 cheapest we could get. We got
24 an estimate, and I --

25 COURT: Can you all move

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1 the property for less than one
2 hundred nine thousand dollars,
3 move it out there, set it up?

4 MR. SOUTHALL: The High-
5 way Department?

6 COURT: Yes.

7 MR. SOUTHALL: No sir,
8 that is the estimate we got for
9 moving it. We have no equipment
10 to move it. We can move it -- we
11 offered to move it, what could be
12 practically moved aside until the
13 issue could be determined.

14 Now, that may not answer
15 the landowner's problem. I am
16 very much aware of his property
17 of ongoing business. He has been
18 placed in certificate what we con-
19 sider to be the value of the
20 property we thought we were taking.
21 That includes the personalty.

22 I realize that amount is
23 at issue, but that's what the law
24 is set up for. He can litigate
25 it and he can get the full value

1 the Commissioner determines, or
2 otherwise we don't think we can
3 move it for any less than one
4 hundred nine thousand dollars.

5 That was our
6 testimony, and -- I think,
7 your Honor -- I know there
8 has been some question about
9 whether the landowner was aware
10 of it. I think Mr. Edwards
11 has cleared it up. He said he
12 was aware there was a contention
13 all along.

14 I don't know what he
15 has to be told to know we're in
16 disagreement. Your Honor knows
17 we're in disagreement. He's
18 known it since October or July,
19 and you weren't even a party to
20 the case.

21 And I submit that -- we
22 have made it known to him and he
23 could have appealed it. And he's
24 delayed until March now. And he
25 still tried to get it in.

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1 That's all I have.
2 I'm through, your Honor.
3 Thank you.

4 COURT: Are you
5 all through with this
6 witness?

7 MR. BEALE: I am
8 not. I was examining the
9 witness.

10 MR. GARNER: Does
11 the Court want to hear any
12 rebuttal?

13 COURT: No, I want
14 to get through with the
15 evidence. I don't know
16 what else you can show,
17 but go ahead.

18
19 BY MR. BEALE:

20 Q Mr. Edwards, let me ask you this
21 pointed question. Do you actually intend to move the
22 conveyor system to the new location?

23 A Yes.

24 Q You intend to make that operational
25 at the new site?

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1 A That was our hope.

2 Q I mean is it your intention to do
3 that without regard to whether you get it moved by some-
4 body else or --

5 MR. GARNER: I've
6 got an objection. If the
7 Relocation Act provides
8 that if he elected at some
9 future date not to move that,
10 he's entitled to certain
11 benefits and he doesn't have
12 to make that election today.

13 COURT: He didn't
14 ask him to make his election.
15 What he intended.

16 MR. GARNER: That's
17 entirely irrelevant and
18 immaterial.

19 COURT: I'm going
20 to listen to it.

21 MR. GARNER: All
22 right.

23 BY MR. BEALE:

24 Q You intend to make that operational
25 irrespective of whether or not you are compensated under

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1 the Relocation Act or whether you had to do that at your
2 own expense?

3 A I can't answer that.

4 Q Why not?

5 A Because I don't know what money
6 is involved.

7 Q What I want to know is, is the
8 conveyor system crucial to the operation of the coal
9 business?

10 A There are other ways it could be
11 handled, but I don't think it would be less expensive,
12 initially.

13 Q Does your layout for your operation
14 at the new location propose a different method of handling?

15 A No, it proposes this method.

16 Q It proposes the method with the
17 conveyor?

18 A Yes.

19 Q Does it propose more elaborate
20 railroad operation than you have at this location?

21 A No.

22 Q Is that a turntable you have on
23 your plan indicating one hundred foot coal arc?

24 A We don't have a turntable on the
25 plan.

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1 Q There is no turntable?

2 A No turntable.

3 Q Did I understand you correctly
4 to indicate that about two hundred fifty feet of siding
5 would be sufficient at the new location?

6 A The question on the new location,
7 we have an arc to make and we have an easement to cross.
8 Two hundred -- two hundred feet, which we have now, over
9 the easement, I will say, will suffice on property that we
10 can use. It takes approximately the same amount of track
11 to get to that point that we have from the C & O Railway
12 to our yard at this time.

13 So it takes several hundred feet
14 to come off of the C & O main line and make the arc
15 across the easement and get onto the -- unencumbered pro-
16 perty, I guess you would call it, the property that --
17 that we'd have to work on.

18 Q Do you know how much track you
19 need?

20 A As I said, I have a plat that the
21 C & O did that would give us a good rough idea. It's
22 approximately the same. I have an idea it's either five
23 or seven hundred feet over and above the two hundred-
24 feet.

25 Q Has the C & O told you they

1 installed their track there?

2 A They have indicated to us we'd
3 have to do it at our own expense. They would not.

4 Q They would not furnish the
5 track?

6 A Would not furnish the track;
7 that's right.

8 Q They furnish all of the track
9 except on your right-of-way in your current location, is
10 that correct?

11 A Yes.

12 Q The switches that Mr. Millner
13 referred to are owned by the C & O, is that correct?

14 A Yes.

15 Q You actually anticipate, Mr.
16 Edwards, the digging up of the storage tanks and removal
17 of those items to the new site?

18 A It would not be my preference.
19 However, I can go on and tell you why that -- that would
20 be preferable to not having any items at all, if you like
21 for me to. Would you like for me to expound on the
22 answer?

23 Q Do you recall that -- we previously
24 have talked about the Cochran estimate for removal of the
25 underground tanks?

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1 A Right.

2 Q Would it be accurate to say that
3 it's your opinion that new ones could be placed in place
4 for approximately one-third of what it would cost to move
5 them?

6 A I don't know the percentage, but
7 my position is, and with the format we filed, if you put
8 new tanks in, that suits me fine, or old tanks, I wouldn't
9 care. To save money on it, it would be fine with me;
10 we're not asking for money. We're asking for a physical
11 move.

12 Q I understand that's your position
13 today on the witness stand. Is it accurate that these
14 two items on the Cochran estimate with your knowledge
15 far exceed what it would cost to put new tanks in at the
16 new location?

17 A Yes, I would say so.

18 Q Now, is it also accurate that --
19 the last indication of your position, through your Attorney,
20 was that you expected to have that one hundred nine thousand
21 dollars paid to Cochran to move each and every one of
22 these items?

23 A No, I never indicated through my
24 Attorney, or otherwise, we selected the contract or had
25 money paid to them. As a matter of fact, I don't think

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7

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1 that we've ever discussed that.

2 Q Haven't you authorized your
3 Attorney to discuss with Counsel for the Highway Department
4 a lump sum cash payment rather than relocation?

5 A Yes.

6 Q Rather than anything to do with
7 relocation, to attempt to try to put them both together
8 and come up with a proposed settlement?

9 A We have discussed that, yes.

10 Q Let me ask you this, Mr. Edwards.
11 Are you aware that -- since the hearing was conducted
12 before this Court, in October, that there has been in your
13 behalf and in behalf of the Highway Department, between
14 Mr. Millner and I, ongoing negotiations to attempt to come
15 to an agreement as to clearing of the right-of-way so that
16 the project could go through?

17 A I'm familiar that you all discussed
18 it.

19 Q And you are aware, are you not,
20 that a letter was prepared and sent to Mr. Millner, to
21 attempt to have you sign, that guaranteed the rights of
22 both parties on all sides to have all their questions
23 litigated on down the line and that -- indicated the High-
24 way Commissioner was prepared to allow you to bring your
25 inventory in to carry you over the winter season and to

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1 remove those items for safekeeping so that the highway
2 project could go through while the other questions were
3 determined on relocation?

4 A I am familiar with the letter
5 that asked that we move and store, but nothing about
6 bringing in the inventory. I don't recall that.

7 Q Let me ask you another way. The
8 fact is, that you have built up your inventory and now
9 have a very large inventory of coal on your property?

10 A That's not true. We don't have
11 an adequate inventory, no.

12 Q You don't have five or six
13 huge piles right now of coal right over on your property?

14 A We would be -- we can readily
15 demonstrate to you in relation to our sales that we do
16 not have an adequate supply and we have not, in fact,
17 made a normal seasonal stocking that we would ordinarily
18 do between now and fall. We don't have the coal on hand
19 that we had last year this time by any stretch.

20 Q What is the season you're getting
21 the inventory now for, of coal?

22 A We'll be stocking coal prior to,
23 of course, the fall. Cold weather.

24 Q We have the summer coming up now
25 and you just got this coal that's out there, did you not,

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9

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1 like a month ago?

2 A Well, we have both bought and
3 sold coal in the last sixty days, I don't know. We got
4 about a month ago; possibly we do have some coal -- we
5 have more coal on hand than we did several months ago
6 in some areas. Some areas we have much less. Depending
7 on the grade of the coal. You're thinking of one grade of
8 coal. We carry several grades.

9 Q Would you say the market for coal
10 right now, Mr. Edwards, would be rather slim between now
11 and the summer and fall?

12 A Yes, but we would stock through
13 this period.

14 Q Don't you have sufficient stock
15 to "call" you through the fall and winter?

16 A Probably through the fall. If
17 we don't stock between now and that time, it's not
18 available to us in the heating season.

19 Q Now, you indicated that the letter
20 requested that you remove items for safekeeping. In fact,
21 did not the Highway Commissioner suggest to you the High-
22 way Commissioner would move those items to a place of safe-
23 keeping on your property so that the project could move
24 through, and even indicate to you that it would move your
25 anchor fence back over to protect the items to the new

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1 right-of-way line?

2 A I think that's correct.

3 Q And as a result of -- at any
4 rate, you disagreed and would not sign the letter, is
5 that correct?

6 A Right, that's correct.

7 Q And if I understand you correctly,
8 then Mr. Millner prepared a letter to meet the -- the
9 stated positions of the parties and to save each side
10 harmless and said that that was the letter he suggested to
11 you, and he presented that to you, is that correct?

12 A That's correct.

13 Q And you told Mr. Millner you
14 weren't going to sign that one either?

15 A Correct.

16 Q Now, are you telling his Honor
17 that you can't determine what you're going to relocate to
18 the new location until you find out what the position of
19 the Highway Department is as to how much they're going to
20 pay you for relocation?

21 A Either how much they will pay us
22 or if they will relocate us. I mean either/or situation.

23 Q You intend to continue in the
24 same business, do you not?

25 A Yes.

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1 Q And you intend to continue to sell
2 coal whether or not you are entitled to relocation, do you
3 not?

4 A Hopefully.

5 Q You don't know the answer to that?

6 A We would hope to.

7 Q You intend to increase the size
8 of your operation at the new location?

9 A We certainly always hope to in-
10 crease. Now, are you talking about our physical plant or
11 buildings or -- or coal storage; what are you talking
12 about?

13 Q Talking about the physical plant
14 and the bulk oil storage and items such as that.

15 A Initially, we would have less
16 physical plant than we do now. Hopefully in the future
17 if we can expand it to a -- a larger plant. Our initial
18 plans are for less square footage, less yard space and no
19 oil storage at the initial move.

20 Q No bulk storage?

21 A Not at the initial move. We
22 hope at the future we can have bulk storage.

23 Q Is oil the larger part of your
24 business?

25 A Yes.

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1 MR. BEALE: Could
2 we agree on this?

3 MR. GARNER: What's
4 the purpose of the introduction?

5 MR. BEALE: The
6 purpose is to show the position
7 of the landowner has been he
8 ought to be paid the amount of
9 the Cochran appraisal even
10 though he admits the cost is
11 too high.

12 A I may have misunderstood that
13 question. If I could -- give you the question that I
14 thought you asked me, I might be able to clarify that. The
15 way you stated it, we can see what the record says. I
16 thought you said I want you to direct that money to be
17 paid to Cochran. I said we never selected a contractor,
18 didn't care who did it and didn't direct its payment to
19 anybody. I don't know how the question would read if it
20 was read back, but that's the way I understood it.

21 MR. BEALE: I
22 don't want to be unfair with
23 you no matter which way it
24 was earlier or however you
25 want to say it now. Maybe

13

1

that depicts it more accurately

2

in your mind, but the real

3

question was whether or not

4

you were aware that your

5

Attorney as late as December

6

the first, of 1976, continued

7

to take the position that you

8

ought to be compensated under

9

the Relocation Act for the

10

amount shown in this appraisal

11

of one hundred ten thousand

12

dollars.

13

14

A Based on the Highway's estimate
and, of course, the law that we have understood it --

15

I'm not trying to interpret the law, you supposed to get

16

two estimates; if that's your estimate, that's what you

17

ought to pay it. I'll accept that.

18

19

MR. MILLNER: Put

20

the letter in. It's the

21

letter in the nature of a

22

compromise, Judge.

23

MR. BEALE: I'm

24

trying to make one point

25

with this letter, if the

Court please.

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1 As I understood
2 the evidence, Mr. Edwards
3 indicated that he was aware
4 that the forty thousand
5 dollar and sixteen thousand
6 four hundred dollar item
7 were way out of line, as
8 compared to what it would
9 cost to install new tanks.

10 Now, while he said
11 here today that he would be
12 perfectly happy with new
13 tanks, at whatever cost they
14 were, the fact of the matter
15 is, during the period of
16 time that they're attempting
17 to show to this Court that
18 they don't believe the High-
19 way Commissioner has acted
20 rightly as it relates to the
21 relocation, we find that as
22 late as December, that Mr.
23 Edwards, through his Attorney,
24 was taking the position that
25 even though he was aware that

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15

1 was way overpriced, that
2 the one hundred ten thousand
3 dollars was what they wanted.

4 Which is a part of
5 the fact that the negotiations
6 had broken down and we're at
7 loggerheads and that -- they
8 are aware of that, and that's
9 an unreasonable position, and
10 that they ought to have moved
11 forward in their administrative
12 remedies.

13 MR. MILLNER: The
14 answer, Cochran appraisal was
15 made at the request of the
16 State Highway Department.
17 They gave it to us.

18 Now, Mr. Beale
19 apparently says Cochran was
20 wrong. They gave it to us
21 and the letter is -- as they
22 have said, "Relocation, one
23 hundred ten thousand dollars."

24 So I think that I,
25 perhaps, would be remiss if

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16

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1 I come in and say it ought
2 to be something less than
3 that.

4 MR. GARNER: They
5 are the ones.

6 COURT: I don't
7 think any of this really
8 makes any difference.

9 MR. GARNER: I don't
10 either. I don't think it
11 is relevant.

12 MR. MILLNER: The
13 letter further says Cochran
14 missed the portion of the
15 railroad from Edwards to the
16 main line of the C & O.
17 If they're going to get in
18 the part about the oil, I
19 think in fairness, what's
20 sauce for the goose is sauce
21 for the gander, and the other
22 part ought to come in.

23 MR. BEALE: Mr.
24 Edwards, subsequent to your
25 Attorney having a meeting with

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1 Mr. Southall in Richmond,
2 and his reporting back on
3 that matter, you were aware
4 that the position of the
5 Highway Commissioner was
6 that you were not entitled
7 to the relocation that you
8 were asserting yourself to
9 be entitled to, were you
10 not?

11 MR. GARNER: Read
12 that again, please. Say
13 that again.

14 MR. BEALE: Read
15 that back.

16 (At this
17 time the previous
18 question was read
19 by the Court
20 Reporter.)

21 MR. GARNER: I
22 would like to say which
23 Highway Commissioner is
24 he talking about, the
25 one in the condemnation

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13

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1 case or the one in relocation?

2 MR. BEALE: I'm talking
3 about the Attorney General of
4 Virginia, as it relates to the
5 relocation question.

6 COURT: All right.
7 Now, you're talking about the
8 Attorney General. You have all
9 been using the Attorney General
10 and Highway Commissioner inter-
11 changeably all day.

12 Go ahead.

13 A To my understanding, my feeling
14 is that the -- State Highway has not wanted to compensate
15 us for those items, you know -- from the beginning to this
16 time.

17 COURT: This is what
18 I thought it was all about, any-
19 way. That comes as no surprise.

20 MR. BEALE: I think
21 that's all, your Honor.

22

23

REDIRECT EXAMINATION

24

25

BY MR. MILLNER:

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19

J. B. EDWARDS - REDIRECT

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1 Q Is it fair to say all you
2 want is to be restored? You don't want to be a bit
3 better? You would like to be equal at the new spot as you
4 are now?

5 A Yes.

6 Q It's up to the Highway Depart-
7 ment. They can move you and get it done for fifty cents,
8 is that all right?

9 A It suits me fine.

10 MR. MILLNER: Mr.

11 Chapman.

12

13

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1 R. R. CHAPMAN, JUNIOR, being
2 duly sworn, called as an adverse witness on behalf of the
3 Defendant, testified as follows:
4

5 DIRECT EXAMINATION

6
7 BY MR. MILLNER:

8 Q I call Mr. Chapman as an adverse
9 witness. Would you state your name.

10 A R. R. Chapman, Junior.

11 Q What is your occupation with the
12 State Highway Department?

13 A Assistant District Right-of-Way
14 Engineer in Suffolk.

15 Q You're very familiar with the
16 condemnation, the various parcels in connection with the
17 one at 23rd Street?

18 A Yes.

19 Q You know all the landowners that
20 you have worked on, made agreements with, or condemned
21 their property?

22 A I believe so.

23 Q Has the C & O Railroad had their
24 railroad tracks condemned?

25 A Not to my knowledge.

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21

1 Q All right, sir. Well now, the
2 railroad track between Edwards and the main line, there
3 has been testimony that track is owned by the C & O.

4 A That's what I have heard, right.
5 I don't know it for a fact.

6 Q How does the State acquire that
7 track between Edwards and the main line?

8 A It depends on whose property
9 it is on. You say it is on the C & O property?

10 Q I say the track really runs
11 partially over Price's property or what was used to be
12 Price, and then by coincidence, there's a piece that the
13 C & O itself has acquired. Or has owned for a long period
14 of time, and then it hits the main line of the C & O

15 A Are you saying some of the C & O
16 property is within the take-area, is that what you're
17 saying?

18 Q That's right.

19 A The State Highway Department
20 hasn't negotiated with the C & O, to my knowledge. Whether
21 the City of Newport News did or not, I don't know.

22 Q I understand Mr. Beale's position
23 is that the track from Edwards to the main line, it doesn't
24 belong to us, but it belongs to somebody else, and from
25 reading the siding agreement, it appears to belong, that --

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1 upon termination, it would, the title would be vested
2 in the C & O. I'm curious whether the C & O is a party
3 to any condemnation suit?

4 A Not to any suit that the State
5 Highway has brought to my knowledge.

6 Q Well, is the something imminent
7 by way of the Highway Department doing something?

8 MR. BEALE: If
9 your Honor please, we're
10 going to object to this.
11 I can't see the materiality
12 of this. This one case is
13 complicated enough without
14 getting into Price and C & O
15 and all the rest of them.
16 That can't be helpful in this
17 case. We object to it as
18 immaterial.

19 COURT: I see
20 what he is trying to do.

21 BY MR. MILLNER:

22 Q Is it part of what the Highway
23 Department threatening to do is to take up that railroad
24 that serves the Edwards property, isn't it?

25 A It will have to take up all the

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23

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1 tracks within the proposed right-of-way limits, right.

2 Q Have you gotten permission from
3 someone to do that?

4 A Like I told you before, I don't
5 know -- this project was started by the City of Newport
6 News. Whether they have got the actual authority to do
7 that, I don't know.

8 Q All right.

9 A To my knowledge, we have not,
10 on the parcels we actually handled ourselves.

11 COURT: This
12 is the problem with Africa.
13 We didn't know whether
14 the British were in command
15 or the Americans were in
16 command.

17 BY MR. MILLNER:

18 Q All right. Mr. Chapman, as a
19 matter of fact, this project is really being paid for
20 by the City of Newport News, isn't it?

21 A That's correct. The right-of-
22 way is.

23 Q All right; and the State Highway
24 Department is really acting as agent for the City of
25 Newport News?

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24

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1 A You might say that, yes.

2 Q Would it be fair to say that
3 the real party in interest is the City of Newport News?

4 A I would say so.

5 MR. BEALE: That's
6 a legal question.

7 COURT: Who is
8 condemning this?

9 MR. BEALE: State
10 High Commission.

11 COURT: He says
12 it is done with the local
13 money. This is a switch.

14 BY MR. MILLNER:

15 Q Is there federal money involved?

16 A In the right-of-way?

17 Q Yes.

18 A No.

19 Q Is federal money involved in the
20 construction of the highway?

21 A Yes.

22 Q All right, sir, isn't it true
23 that the highway widening is a part of downtown redevelop-
24 ment number three?

25 A I have no idea.

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25

1 Q Wasn't it a part of the location
2 of the city hall and the -- to provide access and so
3 forth?

4 A It could very well be. It's
5 near city hall; whether it's part of redevelopment number
6 three or four, I don't know.

7 Q Isn't it true the federal money
8 will ultimately end up in the project, in the construction
9 phase?

10 A Right.

11 COURT: I think
12 the project will ultimately
13 end up in the federal system.

14 MR. MILLNER: All
15 right, sir, Mr. Chapman, then
16 would the City of Newport
17 News, being the real party
18 in interest --

19 MR. BEALE: That's
20 not the evidence. I object
21 to that, if the Court please.

22 COURT: He said
23 that -- that the Highway
24 Department was acting as
25 the agent for the good people

1 of the City of Newport
2 News. He didn't say
3 "good people." I threw
4 that in. That's what he
5 said, so -- the real party
6 in interest would be the
7 principal, would it not?

8 MR. BEALE: I
9 think the real party in
10 interest is the State
11 Highway Commissioner, and
12 that's evidenced by the
13 papers.

14 COURT: I don't
15 know whether it's the State
16 Highway Commissioner or
17 Attorney General who is
18 calling the shots, from the
19 evidence. By the same
20 token, we're -- it's getting
21 late now; it's a quarter
22 after four.

23 MR. MILLNER: I
24 have no further questions.

25 COURT: We're

1 straining gnats.

2 MR. BEALE: No
3 questions.

4 MR. MILLNER: Call
5 Mr. Dennis Edwards.

6 COURT: I have
7 been wondering all day
8 why the city attorney was
9 sitting at Counsel table.
10 I thought he was lost.

11
12 - - -

13
14 DENNIS B. EDWARDS, being duly
15 sworn, called as witness on behalf of the Defendant,
16 testified as follows:

17
18 DIRECT EXAMINATION

19
20 BY MR. MILLNER:

21 Q Would you state your name, sir.

22 A Dennis B. Edwards.

23 Q This is -- your corporation
24 that's involved in this litigation?

25 A I'm treasurer of the corporation.

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23

D. B. EDWARDS - DIRECT

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1 Q How long have you been in business
2 down 23rd and 24th Street?

3 A We have actually been in business
4 since 1921.

5 Q All right, sir.

6 A We bought the property about 1924.
7 Since that time, we have added to it and -- and expanded
8 the business, and we hope to keep on expanding it.

9 Q As a matter of fact, when you --
10 when you were faced with the relocation, didn't you insist
11 the new site be in the City of Newport News?

12 A They tried very very hard to get
13 us in Hampton and there were a couple of very good sites
14 in Hampton. I was born in Newport News, and it was a long
15 time ago.

16 COURT: They
17 got everything else down
18 there.

19 A I wanted to stay here.

20 MR. MILLNER: Mr.
21 Edwards --

22 COURT: Let's --
23 that's got nothing else to
24 do with the State. It
25 reminds me of the young lawyer

that came from Norfolk
and reminded me he was
from VMI. So I said to
him, "Who do you represent
in this case?" And he
said, "I represent the
Virginia Electric and
Power Company." I said,
"Did I ever tell you about
the time they stole my
farm?"

BY MR. MILLNER:

Q Mr. Edwards, I would like for
you to address yourself to the damage your business will
suffer if that road is cut in there with the shamble
we're now in.

A Well, as I gathered, the purpose
we have here today is that the threat they're going to
dig up our track and our conveyor, tomorrow, and if they
dig it up tomorrow, then I am -- impossible to stock the
kind of coal that I want now. I have heard it said we
had a large stock. We have a very small stock.

We have had to restock because
we had a very cold winter, and at one time we had all
the coal there was on this whole Peninsula.

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1 And with us out of business,
2 it's going to be very very hard for anybody else to do
3 anything; even at the worst, we'd like to have an opportunity
4 to restock, which means buying about ten or twelve more
5 cars of coal that we can buy at a more favorable price
6 within the next sixty days than we could two months ago.

7 As a matter of fact, two months
8 ago we couldn't buy it at all. Because all of the coal
9 from the particular mine we buy from, was being used by
10 the people at the mine.

11 Now, I'm speaking of particular
12 kinds of coal, and that is the prepared coal that is used
13 for domestic purposes.

14 Q Are you the last coal dealer left
15 in Newport News?

16 A There is one coal dealer in
17 Hampton, and between the two of us, that's all there is
18 between Portsmouth, Norfolk doesn't have a dealer any
19 more, and Richmond.

20 Q All right, sir. What has been
21 the effect of having the tracks in for the last three to
22 six months in so far as the needs of the general public
23 and coal?

24 A Well, we had to restock. We
25 sold out and had to restock twice on stoker coal, which

1 furnishes several of our apartment units, and without that
2 coal, I think there would have had to have closed down or
3 changed to some other fuel.

4 Q What was the effect of the
5 immediate past winter with the natural gas shortage and
6 the unusual cold weather?

7 A We had almost a panic on fireplace
8 coal. And that's why we sold out of that and had to re-
9 stock twice.

10 MR. MILLNER: I
11 have no further questions.

12 MR. BEALE: No
13 questions.

14 COURT: All right,
15 thank you, Mr. Edwards.

16 MR. MILLNER: That's
17 the Defendant's case, your
18 Honor.

19 MR. BEALE: By
20 agreement, if the Court please,
21 we would like to place in
22 evidence the memorandum and
23 the letter of the contractor
24 on the project, indicating
25 that their notice to file the

1 claim for delay of the
2 project because the right-
3 of-way has obstructed, which
4 would -- cause liquidated
5 damages to be due the con-
6 tractor in the event that
7 the project does not move
8 forward.

9 MR. MILLNER: It's
10 further stipulated you told
11 us that you intended to go
12 through there tomorrow.

13 MR. BEALE: Well,
14 I will stipulate that Mr.
15 Bateman sent a letter to
16 you intentionally postdating
17 this hearing date so you
18 would get a hearing before
19 he gave you notice of a
20 day that we intended for the
21 contractor to go through,
22 which -- the letter did
23 indicate that the intention
24 was that instructed the
25 contractor tomorrow to

33

1 proceed with the public
2 works in the area. That
3 was over Mr. Bateman's
4 signature and in behalf
5 of the Highway Commissioner
6 and the Attorney General.

7 COURT: Are you
8 going to have to go over
9 the C & O property that has
10 not been agreed upon to get
11 to Mr. Edwards? You are?

12 MR. BEALE: No.

13 COURT: That's --
14 you're not going to have to
15 do that?

16 MR. MILLNER: You're
17 not going to have to?

18 MR. BEALE: That's
19 not pertinent.

20 COURT: I asked
21 you what you were doing.

22 MR. BEALE: I
23 was talking in response to
24 his -- we do have access
25 to Edwards' property without

1 crossing any C & O property.

2 COURT: Is the
3 C & O property in the way
4 of your right-of-way?

5 MR. BEALE: I
6 don't know what C & O
7 property he's talking about,
8 but our position would be
9 that doesn't relate to
10 this matter.

11 COURT: It may
12 not, Mr. Beale. I just
13 asked you the question.

14 MR. BEALE: I
15 don't know the answer.

16 COURT: All right.

17 MR. MILLNER: If
18 this would help elucidate
19 the -- this is 24th Street
20 and this is 23rd. And this
21 is the Edwards two hundred
22 by two hundred. And the
23 area in red is the area of
24 the take.

25 The railroad siding

1 comes here and then it
2 crosses property of Price,
3 and then at this point,
4 is now the C & O property;
5 they acquired fee simple, and
6 then leads on to the main
7 line.

8 And the thing
9 that -- that I don't under-
10 stand is -- that the C & O
11 is not involved in any of
12 these condemnation proceedings.
13 But yet, Mr. Beale says we
14 don't own the track. They
15 do.

16 We say we've got
17 a -- in essence, a life
18 estate for as long as the
19 siding agreement is, to cross
20 to get to the main line of
21 the C & O.

22 COURT: We'll
23 discuss all that in the
24 other case. In the con-
25 demnation case.

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MR. MILLNER: What they're proposing to do, though, is to cut, as we understand it, the railroad tracks somewhere down here, and even if they leave the track from here to here, if we can't connect up with the C & O, it doesn't do us any good.

COURT: I understand that. That wasn't the thrust of my question.

MR. MILLNER: That's all our evidence.

COURT: I want to wait to hear your argument.

MR. BEALE: I'm sure.

(At this time the hearing was recessed, following which the hearing was reconvened.)

MR. MILLNER: Are

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1 you ready, your Honor?

2 COURT: Not
3 really, but I don't guess
4 I have much choice.

5 MR. MILLNER: Your
6 Honor, we come before the
7 Court asking for two things.
8 Number one is that the
9 condemnation proceedings be
10 stayed until the relocation
11 benefits are finally deter-
12 mined.

13 And secondly, that
14 the State Highway Department
15 be enjoined from coming on
16 our property, from interfering
17 with our rail service and
18 interfering on the property
19 until the relocation matter
20 is resolved.

21 I think that the
22 most significant thing, just
23 to review the evidence that
24 we have presented. In 1974
25 when they were first approached,

53
1 relocation was an issue.
2 It continued until 1975;
3 it was discussed. Culminating
4 in a meeting on April 14,
5 1976, attended by all of the
6 representatives.

7 When that proved
8 to be fruitless on May the
9 tenth, 1976, then Edwards,
10 through its Counsel, wrote
11 a letter to the State Highway
12 Department and -- I know of
13 no clearer way that Edwards'
14 position could have been set
15 forth as to exactly what they
16 were anticipating, what they
17 thought their position was.

18 And they filed the
19 form with the State Highway
20 Department and, in accordance
21 with the statute in the regu-
22 lations, checked on the form
23 we wanted to be moved by
24 commercial mover, and whether
25 it cost one hundred ten thousand

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dollars or one hundred fifty
thousand dollars, or fifty
thousand dollars, it's really
no concern of ours. All we
want is the thing to be moved.

We just want to be
in the same position at the
new site as we are in at the
present site.

Now, when the State
Highway Department wrote
back and said, "Well, we're
waiting, we don't know whether
it's realty or personalty,"
then the correspondence
developed, a whole series.

To prevent any mis-
understanding, I wrote back
and reiterated exactly what
our position was and -- as I
interpreted the letters, they're
saying, "We got to hang up; we
don't know whether it's realty
or personalty."

Then to resolve the

1 matter, because the clock
2 was running on and we weren't
3 getting anywhere, by this time
4 the Edwards had acquired the
5 new site at Burcher Road.

6 He was under contract
7 and the delay in closing was
8 at our request because we
9 simply didn't have the money
10 to pay for it, but in any event,
11 when nothing was happening, we
12 then go to Richmond and meet
13 with the representatives and
14 try to resolve the issue, and
15 I think we went there and I
16 think the evidence shows the
17 issue was it realty or personalty.

18 All right. Then
19 about ten days to two weeks
20 later, then this amended
21 certificate is filed in an
22 effort to really, we submit,
23 to really try to cut off
24 Edwards' rights under re-
25 location.

1 And then there's a
2 hearing before your Honor
3 to determine whether it's
4 realty or personalty, and
5 if it's personalty, whether
6 the State Highway Department
7 can take it or not.

8 Now, all during
9 this time, I know of nothing
10 more that Edwards could do.
11 I think that the bind that
12 the State Highway Department
13 finds itself in is in no way
14 the fault of James Edwards
15 or the fault of Dennis Edwards,
16 but I respectfully submit
17 it's on the part of the State
18 Highway Department because
19 they knew over one year ago
20 that we had a dispute and
21 they have failed to move
22 along in any way whatsoever
23 to have any administrative
24 hearings to resolve the issue
25 of location. Relocation.

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1 you know, what they're going
2 to do.

3 COURT: Mr. Southall
4 is a member of what?

5 MR. MILLNER: Under
6 the regulations, there's a
7 final appeals committee in
8 the -- under the Relocation
9 Act. There's a -- a tier
10 of various administrative,
11 hearings, as we understand
12 it.

13 COURT: Is he
14 going to sit in judgment
15 on this?

16 MR. MILLNER: Yes
17 sir, that's as we understand,
18 am I incorrect?

19 MR. SOUTHALL: It
20 doesn't mention me by name.
21 It says Assistant Attorney
22 General, but I can assure
23 you I'll not sit in any
24 determining.

25 COURT: Is your

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1 attorney going to sit and
2 you're here arguing this
3 thing? All right, I just
4 wondered.

5 MR. SOUTHALL: That's
6 what the procedure says.

7 COURT: Who wrote
8 the regulation?

9 MR. SOUTHALL: The
10 regulations were adopted
11 pursuant to law by the
12 Highway Commission.

13 MR. MILLNER: This
14 is after three or four steps
15 and we finally get to the
16 administrative appeal, and
17 we appeal to the Highway
18 Commissioner, and this is
19 on page 77 of the regulations,
20 "Upon receipt by the Highway
21 Commissioner, the appeal will
22 be referred to review board
23 consisting of the right-of-
24 way engineer, as chairman,"
25 and we assume that someone

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directly over Mr. Fowler,
probably the man right
above Mr. Chapman, "and
Assistant Attorney General
and a district engineer.

"The district
engineer serving on this
board will be the one
functioning in the area where
the relocatee resides."

So what -- one
member of the board will be
Mr. Chapman's immediate
superior and this -- Mr.
Culbertson, I think, actually
the man I think who it is
has been bringing to us letters
as to what would be going
on so we see ahead of us,
Judge.

COURT: They're the
people who are going to decide
this case?

MR. MILLNER: Yes
sir, they would make the

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1 final administrative decision
2 as to what relocation benefits
3 we get.

4 And upon conclusion
5 of that hearing, the review
6 board will furnish the
7 Commissioner with a written
8 report of their findings.
9 The Commissioner will review
10 the report, render its decision,
11 which shall be final, and advise
12 the relocatee in writing.

13 The State Highway
14 Commissioner, who is the
15 condemnor in this proceeding,
16 is the one that ultimately makes
17 the decision as to what Edwards
18 is entitled to or not entitled
19 to. All of this is within
20 their province.

21 And the thing that
22 has happened here is that
23 nothing has happened. And
24 since May the tenth, 1976, when
25 we filed the form on the State

1 Highway form, absolutely
2 nothing has happened so far
3 as to get the matter of re-
4 location resolved.

5 Now, we think that
6 without the aid of this Court
7 that a year from now, or two
8 years from now, we'll still
9 be waiting and Edwards will
10 still be in a quandry as to
11 what's going to happen, and
12 that's the reason we come in
13 asking the Court, in the exercise
14 of equity jurisdiction, to
15 enjoin the State from coming
16 onto the property, and we'll
17 bet that if your Honor --

18 COURT: Let's use
19 another term. Let's use
20 another term, other than,
21 "We'll bet."

22 MR. MILLNER: We
23 feel that upon that happening,
24 that these various administrative
25 hearings will very quickly be

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1 resolved one way or another,
2 and hopefully we'll go in and
3 be able to resolve it with
4 them, probably unlikely in
5 view of the sort of stated
6 positions of everyone, but
7 if not, then we can get on
8 to Court, but we don't have
9 any standing to go to Court.

10 We're waiting for
11 this myriad of administrative
12 details to be accomplished,
13 the various hearings to be
14 accomplished and there's
15 nothing Edwards can do. We
16 don't have any standing at
17 all to go to Court. We're
18 sitting there waiting, and
19 so that's the predicament the
20 Highway Department finds it-
21 self in is not created by
22 Edwards and created by the
23 State Highway Department.

24 COURT: What happens
25 after this man makes his

1 final decision?

2 MR. MILLNER: We
3 would hope, your Honor, that
4 the -- you mean if the --
5 if the Highway --

6 COURT: If the
7 Highway Commissioner, when
8 he makes his final decision,
9 what happens then?

10 MR. MILLNER: We
11 really asked the Highway
12 folks, you know, for some
13 precedence as to what happened.
14 We gathered --

15 COURT: I mean
16 do you have a right of appeal
17 to some Court?

18 MR. MILLNER: There's
19 nothing provided in the
20 regulations for any right
21 of appeal. We assume we've
22 got a right of appeal. Mr.
23 Beale's statement to the
24 effect that, it was a subtle
25 statement, but to the effect

1 that -- that can be decided
2 in Richmond.

3 So what we think
4 is that now the burden will
5 be put on us in a project
6 funded by the City of Newport
7 News, really for the City of
8 Newport News, and since the
9 State Highway Department is
10 the, quote, Condemnor, that
11 we understand that they take
12 the position that if we want
13 to appeal, that since venue
14 against the State Highway
15 Department is in the Circuit
16 Court of the City of Richmond,
17 then Mr. James Edwards and Mr.
18 Dennis Edwards are going to
19 have to be trotting up in
20 Richmond to fight about a case
21 located half a block from this
22 Courthouse.

23 COURT: Do you
24 contend that's why they are
25 the Condemnor because you have

1 to bring the action against
2 them in Richmond?

3 MR. MILLNER: No
4 sir, we think that -- we've
5 suggested that we agree if
6 we can't resolve the relocation,
7 we do it in the Eighth Circuit
8 Court of the City of Newport
9 News.

10 COURT: Why is
11 not the city the Condemnor?

12 MR. MILLNER: We
13 don't understand that, your
14 Honor. We really didn't
15 realize until I think just a
16 matter of a few days ago that
17 the entire funding came from
18 the City of Newport News.
19 I don't believe I knew that
20 before. I don't believe that
21 the State Highway folks realized
22 the situation, and my good
23 friend Mr. Roylance had never
24 or my friend Mr. Thomas, who
25 was here a minute ago, never

1 had taken any interest in
2 these proceedings until about
3 five or ten days ago when
4 it developed that the City of
5 Newport News was the party
6 in interest. But we didn't
7 know that before.

8 But we think that
9 the equities are on our side.
10 We think you come down to what
11 is the purpose of the Re-
12 location Act, and the purpose
13 of the Relocation Act is to
14 help a landowner be moved from
15 one site to another site.

16 And that, obviously,
17 the intent and purpose of
18 relocation is to get that
19 done before the condemnation
20 takes place.

21 Now, as we read the
22 regulations, they're supposed
23 to go through all of these
24 booklets and all that information,
25 but it's designed to make

1 certain that -- they know
2 what's going to happen and
3 to help the -- relocatee
4 be moved.

5 And we submit that
6 none of that has really
7 happened and we are the ones
8 sort of left holding the
9 bag. They have asked us to
10 go snipe hunting and we're
11 out there holding the bag,
12 but we don't know, you know,
13 when the snipe is going to
14 come along.

15 COURT: Let me
16 ask you a question. Who
17 is going to decide, they say,
18 whether the items we have
19 ruled are personalty, are in
20 fact, personalty? Who is
21 going to decide that. Is
22 that the Attorney General's
23 office and the Highway
24 Commissioner?

 MR. MILLNER: Apparently,

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1 your Honor, that -- they
2 now -- they take the position
3 that they're not bound by
4 your Honor's ruling and they're
5 going to make their own de-
6 cision as to what they want
7 to do, and we think it's
8 grossly unfair, inequitable
9 to the Edwards Company.

10 It defeats the whole
11 purpose of the Relocation
12 Act. In fact, if their
13 position is correct, then
14 the only thing that they want
15 to give by way of damages is
16 really what's under the Con-
17 demnation Act. They really
18 haven't changed anything from
19 the initial offer in connection
20 with the Condemnation Act.

21 So the question
22 presents itself, what's the
23 purpose of Relocation Act if
24 they can just simply file an
25 amended certificate and say

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1 it doesn't make any
2 difference if it's realty
3 or personalty, we'll just
4 take it. And that's really
5 what's happened.

6 We fussed for
7 several months as to whether
8 it was realty or personalty.
9 We showed them cases where
10 railroad tracks were per-
11 sonalty, where conveyors were
12 personalty, and they say,
13 "Aha, we'll amend the certificate
14 and that will end that." But
15 that completely defeats and
16 frustrates any rights we would
17 have under relocation.

18 So we come back
19 to the cardinal point, that
20 the fault has been with the
21 State Highway Department.
22 What excuse can they have for
23 not moving along, going through
24 their various stages of hearings
25 and then tell us either we're

1 entitled to something or
2 we're not entitled to some-
3 thing. Then get on with
4 that adjudication.

5 They have known
6 this highway was going to be
7 a problem. They've known
8 for months they wanted to
9 come through there. And,
10 your Honor, I don't know
11 what more we could have
12 done than just simply have
13 told them not only verbally,
14 but in writing, exactly what
15 our position was.

16 We're not coming
17 in here at the last minute
18 and saying, you know, we're
19 pulling something out of the
20 hat as a new position. This
21 is something we have been
22 maintaining for over one year
23 in written form, and the letter
24 to that detail just merely
25 reflected another six months

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1 of discussion with them
2 prior to that time. So
3 there's nothing new. We're
4 still quarreling about the
5 same thing that we were a
6 year ago. We're quarreling
7 about the same things we were
8 two years ago. And Mr.
9 Fowler, I said, "Have we
10 moved anywhere from the last --
11 in the last two years?" and
12 he said, "No. We haven't made
13 any progress at all."

14 And Edwards, they
15 have been damaged. They're
16 paying interest on the new
17 site. They have had the
18 adverse publicity in the news-
19 paper about the hearing and
20 people think they're holding
21 up something. They haven't
22 done a thing. They just sat
23 and tried to get their just
24 entitlement as provided by
25 law.

1 Now as to the
2 condemnation case being
3 stayed, it just seems that --
4 we're in a dilemma. If we
5 try to go into that, you
6 know, in the next month or
7 so, well, we say that, you
8 know, the railroad track and
9 the conveyor are personalty.

10 We're not entitled
11 to recovery in the condemnation
12 case, but suppose we go and
13 try the condemnation case and
14 then we're ultimately proved
15 to be wrong on the relocation
16 aspect. Then we wouldn't get
17 entitlement in condemnation,
18 we wouldn't get any in the re-
19 location. We wouldn't get it
20 in any event. It's a mixed bag
21 of worms. Some things there's
22 no dispute about.

23 COURT: Suppose we
24 try the condemnation suit?
25 This is the question I wanted

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1 to ask, and I'm not quite
2 sure you answered it.
3 Suppose we tried the con-
4 demnation suit. We left out
5 the trestle and all those
6 things we ruled were personalty.
7 And they dealt only with the
8 land and the other improvements,
9 the building and so forth, and
10 then the Highway Commissioner
11 overrules me, accompanied by
12 the Attorney General, or some-
13 one in his office. Then
14 what happens to your rights
15 and your personalty?

16 MR. MILLNER: We
17 think we've lost them. There's
18 some things without question
19 we're entitled to both of
20 them. The inventory of coal
21 and wood that's an element of
22 damages in the condemnation case,
23 but it's also something that
24 apparently, without question,
25 we get.

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COURT: I'm not
worried about the coal and
wood; I think we can resolve
that tomorrow with some dump
trucks. I'm worried about
other things.

MR. MILLNER: That's
a thirty or forty thousand
dollar item.

COURT: I understand
that. I know it's not peanuts.
No disrespect toward Washington,
but by the same token, we can
solve that.

MR. MILLNER: All
right, sir, but it just seems
that -- you know, we really
wouldn't know where we stand.
That it sort of puts the cart
before the horse to try con-
demnation before relocation is
determined.

Because we wouldn't
know really the full amount of
our damages until we know

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1 where -- how we stand on
2 relocation.

3 We want to make it
4 clear to the Court we're
5 not trying to get any double
6 recovery. No suggestion of
7 that. All we want is one
8 case or the other case.

9 Which your Honor
10 has been very patient all day
11 and we would like to reserve
12 a few minutes to rebut Mr.
13 Beale or Mr. Southall as soon
14 as they conclude, and Mr.
15 Garner will handle that.

16 MR. BEALE: May it
17 please your Honor, as we said
18 to you at the outset of this
19 hearing this morning, it's the
20 position of the Highway
21 Commissioner as the -- Petitioner
22 in this case, that the Relocation
23 Act which has nothing to do with
24 just compensation, but is a
25 policy act rather than just

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1 compensation as is the issue
2 in a condemnation proceeding,
3 is a separate and distinct
4 proceeding over which this
5 Court has no jurisdiction.
6 That's our position now and
7 I think the rules and regulations
8 show you that that's true.

9 Now, we would say
10 to you that -- under that
11 Relocation Act, which requires
12 the exhaustion of the land-
13 owner's administrative remedies
14 to have a determination made as
15 to whether or not he is entitled
16 to reimbursement for specific
17 items of relocation.

18 That if the Court
19 were to construe the evidence
20 as indicating that the landowner
21 didn't know he's being denied
22 the relocation benefits at this
23 stage, that if that notice were
24 given to him today, then his
25 remedies are the same. He still

1 has to exhaust his administrative
2 remedy, which he has not done,
3 before he can resort to the
4 Courts.

5 Now, that brings me
6 to a question that you asked,
7 I don't think was answered.
8 That is why wasn't --

9 COURT: Let me
10 ask you this question before
11 you get to that. What ad-
12 ministrative remedies does
13 he have right now? What is
14 it he hasn't done?

15 MR. BEALE: As I
16 said to you earlier, he has
17 not requested a hearing, which
18 is required after the denial of
19 his relocation benefits. Then
20 the hearing is conducted. Then
21 there's an appeal process after
22 that hearing that you were
23 referring to that the Attorney
24 General is on one of the
25 committees.

1 And thereafter, the
2 general administrative remedies,
3 Law Act on Appeals would throw
4 him into the Circuit Court, and
5 our position is that the state
6 comptroller would be a necessary
7 party, and, therefore, the pro-
8 per venue would be in the Cir-
9 cuit Court for the City of
10 Richmond.

11 But I don't think
12 that's a big thing and I don't
13 even know that we care which
14 Court, whether in fact we
15 might even prefer that it be
16 heard down here in Newport
17 News for the convenience of
18 all parties, including Counsel
19 for the Highway Department.

20 But the point is that
21 he has not exhausted his
22 administrative remedies; it's
23 elementary law that he's
24 required to do so before any
25 Court can rule on that question.

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So we have, I think, one side issue on relocation, which almost all of this evidence presented to you dealt with today, which we submit to you is not really pertinent to the question of injunctive relief.

Now, the next thing, our position would be that as we understand the law, and we submit we understand it correctly, that in order to be entitled to any kind of injunctive relief, the burden is on the moving party to show that he will be irreparably harmed and that he has no adequate remedy at law.

We suggest that there hasn't been one iota of evidence presented to you today to show that. Now, there may be some things that show to you ultimately

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1 he might, under the Relocation
2 Act, be entitled to some
3 damages, but he's simply has
4 not shown to you that irreparable
5 harm will result.

6 Now, if we can
7 move away from the -- from the
8 Relocation Act, which is not
9 where I think we are in this
10 proceeding today, anyway, and
11 move to the condemnation pro-
12 ceeding and the question of
13 the rights of the State High-
14 way Commissioner when he
15 petitions in behalf of all
16 of the people in this Common-
17 wealth for a public project.

18 We have in evidence,
19 shown to the Court, that there
20 has been filed a certificate
21 pursuant to law. We would
22 submit that -- it just isn't
23 any question that the law is
24 that when the filing of that
25 certificate takes place in the

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1 clerk's office, that the
2 title to the property trans-
3 fers to the Commonwealth.

4 And that the pro-
5 perty on which these items
6 are located is the real
7 property, as we stand here
8 today, of the Commonwealth
9 of Virginia.

10 And what we are
11 saying to the Court is that
12 under 33.1-119, which is the
13 act that your Honor is familiar
14 with, it's been enacted for
15 years, is the authority to
16 take possession and title to
17 the property before or during
18 condemnation and the purpose
19 and intent of the provisions.

20 And also Section
21 33.1-122 of the Code, which
22 states that the filing of the
23 certificate transfers the title
24 and interest of the landowner
25 to the Commonwealth and transfers

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the interest of the land-
owner to the fund on deposit
for the landowner.

So we're saying to
the Court that as we see this
case, these items are on pro-
perty that the Highway Commis-
sioner has the title to.

And as indicated by
the evidence, by way of attempts
at compromise with the landowner,
we have suggested that the
items within the right-of-way,
that is the fifty foot by two
hundred foot area, that is in
the way of the project, that
those items would be moved by
the Commonwealth to a safe
location until they exhaust
their administrative remedies
and have those questions deter-
mined with reference to entitle-
ment as to reasonable moving
expenses.

COURT: What property

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1 is that?

2 MR. BEALE: What
3 property -- it's the rear
4 fifty by two hundred feet.

5 COURT: I under-
6 stand, but I mean -- what
7 personal property, the
8 Attorney General notwith-
9 standing on, on that fifty
10 feet that you're talking about
11 moving.

12 MR. BEALE: Yes,
13 in other words, we had pro-
14 posed to them and suggested
15 to them that pursuant to the
16 ruling of this Court, all of
17 the items that this Court
18 had held were personalty, we
19 would remove from the free-
20 hold to a place of safe-keeping
21 so that the highway project,
22 one of the main things right
23 now is that the storm sewer
24 system needs to go beneath
25 where the railroad track is.

And the contractor has shown, is out there and cannot proceed with his work and is making a claim for liquidated damages for holding him up every day that it's being held up, because he can't proceed with his work.

So, we had suggested to them that each of those items that you previously held were personalty, we would move off of the right-of-way so that the project could move forward. They could move forward with their administrative remedies and have the question decided as to what reasonable costs were.

One of the prime problems being that cost item of forty-six -- fifty-six thousand dollars on the tanks as compared to the cost of new tanks. Those items need to be

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1 determined in the adminis-
2 trative process as to
3 whether or not they are
4 reasonable moving costs
5 under the Relocation Act.

6 We, of course, in
7 that proceeding say that
8 they are not and they say
9 they are, and we have shown
10 to you they continue to take
11 the position until today,
12 that they were entitled to
13 the amount of that estimate.

14 But I think we have
15 a tendency and have had a
16 tendency today to get bogged
17 down in the question of what
18 his entitlement under the Re-
19 location Act is, and I submit
20 that has nothing to do with
21 this proceeding, whatever.

22 Now, he attempted to
23 show that the Highway Commis-
24 sioner had not complied with
25 the rules and regulations.

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1 We don't -- regulations.
2 We don't think he's shown
3 that. We would suggest to
4 you that if there's one thing
5 that is abundantly clear to
6 Counsel for the landowner
7 and the landowner, it's
8 that we are in disagreement
9 as to what his entitlement
10 is under the Relocation Act
11 and that he ought to now de-
12 mand a hearing and go forward
13 with evidence of what his
14 reasonable moving expenses
15 for the items that he desires
16 to be moved.

17 But that's outside
18 the condemnation case. Out-
19 side the right of the Highway
20 Commissioner to proceed with
21 his public works.

22 We suggest that he
23 has shown to you no irreparable
24 harm whatever, and that we
25 are entitled to go upon and

1 to proceed with this high-
2 way project for the public.

3 Now, we have worked
4 with Mr. Millner; as you are
5 aware he's continued, this
6 says several times, because
7 I think of his position that
8 he wanted -- the relocation
9 question decided before the
10 trial.

11 Now he's asked you
12 to stay that proceeding;
13 proceeding is not set for
14 trial; we have no trial date,
15 as I understand it, here today;
16 I don't know that we are
17 adamant on a -- trying to try
18 the case prior to the relocation.

19 We would suggest he
20 proceed with his administrative
21 remedies, have the relocation
22 question decided, and I think
23 we can work together on when
24 the highway condemnation case,
25 itself, is tried. That's not

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1 any real problem, I don't
2 think, from the Highway
3 Commissioner's standpoint.

4 The problem that we
5 see is the imminent problem
6 of the project being stalled
7 when we submit he has no right
8 to stall the project.

9 We own the property,
10 we have the right to cross --
11 onto the property. There was
12 thought given to the fact that
13 since we had that power and
14 didn't believe it was any
15 question about it, to go ahead
16 and do it. That was -- without
17 regard to a hearing before the
18 Court, and that was -- it was
19 concluded that what we ought to
20 do is to place the date that we
21 intended to go upon the pro-
22 perty at a time after the
23 hearing before this Court on the
24 injunctive relief in order to
25 attempt to be fair to the land-

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1 owner.

2 So that I think
3 that the attempt throughout
4 the evidence to indicate that
5 the landowner is downtrodden
6 because the State Highway
7 Commissioner has treated him
8 so badly over the years is
9 simply not a fact.

10 The fact is that as
11 we proceeded along with these
12 items and as Mr. Millner and
13 I have argued back and forth
14 as to what the entitlement is
15 under the Relocation Act and
16 continued to be at loggerheads,
17 that the area of compromise
18 between the parties has, I think,
19 been good.

20 I had talked to Mr.
21 Millner, I'm sure he won't
22 dispute this, and said since
23 the project was being funded
24 as it dealt with the take and
25 right-of-way area, that we wanted

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to have the question discussed
with the City Council.

And he conceded that
was a good idea and that he
would like to have their re-
action and, of course, we were
attempting at that time to
attempt to put together some
type of agreement as to the
whole thing, the relocation
and the take and the damage to
the residual as to a figure.

That fell through,
but he had full knowledge of
what we were doing as to re-
location at that stage, and I
would submit that's really the
reason why he hasn't pursued
his administrative remedies,
rather than the fact that the
Highway Department has done
nothing.

We have attempted to
work with the landowner, but I
think this comes down to this

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question. And that is under
the law of this Commonwealth,
when there's a project for
the good of the public, and
the purpose, and there isn't
any question that the purpose
has been declared as a public
purpose and the -- Legislature
of this Commonwealth declares
that the title to the property
shall transfer to the Common-
wealth, then if it's our property,
we've got the right to go upon
it and proceed with our work,
especially when it's so clear
as in this case that it's to
the detriment of the public of
the City of Newport News not
to allow it to be done.

So we suggest to you
there is no authority in this
Court to enjoin the State High-
way Commissioner from going
upon the property to which it
has title pursuant to this

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1 certificate filed in this
2 case.

3 Now, I think that --
4 an aside is that the Highway
5 Commissioner has indicated
6 that it will preserve the items
7 while these parties have their
8 relocation question determined
9 in accordance with law. We
10 told them all along. We even,
11 as the evidence shows, Mr.
12 Millner penned the letter him-
13 self, and submitted it to his
14 client, that saved the rights
15 of all the parties, and his
16 client refused to sign it.

17 Now, I don't -- I
18 don't like to do this, but I
19 guess we'll have to get in to
20 some degree because there has
21 been so much evidence on it,
22 into Relocation Act, and I'm
23 going to step aside shortly and
24 allow Mr. Southall to talk to
25 you more about the Relocation

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1 Act, but -- as I understand
2 the Act, the entitlement,
3 the entitlement is reimburse-
4 ment to the landowner for
5 reasonable and necessary moving
6 expenses.

7 Now, what reasonable
8 and necessary moving expenses
9 are in this case, of course,
10 you can see is in dispute.
11 There's no question about that.

12 We suggest must of
13 necessity under this policy
14 program, not a just compensation
15 program, but more of a voluntary
16 program undertaken by the Legis-
17 lature of Virginia would not
18 be required, but for this voluntary
19 program has nothing to do with
20 just compensation under eminent
21 domain.

22 That -- but for that
23 problem being resolved at the
24 administrative level, and then
25 in a Circuit Court in the event

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1 that it's not resolved amica-
2 bly or to the satisfaction of
3 the landowner, that it is based
4 upon that question. Whether
5 or not it's reasonable moving
6 expenses.

7 We disagree you don't
8 have any evidence here today
9 to make that decision. We say
10 that it's an -- an administrative
11 decision at any rate. But you
12 don't have any evidence here
13 today to determine whether or
14 not they are reasonable moving
15 expenses that Mr. Edwards is
16 demanding be paid. There simply
17 isn't any evidence here to tell
18 you that.

19 As a matter of fact,
20 the only evidence that I'm aware
21 of that's here as to that question
22 shows to you that what he's de-
23 manding be paid are unreasonable
24 moving expenses.

25 So, insofar as these

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1 things are concerned, we
2 would suggest to you, that
3 of necessity, they have got
4 to be separated out, and
5 that he simply has failed
6 to -- to exhaust his adminis-
7 trative remedies.

8 And that until he
9 does so, then he has no rights
10 under the Relocation Act and
11 that that question is to be
12 decided in administrative pro-
13 ceedings.

14 But insofar as this
15 proceeding is concerned, the
16 question is, as I see it, and
17 we submit this is accurate,
18 where is the irreparable harm?
19 Where is the lack of the ad-
20 equate remedy at law? And the
21 question is, does the Highway
22 Commissioner have the right,
23 when it has the title to the
24 property, to go on it and con-
25 struct its works?

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1 And we suggest to
2 you and assert to you that
3 these code sections so authorize
4 the Commonwealth and indicate
5 to the Court that no injunction
6 is warranted in this case;
7 there being a failure on the
8 part of the moving party to
9 show any irreparable harm and
10 the lack of adequate remedy at
11 law. That's what we ask you to
12 rule.

13 I'd like to at this
14 time, if the Court please,
15 defer to Mr. Southall.

16 MR. SOUTHALL: Your
17 Honor, if the Court please,
18 I have not much more to add,
19 except to reiterate I think
20 the law is clear and I submit
21 to you the law is clear that --
22 the determination entitlements
23 under the Relocation Assistance
24 Act are separate and distinct
25 from the determination of rights

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1 and just compensation, which
2 rights are guaranteed by the
3 Constitution, as opposed to
4 the statutory, merely statutory
5 guarantee of the Relocation
6 Assistance Rights.

7 Now, I know that it's
8 not in this jurisdiction,
9 but I happened to run across
10 a California case that I think
11 supports that proposition, if
12 the Court might wish to -- to
13 take a look at it.

14 COURT: I don't
15 think much of California.

16 MR. SOUTHALL: I
17 don't either; so that's the
18 reason I don't put too much
19 weight on it, but I think it
20 merely supports.

21 COURT: You got
22 any Virginia law?

23 MR. SOUTHALL: No
24 sir; there has not been a
25 reported case.

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COURT: That's

2

what I'm looking for.

3

MR. SOUTHALL: There's

4

not been a reported case from

5

the Supreme Court on this matter,

6

but -- I would just reiterate

7

what I said earlier, that -- we

8

don't feel that the Highway

9

Commissioner's position has changed

10

from the outset, and we feel that

11

the testimony today, the land-

12

owner's own testimony supports

13

the fact that he has been aware of

14

the Highway Commissioner's position.

15

We respectfully submit

16

that this Court's determination

17

in the condemnation matter, while

18

binding, with the exception, of

19

course, that the Commissioner

20

has taken possible right of

21

appeal, while binding in the

22

condemnation action, is not

23

binding in the relocation matter.

24

COURT: Why do you

25

say that? It's the same

85

1 parties. Even if it's not
2 res judicata, it's estoppel by
3 judgment.

4 MR. SOUTHALL: It's
5 the same party, but two entirely
6 different remedies.

7 COURT: The issue
8 is the same. Whether or not
9 it is personalty has already
10 been decided and I don't
11 believe that administrative
12 board has a right to disregard
13 that unless and until the
14 Supreme Court says I'm wrong.

15 MR. SOUTHALL: Your
16 Honor, the administrative board
17 is not the ultimate, it is
18 merely the decision making
19 process of the Highway Commis-
20 sioner.

21 COURT: You see,
22 they have already got two ringers
23 on that board; they got some-
24 body from your office and the
25 Highway Commissioner.

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1 MR. SOUTHALL: I
2 try, if I ever sat on one,
3 I would try to be as fair
4 as anyone else.

5 COURT: How could
6 you sit up there and make
7 a judgment after arguing the
8 case? I don't understand
9 that.

10 MR. SOUTHALL: I
11 don't think I would sit on
12 some board.

13 COURT: It doesn't
14 make any difference. Someone
15 from your office would sit.

16 MR. SOUTHALL: As
17 Mr. Beale has indicated, there
18 is a right of appeal from that
19 determination.

20 COURT: That's about
21 as flimsy excuse as I ever
22 heard. Go ahead.

23 MR. SOUTHALL: Never-
24 the less, we feel that that
25 is a separate proceeding.

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1 COURT: I'll tell
2 you what the Supreme Court
3 has already decided. I
4 ran across this many years
5 ago when I first came down
6 here to examine title.

7 The City of Newport
8 News has a city attorney.
9 And when you get behind in
10 your taxes, he institutes
11 the suit and then he would
12 be the Commissioner in Chancery.
13 And then he would the Special
14 Commissioner and he'd sell
15 the property. And he did
16 that for years and years.

17 I ran across that
18 and I felt that wasn't right.
19 Well, I did a little research
20 and I found out the very same
21 thing had been decided in
22 Norfolk. The Supreme Court
23 said you can't be advocate,
24 jury, and judge all at the same
25 time. You can't do that.

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1 Has this system
2 been tested?

3 MR. SOUTHALL: Not
4 with regard to the Relocation
5 Assistance Act.

6 COURT: I mean
7 the parties sitting on the
8 appeal board, has that been
9 contested?

10 MR. SOUTHALL: I
11 think, with respect to other
12 appeal procedures, with re-
13 gard to other administrative
14 remedies, it's a common pro-
15 cedure.

16 COURT: Has it been
17 approved by the Supreme Court?

18 MR. SOUTHALL: I
19 don't know; I cannot cite
20 you a case.

21 COURT: It doesn't
22 sound right to me.

23 MR. SOUTHALL: I
24 think it has. I think it's
25 perfectly in accord with the

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1 statute.

2 COURT: Now, how
3 in the world are these people
4 going to get any administra-
5 tive hearing when they're going
6 to go up on administrative
7 hearing before a board composed
8 of the Highway Department lawyer
9 and one of the Highway Department
10 Commissioners? What kind of
11 hearing are they going to get?

12 MR. SOUTHALL: I
13 assume it's a fair hearing.

14 COURT: It might
15 be, and I'm not indicating it's
16 probably not, but -- they're
17 going to appeal to the parties
18 involved. I don't understand
19 any such procedure as that.

20 MR. SOUTHALL: Well,
21 nevertheless, we submit that
22 there are two separate pro-
23 ceedings.

24 COURT: I under-
25 stand that.

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1 MR. SOUTHALL: And
2 I think -- our position is
3 that -- that the landowner,
4 even if he had not received
5 the denial that we say that
6 he has received, could today
7 begin his administrative remedy
8 under the law, if he has not
9 been notified.

10 If he were notified
11 today, he could begin and he
12 could go through it, and
13 whether or not it's fair or
14 not, it's the law, and he would
15 at that point have an appeal
16 to the Circuit Court of the
17 City of Richmond.

18 For those reasons,
19 I reiterate what Mr. Beale
20 said and request that the
21 motion for injunction be denied.

22 MR. GARNER: If
23 your Honor please, one main
24 thing is that both Mr. Beale
25 and Mr. Southall say we have

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1 failed to exhaust the adminis-
2 trative remedies. As the
3 Court has pointed out, it
4 does not appear that they
5 are such administrative
6 remedies that would stand up
7 to attack.

8 Nevertheless, the
9 point is that we have not had
10 an opportunity to exercise
11 these administrative remedies
12 through the fault of the
13 opposing party, because under
14 the regulations, as the Court
15 has before it, it provides
16 on commercial moves, if the
17 owner of the business indicates
18 a desire to have his move
19 accomplished by a commercial
20 mover, which Edwards Company
21 did, it will be the responsibility
22 of the district to contact two
23 or more reputable moving com-
24 panies and request them to sub-
25 mit sealed bids for the move.

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1 They have not done
2 this. They got one bid,
3 but it was -- I don't know
4 if it is sealed or not.
5 They didn't get two bids and
6 they just have not done what
7 the act requires them to do.

8 So until such time
9 as that is done, and until
10 such time as there is an
11 official determination, which
12 there has not been, there's
13 nothing that we can do to
14 put our administrative remedies
15 into motion.

16 And the fault because
17 of this is the fact that
18 the State Highway Commissioner
19 has not gone out and gotten
20 these bids and has not made
21 any official determination
22 so that Edwards Company would
23 then have to pursue its adminis-
24 trative remedies. Now, that's
25 number one.

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1 The second thing
2 is that under the law, it
3 would appear to us, that
4 only in equity can we be
5 protected in a situation
6 such as this.

7 It's a case where
8 Edwards Company is really in
9 an impossible position by
10 virtue of the multiple actions
11 that have been taken by the
12 State Highway Department which
13 are inconsistent, and the
14 code says that an agency that
15 acquires property should not
16 do things to put somebody in
17 that position.

18 And I don't say that
19 it's been intentional. I do
20 not mean to say that. I think
21 Mr. Beale has handled the
22 condemnation end to the best
23 of his conscientious judgment,
24 et cetera.

25 I think that Mr.

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1 Fowler, from the standpoint
2 of relocation, has done the
3 same thing, and I think that
4 Mr. Fowler was very candid
5 with the Court, and the only
6 thing I think that we can
7 conclude from his testimony
8 is the fact that -- he had told
9 the Edwards Company that if
10 this property was personalty,
11 it was going to be moved.

12 And he said on one
13 occasion, his first testimony
14 was that was his understanding
15 that's the way it would be
16 handled, and then he said he
17 couldn't say for certain whether
18 he had or had not, but Mr.
19 Edwards said that he did, in
20 fact, tell him that.

21 And that was the
22 whole purpose of the hearing
23 before your Honor back in
24 October, to find out whether
25 it was realty or personalty,

1 because if it was personalty,
2 we thought it was going to
3 be moved. By virtue of what
4 the -- relocation authorities
5 and the State Highway Commis-
6 sioner under that act or under
7 that -- portion of this case,
8 had indicated.

9 But in Court it was
10 indicated by the Plaintiff,
11 State Highway Commissioner, by
12 his attorneys, that they didn't
13 care if it was personalty or
14 realty, they were going to try
15 to take it.

16 And that's the position
17 that has been maintained through-
18 out. That -- even though the
19 Court has decided this, they're
20 going to appeal it, and their
21 position is going to be even if
22 it's personalty, they have got
23 a right to take it.

24 And this is in spite
25 of the fact that the relocation

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1 authorities had indicated
2 to the Edwards Company it
3 was personalty, it was going
4 to be moved.

5 And, of course, if
6 it's taken, it can't be moved
7 and vice versa, and caught
8 right between a rock and a
9 hard place.

10 If the condemnation
11 case is tried, it might be two
12 years before it goes up on
13 appeal. If they sit back and
14 not try the relocation case
15 until then, well, then they're
16 in a fix.

17 If they make a decision,
18 we could go forward with the
19 relocation and bring a suit
20 here in Newport News. He's in-
21 dicated that he would possibly
22 agree to that, and even if he
23 didn't, but it would appear if
24 the city is the main party in
25 interest, we could do that; this

1 could be done in a reasonably
2 short time if the State High-
3 way Department would act.

4 It is not the Edwards
5 Company fault, I submit, your
6 Honor, because they have not
7 gotten two sealed bids and --
8 these two mutually exclusive
9 alternatives have been pointed
10 out, and if you take one, then
11 you're going to lose the other.

12 The irreparable damage
13 is, I think, as Mr. Jimmy Edwards
14 said, if this happened and they
15 come in there, then he is likely
16 and probably will and he feels
17 will lose his coal business.
18 And if that isn't irreparable
19 damage, I don't know what it is,
20 and we have no adequate remedy
21 at law.

22 So I would submit
23 to your Honor that it is up
24 to the State Highway Department
25 to take the action which are

1 required of it under the
2 Relocation Act and the --
3 it's getting late, I'm not
4 going to cite the statutes
5 and whatnot, but the clear
6 intent of the Relocation Act
7 and the clear spirit of the
8 law is to keep people from
9 having to be in the position
10 that they have put Mr. Edwards
11 in.

12 Again, not intentionally,
13 because Mr. Beale is acting for
14 the State Highway Commissioner
15 in one case and Mr. Fowler, and
16 their representatives are acting
17 in another case, and they have
18 taken mutually inconsistent
19 positions, and it's not his
20 fault he's in the position, and
21 we have no remedy except through
22 a Court of equity.

23 MR. BEALE: Your Honor,
24 I know I'm not entitled to
25 talk again.

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1 COURT: Be my
2 guest.

3 MR. BEALE: Thank
4 you so much.

5 I wanted to be sure
6 to cite this to you and I
7 failed to do it because I
8 think it's an indication of
9 what the law is on this very
10 issue as to whether or not
11 he's required to move off the
12 property.

13 In Section 25-248 D,
14 it provides: "No owner shall
15 be required to surrender possession
16 of real property before the
17 agency concerned pays the agreed
18 purchase price or deposits with
19 the State Court in accordance
20 with the applicable law for the
21 benefit of the owner an amount
22 not less than the agency's approved
23 appraisal of the fair market
24 value of such property. Or the
25 amount of the award of compensation

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1 in the condemnation pro-
2 ceeding.

3 "The construction
4 or development of a public
5 improvement shall be so
6 scheduled that to the greatest
7 extent practicable, no person
8 lawfully occupying real pro-
9 perty shall be required to
10 move from a dwelling or to
11 move his business or farm
12 operation without at least
13 ninety days written notice from
14 the agency concerned of the
15 date by which such move is
16 required."

17 So I would just say
18 to you, the Legislature has
19 told you that in the event that
20 the ninety-day notice is given,
21 that he's required to remove
22 himself from the right-of-way
23 and then the question is in the
24 administrative area, what he's
25 entitled to by virtue of re-

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1 imbursement for that move.
2 MR. GARNER: If
3 your Honor please, I would
4 like to just move down to
5 Section G of the same statute
6 and again I'm not imputing
7 any bad intentions, but just
8 pointing out the -- the ir-
9 reconcilable and difficult
10 position the Edwards Company is in.

11 It says: "In no
12 event shall the agency either
13 advance the time of condemnation
14 or defer negotiations or con-
15 demnation and deposit the funds
16 in Court for the use of the
17 owner.

18 "Or take any other
19 action coercive in nature in
20 order to compel an agreement
21 on the price to be paid for
22 the property."

23 I say there's nothing
24 intentionally they have done,
25 but this has been the ultimate

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1 effect with one side saying
2 one thing and one the other;
3 they just put a squeeze on
4 the owner and that's why we're
5 in the Court of equity today
6 because we're remediless except
7 before a Court of equity.

8 MR. BEALE: Of
9 course, we have done none of
10 that in that section, and also
11 it deals with the question of
12 price to be paid in the con-
13 demnation proceeding as just
14 compensation for the property.

15 COURT: Are you
16 all done, gentlemen?

17 MR. BEALE: Yes sir.

18 COURT: All right.

19 Now, I've sat here pretty near
20 all day listening to this and --
21 listening to the witness testify
22 and listening to Counsel present
23 their prospective positions,
24 both factually and legally.

25 It's frightening to

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1 me, really, that -- it's
2 always been, I thought, that
3 the Commonwealth of Virginia
4 was -- in the forefront when
5 it came to the -- to the pro-
6 tection of its citizens and
7 that it wanted to make sure
8 that the Commonwealth did
9 not tread upon the toes of any
10 of its citizens

11 And I fear that the
12 philosophy has gotten turned
13 around where it is spread down
14 from across the Potomac like
15 some big plague, infiltrated
16 the Commonwealth and its govern-
17 ment to a great extent that
18 the -- that the government or
19 the state is greater than its
20 people.

21 We're not concerned
22 with protecting government,
23 in the Commonwealth. We're
24 concerned with protecting the
25 people in the government.

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1 That seems to me to be what
2 this great state of ours is
3 all about.

4 Now, the Highway
5 Department has come in here.
6 Why the Highway Department
7 I don't know, but they're
8 here representing the City
9 of Newport News, and they
10 have condemned, which they
11 have a right to do and I
12 understand this, the property
13 of Edwards for the public good,
14 and I understand that.

15 And it's necessary
16 that we have that right or else
17 we would be at a standstill
18 when it came to roads and schools
19 and public utilities and other
20 matters of necessity to the
21 general public. And it is
22 necessary, therefore, that
23 some individual and personal
24 rights must -- have to give way
25 for the common benefit of that,

1 and I recognize that and
2 I agree with that.

3 This is necessary,
4 but it's a cardinal rule, I
5 thought, until today, that
6 when the government undertakes
7 to dispossess someone of his
8 property, that it was incumbent
9 upon the government to make
10 the person whole.

11 This is -- I thought
12 this was fundamental and I
13 was shocked to find that there's
14 some thinking in the Highway
15 Department that's not true,
16 but this is what I always thought
17 was true. That you're supposed
18 to make the individual, who has
19 given up his property for the
20 benefit of the public, whole.

21 Now, you're not
22 supposed to give him anything
23 he's not entitled to, but
24 you're not supposed to take
25 away anything he has, without

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1 just compensation for it.

2 Now, in this
3 particular position, or
4 case, the Commonwealth says
5 that Edwards hasn't exhausted
6 its administrative remedies
7 relative to the relocation and,
8 therefore, he's not entitled
9 to be heard in this Court.

10 He has to -- to
11 note an appeal, go up to
12 Richmond or wherever it is
13 this body is to meet, and he
14 has to present his case up
15 there.

16 But he hasn't been
17 put in the position where he
18 is ready to go, because the
19 Highway Department hasn't
20 done what their own rules,
21 valid or invalid, require
22 them to do. They haven't
23 done that. And they haven't
24 dealt fairly with these people
25 in my opinion.

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1 I'm not talking
2 about Counsel, Mr. Beale.
3 But I don't think the High-
4 way Department, itself, has
5 dealt fairly, whoever -- we
6 have never been able to find
7 out today who makes the
8 decisions. I haven't found
9 that out yet. Who ultimately
10 makes the decision in the High-
11 way Department. On this very
12 issue.

13 Now, they came into
14 my Court, I thought in good
15 faith because they had a bona
16 fide contention as to what
17 was and was not personalty.
18 And we heard evidence on it
19 and someone suggested that we
20 go over to the Edwards Coal
21 Company and look around, and
22 we did that. Did everything
23 I think, Mr. Beale, but get in
24 the pit. But we went over
25 there and we looked.

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1 I might tell you that
2 now that you all have conceded
3 about the railway business, I
4 think, I think you took me by
5 surprise, but anyway, we got over
6 there and in good faith this
7 Court very carefully considered
8 the situation and made a ruling
9 that this was and this wasn't
10 personalty. And listed it.

11 I thought we were making
12 a rule and making a ruling that
13 was binding on the parties until
14 such time as the Supreme Court
15 stated that I was wrong. And
16 either party has a right to
17 appeal that decision.

18 Now, lo and behold,
19 the Commonwealth says we don't
20 agree with that decision. And
21 we are not going to abide by
22 it. We've got no intention of
23 moving that personalty off that
24 property.

25 Now, that's what the

1 Highway Department said here
2 today. Backed up by the
3 Attorney General. And they
4 tell me that they're not bound
5 by this decision as it now
6 stands. And that these people
7 have to take their administrative
8 remedies, Mr. Beale, to whom?
9 To the very people that are
10 in here today contending I'm
11 wrong.

12 Now, what type of
13 administrative remedy is that.
14 This is frightening. It's
15 really frightening to me to
16 believe that this is true.

17 And then they say
18 we'll give them a fair trial.
19 Well, I don't say they won't.
20 And if we don't, you're not
21 satisfied, they can go to the
22 Circuit Court in Richmond and
23 have Judge Wilkerson or some-
24 body else up there decide
25 whether I'm right or wrong.

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1 I never heard that
2 one Circuit Court could over-
3 rule another one. I never knew
4 that was true, and I certainly
5 never knew that the Attorney
6 General had a right to overrule
7 the Court. Certainly I never
8 knew that the Highway Commission
9 had a right to overrule the
10 Court. I made this ruling in
11 good faith.

12 Now, the Highway
13 Department has done nothing
14 to attempt to resolve this
15 issue with Mr. -- the Edwards
16 Company.

17 You say irreparable
18 damage and adequate remedy;
19 what remedy have they got at
20 law?

21 Sue the Commonwealth;
22 I don't know -- I don't believe
23 they can do that.

24 If they go in there
25 tomorrow and cut his trestle

1 in two, he's out of business.
2 I call that irreparable
3 damage.

4 And I say you haven't
5 dealt with them fairly. You
6 have made no effort to resolve
7 this case because you've got
8 no intention, and your Counsel
9 stated it in this Court, you
10 have no intention of removing
11 that -- those articles that
12 this Court has heretofore said
13 was personalty.

14 Now, I think these
15 people are entitled to conduct
16 their business until such time
17 as they are removed -- until
18 the agreements have been made
19 as to how they can remove their
20 premises.

21 This is no dry goods
22 store where somebody was talking
23 about the sweaters being packed
24 up on the shelving and you move
25 the sweaters. This involves a

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1 trestle over there which is
2 a very essence of this whole
3 business. The loading and
4 unloading of the coal, and
5 that's a very -- delicate and
6 expensive operation.

7 We're not dealing with,
8 I say again, with all due
9 respect to everybody, with
10 peanuts. You're about to
11 put this man out of business.

12 I say to the Highway
13 Department that Edwards is a
14 member of the public too. And
15 he's got to be treated fairly
16 along with me and all the rest
17 of the taxpayers of the City of
18 Newport News.

19 They're supposed to
20 treat everybody fairly, and
21 you're not treating him fairly
22 and I'm going to stay these
23 proceedings, and I'm going to
24 issue the injunction until
25 such time as you can get

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1 together. You tell him what
2 you're going to do and whether
3 you all comply with the law
4 by getting the two estimates
5 that you were supposed to
6 have gotten and haven't done
7 that.

8 All right.

9 MR. BEALE: If your
10 Honor please, I see you're
11 spinning your chair; I hope
12 you're not leaving because
13 I want to -- see if I have --

14 COURT: No sir,
15 I'm just trying to get unstuck.

16 MR. BEALE: I want
17 to see if I have clear your
18 ruling. You have stayed the
19 condemnation proceeding until
20 such time as the Highway
21 Department indicates its
22 position to Edwards on his
23 entitlement under relocation?

24 COURT: Right. And
25 although, I recognize, Mr. Beale,

1 there are two separate and
2 distinct situations, they
3 cannot of necessity in this
4 case be really separated in
5 view of the fact that the
6 Highway Department has stated
7 categorically, "We are not
8 going to do it." That's
9 what you stated.

10 MR. BEALE: All
11 right. We disagree, of course,
12 that they can be separated or
13 are separated under the law,
14 and we, of course, except to
15 the ruling of the Court and
16 say it's plain they are totally
17 separate and easily separated.

18 COURT: I understand
19 that.

20 MR. BEALE: I
21 want to be certain that I
22 understand you also because --
23 we, of course, are going to
24 ask for an injunctive bond here
25 today.

1 It's my understanding
2 that you have enjoined the
3 Highway Department from going
4 onto the area of the Take
5 described in its certificate
6 which transferred the title
7 to it until such time as, I
8 got the impression from the
9 way you were talking, that you
10 were saying that you had ruled
11 that we were required to re-
12 move these items, which of course
13 has not been an issue before
14 this Court.

15 And, of course, your
16 determination as to whether
17 they are personalty or realty,
18 it's our position, for the
19 record, that that doesn't
20 determine whether or not they're
21 required to be moved.

22 And I don't think
23 you're saying it determines
24 that. If I understand what
25 you're saying, and I want to

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1 be certain that I do, you're
2 merely saying we need to tell
3 them what our position is,
4 and once we have done that,
5 the injunction is dissolved,
6 is that correct, because we
7 can handle that today.

8 We can tell them
9 what our position is, and I
10 thought we had done that, and
11 that -- your Honor understood
12 that, and now, as I understand
13 your ruling, it's conditioned
14 upon the injunction would be
15 dissolved as soon as they know
16 what our position is on re-
17 location. Is that -- the
18 correct ruling?

19 COURT: No sir,
20 that is not. I don't want
21 to go through all this again.

22 But I'm saying Edwards
23 has not been put in the position
24 to exhaust this nebulous adminis-
25 trative remedy that you all say

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1 it has and you've made no
2 effort to do that because
3 you haven't complied with
4 the law, and I'm going to
5 enjoin you until such time
6 as you do comply with the
7 law, and I'm satisfied that
8 these people are not going
9 to be willy-nilly put out of
10 business. They have got a
11 right to know what they can
12 expect.

13 Now, you certainly,
14 you either going to have to
15 remove some of the personalty
16 or their relocation or pay
17 them. You're going to have to
18 do that sooner or later, and
19 it could have been decided a
20 long time ago. It hasn't been
21 decided.

22 MR. BEALE: We
23 didn't have a hearing on it
24 until October of last year,
25 before the Court.

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1 COURT: Sir?

2 MR. BEALE: We did
3 not have a hearing on that
4 question until October.

5 COURT: Little
6 good did it do the Highway
7 Department to have the
8 hearing, because they told
9 me they're not going to abide
10 by it.

11 MR. BEALE: I
12 don't think we told you that
13 at all; we disagree with that.

14 COURT. You said
15 you have no intention of re-
16 moving it. The whole argument
17 in there was to determine
18 whether or not in this condem-
19 nation suit we were talking
20 relocation, too, whether or not --

21 MR. BEALE: Excuse
22 me, your Honor.

23 COURT: Are you
24 through?

25 MR. BEALE: Yes sir.

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1 COURT: Whether
2 or not the items we were
3 discussing were personalty.

4 Now, you've already
5 said you don't agree with
6 that and you're not going
7 to abide by it. This is what
8 you told me.

9 In the condemnation
10 suit, of course, you're not
11 going to claim that, but if
12 you don't abide by that, and
13 these people get up before
14 your lawyer and your client,
15 on an appeal, and they rule
16 that they are not personalty,
17 these people, I don't know what
18 they're going to do. What is
19 their remedy then?

20 MR. BEALE: Of course
21 their remedy is what the
22 administrative procedure act
23 gives them; that's to be heard
24 in a Circuit Court in Richmond
25 or here, if it ends up that way.

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1 Certainly Circuit Courts
2 can do that.

3 COURT: Yes sir,
4 I knew that.

5 MR. BEALE: And
6 you indicated that -- you
7 could find no authority
8 that the Attorney General
9 could overrule you or that
10 Judge Wilkinson in Richmond,
11 a Circuit Court, can over-
12 rule you.

13 Of course, we
14 haven't suggested that,
15 but we have suggested and
16 we would say for the record
17 that that is where their
18 remedy under the Relocation
19 Act is, and that in essence
20 what your Honor --

21 COURT: I'm saying
22 that in the opinion of this
23 Court, until the Supreme
24 Court says I'm wrong, and
25 they probably will, those

1 items remain personalty, and
2 the -- as between these two
3 parties, and neither the
4 Circuit Court in Richmond,
5 nor the Attorney General, nor
6 any combination of the two or
7 three have a right to overrule
8 that.

9 MR. BEALE: And we
10 have not suggested that they
11 did. We have suggested we
12 disagreed with you.

13 COURT: I think
14 you said you didn't agree
15 and you could go up to the
16 board and they weren't bound --
17 this gentleman here told me
18 that. I asked him specifically.

19 MR. BEALE: Now, I
20 think, if the Court please,
21 that the Highway Commissioner,
22 representing the general public
23 in this case, is also entitled
24 to know where it stands, and
25 frankly, the general statement

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1 as to, "When it complies
2 with the law"; we don't
3 know what the Court is
4 telling us to do.

5 So I would like
6 to know what the Court is
7 saying that the Highway
8 Commissioner has not done
9 to comply with the law.

10 COURT: Put these
11 people in the position where
12 you are going to have to decide
13 definitely what you're going
14 to do or not do about the
15 relocation so that they can
16 go ahead and know what they've
17 got to work with, and they
18 don't know. They don't know
19 what money you're going to
20 pay them or not going to pay
21 them. They don't know that.

22 All right, gentlemen.

23 MR. BEALE: We'd
24 like to -- to be heard on the
25 question of the injunctive

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1 bond.

2 COURT: All right,
3 sir.

4 MR. BEALE: We
5 would suggest to you Section
6 8-623 requires the bond
7 when the Court issues such
8 an injunction, and I guess
9 to determine the amount of
10 the bond, that very possibly
11 the Court would need some
12 evidence on value.

13 That's one of the
14 main reasons we tried to show
15 you some indication of values
16 within the right-of-way.
17 There will be a liquidated
18 damage claim by the contractor
19 and in the event, of course,
20 that this injunction is de-
21 cided -- this injunctive bond,
22 according to Section 8-623
23 of the Code, also requires the
24 bond to encompass any and all
25 damages which may result by

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1 and through the granting of
2 the injunction.

3 If you would like to
4 hear some evidence on what we
5 believe to be involved on the
6 damages --

7 COURT: All right,
8 sir; when do you want to do
9 that?

10 MR. BEALE: Right
11 now.

12 COURT: I'm not
13 going to do it right now.
14 It's a quarter of six. I'm
15 tired.

16 MR. BEALE: We ask
17 you to set a reasonable bond
18 at this time with reference
19 to the injunction.

20 COURT: I'll do
21 that tomorrow morning. You
22 all come back tomorrow morning.

23 MR. GARNER: Thank
24 you, your Honor.

25 MR. MILLNER: What

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1

time would you like us?

2

COURT: Ten o'clock.

3

This case is continued until

4

tomorrow morning at ten

5

o'clock.

6

7

(At this

8

time the hearing

9

was concluded.)

10

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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

STATE HIGHWAY COMMISSIONER
OF VIRGINIA

vs.

THE EDWARDS CO., INC.,
a Virginia Corporation

Stenographic report of all the testimony,
together with all the motions, objections and exceptions
on the part of the respective parties, the action of the
Court in respect thereto, and all other incidents during
the trial of the case of State Highway Commissioner of
Virginia versus The Edwards Co., Inc., a Virginia Corporation,
tried in the Circuit Court for the City of Newport News,
at Newport News, Virginia, on March 31, 1977, before the
Honorable Henry D. Garnett, Judge of said Court.

- - - oOo - - -

PRESENT:

Mr. Robert V. Beale and
Mr. V. Southall, Attorneys
for the Plaintiff.

Mr. B. M. Millner and
Mr. W. Glover Garner, Junior,
Attorneys for the
Defendant.

- - - oOo - - -

1 COURT: All right;
2 are we ready to discuss the
3 bond?

4 MR. MILLNER: Yes,
5 your Honor.

6 COURT: All right.
7 Before we get to the bond,
8 I want to tell you what I
9 want the decree to show,
10 among other things.

11 I want the decree to
12 show that the Highway Depart-
13 ment never complied with its
14 own rules by getting the two
15 estimates for removing the
16 personal property as it is stated
17 in the rules.

18 And I want the order
19 to show that the Highway Depart-
20 ment never intended to move
21 that personal property or the
22 property ruled to be personal
23 by this Court from the property,
24 and so stated in open Court,
25 through Counsel.

1 And, therefore,
2 even if the Respondent,
3 Edwards, had been put in a
4 position where he could
5 appeal in accordance with the
6 rules of the Highway Depart-
7 ment, it would have been a vain
8 act because they had already
9 determined they weren't going
10 to move the personalty.

11 I want the decree
12 to hold -- to show that this
13 Court holds that the ruling
14 on personal property is binding
15 between the parties, notwith-
16 standing the fact that the re-
17 location is provided -- it is
18 provided that the relocation is
19 a different proceeding; that the
20 issue as to what is personal
21 property is the same and has been
22 litigated.

23 And I want the -- the
24 injunction to be in full force
25 and effect until such time as

1 the relocation issue has
2 been decided by a Court of
3 competent jurisdiction.
4 Unless otherwise dissolved or
5 amended.

6 All right, now we
7 can discuss the bond.

8 MR. BEALE: Before
9 we discuss the bond, if the
10 Court please, I'd like to say.
11 this with reference to the
12 comments the Court has made,
13 if I may.

14 We would suggest that
15 the Court has misconstrued
16 the comments of Counsel and
17 that the decree ought not to
18 show, nor did comments of
19 Counsel indicate that the
20 Highway Department never in-
21 tended to move the items.

22 What Counsel said to
23 the Court was we did not intend,
24 my recollection of it is, and
25 certainly this is what Counsel

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1 intended to say to the Court,
2 that we did not intend to
3 compensate under the Relocation
4 Act the moving of those items
5 as a reasonable moving expense
6 until that question was finally
7 decided by a Court higher than
8 this one, and further that the
9 decision in the condemnation
10 case by this Court as to whether
11 or not that is personalty or
12 realty does not determine the
13 question as to whether or not
14 they are entitled to have it
15 relocated.

16 COURT: That's right,
17 and it was for that reason you
18 said you had no intention of
19 relocating them because you
20 didn't accept this Court's
21 decision that it was personalty.

22 MR. BEALE: No sir.
23 The reason --

24 COURT: Anyway, we
25 are through arguing about that.

1 Let's talk about the bond.

2 MR. BEALE: At any
3 rate, for the record I want
4 to put into the record that
5 I disagree that's what occurred
6 here and that our position was
7 that they're required to ex-
8 haust their administrative
9 remedies, our position through-
10 out the hearing yesterday, and
11 it remains the same today, is
12 that they failed to do that,
13 and that that's where the
14 decision on whether or not the
15 items are required to be relocated
16 is made and not in this Court.

17 COURT: I've stated
18 they have been precluded from
19 exhausting their administrative
20 remedy by the action of the High-
21 way Department, and that's what
22 I've ruled and that's the end
23 of that.

24 Let's get along with the
25 bond.

1 MR. BEALE: We, of
2 course, would note an exception
3 to the ruling of the Court.

4 COURT: Yes sir;
5 note your exception. All
6 right.

7 MR. BEALE: Now, on
8 the bond, if the Court please,
9 there is, as I understand it,
10 a dispute whether or not a bond
11 ought to be required. You may
12 prefer to take that argument
13 up first because you might not
14 want to hear any evidence on
15 how much the bond ought to be.
16 Would you rather go --

17 COURT: Well, I
18 think all along in this case
19 we have had the cart before the
20 horse, and I think maybe we
21 ought to get around to put the
22 horse before the cart and dis-
23 cuss whether or not you are
24 entitled to a bond.

25 MR. BEALE: All

1 right, sir.

2 COURT: And discuss
3 that.

4 MR. BEALE: All
5 right, sir, our position, if
6 the Court please, is that
7 under 8-63 of the Code that
8 we are entitled to an injunctive
9 bond.

10 Now, that bond, we
11 suggest to you, ought to be for
12 the cost of this proceeding,
13 actual cost that are incurred
14 by virtue of the Court's entering
15 the injunction, plus any and
16 all damages.

17 I think the evidence
18 and one of the prime values of
19 the two items that were admitted
20 in evidence before you yesterday
21 on the difference between the
22 in place property and the cost
23 of moving those items from the
24 right-of-way would be one element
25 of the damage, since our position

1 is that they're entitled,
2 under the Act that was gone into
3 yesterday, only the value of
4 the in place depreciated value
5 of the items.

6 And their position is
7 the opposite, as I understand
8 it. That they are entitled
9 to the actual relocated value
10 of the items, and I'm limiting
11 that to those items that were
12 put in evidence before your Honor
13 that are actually on the fee
14 take area.

15 We would also suggest
16 insofar as the stay that the
17 Court has granted of the condem-
18 nation proceeding, that the actual
19 cost ought to be a part of the
20 bond, and in addition to that,
21 that the measure of damages would
22 be the interest that the Highway
23 Department would have been re-
24 quired to pay for the difference
25 between the amount shown in the

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1 certificate and the amount
2 of the actual award by the
3 Commissioners in the condem-
4 nation case or in excess of
5 the certificate for the period
6 of time that the condemnation
7 case is declared by virtue of
8 the stay.

9 Now, in addition, on
10 the damage item for the area in
11 the take, we will present evidence
12 to show to you that the -- that
13 the penalty for the delay of
14 the contractor is one hundred
15 fifty dollars per day.

16 Now, as we read this
17 statute, and I'm frank to say
18 to the Court that it appears to
19 me the better argument is that
20 the granting of this bond is
21 discretionary with your Honor,
22 but we think because of the
23 dollars that are involved with
24 reference to the people of the
25 Commonwealth in this case, that

1 it is a proper case for this
2 Court to protect the interest
3 of the people of the Common-
4 wealth by virtue of this bond.

5 We know of no way
6 that it can be protected, other
7 than that, and there is some
8 question in our mind whether
9 or not it is discretionary.

10 It seems to us that
11 it says your injunction will
12 take no force and effect until
13 such time as this bond is given,
14 but then there's a clause following
15 this which says: "Except in
16 the case of a personal representative
17 or other person from whom in the
18 opinion of the Court or Judge
19 awarding the injunction it may
20 be improper to require bond."

21 I think that's rather
22 difficult to interpret, but we
23 would suggest to the Court that
24 that suggestion where it would be
25 improper in cases such as a

1 personal representative or
2 other types fiduciaries for
3 the Court to require a bond;
4 so it does not give what we
5 would call a wide open dis-
6 cretion to the Court, we would
7 suggest.

8 So with that, we would
9 request that the Court require
10 a bond from the petitioner
11 in this matter for the injunction.

12 I think it is no
13 question that the amount of the
14 bond is discretionary with the
15 Court, and we will attempt with
16 the evidence, if the Court
17 reaches a point to hear that,
18 to guide the Court in arriving
19 at that amount.

20 MR. GARNER: If your
21 Honor please, we would agree
22 with Mr. Beale when he said that
23 he felt the better argument in
24 interpreting this statute was
25 that -- the bond is entirely

1 discretionary with the Court,
2 because we feel that is the
3 law and would agree with what
4 he feels the law to be, also;
5 so I think we're in agreement
6 that -- the better interpretation
7 of this statute would be, and
8 we say the only interpretation,
9 is that the bond is discretionary
10 with the Court.

11 And that's because in
12 the first sentence it says:
13 "An injunction, except in the
14 case of a personal representative,"
15 but then it says: "or other
16 person from whom, in the opinion
17 of the Court or Judge awarding
18 the same, it may be improper to
19 require bond."

20 So right at the beginning
21 it gives the Court the discretion
22 to reach a determination as to
23 whether or not it feels that a
24 bond should be posted. And we
25 would submit to your Honor that

1 under the facts and the evidence
2 adduced in this case, and the
3 Court's ruling thereon, that
4 if there ever was a case when
5 no bond should be required, that
6 this is certainly one.

7 Under the facts in
8 evidence, we're in this position,
9 or our clients are, through no
10 fault of their own, and it would
11 be most unjust, we feel, under
12 the circumstances to require a
13 bond to be posted based on the
14 facts in this case, and we feel
15 it is entirely within the sole
16 discretion of the Court, as Counsel
17 for the State Highway Commissioner
18 has conceded is the better argu-
19 ment, and which we feel the
20 statute clearly states, the part
21 down at the end of the statute
22 which says that -- talking
23 about the sixty days, that would
24 be only if the Court did require
25 bond, and I think that's clear

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1 from reading the statute.

2 So -- we would ask
3 your Honor to exercise the
4 Court's discretion as to what
5 it felt was right, just, and
6 proper under the circumstances,
7 with the understanding that
8 our plea would be that no bond
9 would be required.

10 MR. MILLNER: Just
11 one. Everyone is in agreement
12 that it is a matter of discretion
13 with the Court, and I may have
14 misunderstood Mr. Beale, but I
15 think we both talking about the
16 same section. 8-623. I under-
17 stood it to be 23. 6-23 is the
18 one we're talking about, just for
19 the record, and -- in applying
20 equitable principles, the contract
21 which they claim penalty under
22 was entered into with full
23 knowledge of Edwards' position
24 and with full knowledge that
25 they were -- not taking any action

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1 to resolve the relocation
2 and, therefore, as a matter
3 of equity, it's unfair to
4 penalize us because the pre-
5 dicament that the Highway
6 Department finds itself in
7 is one of their making, and
8 Edwards, we respectfully submit,
9 and we think the Court has held,
10 has done everything that it
11 can do to try to alleviate the
12 situation, and the predicament
13 is solely due to the fault of
14 the Highway Department.

15 And, therefore, we
16 think it is inequitable to
17 require any bond, whatsoever.
18 We just -- are here to --
19 assert our rights. The Court
20 says we're entitled to assert
21 our rights and, therefore, we
22 would request no bond, whatso-
23 ever.

24 MR. BEALE: If your
25 honor please, we would just

1 say the purpose of the bond,
2 of course, is for the pro-
3 tection of both parties. It's
4 not a penalty bond; in the
5 event the position of the land-
6 owner is incorrect in this case,
7 then we think it calls for a
8 bond for the protection of the
9 people of the Commonwealth.

10 We would ask you to,
11 and -- I disagree that I say
12 that it definitely is discre-
13 tionary. I think some question
14 whether it is discretionary,
15 but we are asking you this
16 morning to exercise the dis-
17 cretion for the protection of
18 the parties involved in the
19 matter and we think that's the
20 very purpose of this 8-623;
21 so we would reiterate we request
22 that you set a bond in the
23 matter.

24 COURT: Well, in --
25 in cases of this nature, it

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1 would seem to me that this
2 is not a dispute between
3 the -- ordinary dispute be-
4 tween two property owners or
5 some individual undertaking
6 to encroach upon another's land.

7 In those cases we
8 have always required a bond. I
9 never recall, frankly, entering
10 any restraining order where
11 one is -- is restrained from
12 going into a -- going onto another
13 person's property under some
14 color of title or something,
15 without requiring a bond.

16 But in this case, these
17 people here are members of the
18 public, too, and this is sort of
19 a family dispute. Members of
20 the public fighting each other.
21 These people have a bona fide
22 contention and I've so ruled
23 that they have.

24 Now, it just so happens
25 that if this injunction is --

1 is -- sticks, that these
2 people are holding up the
3 Commonwealth of Virginia in
4 a matter involving what we as
5 individuals would think,
6 anyway, a whole lot of money.
7 To the Commonwealth, of course,
8 they're used to dealing in
9 larger figures, but to the
10 individual that's a lot of
11 money.

12 And if we were to
13 hold that a taxpayer or that
14 a property owner cannot come
15 into this Court and assert
16 his rights against the Common-
17 wealth and all of its resources,
18 under the penalty of having to
19 put up thousands and thousands
20 of dollars in bond, while the
21 Commonwealth undertakes to
22 appeal the matter, would in
23 effect close the doors of this
24 Court to the average litigant
25 whose property is being taken

1 by the State.

2 To take a person's
3 property is a very serious
4 thing, and the State has to
5 dot every "I" and cross every
6 "T" before it can take it.
7 That's one of the fundamental
8 bases of our society; the right
9 to own and control your own
10 property.

11 If I were to set a
12 bond in this matter, and I gave
13 this a lot of thought last
14 night, Mr. Beale. If I were
15 to set a bond in this matter, say
16 well, maybe it's not really
17 discretionary in that statute,
18 then I think you could really
19 complain if I did not set an
20 adequate bond. If I just set
21 the bond at ten thousand dollars
22 or twenty thousand dollars,
23 something of that nature, that
24 would -- just to say, well,
25 we complied with the statute

1 in setting the bond, I think
2 you would have a legitimate
3 complaint.

4 I think if I -- if
5 this were a case wherein I
6 thought a bond should be --
7 set, the bond would be a
8 pretty good bond. I wouldn't
9 need a whole lot of evidence
10 in order to set this bond.

11 I recognize that. --
12 we are holding up a major pro-
13 ject. I recognize that, and
14 I don't enter this injunction
15 lightly.

16 I say I will not close
17 the doors of my Court to a pro-
18 perty owner of the Commonwealth
19 when it's in here, when they're
20 in here bona fide undertaking
21 to assert their rights or to
22 protect their rights against the
23 assertion of the Commonwealth,
24 and I decline to set a bond.

25 MR. BEALE: We'd like to,

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1 if Your Honor please, proffer
2 evidence from the project
3 supervisor of the one hundred
4 fifty dollars a day. We
5 can't agree on that amount,
6 for the record.

7 COURT: Well --
8 all right. I have no objection
9 to that. What sort of bond
10 were you asking, anyway? What
11 bond were you going to ask?

12 MR. BEALE: The amount,
13 I don't think we could have ---
14 I think we would have just been
15 able to give the Court some
16 guidelines on arriving at the
17 amount of bond, because I think
18 it's -- the actual amount we
19 don't know how long the condemnation
20 case is going to be delayed;
21 so --

22 COURT: This is
23 right. That's what I am
24 talking about.

25 MR. BEALE: And so

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1 the interest --

2 COURT: That's why
3 I was asking as to what --
4 what figure. Surely you
5 must have, overnight have
6 thought of some figure for
7 the bond. Since you want to
8 put that in the record, or I'll
9 take whatever evidence you want
10 to offer as to what the -- the
11 bond should be if it were
12 awarded. I'll accept that
13 into evidence.

14 MR. BEALE: Our
15 request, the amount of the
16 bond was seventy-five thousand
17 dollars. What we were going to
18 indicate to the Court was that
19 the measure in order for the
20 Court to arrive at the amount
21 of the bond would have been
22 those items previously mentioned
23 to you, along with the evidence
24 of the project supervisor that
25 the penalty for each day's

1 delay on the project to
2 the contractor is one hundred
3 fifty dollars per day.

4 Now, we can offer
5 Mr. Trask.

6 COURT: Is that
7 written in the contract?

8 MR. BEALE: Yes
9 sir.

10 MR. MILLNER: Your
11 Honor, the only point would
12 be if that part comes in to
13 which we object, we think that
14 it should also come in the fact
15 as to the -- the contract being
16 entered into, we assume, some
17 four or five or six months ago;
18 long after Edwards had filed
19 for relocation. So that anyone
20 looking at the record would
21 know the full facts as to when
22 the contract was entered into.

23 MR. BEALE: We don't
24 object to that.

25 MR. MILLNER: And

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1 that -- if it can be stipulated
2 that the contract was entered
3 into on what date.

4 MR. R. J. TRASK: September
5 27th was when the work started.

6 MR. MILLNER: The
7 contract was entered into on
8 or about September 27, 1976?

9 MR. R. J. TRASK: Yes.

10 MR. MILLNER: Provides
11 for how many days completion?

12 MR. R. J. TRASK: 180
13 days.

14 MR. MILLNER: 180 day
15 contract.

16 COURT: Well, I think
17 these people -- I think the
18 Commonwealth is entitled to
19 put into the record --

20 MR. MILLNER: All right,
21 sir.

22 COURT: What they feel
23 the damages will be, because
24 they -- they have a right to
25 request seventy-five thousand

1 dollars. As a matter of fact,
2 I'm surprised that they only
3 requested seventy-five thousand.
4 I thought it would be higher
5 than that.

6 MR. BEALE: And we
7 note an exception to the ruling
8 in denial --

9 COURT: Let the
10 record show he was sitting
11 in the congregation.

12 MR. BEALE: We note
13 an exception to your Honor's
14 ruling on the denial of bond
15 and suggest that the better
16 interpretation of the statute
17 in this case would be that a
18 bond ought to be granted whether
19 or not it is discretionary in
20 the Court and would submit for
21 the record that it is not
22 discretionary.

23 COURT: Yes sir.
24 All right; now, I'll allow you
25 to put on your evidence, if

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1 you like, or you can rely on
2 your statements, whatever you
3 want to do.

4 I think everybody
5 would have to agree -- I think
6 everybody would have to agree
7 certainly it would be costly
8 in all probability to hold up
9 this project. We can agree on
10 that.

11
12 - - -

13
14 ROBERT J. TRASK, being duly sworn,
15 called as a witness on behalf of the Plaintiff, testified
16 as follows:

17
18 DIRECT EXAMINATION

19
20 BY MR. BEALE:

21 Q State your name, please.

22 A My name is Robert J. Trask.

23 Q What is your position with the
24 Highway Department, Mr. Trask?

25 A I'm the inspector in charge of the

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R. J. TRASK - DIRECT

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1 23rd Street improvement.

2 Q Are you familiar with the contract
3 in that matter?

4 A Yes, I am.

5 Q Has the completion date for that
6 contract passed?

7 A Yes, it has.

8 Q Now, the contract, I believe, was
9 entered into around the latter part of September, is that
10 correct?

11 A The notice to proceed to the
12 contractor was on the 27th of September, 1976.

13 MR. GARNER: Can we
14 have the contract we're talking
15 about? The contract speaks
16 for itself.

17 MR. BEALE: I don't
18 think --

19 COURT: I'm sure
20 they don't have it.

21 MR. BEALE: What is
22 the completion date of the
23 contract, the time period?

24 MR. GARNER: I
25 would like, for the record,

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1 to except on the basis that
2 all of this testimony is
3 nothing but hearsay and the
4 contract would speak for
5 itself, and I object to all
6 of this testimony on the
7 grounds it is hearsay.

8 COURT: Well, I
9 really don't think your
10 objection is well taken, Mr.
11 Garner. This is -- just
12 trying to determine for the
13 benefit of the Court how
14 much the bond should have
15 been. They don't really
16 have to do this.

17 They could stand and
18 represent we claim we're
19 damaged -- we will be damaged
20 in the sum of half a million
21 dollars if they wanted to.
22 We all know that it's going
23 to be costly, as I said. We
24 know that. I didn't enter
25 this injunction lightly. I

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R. J. TRASK - DIRECT

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1 understand this.

2 BY MR. BEALE:

3 Q What is the -- Mr. Trask, is it
4 180 day completion date?

5 A Yes sir, it is.

6 Q What is the per day penalty
7 amount on this contract for each day that it goes over?

8 A One hundred fifty dollars a day.

9 MR. BEALE: That's
10 all we have, your Honor.

11

12 CROSS EXAMINATION

13

14 BY MR. MILLNER:

15 Q Mr. Trask, under the normal way
16 of letting contracts, is there not a state statute or
17 regulation of the Highway Department that the right-of-way
18 is supposed to be clear before any contract is let?

19 A I'm not familiar with right-of-
20 way matters.

21 Q You don't know anything about it?

22 A No sir.

23 Q Do you know when the contract
24 was let?

25 A I know when the notice to proceed --

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R. J. TRASK - CROSS

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1 COURT: I thought
2 this was a contract of --
3 of clearing the right-of-way.
4 This is --

5 MR. BEALE: Yes,
6 it is.

7 COURT: How could
8 the contract -- how can the
9 right-of-way be cleared before
10 any contract is let? It is
11 a contract to clear the right-
12 of-way. I don't understand
13 that.

14 MR. BEALE: I think
15 he's referring to the statute
16 that says that the title has
17 to be vested, all the certificates
18 have to be filed prior to letting
19 the contract. That's how I
20 understand the law on that
21 point.

22 MR. MILLNER: Is your
23 contract --

24 COURT: He's done
25 that. You have already done

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NEWPORT NEWS, VA.

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R. J. TRASK - CROSS

32

1 all that. The title has
2 passed. I don't think
3 there's any question about
4 that.

5 MR. GARNER: Is this
6 the contract for the road
7 or clearing the right-of-
8 way?

9 COURT: I thought
10 they were talking about
11 coming in there with torches
12 and cutting that trestle in
13 two is what Mr. Beale had
14 threatened he was going to
15 do when he was in Court the
16 last time, and that's what
17 I thought we were talking about.

18 MR. MILLNER: The
19 contract is involved with an
20 underground sewer line?

21 A The contract I'm speaking of is
22 for the construction of the road, the installation of storm
23 sewers and for the demolition of certain buildings within
24 the right-of-way.

25 COURT: You're not

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R. J. TRASK - CROSS

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1 going to construct any road
2 within 180 days, are you?

3 A That was the intention, yes sir.

4 MR. MILLNER: Do
5 you know of your own knowledge
6 whether there has been some
7 periods that -- extensions
8 have been granted or requested
9 by the contractor due to the
10 weather condition?

11 MR. BEALE: We would
12 concede there has been delay
13 because of weather. We're
14 merely talking from the day the
15 Court issued the injunction of
16 one hundred fifty dollars a
17 day.

18 COURT: You really
19 weren't. You were talking
20 about overall.

21 MR. BEALE: No,
22 we're not talking about any-
23 thing that's gone in the past
24 prior to this Court's entry
25 of the injunction. Our

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R. J. TRASK - CROSS

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1 measure of the delay we re-
2 late from yesterday forward.

3 COURT: All right.

4 BY MR. MILLNER:

5 Q Did the contract have a provision
6 in it for removing the railroad siding and the coal
7 conveyor system of Edwards? Was that a part of the contract?

8 A No sir. The only part of the
9 contract that had to do with Edwards Company, there are two
10 buildings located on the Edwards Company, and the contract
11 that I am speaking of had to do with the demolition of
12 those buildings.

13 Q All right, sir, so then the con-
14 tract that you are -- who is the contractor, by the way?

15 A Peninsula Engineering Company.

16 Q All right, sir, so then Peninsula
17 Engineering would not be involved in removing the railroad
18 siding or the coal conveyor?

19 A That's correct.

20 Q Do you know of any contract that
21 has been let by the State Highway Department for removal
22 of those?

23 A Not to my knowledge.

24 Q Who do you anticipate will remove
25 this?

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R. J. TRASK - CROSS

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1 A I have no idea.

2 Q Is it the responsibility of the
3 Peninsula Engineering?

4 A No, it's not.

5 MR. MILLNER: That's
6 all.

7 MR. BEALE: No
8 further questions.

9 COURT: Thank you,
10 sir.

11 MR. BEALE: Thank
12 you, your Honor.

13 COURT: You're
14 welcome. Who is going to
15 draw the order?

16 MR. MILLNER: I
17 assume we'll prepare the
18 order.

19 COURT: When are
20 you going to have it down
21 here?

22 MR. MILLNER: We'll --

23 MR. BEALE: He's
24 working on the order on yesterday,
25 too, as soon as he can. We're

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1 going to have a problem.
2 It's going to be some few
3 days before we can get the
4 record, anyway. We'll get
5 together with you on the
6 decree.

7 COURT: All right.
8 What I am trying to determine
9 now is whether -- we are in
10 any understanding about the
11 damages, if any, running from,
12 starting today, or from the
13 date we enter the order.
14 This is -- is what I want
15 to -- to clear up.

16 MR. BEALE: I would
17 think we should put the date
18 in the order.

19 COURT: All right.
20 I think it should start from
21 today, because you were supposed
22 to start today; that's what
23 you represented to me yesterday.
24 Is this right?

25 MR. BEALE: Yes,

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1 that's fine; today.

2 (At this

3 time the case was

4 concluded.)

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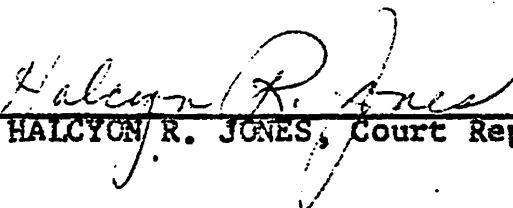
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CERTIFICATE OF COURT REPORTER

We, Halcyon R. Jones and Morris Schneider,
hereby certify that we, having been duly sworn, were the
Court Reporters in the Circuit Court for the
City of Newport News, at Newport News, Virginia, on March
30, 1977 and March 31, 1977, respectively, at the time
of the hearings herein.

We further certify that the foregoing tran-
script is a true and accurate record of the testimony and
other incidents of the hearings herein.

Given under our hands this _____ day of
_____, 1977.


HALCYON R. JONES, Court Reporter

MORRIS SCHNEIDER, Court Reporter

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CERTIFICATE OF COUNSEL

Final judgment in the foregoing matter having been rendered on the _____ day of _____, 1977 the Attorney for the Plaintiff and Counsel for the Defendant hereby affix their signatures to the foregoing transcript of testimony and other incidents of trial to the end that the same may become part of the record on appeal.

Given under our hands this _____ day of _____, 1977.

By: _____
Attorney for the Plaintiff

By: _____
Attorney for the Defendant

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CERTIFICATE OF TRIAL JUDGE

Date Tendered _____

Date Signed _____

HENRY D. GARNETT, Judge.

CERTIFICATE OF CLERK

Date Received _____

GEORGE D. DESHAZOR, Clerk

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