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Richmond, Va.

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Record No. 6134

In the
Supreme Court of Appeals of Virginia
at Richmond

CHARLES WILLIAM HURT

v.

SOUTHERN RAILWAY COMPANY

FROM THE CIRCUIT COURT OF ALBEMARLE COUNTY

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6134

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 27th day of April, 1965.

CHARLES WILLIAM HURT, Appellant,

against

SOUTHERN RAILWAY COMPANY, Appellee.

From the Circuit Court of Albemarle County
Lyttelton Waddell, Judge

Upon the petition of Charles William Hurt an appeal is awarded him from a decree entered by the Circuit Court of Albemarle County on the 20th day of October, 1964, in a certain chancery cause then therein depending wherein the said petitioner was plaintiff and Southern Railway Company was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

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DECREE.

This cause came on this day to be heard on the complainant's bill and amended bill and the respondent's answers thereto; the evidence on behalf of the complainant and the respondent, and was argued by counsel.

And it appearing to the court that the complainant is the owner of lands on both sides of the Southern Railway just south of the Southern Railway trestle, across the South Rivanna River between mile posts 107 and 108, and that two former farm crossings connecting the complainant's lands through which the railroad passes are no longer being maintained by the Company, it is hereby ordered that the respondent repair and maintain both of said crossings in their original locations; and

It is further ordered that the use of both crossings by the complainant is limited to that of ordinary private access to the land on the east side of the railroad, including the right to take sand therefrom for the use of the owner of the land.

The defendant shall pay the costs of this proceeding.

The complainant objects and excepts to the limitation of his use of the crossings and to the refusal of the court to allow him damages.

The respondent objects and excepts to being re-
page 16 } quired to repair and maintain two crossings instead of only one.

The object of this suit having been accomplished it is ordered that this cause be stricken from the docket and the papers filed among the ended causes.

LYTTELTON WADDELL

Oct. 20, 1964.

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ASSIGNMENTS OF ERROR.

Charles Wm. Hurt asserts as assignments of error the following:

1. That the Court erred in its refusal to allow him damages.
2. That the Court erred in its limiting of the use of the crossings, for the removal of sand, to the right to take sand therefrom "for the use of the owner of the land".

. . . . . .
Charles Wm. Hurt
By Counsel.

* * * * *

(on back)

Filed this 2 day of Nov., 1964.

EVA W. MAUPIN, Clerk.

page 17-A }

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ASSIGNMENT OF CROSS ERROR.

To Eva W. Maupin, Clerk:

Pursuant to Rule 5:1 Section 4, Rules of the Supreme Court of Appeals of Virginia (1950), the Southern Railway Company assigns the following error:

That the Court erred in requiring the Southern Railway Company to repair and maintain two crossings instead of only one.

SOUTHERN RAILWAY COMPANY
By GEORGE R. ST. JOHN
Of Counsel.

Filed this 18 day of Nov. 1965.

EVA W. MAUPIN, Clerk.

* * * * *

page 2 } CHARLES W. HURT,

the Plaintiff, being first duly sworn, is examined and testifies, as follows:

DIRECT EXAMINATION.

By Mr. Gilmer:

Q. You are Dr. Charles Hurt?

A. Yes, sir.

Q. I believe you are the land owner and contractor in Albemarle County, Virginia, on the Southern Railway just south of where the Southern crosses the Rivanna River?

A. Yes, sir.

Q. From whom did you purchase that land?

A. The Basham estate.

Q. And when did you purchase it?

A. In January of 1959.

Q. When you bought it in January of '59, or before that, what was the means of access to the land on the east side of the Southern Railway?

A. There were two railroad crossings.

Q. Were they in a normal condition for railroad crossings? I mean something between the rails so that they wouldn't stall a truck?

page 3 } A. There were extra ties and gravel to make the passing of a truck very easy.

Q. Was the railroad right-of-way fenced?

A. There were fences and gates, sir.

Q. A gate on each side of each crossing?

A. I believe there were gates on each side of the crossings.

Q. Well now, how much did you use those crossings after you bought the Basham property?

A. Well, in dry weather we used it from time to time to secure sand and to—and we used it as a dump area.

Q. When did you stop using them?

A. Well, when we found that the crossings had been removed.

Q. Did you try to get the Southern Railway to restore the property without a suit?

A. Yes, sir.

Q. Were you successful?

A. They did not.

Q. Have they been restored to this date?

A. No, sir.

Charles W. Hurt.

Q. How much damage have you suffered by rea-
page 4 } son of that obstruction? Let's go into some sort of detail. Have you hauled any stumps across there since they took the crossings?

A. No, sir.

Q. Are any stumps hauled across there?

A. Yes, sir, now with our road building activities we have built about I guess a mile of road in that area when we have to move, moved the stumps across town to the City dump.

Q. About how many loads and how much a load does that cost you extra?

A. I think about a hundred loads at about $2.00 a load.

Q. Now, did you ever use any sand down there for your road construction work?

A. Yes, sir.

Q. Well, after they took up this crossing were you able to use any *nore* sand from down there for your road construction work?

A. No, sir.

Q. How much sand and gravel did you have to purchase as a substitute and at what cost?

page 5 } A. Well, we buy it and they put in $2,000.00 gravel a month. We could have used about $700.00 of business per month, at a savings of two-thirds the cost of what we pay for gravel, in the neighborhood of $500.00 a month.

Q. And how many months would that be afterwards?

A. Again, twelve months.

Q. Could you haul out that volume in a month?

A. Well, if we had known that fall during the dry periods if we could have hauled that summer and have someone to stockpile it.

Q. Stockpile it?

A. Yes, sir.

Q. Did you have any work out on 29 where you could have used some of the sand?

A. Yes, sir.

Q. Where was that?

A. Well, we had a parking area for the Moose Home, about an acre. And that would have saved us about a thousand dollars to have been able to use the sand instead of the crushed gravel dust.

Charles W. Hurt.

Q. Have you had an offer to buy the sand from the bottom from a trucker?

page 6 } A. Yes, sir.

Q. Who is your trucker?

A. Mr.—I can't recall his name.

Mr. St. John: If you want to tell him who the trucker is.

Q. Mr. B. E. Chisholm?

A. Mr. Chisholm. Excuse me.

Q. What price did he offer you for the sand and gravel?

A. I believe it was a dollar a load.

Q. Is that the customary price along the Rivanna River to get this sand and gravel?

A. I believe that is about the minimum price.

Q. Have you made any personal estimate as to how much sand and gravel you have in this land to remove?

A. No, sir. Well, I made a cursory examination. I have walked it over and determined that there is quite a quantity, several acres.

Q. Have you gone down in the ground to determine the thickness at all?

A. We haven't core-drilled it. We have done some work with shovels.

page 7 } Mr. Gilmer: Witness with you.

CROSS EXAMINATION.

By Mr. St. John:

Q. Your main occupation then is building?

A. That's correct.

Q. And then buying and selling land?

A. That's correct.

Q. And you state in your pleadings and counsel has stated to us that your main reason for wanting these crossings now is to get this sand, isn't that correct? That's the main reason now that you want it?

A. No, I wouldn't say that. Of course, the damage that probably it has done me recently is that I have been doing construction in that area; and although the sand is still there, one of the big factors is the loss of the extra money that I have spent for transportation. I mean, even though we secured a crossing of the railroad again if we built that

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area up and we want to use that sand we may have to haul it across town.

Q. Do you intend to also sell it to anyone who would buy it, including Bill Chisholm? Do you not?

A. Well, I was willing to sell it last summer.

Q. Are you willing to sell it now?

A. Yes.

Q. Do you own a half interest in Belvedere Farm

page 8 } at present?

A. Yes, sir.

Q. Belvedere farm adjoins this tract of land where the sand is on the south, does it not. Belvedere Farm is on the same side of the railroad tracks as this sand is, is it not?

A. Divided by the creek.

Q. How big is the creek?

A. It's a small creek, but a deep ravine, as I recall.

Q. There is a bank between Belvedere farm and this tract we are talking about?

A. A small channel of water, a creek or branch.

Q. That's the only thing between Belvedere farm and this tract, isn't it? Besides the fence, that is.

A. And a rather steep hill.

Q. Well, Belvedere farm—

* * * * *

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A. Well, let me answer it this way. I have a paved road within a hundred yards of this property on my original land, and to go through the neighboring property which I have a half interest in is over a mile across an unpaved road and across probably a third of a mile of where there is no road established, and would necessitate building a bridge.

Q. Building a bridge across this branch?

A. I have never considered it as a logical access to this property.

Q. But you do own all of the land between the highway—or you own half interest in all of the land between what's called Rio Road and the sand?

A. That's correct.

Q. Now, how many times, Dr. Hurt, have you or your em-

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ployees, to your knowledge, crossed either one or both of these crossings in trucks?

A. Oh, many times.

Q. How many loads of sand, if you can estimate,
page 10 } would you say have been hauled out of there?

A. One of my employees can possibly answer that better than I can, sir.

Q. Do you know what kind of trucks and equipment were used to get the sand out of there?

A. Do you mean the kind of trucks that I used or have been used?

Q. The kind of trucks you have used. What was used there?

A. Truck, dump truck. Ordinary size dump truck.

Q. What kind of equipment did you use to load the sand?

A. Let me make this clear. I personally—I don't know.

By the Court:

Q. Have you had the property since—

A. Since January of '59.

By Mr. St. John (continuing):

Q. Can you state approximately the last date that they were taken up?

A. I think they removed the crossing when they single-tracked the railroad. I'm not very good on dates when it happened last year. I think it happened a little over a year ago. It came to our attention last summer when Mr. Chisholm—

when I made a deal to sell him some sand. I said,
page 11 } "Go on and take it out". He called back and said
that there was no crossing.

And I imagine the last time we probably crossed that was probably in the fall, fall a year ago. But I had no reason to tie it down to any definite time.

We had not hauled much sand out of there recently and we—last summer was the occasion when we really wanted to haul quite a quantity out.

Q. Now you propose to sell Chisholm as much sand as he is willing to pay for it to take out of that bottom, aren't you?

A. Yes, but the quantity of sand with the construction of this area has disappeared.

Q. There is a substantial amount of sand down there, and you say several acres all covered with sand?

A. That's correct.

Q. And Mr. Gilmer as your counsel has stated that when

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this sand is removed it is likely that the river will fill back up again and you will continue with this sand and gravel operation as long as it is possible, as long as you want to. How long will you do it?

A. Until it is all gone.

Q. And if it fills back up again by high waters then you will do it again until it is all gone?

page 12 } A. Well, I think the possibility of it refilling again is rather unlikely with the new dam going in.

Q. Has there been any high water in that meadow to your knowledge since last fall?

A. I don't believe there has been.

Q. Well, if you had taken the sand out it would have filled back up between then and now, wouldn't it?

A. No, it wouldn't.

Q. So you have still got the same sand you would have had?

A. Of course, there is the possibility if we had taken it out and it flooded it would have been returned, which I think is the last chance.

Q. It hasn't done that yet, though?

A. Well, I think the likelihood of it doing it that it would take quite as long to get the sand out is rather remote.

Q. How long do you think it would take to get the sand out?

A. I don't think it would take so long to get it out yet continue sales for it.

Q. How many truck loads a day do you think you would be able to sell?

A. I have never been engaged in the sand business. I think that is probably a question Mr. Chisholm could answer.

page 13 } Q. What type of—

A. I just know the amount that we could have used in the last year.

Q. What type of equipment do you think Mr. Chisholm is going to use?

A. Possibly a dump truck.

Q. Pardon?

A. A front end loader and dump truck, sir, a hydraulic dump truck.

Q. Do you know how many dump trucks he uses in the sand business?

A. I am sure he uses as many as he can sell. In these days trucks run almost continuously. We have got substantially

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an actual building market in Charlottesville area now that—So if he uses all he can sell he will use a whole lot.

Q. How many truck loads a day, can you estimate that?

A. Oh, I imagine he will be hauling probably maybe ten to twenty.

Q. Ten to twenty dump truck loads of sand?

A. Yes, sir. I would say that would be the minimum to justify the use of a front-end loader with an operator full time.

Q. Yet you would have used seven hundred dollars worth of this sand a month? That was your estimate,
page 14 } wasn't it?

A. Yes, sir.

Q. And you can do that at one-third the price, the going price of sand, which is $1.00 a load?

A. Yes, sir.

Q. So that would be twenty-one hundred truck loads of sand a month that you yourself would have used out of there, isn't it?

A. No, maybe I didn't make myself clear. It would have probably have cost me about $200.00 to move the sand that I would use that I had to pay $700.00 for, because of the proximity of the source and the cheapness of the sand. The dollar a load is what he would pay me and I wouldn't have to touch the sand. He would load it and haul it. And I imagine he sells the sand for—

Q. Well, I meant the truck loads you would have used you must have estimated that in order to arrive at the $700.00 figure. How many truck loads a month would you have used in order to save yourself this two-thirds of $2,000.00?

A. Well, I'd have to take a piece of paper—

Q. Well, that's just a guess on your part in the first place then?

A. No, I was giving that in dollars and not in loads.

Q. Well do you know how many dollars it is
page 15 } if you don't know how many loads is involved?

A. Well, because I have a continual gravel Bill which is the amount of stone that I use in my operations. We pay about $15.00 a load for the other and this would probably cost me in the neighborhood of two or three dollars a load.

Q. Well, you know how much you paid for it, but you also said how much you would have saved. You said you would have saved a thousand dollars on the Moose lodge on sand?

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A. Yes, sir.

Q. How many truck loads of sand was there involved?

A. Well, with the one building besides the Moose lodge—If you will give me a piece of paper I can answer this correctly. Would you give me your question again?

Q. You stated you could have saved $1,000.00 on your sand bill for the Moose lodge if you had had access to that property. How many truck loads of sand were used in the Moose lodge?

A. I used crushed stone instead of sand. Oh, between sixty and seventy loads.

Q. All right, thank you.

page 16 } By Mr. Gilmer:

Q. How many did you say? I didn't hear you.

A. Between sixty or seventy loads.

By Mr. St. John (continuing)

Q. How much was the total cost to you for those sixty or seventy loads?

A. Excuse me, I am in error. I used about a hundred loads, about $1,500.00 worth of stone. And I could have placed sand on there for probably less than $500.00.

Q. $1,500.00 for a hundred loads?

A. Yes, sir. These are approximations. I didn't come prepared for the question on this point this morning.

Q. You don't ever plan to farm this property, do you?

A. I have no active plans to farm any land that I have, but I wouldn't say that that means that this land isn't suitable for farming or that I might not change my plans.

Q. Do you have any firm plans to put it to any kind of use except to get sand out of it and to use it as a dump?

A. Oh, I think it will eventually be a park area.

Q. A park area?

A. Or a golf course or something of that sort.

page 17 } If this area were built up I think the City would still pass across that railroad.

Q. And then the public would be using this crossing that you have in mind now?

A. Yes.

Q. Is that also one of the reasons that you want the crossings installed now, so that in the future it can be used as a park or a golf course?

A. As an access to this land. It's about 30 acres and I

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think it will eventually have a value of two or three thousand dollars an acre.

Q. As a golf course or a park?

A. Yes, some sort of recreational spot.

Q. Do you have an offer now from Bill Chisholm?

A. Yes, sir.

Q. Did you ever have a written contract with him?

A. No, he called me on the telephone and made me an offer, as I recall, and I said "fine."

Q. You accepted then? You had an oral contract and not just an offer?

A. Oh, yes. He called me up and said he wanted some sand and I said, "What do you pay". And he said,
page 18 } said, "I pay a dollar a load." And I said, "fine".

Q. If you should develop this area for a park or golf course you would pave the approaches across there, wouldn't you?

A. Oh, I think you would have to, to improve the approaches, yes.

Q. You can't even drive down there to either one of them, can you? It's all grown up in weeds and small trees where the road used to lead to the crossings, isn't it?

A. I don't think so.

Q. When is the last time you were out there?

A. Oh, a few months ago.

Q. Could you drive your car right down to the right-of-way fence?

A. Yes, sir. I think you could drive a truck. I don't know that you would want to drive your automobile.

Q. Well, it's a rough road, isn't it? It's grown up more or less, isn't it?

A. Well, I didn't want to give the idea that it was nice and so forth, but we used to go across there in our pick-up and I had been across in my car since 1959.

Q. What condition were the crossings them-
page 19 } selves now as opposed to the approaches then?

A. At this moment or when I went across originally?

Q. Originally.

A. Oh, the conventional crossing with the ties running parallel to the rails, as I remember, with gravel in between, so that you could go across without any bumps of any consequence.

Q. Now, if you crossed either one of those crossings you

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could get anywhere in the field to the east, could you not?

A. As I recall, one of the crossings, the eastern access, you dropped off rather steeply.

Q. Let me clarify my question. Once you got across into the east field where your sand is, from either one of the crossings, the northernmost or southernmost crossings, then you can reach any point in that field, can you not?

A. I believe that originally there was a creek that divided the field and that was the reason for the two crossings.

Q. The creek is no longer there, though; the creek is between Belvidere Farm, isn't it?

A. No, I think there was an additional pond or
page 20 } swamp, or something, that necessitated the two crossings.

Q. There is no necessity for them now though, is there?

* * * * *

A. But I can answer this question in another way. Well, I sold some of the land on the West side of the railroad. I bought the property as a farm, with thirty acres on the east side of the railroad and two hundred and seventy some on the west side of the railroad; and then I divided up the land on the west side of the railroad and have a parcel of land on the west side of the railroad that is cut off from the other parcel of the land on the west side. And the only
page 21 } approach that I have to it is to go from the railroad and come back.

Q. You sold some of that property?

A. Yes.

Q. You sold off part of your land on the west, in other words, without reserving yourself a right-of-way into the other part?

A. That's right.

Q. So now the only way you can get to it is to cross the Southern railroad at one place and go down and fishhook around back up into this part from which you have cut yourself off?

A. That's right.

Q. That's the only reason you need two crossings?

A. That's right, that's the only need for two crossings.

By the Court:

Q. When was that sale made?

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A. Well, I sold lots off of it. And this was the natural dividing line. I backed the lots up to a low spot. I can show you on the plat.

Q. From the railroad to the line of the property?

A. I think if I showed you my plat you would
page 22 } understand.

* * * * *

Note: Said plat now received in evidence and marked and filed Plaintiff's Exhibit No. 1.

A. I'd like to correct a statement I made. I am not absolutely sure that I have sold off all these lots that separate this, but the best approach—They are for sale and they may have been sold, these lots along here, but—

Q. Just mark approximately, if you can, just where these two crossings are. Let the record show that this is
page 23 } a sketch of Virginia Land from this Northfield Subdivision and the witness is now—Mark with two X's, if you will Dr. Hurt, approximately where these two crossings are.

A. I just have to use the general area?

Q. That's right. Now, the witness has marked with two X's in blue ink where these two crossings are.

So the only reason if you need the two crossings, that you need them is to get the land on the west or upper side as we look at this Exhibit 1, which you cut yourself off from by selling the land without reserving a right-of-way to? Is that correct?

A. Some other right-of-way. I didn't know I was doing it when we platted these lots and put them to record. I didn't know the railroad was cutting me off.

The Court: Let me see it, please.

Mr. St. John: What he said about the crossings, needing two crossings, is to go in from this direction and go down here across one of them so he could get back to the west or north to some of these lots here in the northeast corner of his subdivision from Route 29. (Counsel indicating on Exhibit No. 1.)

page 24 } By the Court:

Q. No lots have been sold in the 30 acres?

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A. No, sir, there has been no attempt to divide that land. But I have divided the lots on the east side and—

By Mr. St. John (continuing):

Q. East side? Are you sure this is the east side, the 30 acres?

A. I beg your pardon. I divided land on the west side.

Q. On the opposite side?

A. That's correct. And I left at the northernmost part of the property on the west side of the railroad approximately five acres.

By the Court:

Q. You can't tell us then whether the lots marked on here, 10, 11, 12, 13, 14, and so forth, have been sold, whether they actually have been sold or not?

A. I am under the impression that they have been, and if they haven't been I didn't want to ruin them by putting a road through them, because these lots are improved and have water and everything on them, ready to be sold for about forty-four hundred dollars. And if I took fifty

page 25 } feet off of it would kill one of those lots.

Q. Now does this area include—It does not I suppose include the whole 230 acres, this plat?

A. Oh, that's on the east side of the railroad between two and three hundred acres. I think two hundred and seventy some.

Q. East or west side?

A. West side of the railroad. And I sketched in pen, I believe, the about thirty acres on the east side of the railroad, the sand that we are talking about, the sand area.

I have an aerial photograph if that would help. Each of those lots was approximately three-quarters of an acre.

The Court: Now, with reference to which of these crossings, the northernmost or the southernmost, was the original suit filed?

Mr. St. John: It was never made clear, Your Honor. Mr. Gilmer didn't know that both crossings were in existence. He knew we could get access to one of them, but he—I asked him which one and he said the northernmost one, but

page 26 } he thought the southernmost one was the northernmost one. Correct me if I am wrong, Mr. Gilmer.

Charles W. Hurt.

Mr. Gilmer: That's entirely correct, when I filed suit I didn't know that there was but one crossing out there, sir.

Mr. St. John: When they found out that there were two crossings then they continued the case and amended their pleadings to demand that both crossings be installed.

By the Court:

Q. What land do you own on the west side, Dr. Hurt?

A. I own the five acres that is undivided, the most northern portion of that survey. And then I own various plots that are unshaded through there. And some of the ones that are unshaded are—

The Court: Gentlemen, I would like to know exactly what he owns. I think it would be material since he is asking for two crossings. For instance, if he doesn't own Lot 12 and such other lots I don't see what possible use he could have for a crossing at that point.

page 27 } Mr. St. John: May I examine him on that question?

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By Mr. St. John (continuing):

Q. Dr. Hurt, if and when you do sell these lots, if you haven't sold them, on the west side of the tracks then if you can't get to them now the buyers will have to use the crossings and cross the railroad twice each time they go to and from their homes, isn't that right?

A. No, you misunderstand. I have no plans to divide the other five acres into lots and make people go across the railroad, for home sites.

Q. You said they are divided now and have been sold.

A. No, no, thev are alreadv on a dedicated road. I have five acres that I thought might be—

By the Court:

page 28 } Q. Let me ask you: if you own, designated here as Lot 12 opposite the crossing that you have marked as the southernmost crossing—

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Charles W. Hurt.

By the Court:

Q. You have not sold Lot 12, the lot that adjoins the second crossing?

A. No, sir. What I was talking about was up here. My access to this property I said was across this property and back up here. That was the point that I was trying to make.

By Mr. St. John (continuing):

page 29 } Q. You have sold off land in here, cutting yourself off from going through—

A. I may have sold and if I haven't I intend to sell. I wouldn't want to ruin one of these lots.

* * * * *

A. I own land on both sides of the railroad where the crossing is, without question. That was the point that I was making.

* * * * *

page 30 } Q. I show you Exhibit No. 1 and ask you to mark with this black pen the approximate route that you are talking about when you say you have got to cross the railroad twice to get to Route 29, across the railroad one way and then back across it back to reach the property that you have cut off from yourself. Start out here where 29 is, about the top of Exhibit 1. 29 isn't shown on here. Make it a double black line. Draw from Route 29 through your subdivision down across the tracks, if you will.

Now witness is drawing in black, single line, this proposed route. If you will, Dr. Hurt, just make an arrow at the end of that line so that there is no doubt which line it is there. Make an arrow at the end if you will, please. Thank you, sir.

* * * * *

By Mr. Gilmer:

Q. What percent of the road shown on your map has been taken over by the State, public road State maintenance?

A. Mr. Gilmer, we expect the Highway Department to accept about two miles of that road this summer. We had a meeting on it just very shortly.

B. E. Chisholm.

Q. It hasn't been accepted yet?

page 31 } A. It hasn't been accepted but we think it will be this summer.

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Q. Now, it is the suggestion of Mr. St. John seems to be that the sand you used at the Moose Hall was used in erecting the building. Was most of the sand you could have used as to the building?

A. Oh, no. We could have used the sand on the parking area, which was about an acre.

Q. An acre of parking area?

A. Yes, sir.

Q. What does your gravel bill run with Superior Stone a month, say?

A. About $2,000.00 a month.

Q. And how long has that been keeping up?

A. For the last five or six years.

Q. How much road have you built within two miles of those crossings recently?

A. Oh, something between two and four miles, I believe.

By the Court:

Q. You don't mean that you would have used sand everywhere that you used gravel, do you?

page 33 } A. Oh, no, sir.

Q. That's what I thought.

A. I said probably in one-third of the situations, we could have used sand.

By Mr. Gilmer (continuing):

Q. Could you have used sand for base or surface?

A. We could have used it for only a portion of the base and for driveways and for parking areas off the State right-of-way.

B. E. CHISHOLM,

a witness called by and on behalf of the Plaintiff, being first duly sworn, is examined and testifies, as follows:

B. E. Chisholm.

DIRECT EXAMINATION.

By Mr. Gilmer:

Q. Mr. Chisholm, what is your occupation?

page 34 } A. Hauling sand and gravel.

Q. How long have you you been in the business of hauling sand?

A. I've been in business for myself for thirty-two years.

Q. How many sand haulers are there around here hauling sand for business?

A I don't think there's but three of us now.

Q. Three now?

A. Yes, sir.

Q. And when did Mr. Sprouse die?

A. He died about a month ago.

Q. And he would have made the fourth?

A. The fourth, yes, sir.

Q. Did you try to buy some sand from Dr. Hurt?

A. I did.

Q. What did you offer him for the sand?

A. A dollar a load.

Q. And where were you going to get the sand from?

A. I was going to get it out there from the field across the tracks but there wasn't no crossing to get it.

Q. Did you examine the sand to see what quality

page 35 } and quantity you had?

A. Yes, sir.

Q. How did you propose to load it?

A. Well, I have two tractors. And I have a 25-foot conveyance to screen it. I have two tractors on rubber.

Q. Did you make any rough estimate as to the amount of sand down in that bottom?

A. It's a good quantity of it if you can get it up clean.

Q. Well, could you give us any idea as to how many yards?

A. Well, it's a right good deal. I couldn't say—I didn't measure it.

Q. You haul how many yards to a load?

A. Five yards to a load.

Q. Five yards to a load. And would you give us a rough estimate of how many yards are down there?

A. Well, it's hard to tell, Mr. Gilmer because it's all over the bottom and it's all over the bushes clear to the river.

Joseph Buck.

Q. Well, give us the smallest amount you think might be there.

page 36 } A. Well, I'd say there's a little over a hundred thousand yards there.

Q. Yes, sir.

A. That's a rough guess.

Q. And is there any way to get it out practically except to cross the railroad tracks?

A. No, sir. There's a ditch goes down that divides the land and you'd have to go across where a crossing used to be, but there's none there now.

Q. So if you can't get the crossings you can't buy the sand?

A. No, sir. I can't get the sand out. If I Did I could have had half of it out of there.

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page 37 } JOSEPH BUCK,

a witness called by and on behalf of the Plaintiff, being first duly sworn, is examined and testifies, as follows:

DIRECT EXAMINATION.

By Mr. Gilmer:

Q. Mr. Buck, I believe you work for Dr. Hurt, don't you?

A. Yes, sir.

Q. How long have you been working for him?

A. I've been working for him ever since he bought the place.

The Court: Been working for him when?

Mr. Gilmer: Ever since he bought the place.

Q. You mean the Basham place out there?

A. I worked for Mrs. Basham twenty-two years before he bought it.

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page 38 }

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Joseph Buck.

Q. During that time, what can you tell us about any crossings on the Southern Railroad northern end near the river?

A. Well, we have two there all the time until they made a single track. They didn't put the gravel back so we could get through.

Q. And why were there two crossings?

A. Well, there was a big ditch run through that cut the two bottoms off, right through the middle of them.

Q. Was there a stream down that ditch?

A. Yes, sir. There's a stream down there now unless this dry weather it might be done dried up.

page 39 } Q. Now, isn't the stream you refer to as separating the Belevdere tract and the Basham tract, is it?

A. No, sir, it's another one.

Q. Another stream?

A. Yes, sir.

Q. Is there any practical way of getting sand out of that bottom except across the railroad track?

A. No, sir.

Q. How much did you use the crossings before the Southern Railroad took them up?

A. Well, we farmed it up until 1948. Hauled corn, wheat, oats, anything across there.

Q. Did you get your hauling equipment in over the railroad?

A. Yes, sir, it wasn't no trouble at all.

Q. Was there any other access you had to it except across the railroad?

A. No, sir.

Q. Were there gates and a right-of-way fence?

A. Four gates and the right-of-way fence.

Q. Now, you quit farming that land about when?

A. When Dr. Hurt brought it.

page 40 } Q. Now, since that time how much have you used it, the crossings?

A. Well, I used it all up until—I hauled sand out of there for Doc until the single track—I don't remember just what date that were.

Q. Can you give us any idea how much sand you hauled out before this single track?

A. Well, I've been—No, sir, I don't know how much I've hauled out. but we sands some roads down there.

Q. For Dr. Hurt?

Joseph Buck.

A. Yes, sir.

Q. Did you haul anything across those crossings except sand?

A. For Dr. Hurt?

Q. Yes.

A. Yes, sir, we hauled trash down there and dumped it.

Q. Trash?

A. Yes, sir.

Q. Did you haul anything besides trash?

A. Old stumps and things like that, cleaning up.

Q. What did you do with them when you got page 41 } across there?

A. Dumped them over there in that big hole down there.

Q. Is there a big ravine you could put them in?

A. Yes, sir.

Q. And when the Southern Railroad took up the crossings what did you have to do with the stumps?

A. Well, we hauled them off.

Q. Where did you have to haul them?

A. Took them off to the County Dump.

Q. Where is the County Cump?

A. On the Old Lynchburg Road.

Q. On the Old Lynchburg Road south of Charlottesville?

A. Yes, sir.

Q. About how many loads did you have to haul over there that you would have liked to have put in this ravine?

A. Well, I couldn't tell you exactly how many loads, but I hauled a lots of them out there.

Q. I know you haven't kept a record of them, but I mean approximately, would you say one or a hundred or what?

A. Oh, a hundred or more. Lots of things I page 42 } would have carried across there if I could get across there. They were grading those yards across there and if I could have gotten across there I could have carried all of that trash.

Q. Well, about how many loads do you think you could have gotten across there if they hadn't have taken it up?

A. Oh, it would have been hundreds of them, I imagine. Sometimes I get ten or twelve loads a yard when I grade it, roughly.

Q. How are the roads cleaned up at the crossings now?

A. Well, one of 'em has been all right.

Q. Can you drive right to the railroad right-of-way?

Joseph Buck.

A. Yes, sir, we went right there not long ago.

Q. What sort of vehicle did you drive in then?

A. Drove a Jeep down the last time I was down there. The snow was about a foot deep.

Q. How many gates are on those rights-of-way?

A. Four.

Q. One on each right-of-way?

A. Yes, sir, one on each side of the track.

Q. Are they same kind of material as the right-
page 43 } of-way fence?

A. Yes, sir, railroad gates.

Q. When you first became familiar with that place you say it was about twenty-two years ago?

A. Yes, sir.

Q. Were those crossings new or old at that time?

A. They was old.

Q. Did you ever put a bridge across that stream that separated those two bottoms on the east side?

A. Yes, sir, we put a bridge across there.

Q. About when did you do that?

A. Oh, I can't remember exactly when it was.

Q. Was it when Dr. Hurt bought the property or before?

A. It was before Dr. Hurt bought the property . That was when we was farming down there. We had it so we could go from one bottom to the other one after Dr. Hurt bought it. We kept it that way.

Q. During the twenty years that you have known that property has the land on the east side of the railroad had any outlet except across the railroad?

A. No, sir. The man that owned it before Mr.
page 44 } Basham got it had to cross it.

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CROSS EXAMINATION.

By Mr. St. John:

Q. Mr. Buck, up until Dr. Hurt bought the land it was always used for farming only, wasn't it?

A. Yes, sir.

Q. And the sand was gotten off of it then?

A. Oh, yes, we got the sand off of it.

Q. For your own use?

A. For our own use, for our own roads. Sometimes other

Floyd James Estes.

people would come in there and get the sand for their roads.

Q. But it was just a regular farm crossing, wasn't it?

A. Yes, sir.

Q. What type of equipment did you use when Mr. Basham owned it?

A. We used trucks and tractors.

Q. To go down in there and get your crops?

A. Yes, sir.

page 45 } Q. You didn't use it in the wintertime to do that then, only in harvest season and planting season?

A. Only in the fall. Sometimes high water would get up before we would get all the crops out.

Q. There's nothing down in there now? The old creek that divided the two parcels, that's gone, isn't it?

A. No, sir, it's still there.

Q. Well, you said that at one time you needed both crossings to get to the fields down there, but you only need one of them to get to any part of that field down there now, don't you?

A. Well, I don't know what kind of shape it's in now. When I used to farm it there we had to get across with farm equipment. I just fixed it temporarily to get across there because every time the river got up it washed it away, you see. I just temporarily fixed it.

Q. Didn't you say that you made one bottom out of what was once two down there, since Dr. Hurt bought it?

A. I did that before.

Q. It's all one bottom now then?

A. No, sir, two separate, the stream comes down there.

page 46 } The Court: He said he put a bridge across the stream, Mr. St. John.

Mr. St. John: I know it, but I thought the witness said, Your Honor, that after Dr. Hurt bought the land that the property down there was changed so that the only stream down there separates Belvedere from this property.

A. No, sir, the stream still goes down through there.

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FLOYD JAMES ESTES,

a witness called by and on behalf of the Plaintiff, being first duly sworn, is examined and testifies, as follows:

Floyd James Estes.

DIRECT EXAMINATION.

By Mr. Gilmer:

Q. Do you work for Dr. Hurt now?

A. No, sir.

page 47 } Q. When did you stop working for him?

A. Directly after Christmas.

Q. Well, you used to work for him, didn't you?

A. Yes, sir, I worked for him.

Q. How many years did you work for him?

A. About four years.

Q. I believe you were raised in Greene County, weren't you?

A. Sir?

Q. You were raised in Greene County, weren't you?

A. Yes, sir, Greene County.

Q. When did you first come to Albemarle County?

A. I worked practically altogether in Albemarle County. I used to saw wood and thresh wheat.

Q. How old were you when you first came to Albemarle County?

A. I was about sixteen or seventeen.

Q. Did you ever work for the railroad?

A. Yes, sir, I worked on the railroad.

Q. What kind of work did you do for the railroad?

A. I worked on the railroad in the first World War.

Q. During the first World War?

page 48 } A. Yes, sir. Jack Thomas was the foreman of it, of the section, right down here, where they are talking about those gates were at. There was two gates there and two right-of-ways. We used to take the lever cars off, had them old hand lever cars that pulled us back and forth. And those gates and all was right there, both outlets.

Q. And that was during the first World War?

A. Yes, sir, that's right, first World War.

Q. Now, did those crossings look like new or old crossings then?

A. Looked like people had been using them.

Q. Do you remember who owned the land on both sides of the railroad there at that time?

A. No, sir, I don't. I don't remember who owned it. I never did ask anyone at that time who owned the land on each side of the railroad.

Floyd James Estes.

Q. Well, did you know later on who owned it?
A. Yeah, Mr. Pete Rhoads owned it.
Q. Mr. Pete Rhoads?
A. Yes, sir.
Q. Did he have any access to his bottom except across the railroad tracks?
page 49 } A. Yeah, he had crossings.
Q. Was there any other way to get to that bottom land on the east side of the railroad except over these crossings?
A. No, sir, there wasn't no other way. No other way to get there.
Q. Since 1914 how much have you lived near these crossings?
A. Since 1914?
Q. Yes, sir.
A. I don't know exactly how long. I been on Belvedere close to twenty years.
Q. On Belvedere close to twenty years?
A. Yes, sir.
Q. And did anybody hauling produce in or anything else to this bottom ever go through Belvedere?
A. No, sir.
Q. Is there any road leading up there so they could go through it?
A. No, sir.
Q. Is there any bridge across the stream that bounds and separates this property from the Belvedere tract where you live?
page 50 } A. No, sir, hasn't been any since I've been living there.
Q. Did you ever see any remains of any old crossing there?
A. No, sir, I didn't.
Q. Do you know when they stopped having a crossing across the railroad tracks?
A. No, sir, I don't. I know Mr. Buck and them used to go back and forth across when he was farming for Mr. Basham.
Q. You don't know when the railroad took it out, do you?
A. Sir?
Q. You don't know when the railroad took the crossing out?
A. Taken it out about the same time that they changed tracks, single tracked it.

Thomas D. Blue.

Q. From a double track to a single track?
A. That's right.
Q. But you don't know when that was?
A. No, sir, I don't.

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Mr. Gilmer: We rest.

The Court: Mr. St. John, as I understand the issues in this case, I have ruled that it is not a question of whether these rights-of-way could be established at this time under the statute. The question is whether they had been established and the railroad had a duty to repair them. Do you see what I mean? The issue before the Court is not the same as if application were being made now to establish the crossings. I ruled on the issue that it is not a question of whether these crossings should be established at this time. The question is whether they had been established under the statute and the railroad has failed to repair them.

Mr. St. John: Well, we object to that, Your Honor. We didn't understand that that was the ruling.

The Court: All right. I just wanted you to understand what I considered to be the issue.

page 54 } THOMAS D. BLUE,

a witness called by and on behalf of the Defendant, being first duly sworn, is examined and testifies, as follows:

DIRECT EXAMINATION.

By Mr. St. John:

Q. State your name, please, sir.
A. Thomas D. Blue.
Q. Where do you live?
A. On the Stoney Point Road, Charlottesville, Albemarle County.
Q. What is your occupation?
A. I'm a civil Engineer and land surveyor.

Thomas D. Blue.

Q. Are you a licensed land surveyor?
A. Yes, sir.
Q. How long have you been such?
A. I've been a licensed land surveyor since November of 1962 and an engineer since February of 1962.
Q. You have your own surveying business?
A. That's right.
Q. You are not an employee of the Southern Railway, in other words?
A. That's right.
Q. Were you engaged recently to make a physical sketch or a survey of two crossings on the Southern Railroad near the Rivanna River, which are the subject of this
page 55 } suit?
A. Yes, I was.
Q. I hand you this plat here with your certificate on it, captioned "Plan Profile of Old Road Crossing, Southern Railway North of Charlottesville Near the South Fork Rivanna River", and ask you if this is one of the plats that you made?
A. Yes, it is.

Mr. St. John: I would like to have this marked for identification, Defendant.

Note: Plat now received in evidence and marked *Defendant's Exhibit A* for identification.

Q. Now, Mr. Blue, I hand you this plat also with your certificate on it but it is captioned, "Plan Profile Old Road Crossing Southern Railway North of Charlottesville, Virginia, located approximately 1183 feet North of Mile Post 108", and I ask you if this is the other one which applies to the other crossing?
A. Yes, it is.

Note: Said plat now received in evidence and marked and filed *Defendant's Exhibit B.*

Q. All right, looking at Defendant's Exhibit B, which crossing of the two was that? Was that the southernmost or the northernmost?
A. This is the southernmost crossing.

Thomas D. Blue.

Q. The southernmost of the two crossings?

A. Yes, sir.

page 56 } Q. What information did you accrue from these two plats with respect to the two crossings?

A. We showed the—both rails, the east and west bound, the east and west rail, and we showed the sight distances taken from a point ten feet from the rail on the lines of the crossing. The distances that you would see an object coming down, coming north or south on the tracks.

Q. All right, state to the Court what these sight distances are from a vehicle parked on the east side of this southernmost crossing. State the sight distances north and south along the track.

A. To the north it is 1140 feet; to the south it is 1900 feet.

Q. With respect to a vehicle waiting on the west side of the crossing to go east across it what is the sight distance north and south?

A. To the north it is 1070 feet; to the south it is 1930 feet.

Q. All right now, look at Defendant's Exhibit A. For a vehicle parked on the east side of this crossing preparing to cross west what is the sight distance north and south?

A. To the north it is 2060 feet and to the south it is 880 feet.

page 57 } Q. For a vehicle waiting on the west side getting ready to go east across it what is the sight distance?

A. To the north it is 2080 feet; to the south 770 ft. How did you you take these sight distances, Mr. Blue?

A. We took it visually. We took a point ten feet from the east rail and the west rail, in either case, on the line of crossing and observed down the track until an object coming around the curve would come in sight. The alignment of the curvature is what controlled it rather than the grade. It didn't go over the horizon. It was coming from around the curve.

Q. Would it make any difference in these sight distances how high an object was?

A. Not materially it wouldn't because the slope of the railroad itself is so flat it's practically level. It wouldn't make too much difference.

Q. In other words, you could see a man pretty near as far as you could see a higher object?

A. That's correct.

Thomas D. Blue.

Q. Did you also make a profile of the grade of the approaches to these two crossings?

A. Yes, we did.

Q. I believe you are looking at Exhibit A now; looking at the approach from the east what is the approximate grade of that approach? That's the northernmost crossing.

A. From the grade in the east it is approximately twenty percent. That's within the right-of-way itself.

Q. Would you characterize how steep the approach is?

A. That's fairly steep. The maximum allowed

page 58 } in the Ordinance for streets in Albemarle County or subdivisions, rather, in the Ordinance it says ten percent. I think the maximum is over that.

Q. Approaching the

A. That's right.

Q. What is it on the west side?

A. Well, it's about half that, about ten percent.

Q. All right, looking at Exhibit B would you give the Court the grade?

A. Approaching from the east again the grade is somewhere between thirteen or fourteen percent and approaching from the west side again about half that, or approximately six percent.

Q. That is the southernmost crossing?

A. That's right.

Q. Now, when was this plat made? When were both plats made?

A. February, I believe, of this year, 1964. The date is on them.

Q. Well, read them to us.

A. February 29, 1964.

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By Mr. St. John (Continuing):

Q. Did you observe the material of the surface or the ground at the grades to the crossing, the approaches to the crossing?

Thomas D. Blue.

A. Not specifically. I would say it would be sandy gravel, or perhaps some red clay in this particular Albemarle County material. I didn't take particular notice of it.

Q. On the east side, I direct you to the east side, is there any packed down road area there or is it loose?

A. No, I didn't notice it, particularly on the east side.

Q. Did you notice the character of the roads leading to this area from the west side?

A. Well, on the southernmost crossing it was—We drove to the crossing in our Jeep also. But on the northern, the other two crossings, the northern crossing and on the west side we did not try it. I don't know whether—It didn't look like it had been used in a good while.

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page 63 }

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CROSS EXAMINATION.

By Mr. Gilmer:

Q. How far do these grades that you speak of extend to the Southern track?

A. Merely from the track to the railroad right-of-way fence.

Q. And that's about how far?

page 64 } A. Roughly fifty feet above. I think the right-of-way is approximately a hundred feet. I could scale it off on the plat.

Q. And the grade is necessitated by the elevation of the Southern Railway at those points, isn't it?

A. That's right, sir.

Q. Now, did you find any evidence to indicate whether the Southern Railroad had raised that grade in '17 when they double-tracked?

A. No, sir, I wouldn't know that.

Q. Now, your limiting facts on your sight is the bank of the railroad track, isn't it, the limiting fact of the distance? And the banks slope back, don't they? Isn't that right, sir?

A. I don't recall, sir.

Thomas D. Blue.

Q. The railroad banks have what kind of a slope for limited sight?

A. They're quite steep. But it's not so much the slope as it is the curvature that causes the sight distance.

Q. Well, the curvature takes them around and behind?

A. That's right.

Q. Well, a lower object at the rail level would be cut off from view sooner than a higher object, wouldn't it?

page 65 } A. No, sir, not in this particular instance, because the slope is such that it doesn't make much difference. If you are talking about one foot and a hundred feet, certainly. But the difference say between two feet and seven feet, or maybe even ten feet. I don't think so.

Q. Well, how steep are those banks? They are just dirt banks, aren't they, and not rocks?

A. Well, there's some rocks in them, in the cut.

Q. Well, what do you say they are, one to one?

A. Oh, I would say that in the instance of the southernmost point it probably is somewhere in the vicinity. It might even be steeper. I don't recall. We didn't measure it.

Q. How about the northernmost?

A. That's probably about the same. That's across the river.

Q. That's clear across the river?

A. That's right, sir.

Q. Except for the grade getting up the railroad Bank the roads leading there have not probably more than than five percent grade, have they?

page 66 } A. I don't know, sir, we didn't measure that. I would imagine that on the east side it probably is, going down the bottom. On the west side I don't know.

By the Court:

Q. Let me get that. Is there any way I can tell which of these plats is north and south? I don't recall the way you could tell.

A. Yes, sir, there's a way you can tell—

Q. It was identified in the testimony, but I have forgotten.

A. The only way you could tell is that—You see, this direction is south and it is 1557 feet to the next crossing.

Q. I see. This is the northernmost?

A. This is the northernmost and the next crossing is to the south 1550 feet.

Jack E. Green.

* * * * *

page 67 } JACK E. GREEN,

a witness called by and on behalf of the Defendant, being first duly sworn, is examined and testifies, as follows:

DIRECT EXAMINATION.

By Mr. St. John:

Q. State your name and occupation, please, sir.

A. Jack E. Green, Division Engineer for the Southern Railway.

Q. How long have you been an employee of the Southern Railway?

A. Eighteen years.

Q. What functions now does your present position involve?

A. I am Division Engineer on the Washington Division, general supervision and planning, maintenance, construction of the roadways and tracks between Alexandria, Virginia and Monroe.

Q. Between Alexandria and Monroe; and that includes this area we are talking about?

A. It does.

Q. Does your job include planning and supervising the construction of crossings, grade crossings?

page 68 } A. To a certain extent, yes.

Q. How do you figure into the construction and planning of crossings? What do you do when the railroad has got to build one?

A. Make a recommendation and approximate cost estimates.

Q. Your job involves making approximate cost estimates?

A. Along with my recommendation, yes.

Q. Have you been present here during this entire proceeding and payed attention to all the testimony?

A. I have.

Q. Now I hand you plat marked Defendant's Exhibit B, Mr. Green. And I think that's the southernmost crossing of the two because it is 1570 feet north of the next one.

Now do you see those lines and grades to the approaches on that Exhibit?

A. I do.

Jack E. Green.

Q. Have you viewed this area recently you, yourself?
A. I have.
Q. When was the last time you saw it?
A. I was on the ground there sometime in the
page 69 } first part of this year.
Q. Who went out there with you?
A. I believe you were with me.
Q. You and I and I believe Mr. Hopkins went out there?
A. That's right.
Q. We spent some time out there examining the area?
A. That's right.
Q. Now, Mr. Green, I want you to look at Exhibit A now, which is the northernmost crossing. You also observed this crossing at the same time as you did the other one?
A. I did.
Q. Have you been by there since then?
A. I have passed there in motorcars and trains and engines.
Q. When was the last time you did that?
A. I was down in Greene yesterday.
Q. Now, have these crossing been changed materially since these plats were made? Have they graded these crossings and stuck to what just is on these plats, and to which Mr. Blue has testified; and assuming that they wanted both of these crossings to be used by heavy sand hauling
page 70 } equipment, substantially a part of that has already been testified to, as you heard the testimony, what would be the situation out there in your opinion as State operation of the railroad or trucks, either one?
A. I would say that it would create a hazardous condition.
Q. Why?
A. Because of the speed of your trains and the sight distance.
Q. What is the speed of the train transportation?
A. Sixty miles per hour.
Q. Sixty miles per hour?
A. That's right.
Q. Do you think the grade of the approaches had anything to do with safety? I mean, would they not, knowing the area; heavy loaded trucks would have a hard time starting approaching from the east to the west when there are grades to cross over the crossings? Were you familiar with these crossings as to what existed?
A. I was, yes.

Jack E. Green.

Q. Were you at one time the senior maintenance supervisor of this particulor area ?

page 71 } A. I was at one time assistant track supervisor, at Culpeper, Virginia, which included the area between Culpeper and Charlottesville.

Q. During what period of time did you have that job?

A. From 1950 and 1952.

Q. Did you have any other jobs of supervising work in this area before then?

A. Prior to that I was a trainee with the track supervisor from 1946 until 1950, in the same territory.

Q. So during what periods of time have you been immediately working on this immediate *ares,* responsible for this immediate area?

A. From March 1946 until February, 1952 and July 1959 to present.

Q. So there is a gap from '52 to '59 when you were in a different area?

A. Yes, sir.

Q. Are you familiar with the way these crossings worked before 1952, from your first period of employment here?

A. I am.

page 72 } Q. Describe the character of these crossings?

A. They were what they referred to as a farm type crossing. They used loose ballast between the rails, for a width of approximately ten to twelve feet.

Q. Was there any timbering around the crossings then?

A. Not to my knowledge.

Q. For what purpose were the crossings used for farm work?

Mr. Gilmer: I object to that unless he can show he knows.

Q. Well, how often did you observe the crossings? Were you in constant familiarity with them?

A. I was, yes. Not in constant familiarity with them. I passed over them maybe an average of twice a week, sometimes more often.

Q. Well, you don't know how often these were used, but could you see what use the land to the east of the track was being put to at that time?

A. To my knowledge the only use I have ever seen of that land was for farming.

Jack E. Green.

Q. The crossings are no longer there, are they?

A. That's correct.

page 73 } Q. What happened to them? Do you know that?

A. In 1952 when I left the Washington Division and transferred to another division, the crossings at that time to my knowledge were deteriorating.

Q. Wasting away?

A. Wasting away. There were signs of a crossing. When I returned to the Division in July of 1959 the crossings no longer existed. There was not a crossing in July of 1959.

Q. Well, did the railroad ever actively go there and remove the ballast that was between the tracks?

A. Not actively remove it, no, sir.

Q. Why is it the ballast is not there at present?

A. Well, the ballast in the operation of the track gradually wasted—or equalized itself from the vibration and from non-use of this ballast over a period of years just equalized itself out in the track.

Q. When was the double track removed—I'm sorry. When was the so-called southbound track removed?

A. To the best of my knowledge, in June of 1962.

Q. Was the crossing in existence just before this was done?

A. Not to my knowledge, no, sir.

Q. Was the track re-worked, the existing tract, the one that was left there, was it reworked and re-bal-

page 74 } lasted at that time?

A. It was, in May and June of 1962.

Q. They didn't put any more ballast back to make the crossing useable?

A. No, sir.

Q. Does the track slope downwards or upwards or was it level as the trains approach this area from the north and south?

A. Well, the descending grade to the river from both directions, both north and south.

Q. How many trains a day go by there, scheduled?

A. Twenty-six scheduled trains.

Q. Do you know how many of these are in the daylight, average daylight hours?

A. If I may have a moment to count them up, sir.

Q. Are you using the official Southern Railway time-table there?

A. Just for reference only. It's practically fourteen schedules.

Jack E. Green.

Q. Is this the main route of the Southern Railway?
A. It is, yes, sir.
Q. What kind of safety precautions and fences are required for private crossings?
A. None.
Q. Are trains required to blow at private cross-
page 75 } ings?
A. No, sir.
Q. Do you think it likely or unlikely that if this operation which has been described by Dr. Hurt of from ten to twenty dump truck loads of sand cross it daily during the daylight hours is put into operation and a train struck one of those trucks—

Mr. Gilmer: Judge, I think that's right speculative. He is no expert on wrecks.

Q. You have stated that the crossings as they once existed would be unsafe for this type of operation.
A. Yes, sir.
Q. Now, what type of crossing would have to be installed to accommodate and support the type of travel that Dr. Hurt has described?
A. Without say a crossing of some hard surface material.
Q. What kind of hard surface?
A. Either asphalt or concrete, preferably asphalt.
Q. Would you have to change the grade of the approaches?
A. We would certainly definitely have to change the approaches on the Easternmost side.
Q. How wide would that crossing have to be?
A. My recommendation would be not less than twenty-four feet.
page 76 } Q. Why do you make that recommendation?
A. So that two vehicles can pass.
Q. Why is it necessary for two vehicles to pass?
A. Well, from experience I have found that on single lane crossings vehicles have a tendency for one to get up too close to the crossing and stop and another one following jammed him up and if a train is approaching he doesn't have any place to go.
Q. And you are assuming now that if another vehicle doing the same thing—
A. Approaching from the opposite direction, that's right.

Jack E. Green.

Q. Would it be necessary to provide warning signal devices to make this operation safe?

A. Definitely, yes, sir.

Q. Can you give us any estimate of the cost that would be involved if the Southern Railway installed such a crossing with signal devices?

A. Well, from the past costs on similar crossings, or similar type crossings, picked up from the estimate sheets, the cost of a signal installation would run somewhere between seventeen and twenty thousand dollars.

Q. Can you break that down into how much it would cost for the type you described that would be necessary for this part of the track—the cost of the various items?

page 77 } A. The crossing construction itself within the track area would run approximately seven to eight hundred dollars.

Q. Does that include improving the grade approaches to the crossing?

A. No.

Q. Do you know how much that would cost?

A. It would be a horseback guess. Roughly a thousand dollars plus.

Q. How much would the signals involved cost?

A. Seventeen to twenty thousand dollars.

Q. They cost more than the crossing itself?

A. Definitely, yes.

Q. Well now, even if you had a crossing as you have described, twenty-four feet wide and paved, if you didn't have signal lights do you think that would be safe for sand trucks as Dr. Hurt described going across this railroad at these two points?

A. It would not be safe without signal protection, no.

Q. Which of these two crossings is safer and one of them has to be installed?

A. I would say the southernmost crossing.

Q. For what reason?

A. Because of the sight distance and the curva-

page 78 } ture of the tracks gives you more sight distance on the southernmost crossing.

Q. Is there a traffic light here in this immediate area?

A. A short distance north of the northernmost crossing, yes.

Q. Goes across the Rappahannock River?

Jack E. Green.

A. That's correct.

* * * * *

CROSS EXAMINATION.

By Mr. Gilmer:

Q. How many crossings do you have in Albemarle County with signal lights on them?

A. Three to my knowledge right now.

Q. Where are they located?

A. Two at Charlottesville and one at Red Hill, Virginia.

Q. Well, the one at Red Hill is outside of the City of Charlottesville. isn't it?

A. That is correct.

Q. Now, how many crossings do you have at the railtrack in Albemarle County?

A. Eight public crossings.

Q. Eight public crossings, and how many private crossings?

page 79 }

* * * * *

A. Nineteen.

By Mr. Gilmer: (continuing)

Q. And none of those have any signal lights?

A. No, sir.

Q. Now, how many of those are twenty-four feet wide?

A. You are asking about farm type crossings?

Q. You say there are nineteen private crossings. How many of them are twenty-four feet wide?

A. None of them.

Q. None of them?

A. Yes, sir.

Q. Now. there are eight public crossings. How many of those are twenty-four feet wide?

A. To the best of my knowledge six of them are
page 80 } twenty-four feet wide or wider.

Q. Now, there are two lighted crossing in Charlottesville; one of them is at Ninth Street. Where is the other one?

Jack E. Green.

A. Shamrock Road.

Q. Now, you have double lane tracks just north of Preston Avenue where all trucks over eleven feet high cross, don't you, that's a grade crossing?

A. Yes, sir.

Q. And there is no signal light there?

A. No, sir.

Q. And there is pretty heavy daily traffic there, isn't it?

A. Yes, sir.

Q. And the road there is about fifty feet wide, isn't it? Leaving out the railroad.

A. I believe the crossing is forty-eight foot in width, yes, sir.

Q. Now, when you go through here you travel on a train, or a motor bus, or motor car, or how do you go through when you pass through Charlottesville?

A. On both.

Q. Now, do you stop along the way a great deal?

A. I do, making general inspection, yes, when on motor car.

page 81 } Q. When you are on a motor car, but when you are on a train you don't do much inspecting?

A. Just at station stops. I stand on the rear of the train and make general inspection. That's the purpose for being on there.

Q. Now, when you are on a motor car when you are going through how often do you stop?

A. Whenever conditions require me to stop.

Q. Usually that's where there is a gang working, isn't it?

A. Not necessarily, no, sir.

Q. Do you stop often where there is nobody working?

A. I certainly do.

Q. Now, isn't it perfectly possible for a considerable numble number of traffic to cross a private crossing and you not see them?

A. It could be, yes, sir.

Q. When you go across one of these crossings we are talking about you are not in view of that crossing for only about five minutes, are you?

A. Approximately.

Q. And you cross there how often a week?

Jack E. Green.

A. I would say now I cross there approximately once a week.

Q. Once a week?

page 82 } A. Yes, sir.

Q. You are in sight of one of those crossings approximately once a week?

A. That would be correct, yes, sir.

Q. That wouldn't give you any chance for a very active traffic count, would it?

A. No, sir.

Q. Now, you are not in a position to say that these men who have testified about hauling stuff across there at that crossing until you took up your double line track are not right, are you?

A. I would like to have that question again.

Q. You can't say that Mr. Buck who says he used that crossing is right or wrong, up until you took up one of your tracks and made a single line track, are you?

A. From my observation of the crossings the crossing itself across the railroad is impassible for truck operation or any other operation.

Q. Then the railroad hasn't done its duty to maintain the crossing, has it?

A. If it was impassible, no.

Q. You didn't have authority from anybody except the Southern Railroad to abolish those crossings, did you? You didn't give notice to anyone, did, you, owners or anybody?

A. No, sir.

page 83 } Q. Just on the railroad's initiative?

A. The crossings had deteriorated from non-use and that's the reason they were not re-installed when the work was done approximately two years ago.

Q. You do not allow people who use the crossing to maintain it, do you?

A. I didn't understand.

Q. The Southern Railroad does not allow people who use the crossing to maintain it? They do the maintenance themselves, don't they?

A. That is correct, yes, sir.

By the Court:

Q. Do you know when was the last time any work was done on this crossing by the Railroad?

A. No, sir, I do not.

Q. All right. You do have numerous crossings that lead to various kinds of industry, plants, and quarries, sand bars, and that sort of thing, don't you?

A. Yes, Your Honor, on crossings that have established and cross the railroad. They also sign an agreement accepting liability and they install at their expense a crossing, yes, sir, install and maintain at their expense.

* * * * *

page 85 }

* * * * *

RE-DIRECT EXAMINATION.

By Mr. St. John:

Q. Mr. Green, Mr. Gilmer has asked you if you got any authority from anybody to close these crossings. Did you actually close the crossings or did they just deteriorate?

A. Well, they just deteriorated until there was no longer a crossing and unused. We had no application from anyone or request from anyone to maintain them.

Q. Until Dr. Hurt made the request?

A. Until he made the request to maintain them to haul sand, to haul sand out of the bottom, to restore page 86 } them to haul sand.

* * * * *

RUSSELL C. HOPKINS,

a witness called by and on behalf of the Defendant, being first duly sworn, is examined and testifies, as follows:

DIRECT EXAMINATION.

By Mr. St. John:

Q. State your name and occupation, please, sir.

A. Russell C. Hopkins, Assistant Track Supervisor for the Southern Railway.

Q. Where do you live?

A. Orange, Virginia.

Q. How long have you been a Southern Railway employee?

Russell C. Hopkins.

A. Since 1926.

Q. How long have you been working for the Southern in the area in which these crossings are included and located?

A. Well, I've been on them regularly since 1952 and prior to that I was first in and then out.

Q. During what period of time were you the supervisor that had charge of that particular area?

page 87 } A. 1952.

Q. Until when?

A. Until now. Still have it.

Q. When Mr. Green left here you—

A. Took his place.

Q. What does your job consist of? What are your duties? What do you do? What is your daily work?

A. *Patrole* a certain portion of the railroad, inspecting. That's a general inspection of the whole thing, all over.

Q. Well, can you remember the character of these crossings when you first came here, what they looked like?

A. Well, they were rough, deteriorating all the time.

Q. What were they used for?

A. I never seen anybody use them.

Q. Did they have any timbers in them?

A. No timbers, no, sir.

Q. Just ballast in the middle of the tracks and alongside the rails?

A. Just ballast, yes.

Q. When did they cease to exist as used for crossings, do you know that?

A. Well, I never seen nobody going across there. In 1952 they were deteriorating beyond use.

page 88 } Q. You could have gotten across them with a truck if you had just driven on across, couldn't you? These gentlemen have testified that they went across them since then.

A. Well, it would have been a pretty rough ride because the base of the rails were showing. The rail is seven inches high.

Q. Did you ever do any work to maintain them during the time you've been here?

A. No, sir, I haven't.

Q. Do you know whether any other members of the Southern Railroad force has?

A. No, sir, I don't.

Q. You don't know whether they have?

Russell C. Hopkins.

A. I don't know that. I've never seen none doing it?

Q. Would you have seen them doing it if they had done it? You would have known about it, wouldn't you?

A. Well, I'd have been by there three or four times a week, and they hadn't been filled up.

Q. Did you ever see where the railroad had been repaired or maintained at the crossings?

A. No, sir, I didn't.

Q. Did the Railroad, on the other hand, ever come in and remove what was left of the ballast between the rails?

A. No, sir.

page 89 } Mr. St. John: All right, Mr. Gilmer.

CROSS EXAMINATION.

By Mr. Gilmer:

Q. Your territory runs how far?

A. Well, at the present time it runs from Mile Post 85 to Mile Post 167, from Orange to Monroe.

Q. From Orange to Monroe; and in that area you have how many section crews?

A. How many section crews?

Q. Yes.

A. We don't have any.

Q. You have done away with them?

A. Yes, sir.

Q. Well now, who maintains that track? You don't actually watch the men putting the stone down, do you? They have a foreman, don't they?

A. Well, if anything needs to be done to the track I report to my superior officer and he handles it from there on.

Q. He handles it from there on, but I mean, just the current maintenance of ballast and keeping ditches open and stuff like that, don't you have some sort of gang to do that, men around the track?

A. We have to ask for authority to do it.

Q. Ask for authority?

page 90 } A. Yes, sir, from the higher officials.

Q. So, until you ask for authority to do it that stuff just isn't done any more?

A. Well, what I can do myself, light jobs with one man. I have one man with me all the time on this inspection.

Russell C. Hopkins.

Q. You don't do any physical work yourself? You just superintend it, don't you?

A. Well, I do—

Q. Do you use a pick and shovel and hammer and drive and cut spikes or anything? Do you do any of that sort of work?

A. If necessary, yes, sir.

By the Court:

Q. Let me ask you this question: You have lots of private crossings. How are they maintained? What's done to maintain them? How do orders about maintaining them go out?

A. Well, this labor I have with me throws in a few shovels of ballast at times.

Q. Is that all that is done?

A. And at different times maybe we may have a small gang somewhere or other and if we work the crossing we fill it with ballast and stuff like that.

Q. Well, the crossings that are maintained, who gives the orders that they shall be maintained? Is that done in a routine manner or do you have to have a special

page 91 } order each time anybody works on a crossing?

A. No, that's just done in a routine manner.

Q. Well, who does it?

A. Well, I ask the Supervisor for authority to do it and he handles it with Mr. Green and then he puts a note on it.

Q. You have to have a special order for the maintenance of any crossing, private crossing?

A. No, sir, a private crossing is just like say this labor that I have with me and we stop there checking the track and it needs a few shovels full of ballast in a hole or ditch he puts it in there. They don't do several hours work to maintain them.

Q. All right.

By Mr. Gilmer (continuing):

Q. Mr. Green says that there are nineteen private crossings that he can recall in Albemarle County. How many of those have you worked on in the last twelve months?

A. I don't know, sir.

Q. Have you worked on half of them?

A. I'd say about half of them, yes, sir.

Q. You have worked on about half of them and the other ones you haven't worked on for the last twelve months?

Russell C. Hopkins.

A. Not a general overhauling, no, sir.

Q. So you have seen these crossings and plenty
page 92 } of them in your territory from Orange to Monroe?

A. I don't understand you.

Q. You treated these crossings just about like most of the crossings from Orange to Monroe, didn't you?

A. Well, they weren't used. We kept them filled up.

Q. Well, how could you tell which ones were being used, by looking at the tracks.

A. The ones that were regularly used.

Q. Did you ever get off and stop at one of these crossings?

A. Which crossings are you referring to?

Q. These crossings that cross Dr. Hurt's land up there near the Rivanna River.

A. Inspect the tracks through there, yes, sir.

Q. You have walked the tracks?

A. Yes, sir.

Q. When was the last time you did that?

A. Well, last Tuesday a week ago.

Q. How often did you do it?

A. Four times a week, average four times. That's my schedule.

Q. Now, if you have walked the tracks—

A. Small motor car.

Q. I asked you how often you had walked them.
page 93 } A. No, it was a small motor car.

Q. A small motor car several times a week?

A. Yes, sir.

Q. But ordinarily you don't stop that motor car often, do you?

A. Don't stop it very often.

Q. Well, how far do you go without stopping? You don't go five miles without stopping, do you?

A. I didn't understand you.

Q. You don't mean that you run that motor car five miles without stopping, do you?

A. No, we stop it oftener than that, on curves, inspecting track. That's my job, inspecting the whole track.

Q. And you have a hundred miles of track?

A. Not quite a hundred.

Q. And you are the only man that inspects that whole track?

A. No, sir, there are others. They go over it, too.

Russell C. Hopkins.

Q. Who else inspects it?

A. Supervisors and Division Engineer, anybody who goes over it.

Q. Well now, when you were running your little car down the rails how do you know where the station is and a train coming at sixty miles an hour?

A. Well, just experience, I reckon, checking the
page 94 } track, elevation, lines and all that stuff.

Q. How long did it take you to stop your hand car and get it off the rails if a train comes along?

A. How long would it take me to do it?

Q. Yes. You have to take it off the rails every time a train passes, don't you?

A. Not all the time, no, sir.

Q. You leave it sitting on the rails when a train passes?

A. Well, the dispatcher is running me just the same as the trains.

Q. Oh, the dispatcher is running it?

A. He gives me a certain portion of the railroad.

Q. You go in a siding just like the trains do?

A. Yes, sir. Charlottesville is a big crossing and I get off at a crossing.

Q. Well, how long does it take you to cover from Orange to Monroe?

A. Ten to twelve hours.

Q. What is that, how many miles, eighty?

A. About eighty miles.

Q. Eighty miles and you travel ten or twelve hours?

A. Yes, sir.

Q. And you do that how many times a week?

A. Four times a week.

page 95 } Q. Four times a week?

A. Yes, sir.

Mr. Gilmer: That's all I have.

By the Court:

Q. Are you prepared to state that no work has been done on this crossing since you started on this job?

A. I taken this job in 1952 when Mr. Green—

Q. And is it your testimony that no work has been done on these crossings involved here since that time?

A. Yes, sir. I haven't seen a thing going on on these cross-

ings since I've been back here, since that time. And that portion of the railroad has been in my inspection territory ever since.

Q. As I understand it you said these crossings were impassible in 1952?

A. Yes, they was. They certainly was. The ballast was just deteriorating all the time.

* * * * *

page 96 } CHARLES W. HURT,

upon being recalled, is examined and testifies further, as follows:

DIRECT EXAMINATION.

By Mr. Gilmer:

Q. What can you tell us about the condition of those crossings when you bought the property in 1959?

A. Well, I was able to go out and drive my car across them.

Q. Did you actually drive your car across it after you bought the property?

A. Yes, sir.

Mr. Gilmer: Witness with you.

CROSS EXAMINATION.

By Mr. St. John:

Q. Did you or your men ever do any work to your knowledge, Dr. Hurt, on the crossings, shoveling gravel back into the center or anything like that?

A. Not that I know of.

Q. Which crossing do you use when you go over in your car across them?

A. I am inclined to think I used both of them.

Q. You can't remember for sure?

A. I am relatively sure that I used both of them.

Q. Were they both in exactly the same condition?

A. Well, as I testified earlier the southern one
page 97 } is the—Excuse me, the northern one is the most rugged.

Q. What do you mean by "rugged"?

Joseph Buck.

A. It would be the deepest. The crossing itself was not—was not parting—it was the bank on the other side. The approach on the eastern side is deep, on the northern end.

Q. And you drove your car across both of these crossings?

A. I have driven my car across both of these crossings. I drive places that most people don't drive cars. I'm not trying to make a point, but I drive my car over fairly rough terrain.

Q. Were the crossings rough when you crossed them?

A. No, not the crossings, but the approach on the east side of the northern crossing was rugged.

* * * * *

RE-DIRECT EXAMINATION.

By Mr. Gilmer:

Q. Was gravel between the rails on both sides?

A. Yes, sir.

Q. On top of ties?

A. Yes, sir.

* * * * *

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* * * * *

JOSEPH BUCK,

upon being recalled by the Plaintiff, having been previously sworn, is examined and testified, as follows:

DIRECT EXAMINATION.

By Mr. Gilmer:

Q. I believe you testified earlier that you hauled some stumps across these crossings?

A. Yes, sir, I hauled some trash across there.

Q. Now, when you hauled that trash across there, what were the conditions of the crossings; was there any gravel across there on top of the tracks between the rails?

A. Yes, sir, there was gravel between the rails.

Q. Did you have any trouble getting across them?

A. No, sir.

Joseph Buck.

Q. Was there gravel on the outside leading up to the rails or not?

A. Yes, sir.

Q. And did that condition remain unchanged or changed up until they took up one of the tracks?

A. Could get across there with most anything page 99 } until they taken up one of the tracks.

Q. And since then have you been able to drive a car across?

A. No, sir. Because I went down there to carry some stuff down there and had to back out and carry it somewhere else.

* * * * *

CROSS EXAMINATION.

By Mr. St. John:

Q. Which one of the two crossings did you use, Mr. Buck, to take the stuff over there?

A. I used the first one.

Q. The one nearest Charlottesville?

A. Yes, sir. Because you see that was the one closest to us and that was a shorter haul.

Q That's the one that leads to the ravine, go right across that and then—

A. Right across it.

Q. Did you ever see any Southern Railway workmen putting gravel in there?

A. Well, not for quite a good while I haven't.

Q. Do you have any recollection about how long it has been since you have seen them? Can you give me an estimate of the time?

A. No, sir, I couldn't say because in the last few page 100 } years I haven't been down there much, you see.

Q. You haven't been down there for the last few years?

A. I haven't been on the railroad much. I used to work down there. I used to crop down there.

Q. Since you cropped down there you haven't been down there?

A. I haven't been down there. I just go down there to take a load of stuff.

Joseph Buck.

Q. All right, sir.

Mr. St. John: That's all.

By the Court:

Q. Before Dr. Hurt bought the property you were farming up to '59?

A. Yes, sir.

Q. And did you continue farming right up until he bought it?

A. Yes, farmed up until he bought it.

Q. Did you ever see any work done on there?

A. Yes, sir, they used to come by there and cut the car off and keep it up when we was all hauling crops across there. That's where they used to cut the lever cars off, right there.

Q. Well, that was a long time ago when they had lever cars?

page 101 } A. Yes, sir.

Q. How about motor cars?

A. It's motor cars I mean. Didn't mean the old lever cars.

Q. You've seen the motor cars cut off there, too?

A. Yes, sir.

By Mr. St. John:

Q. Let me ask you one more question, Mr. Buck. Can you tell us what the last year was, Mr. Buck that you had a crop down there?

A. 1948.

Q. 1948 is the last year you had a crop down there?

A. Yes, sir.

Q. Have you seen the railroad men down there since you had crops down there?

A. Well, I've seen them down there, yes, sir. I've seen the car sitting down there.

Q. You haven't seen them down there since the crops were being raised, have you?

A. Before they got rid of the cars, the old cars.

Q. Before they got rid of the old cars?

A. The motor cars. They stop down there any time and work on them signal lights.

Q. Have you seen them working on the crossing since you were raising crops?

page 102 } A. No, sir, they haven't done anything to the crossing.

Joseph Buck.

Q. Thank you, sir.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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