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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 6328

In the

Supreme Court of Appeals of Virginia

at Richmond

RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY

v.

HUGHES-KEEGAN, INC., ET AL.

FROM THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

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. 6328

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 14th day of January, 1966.

RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, Appellant,

against

HUGHES-KEEGAN, INCORPORATED, AND THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, Appellees.

From the Law and Equity Court of the City of Richmond
Robert Lewis Young, Judge

Upon the petition of Richmond, Fredericksburg and Potomac Railroad Company an appeal is awarded it from an order entered by the Law and Equity Court of the City of Richmond on the 27th day of July, 1965, in a certain proceeding then therein depending wherein the said petitioner was plaintiff and Hughes-Keegan, Incorporated, and another were defendants; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said Law and Equity Court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

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page 1]

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Received and Filed 3/28/63
Teste: LUTHER LIBBY, JR., Clerk
By EDW. G. KIDD, D.C.

MOTION FOR DECLARATORY JUDGMENT

1. By contract dated January 1, 1956, defendant Hughes-Keegan, Incorporated, agreed to perform whatever construction work plaintiff by its Chief Engineer or his duly authorized representative or representatives might call upon it to perform, and plaintiff agreed to pay for such work at the rate established in the contract.

2. At all times material to this cause, and especially on July 27, 1961, the aforesaid contract between plaintiff and defendant Hughes-Keegan, Incorporated, was in full force and effect.

3. Defendant Hughes-Keegan, Incorporated, agreed in the contract, in part:

"The Contractor (defendant Hughes-Keegan, Incorporated) shall indemnify and save harmless the Company (plaintiff) from and against all losses and all claims, de-
page 2] mands, payments, suits, actions, recoveries and judgments of every nature and description made, brought or recovered against the Company by reason of any act or omission of the Contractor, his agents or employees, in the execution of the work or in guarding the same."

4. Defendant Hughes-Keegan, Incorporated, further agreed to obtain and maintain bodily injury and property damage insurance for plaintiff's benefit to insure the indemnification agreement set forth in paragraph 3 of the Bill of Complaint. Pursuant to such agreement, and for the benefit of plaintiff, defendant Hughes-Keegan, Incorporated, obtained from defendant The Fidelity and Casualty Company of New York an

endorsement to the policy of insurance between defendants, the endorsement being in full force and effect on July 27, 1961. The endorsement provides:

"CONTRACTURAL ENDORSEMENT NO. 1

"Agreement between Insured and R. F. & P. Railroad Company, Richmond Terminal Railway Company and Richmond Land Corporation.

The Contractor shall indemnify and save harmless the company from and against all losses and all claims, demands, payments, suits, actions, recoveries and judgments of every nature and description made, brought or recovered against the Company by reason of any act or *ommission* of the Contractor, his agents or employees, in the execution of the work or in guarding the same."

5. On or about July 27, 1961, pursuant to the aforesaid contract defendant Hughes-Keegan, Inc. was engaged in certain construction work in plaintiff's Acca Yard in Richmond, Virginia. In performance of this work it was necessary to move a railroad track panel through the Yard by means of a crane.

page 3]

6. Defendant Hughes-Keegan, Incorporated, engaged Moore Crane Service, Inc., as it agent for the purpose, among other things, of moving the aforesaid railroad track panel.

7. In course of moving the aforesaid track panel on July 27, 1961, the agent of defendant Hughes-Keegan, Inc., caused the crane to contact an overhead high tension electric transmission line running through Acca Yard. As a result of such *contract* Earnest Wilson Winston and Otho Beasley, employees of plaintiff who were assisting in movement of the track panel, were injured, and Winston subsequently died from his injuries.

8. Claims have been asserted against plaintiff on behalf of both Winston and Beasley pursuant to the Federal Employers' Liability Act, 45 U.S.C.A. § 51 *et seq.* Plaintiff, after having informed defendants of such claims and after having called upon defendants to save it harmless against all such claims in accordance with plaintiff's contract of January 1, 1956, with defendant Hughes-Keegan, Inc., and

defendant The Fidelity and Casualty Company of New York's insurance policy endorsement issued for plaintiff's protection, which defendants have failed, refused and declined to do, made a reasonable compromise with Winston's estate in amount $11,500.00. Plaintiff has been unable to effect compromise settlement with Beasley, and his claim is still pending.

9. In addition to the aforesaid $11,500.00 compromise settlement plaintiff has also been obligated to expend large sums of money for medical and settlement expenses and necessary attorneys' fees on account of the aforesaid accident.

10. An actual controversy exists between the parties as to the liability of the defendants, or either of them, under the aforesaid agreements, which controversy amounts to an actual antagonistic assertion and denial of right.

page 4]

WHEREFORE plaintiff prays the court for an order adjudicating that defendants are obligated to perform their respective contracts for plaintiff's benefit and to indemnify and save plaintiff harmless from any loss on account of the injuries to Winston and Beasley, and that such further relief based upon said order be granted as may be necessary or proper, including, but not limited to, the entry of an order requiring the defendants to assume their obligations to defend the pending claim asserted by Beasley against the plaintiff and the entry of a judgment in favor of the plaintiff against the defendants for reimbursement of all expenses which the plaintiff may now have incurred or may hereafter incur on account of such injuries, including reasonable attorneys' fees, and the costs, including reasonable attorneys' fees, of this action.

RICHMOND, FREDERICKSBURG &
POTOMAC RAILROAD COMPANY

By LEWIS T. BOOKER
R. COLSTON CHRISTIAN
Counsel

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page 19]

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Filed Apr 18 1963
Teste: LUTHER LIBBY, Clerk

SPECIAL PLEA

Defendant, Fidelity and Casualty Company of New York, for its Special Plea to the petition filed against it and another by the plaintiff, says:

1. It adopts the allegations of the Special Plea filed by co-defendant.

2. It says that upon information and belief the terms, provisions, conditions, insuring agreements and exclusions of the policy of insurance mentioned in the petition, were submitted to plaintiff by co-defendant and were by plaintiff approved and agreed to as being fully in compliance with all provisions of the co-defendant's contract with plaintiff.

page 20] 3. It says that the provision of its insurance contract with co-defendant entered into pursuant to the requirements of the contract between co-defendant and plaintiff are as set forth in copy attached, marked Exhibit B.

4. That no act or omission of co-defendant, or of any agent or employee of co-defendant, in the execution of the work or in guarding the same resulted in any way in the injuries and claims mentioned in the pleadings.

5. Defendant requests an affirmative response.

Wherefore, this defendant prays judgment that it has no liability to plaintiff.

FIDELITY AND CASUALTY COMPANY OF NEW YORK
By Counsel

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page 33]

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Filed Apr 18 1963
Teste: LUTHER LIBBY, Clerk

SPECIAL PLEA

Defendant, Hughes-Keegan, Incorporated, comes and says that the facts of the transaction concerning which the plaintiff's petition for declaratory judgment is filed are not fully and completely and accurately set forth in the said petition, and that the true facts with reference thereto are as follows:

1. The contract between plaintiff and defendant dated January 1, 1956, with subsequent addenda and amendments thereto is filed herewith as Exhibit A.

2. By reference to such contract it will affirmatively appear that not only was defendant under obligation to perform such work as might be required by plaintiff upon plaintiff's lines and property, but defendant was also obligated to supply rental equipment for use of plaintiff in and about work being performed by plaintiff upon its own premises.

page 34]

3. That on July 27, 1961, defendant was not engaged in any construction work or other work pursuant to any proceed order or unit price agreement upon any portion of plaintiff's premises material to this controversy, had no employees either supervisory or otherwise upon any such premises, but on the contrary, all work being performed was being performed by the plaintiff by and through the use of its own employees, both supervisory and labor forces.

4. That on July 27, 1961, no equipment owned and operated by defendant was engaged in any of the work being performed by plaintiff as a result of which work the accident mentioned in the pleadings occurred.

5. That prior to the happening of the accident, plaintiff's authorized representatives, one Pat Hayes, acting within the scope of his employment, called by telephone, talking with Lewis D. Schmuck. Jr., an employee of defendant, and requested defendant to supply a crane to plaintiff for certain operations of plaintiff in Acca Yard, and was then advised by the said Schmuck that defendant had no crane available of the type required, but would procure one and send it to the job.

page 35] 6. That the said Schmuck thereupon called Moore Crane Service, talking with an employee of said company, and ordered a crane to be sent to Acca Yard to there work under the supervision of the R.F.&P. Railroad Company, the rental for which was to be billed to defendant.

7. That Moore Crane Service thereupon sent a truck mounted crane to Acca Yard and with it sent two of its, Moore Crane Service's, employees, namely: J. T. Dunbar, who operated the crane, and Alton E. Lawson, who operated the truck upon which said crane was mounted, where upon direction of the plaintiff, the same was placed in operation under the control and supervision of one Hubert Mayo, foreman employed by plaintiff.

8. That the said Hubert Mayo, then in the course of his employment, assumed supervision and control of the operation of said crane belonging to Moore Crane Service, and operated by its employees as aforesaid, directing said employees of Moore Crane Service as to the work to be performed, and giving the necessary signals to direct the crane operators in the performance thereof.

9. That in the course of said work being so performed under the control of said Mayo, the boom of the Moore Crane Service crane came inadvertently in contact with a high tension wire belonging to plaintiff, with the result that electrical burn injuries were sustained by two of page 36] plaintiff's work crew who were also engaged in the performance of the work, holding guy lines attached to the crane load and or portions of the load itself so as to steady the load and position it for lowering.

10. That from said accident one of said employees died and the other received serious burns.

11. That J. T. Dunbar and Alton E. Lawson were on the payroll of Moore Crane Service at the time of the mentioned accident, and not upon the payroll of either plaintiff or defendant.

12. That the rental charged by Moore Crane Service to defendant covering the said crane included the services of the said Dunbar and Lawson on a blanket rental basis of crane with operators, of $15.50 per hour.

13. That under the contract between plaintiff and defendant, Exhibit A, said equipment was to be paid for by plain-

tiff on a basis of actual rental cost to defendant plus 10%, plus actual cost of repairs paid for by defendant.

14. That plaintiff was at all material times aware that the crane was owned and operated by Moore Crane Service and not in any respect by defendant.

Defendant requests an affirmative response to the foregoing allegations, an admission of the truth of such of them as may be controverted by plaintiff, and an affirmative statement setting forth plaintiff's version of any such

page 37] facts as may be controverted or denied. Defendant also requests an admission as to the correctness of "Exhibit A" filed herewith, as a full and complete copy of the contract between the parties, and the filing of a full and complete copy of said contract if "Exhibit A" be not such copy.

By reason of all of which, but without waiving any other pleading or defense filed simultaneously herewith, defendant prays judgment that it has not liability or responsibility to plaintiff by reason of the matters and things alleged against it.

Respectfully,

HUGHES-KEEGAN, INCORPORATED
By Counsel

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EXHIBIT "A"

WITNESSETH:

That in consideration of the covenants and agreements herein contained to be performed by the parties hereto and of the payments hereinafter agreed to be paid, it is mutually agreed as follows:

The Contractor shall furnish all the materials, superintendence, labor, tools, equipment and transportation, and shall

execute, construct and finish in an expeditious, substantial and workmanlike manner to the satisfaction and acceptance of the Chief Engineer of the Company, such work for the Company or any work which the Company is obligated to do for the Richmond Terminal Railway Company or the Richmond Land Corporation on their properties, as it shall be called upon to do by the Chief Engineer of the Railroad Company, his authorized representative or representatives set out at the end of this contract. Such work shall be called for by (1) a proceed order or orders addressed to the Contractor, setting out a description of the work to be done under the terms of this contract, such proceed order or orders to become a part of this contract, and the work performed under said order or orders to be under the terms of this contract as hereinafter set forth, or (2) a unit price agreement addressed to the contractor setting out a description of the work to be done under the terms of this contract, such unit price agreement to become a part of this contract and the work performed under such unit price agreement to be under the term of this contract as hereinafter set forth.

In consideration of the completion of the work described herein and the fulfillment of all stipulations of this contract to the satisfaction and acceptance of the Chief Engineer of the Company, the Company shall pay to the Contractor (3) the complete cost of such work to the Contractor plus 10%, except for Contractor's equipment which shall be billed at an agreed rental (set out in Appendix A hereto attached as a part hereof) without percentage added; payment to made currently upon presentation of monthly bills or upon completion of each job within sixty (60) days from presentation of statement of account approved by the authorized representative of the Company for work performed under clause (1) above or (4) the amount set out in the unit price agreement as set out in clause (2) above; payment to be made

page 39] currently upon presentation of monthly bills or upon completion of each job within sixty (60) days from presentation of statement of account approved by the authorized representative of the Company.

Before doing any work under this contract, the Contractor shall secure and keep in effect until the entire work is completed and accepted the following items:

(a) All permits, licenses and authorizations of a temporary nature required by Federal, State, County or municipal authorities and assume payment of salaries and expenses of city and other public inspectors, policemen or officers which may be required in connection therewith. (Permits for permanent structures will be secured and paid for by the Company.)

(b) Fire and extended coverage insurance to cover such structures or stuctural material and supplies on hand and subject to damage as a result of fire or related perils in such amount as necessary to cover their value in the name of and payable to the Company for the benefit of the Contractor or the Company as the Chief Engineer of the Company shall find their interests may appear.

(c) Workmen's Compensation insurance covering employees of the Contractor or any subcontractor as required by law as the same may apply so that the Company shall be fully protected from any liability or claims for damages for personal injury, including death, which may arise while engaged upon the work covered by this contract.

(d) Comprehensive automobile and liability insurance, including Contractor's protective insurance, shall be carried by the Contractor with bodily injury limits of not less than $100,000 each person and $50,000 each accident and property damage limit of not less than $250,000 each accident. This insurance shall apply to bodily injury to Agents and employees of the Company and to damage to the property of the Company when caused by the negligence of the Contractor, its agents or employees.

Policies required in (d) shall be endorsed to cover the collapse and explosion hazard in addition to all other hazards unless endorsement be waived by the Chief Engineer.

All the policies must be written by reliable and well-rated companies acceptable to the Chief Engineer. The policies shall be so written that they protect both the Contractor and the Company against any action which may be instituted against either of them. All certificates of insurance shall be delivered to the Chief Engineer.

page 40] The Contractor shall indemnify and save harmless the Company from and against all losses and all claims, demands, payments, suits, actions, recoveries and judgments of every nature and description made, brought

or recovered against the Company by reason of any act or omission of the Contractor, his agents or employees, in the execution of the work or in guarding the same.

All material furnished and work done under this contract shall be subject to the inspection and supervision of the Chief Engineer of the Company or his duly authorized representative. The contractor shall keep and preserve full and accurate records of all work performed and of all materials, superintendence, labor, tools, equipment and transportation furnished in the execution of this contract, all of which records of the contractor shall be available at all times for examination and audit by the General Auditor of the Company and his representatives. Appendix A setting out the rates of rental to be paid on Contractor's equipment attached hereto may be revised at any time by agreement between the representatives of the Chief Engineer of the Company and the Contractor and such new rates shall become operative when attached to this contract as a revised Appendix A.

This agreement shall be and remain in effect for an initial period of one year from the date hereof, and unless terminated by either party on December 31, 1956, by written notice given to the other party at least ninety days prior thereto, it shall continue in effect after said initial period until terminated by either party by giving to the other at least ninety days' prior written notice.

RICHMOND, FREDERICKSBURG AND
POTOMAC RAILROAD COMPANY

By J. C. DeJARNETTE, JR.
Chief Engineer

Authorized Representatives:
L. B. CANN, JR.
Division Engineer
P. A. RICE
Real Estate and Industrial Engineer

HUGHES-KEEGAN, INC.

By W. R. SUTHERLAND, JR.
President

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Filed May 10 1963
Teste: LUTHER LIBBY, Clerk

REPLY TO SPECIAL PLEA OF DEFENDANT HUGHES-KEEGAN, INCORPORATED

Plaintiff for reply to the special plea filed by defendant Hughes-Keegan, Incorporated, says:

1. Plaintiff admits that Exhibit A is a correct copy of the contract dated January 1, 1956, between it and defendant Hughes-Keegan, Incorporated, but denies that Exhibit A contains all addenda and amendments thereto in effect on July 27, 1961.

2. Plaintiff denies the allegations of paragraph 2 of the special plea.

3. Plaintiff denies the allegations of paragraph 3 of the special plea.

4. Plaintiff denies the allegations of paragraph 4 of the special plea.

page 49] 5. Plaintiff admits the allegations of paragraph 5 of the special plea.

6. Plaintiff is without knowledge as to the allegations of paragraph 6 of the special plea and accordingly denies the same.

7. Plaintiff admits that Moore Crane Service sent a truck-mounted crane to Acca Yard and with it sent two of Moore's employees, J. T. Dunbar and Alton E. Lawson, but plaintiff denies the remaining allegations of paragraph 7 of the special plea.

8. Plaintiff denies the allegations of paragraph 8 of the special plea.

9. Plaintiff admits that the boom of the Moore Crane Service crane contacted an overhead high tension line injuring two of plaintiff's employees but denies the remaining allegations of paragraph 9 of the special plea.

10. Plaintiff admits the allegations of paragraph 10 of the special plea except that one employee died and the other received slight burns.

11. Plaintiff admits the allegations of paragraph 11 of the special plea.

12. Plaintiff is without information as to the allegations of paragraph 12 of the special plea and accordingly denies the same.

page 50] 13. Plaintiff denies the allegations of paragraph 13 of the special plea.

14. Plaintiff denies the allegations of paragraph 14 of the special plea.

15. Plaintiff except as aforesaid declines to make an affirmative statement setting forth plaintiff's version of any such facts as may be controverted or denied and, except as aforesaid, declines to admit the correctness of Exhibit A or to file a full and complete copy of the contract.

RICHMOND, FREDERICKSBURG &
POTOMAC RAILROAD COMPANY

By LEWIS T. BOOKER
Of Counsel

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Filed May 10 1963
Teste: LUTHER LIBBY, JR. Clerk

REPLY TO SPECIAL PLEA OF DEFENDANT FIDELITY AND CASUALTY COMPANY OF NEW YORK

Plaintiff for reply to the special plea filed by defendant Fidelity and Casualty Company of New York says:

1. Plaintiff adopts its reply to the special plea filed by defendant Hughes-Keegan, Incorporated.

2. Plaintiff denies the allegations of paragraph 2 of the special plea.

3. Plaintiff admits that Exhibit B is an insurance contract which contains some of the provisions of the policy of insur-

ance between defendants for the benefit of plaintiff but denies that Exhibit B contains all the provisions of the insurance contract for the benefit of plaintiff.

4. Plaintiff denies the allegations of paragraph 4 of the special plea.

page 52] WHEREFORE, having fully replied, plaintiff prays that the special plea be dismissed, with costs.

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY

By LEWIS T. BOOKER
Of Counsel

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Filed Nov 19 1963
Teste: LUTHER LIBBY, JR. Clerk

MOTION FOR JUDGMENT

1. By contract dated January 1, 1956, defendant Hughes-Keegan, Incorporated, agreed to perform whatever construction work plaintiff by its Chief Engineer or his duly authorized representative or representatives might call upon it to perform, and plaintiff agreed to pay for such work at the rate established in the contract.

2. At all times material to this action, and especially on July 27, 1961, the aforesaid contract between plaintiff and defendant Hughes-Keegan, Incorporated, was in full force and effect.

3. Defendant Hughes-Keegan, Incorporated, agreed in the contract, in part:

"The Contractor (defendant Hughes-Keegan, Incorporated) shall indemnify and save harmless the Company (plaintiff) from and against all losses and all claims, demands, pay-

ments, suits, actions, recoveries and judgments of every nature and description made, brought or recovered against the Company by reason of any act or omission of the Contractor, his agents or employees, in the execution of the work or in guarding the same."

page 55] 4. Defendant Hughes-Keegan, Incorporated, further agreed to obtain and maintain bodily injury and property damage insurance for plaintiff's benefit to insure the idemnification agreement set forth in paragraph 3 of this Motion for Judgment. Pursuant to such agreement, and for the benefit of plaintiff, defendant Hughes-Keegan, Incorporated, obtained from defendant The Fidelity and Casualty Company of New York an endorsement to the policy of insurance between defendants for the benefit of plaintiff, the endorsement being in full force and effect on July 27, 1961. The endorsement provides:

"CONTRACTUAL ENDORSEMENT # 1

"Agreement between Insured and R. F. & P. Railroad Company, Richmond Terminal Railway Company and Richmond Land Corporation.

The Contractor shall indemnify and save harmless the company from and against all losses and all claims, demands, payments, suits, actions, recoveries and judgments of every nature and description made, brought or recovered against the Company by reason of any act or ommission of the Contractor, his agents or employees, in the execution of the work or in guarding the same."

5. On or about July 27, 1961, pursuant to the aforesaid contract defendant Hughes-Keegan, Incorporated, was engaged in certain construction work in plaintiff's Acca Yard in Richmond, Virginia. In performance of this work it was necessary to move a railroad track panel through the Yard by means of a crane.

6. Defendant Hughes-Keegan, Incorporated, engaged Moore Crane Service, Inc., as its agent for the purpose, among other things, of moving the aforesaid railroad track panel.

7. In course of moving the aforesaid track panel on July 27, 1961, the agent of defendant Hughes-Keegan, Inc., caused

the crane to contact an overhead high tension
page 56] electric transmission line running through Acca Yard. As a result of such contact Earnest Wilson Winston and Otho Beasley, employees of plaintiff who were assisting in movement of the track panel were injured, and Winston subsequently died from his injuries.

8. Claims have been asserted against plaintiff on behalf of both Winston and Beasley pursuant to the Federal Employers' Liability Act, 45 U.S.C.A. § 51, *et seq.* Plaintiff, after having informed defendants of such claims, called upon both defendants to save it harmless in accordance with plaintiff's contract of January 1, 1956, with defendant Hughes-Keegan, Incorporated, and the insurance policy *indorsement* issued for plaintiff's benefit by defendant, The Fidelity and Casualty Company of New York. Defendants have failed, declined and refused to save plaintiff harmless, and as a consequence plaintiff has made a reasonable compromise settlement with Winston's estate in amount $11,500.00, and a reasonable compromise settlement with Beasley in amount of $7,000.00.

9. In addition to the aforesaid compromise settlements in amount $18,500.00 plaintiff has also incurred medical expenses in amount $332.92 and attorneys' fees and suit costs in amount $765.10 on account of the aforesaid injuries to Winston and Beasley.

WHEREFORE, plaintiff prays for judgment against defendants in amount $19,598.02, plus interest, costs, and reasonable attorneys' fees of this action.

RICHMOND, FREDERICKSBURG
& POTOMAC RAILROAD
COMPANY
By LEWIS T. BOOKER
R. COLSTON CHRISTIAN
Counsel

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Filed Nov 20 1963
Teste: LUTHER LIBBY, JR. Clerk

DEMURRER

The defendant, Fidelity & Casualty Company of New York, comes and says that the motion for judgment filed against it by the said plaintiff is insufficient in law and assigns grounds as follows:

1. Motion for judgment on its face discloses no contractual obligation of any kind on its part to anyone other than Hughes-Keegan, Incorporated.

2. The public policy of Virginia precludes the joinder of a liability insurance carrier with its insured in a direct action by an alleged injured person.

3. For other grounds apparent on the face of the pleading.

Respectfully,
FIDELITY & CASUALTY CO.
OF N.Y.
By Counsel

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page 64] LAW AND EQUITY COURT
OF THE
CITY OF RICHMOND

Richmond, Virginia
September 21, 1964

Lewis T. Booker, Esq.
Hunton, Williams, Gay, Powell & Gibson
Attorneys at Law
Electric Building
Richmond. Virginia 23212

Edward A. Marks, Jr., Esq.
Sands, Anderson, Marks & Clarke
Attorneys at Law
American Building
Richmond, Virginia 23219

re: *R. F. & P. R. R. Co.,*
v.
Hughes-Keegan et al

Gentlemen:

I thank you for your recent letters setting forth your respective views upon the issue raised by the demurrer of the defendant, The Fidelity and Casualty Company of New York, to the motion for judgment herein.

It seems to me that the obligation of this defendant under its Contractual Endorsement #1 is that of an insuror and that it may not be joined in this action. Demurrer would seem to be the proper method to raise this issue. Burk's Pl. & Pr., 4th ed., Sec. 72. An order sustaining it may be presented.

Yours very truly,
ROBERT LEWIS YOUNG

RLY:b

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ORDER

The court being of opinion, for the reasons stated in letter opinion dated September 21, 1964, that the demurrer of The Fidelity and Casualty Company of New York to the motion for judgment herein should be sustained, doth accordingly sustain the same, and doth dismiss the said The Fidelity and Casualty Company of New York as a party defendant hereto, but without prejudice to any right the plaintiff might have against the said The Fidelity and Casualty Company of New York, if and when the liability of Hughes-

Keegan, Incorporated, to the plaintiff has been determined, to which action of the court the plaintiff, by its attorney, excepted.

Enter
R.L.Y.
Judge, Law and Equity Court
City of Richmond
Sept. 29, 1964

We ask for this:
EDWARD A. MARKS, JR.
Counsel for The Fidelity & Casualty Co. of New York and Hughes, Keegan, Incorporated

Seen and excepted to:
LEWIS T. BOOKER
Counsel for the plaintiff

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page 71]

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VIRGINIA:
In the Law and Equity Court of the City of Richmond, the 27th day of July, 1965.

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ORDER

This day came again the parties, by counsel, and came also the jury sworn in this case pursuant to their adjournment on Friday, July 23, 1965, and having fully heard the plaintiff's evidence, the defendants, by counsel, moved the Court to strike the plaintiff's evidence and enter summary judgment in their favor, which motion the Court doth sustain, and the jury is altogether discharged from further consideration of this case.

Therefore, it is considered by the Court that the plaintiff recover nothing of the defendants, but that the defendants

recover of the plaintiff their costs by them about their defense in this behalf expended.

To all of which action of the Court the plaintiff, by counsel, objected and excepted.

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Filed Sep. 22, 1965.
Teste: LUTHER LIBBY, JR., Clerk

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

To Mr. Luther Libby, Jr., Clerk
Law and Equity Court of the City of Richmond
City Hall
Richmond, Virginia

Plaintiff notes an appeal from the judgment entered in this action on July 27, 1965, and hereby signifies its intention to file a petition for writ of error and *supersedeas* with the Clerk of the Supreme Court of Appeals or with one of the Justices of that Court within the time prescribed by law.

Plaintiff assigns as error:

1. Action of the trial court in sustaining the demurrer filed on behalf of defendant, The Fidelity and Casualty Company of New York, upon the ground that plaintiff is a third-party beneficiary of the contract between defend-
page 73] ants and as such is entitled to maintain its action directly against defendant The Fidelity and Casualty Company of New York.

2. Action of the trial court in sustaining the motion to strike plaintiff's evidence made by defendant Hughes-Keegan, Incorporated, upon the grounds that:

a. The court erroneously applied the principles of the loaned servant doctrine to this action.

b. Viewing the evidence before the court at the conclusion of plaintiff's case in the light most favorable to plaintiff, plaintiff was entitled to have the jury determine whether it was entitled to indemnification from defendant Hughes-Keegan, Incorporated.

c. The action of the trial court was contrary to the law and the evidence.

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY

By LEWIS T. BOOKER
Of Counsel

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page 3]

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L. B. CANN, JR.,

a witness called by and on behalf of the plaintiff, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Booker:

Q. Please state your name and address.

A. My name is L. B. Cann, Jr.; my home address is 5507 Kingsbury Road, Richmond, Virginia.

Q. Mr. Cann, by whom are you employed?

A. By the R. F. & P. Railroad Company.

Q. What is your position with the R.F.&P.?

A. My position is Chief Engineer.

Q. What are your duties as Chief Engineer?

A. As Chief Engineer I am responsible for the construction, maintenance, signalling and right-of-way of the R. F. & P.

page 4]

Q. When did you become Chief Engineer?

A. In November of 1957.

L. B. Cann, Jr.

Q. What had been your duties immediately prior to that?

A. I had been Division Engineer.

Q. And what Division were you in?

A. I was in the Richmond Division.

Q. What territory does that include?

A. There is only one Division Engineer, and that covers the road from Richmond to the Potomac River in Alexandria.

Q. Are you familiar with the contract which has been introduced in evidence as Plaintiff's Exhibit 1?

A. Yes, I am.

Q. Would you please keep your voice up so the jury can hear you, Mr. Cann? What is your connection with the contract?

A. I didn't negotiate that contract. It was negotiated by Mr. DeJarnette, who was the Chief Engineer just prior to me, and it's my duty to enforce the contract and to work by the contract.

Q. Are you a signatory to that contract?

page 5] A. Yes, sir. I was an authorizing representative as Division Engineer.

Mr. Booker: If Your Honor please, could the witness have the contract?

The Court: Surely.

By Mr. Booker:

Q. Will you please look at that contract and the attachments and tell us whether that is a contract that was in effect between the Railroad and Hughes-Keegan on July 27, 1961?

A. That is correct. This is the contract.

Q. What method is used to implement that contract from year to year?

A. We have what is known as an "Appendix A," which covers the rates of various pieces of equipment that is used. The reason for this contract in this manner is that we have a standard contract that is renewable each year; it goes from year to year unless cancelled by either party on ninety days' notice. But since the rates of equipment vary from year to

year and, as we all know that everything is going up, the rates go up from time to time and we negotiate or change these rates at various times. It's also used in order that if a piece of equipment is not on here and is necessary in the performance of the work, that we can

page 6] agree on a rate and then it can be added as just an amendment to the rates without having to go and negotiate an entirely new contract.

Q. What method, if any, is used for effectuating this contract from year to year?

A. What method?

Q. Yes.

A. Normally, unless there is some change desired by us, it just automatically becomes effective the next year.

Q. Does the Railroad give any notice to Hughes-Keegan each year about the contract or in relation to the contract?

A. Normally, Hughes-Keegan is very prompt about sending in insurance coverages as covered in the contract. We usually change our proceed orders — a proceed order is a separate piece of paper or a part of this contract to cover some specific job. At the beginning of the year we usually have three or found outstanding proceed orders, and we will number them, depending upon the year. If it was the year 1961, the first one would be 1-61, the next 2-61, the next 3-61. The types of proceed orders would be to furnish equipment we needed, for wrecks or emergencies, or as called for by the Chief Engineer or one of the authorized representatives.

page 7] Q. Now, Mr. Cann, I hand you a piece of paper and ask you whether you can identify it?

A. Yes, I can identify this. This is a proceed order that was issued on January 5, 1961, and it is No. 1 for the year of 1961, addressed to Hughes-Keegan, Incorporated, and it says, "Furnish trucks and trailers as requested by Engineer of Construction for assisting in various Maintenance of Way projects."

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Q. Was that a proceed order which governed the work being done at Acca Yards?

L. B. Cann, Jr.

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Q. Mr. Cann, is there any other proceed order other than that piece of paper which governs the work that was being done on July 27 —

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By The Court:

Q. Well, let's see. Was there any No. 2, 3, 4-61?

page 9] A. Yes, sir.

Q. And did any of them pertain more specifically to this job than this order?

A. This is the one we have always used.

Q. Well, explain this. What work do you think was embraced in that proceed order? Did you know you were going to move this track way back there, or did they issue a proceed order and then go on by word-of-mouth?

A. I'll try to explain it this way. The Hughes-Keegan Company have a large complement of equipment. They are a well equipped company with cranes and a certain amount of trucks, but occasionally they don't have sufficient trucks for our work and this is a way in which they can furnish them from some other source. They don't have a large tractor and trailer to move heavy equipment, and this is used —

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page 10] By The Court:

Q. Well, this is sort of an open-ended order, you would call it?

A. That's correct. It's an open order, for any type of equipment we may need. We have had them written where they are used for emergencies. This doesn't say "emergencies." For instance, if we have a bad wreck out on the

road at any time, Hughes-Keegan has blanket permission with the State Police that they can call up and get bulldozers and equipment to our work in a short length of time. Naturally —

Q. Did you have any specific work in mind when you issued this proceed order, or do you open the gate for the year's operation?

A. Open the gate for the year's operation for any type of equipment. You couldn't list on this list every piece of equipment we might want to rent.

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By Mr. Booker:

Q. What work was being done by the Railroad in the vicinity of where this accident occurred on July 27, 1961, Mr. Cann?

A. We had authority to build a large mechanical shop to repair diesel engines and it required certain tracks to be built in order for the engines to get in and out of the new facility.

Q. Pursuant to your agreement with Hughes-Keegan, what was the procedure that was followed if it was necessary to call upon them to furnish work or equipment?

A. When we needed a — I want to try to do it without a lot of, going into too much detail. Normally, when we had a project that Hughes-Keegan could handle, we would go over the work with Mr. Sutherland, their President.

Q. Who is Mr. Sutherland?

A. Mr. Sutherland, the President of Hughes-
page 12] Keegan.

Q. Is he the gentleman in court?

A. That's correct. And then it would be up to him to decide what type of equipment was needed to do the job. There were occasions when we needed equipment to do a special job we were involved in that he did not have the precise type of equipment to do it; it was necessary for him to go outside

of his organization and to rent a piece of equipment, as we may ask for.

By The Court:

Q. Well, this proceed order is kind of a fifth wheel, isn't it? I mean to say, weren't you really operating under your main contract, renewable from year to year? Why did you need this? Is this just Railroad procedure?

A. Accounting procedure, so that every time we wanted a piece of equipment we wouldn't have to go and issue a new one.

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By Mr. Booker:

Q. Mr. Cann, you were describing how you would make arrangements with Hughes-Keegan. Were you furnished from day to day by Hughes-Keegan a list of their equipment and where it was?

A. No, sir.

Q. So did you know at any given time what equipment they had available for your work?

A. No, I couldn't keep up with that.

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By The Court:

Q. In other years — this contract is dated back in 1956, and I take it it just went on from year to year.

page 14] Was it your custom to issue a sort of blanket proceed order from year to year, or in the earlier years did you issue a proceed order and describe the specific work?

A. We had blanket orders on types of work that came up every year. And I will state others, fighting of snow — in other words, you can't stop in the middle of the night and write up a proceed order to ask Hughes-Keegan to come

help you out of the snow. We also had them for wrecks. You can't go to get an administrative procedure, to write up one in an office, when you have got accidents on the road.

Q. You could do it later that day or the next day, but did you?

A. No, sir. We had blanket ones for about four jobs, road *crossingrepairs,* furnishing of equipment, emergencies, and snow fighting, I would say.

Q. And that would be your customary practice back in 1956?

A. Yes.

By Mr. Booker:

Q. Was the same language used in the Proceed Order No. 1 for the same year?

A. I couldn't testify to the exact wording each year it went through. It's written in the Engineer of

page 15] Construction office.

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By Mr. Booker:

Q. Despite the exact wording of that order, did Hughes-Keegan from January 1 of 1961 through July of 1961 furnish your equipment other than trucks and trailers?

A. Yes, sir.

Q. And did you pay for it?

A. Yes, sir.

Q. Did they submit a bill for it?

A. Yes, sir.

Q. Did they understand what it meant?

A. Yes, sir.

Q. Did you understand what it meant?

A. The bill showed the proceed order is what they furnished the equipment under.

Q. Had this been your custom in the past?

A. Yes, sir. It still is.

Q. It still is your custom?

page 16] A. Yes, sir.

L. B. Cann, Jr.

By The Court:

Q. The bill for the use of this crane on this occasion, was that billed under this order?

A. Yes, sir. It has it right on the face of it.

By Mr. Booker:

Q. Well, let's get to that. I hand you another piece of paper, a bill with several attachments on it and a cancelled check, and ask you whether you can identify it? Now do you recognize that, Mr. Cann?

A. Yes, sir.

Q. What is it?

A. It's the bill that covers the work that was done during the month of July, under this proceed order, and the date of it is August 10th. The bills usually come in around August 10th. It's addressed to the R. F. & P. Railroad Company by Hughes-Keegan. It says, "Furnish trucks and trailers as requested by Engineer of Construction for assisting in various Maintenance of Way projects," and then, "A. F. E. 9855, Proceed Order No. 1-61" and —

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By The Court:

Q. What did you tell us "A. F. E. 9855" stood for?

A. That is an additional expenditure for some capital improvement to the Railroad.

Q. That is an accounting identification?

A. Yes, sir.

By Mr. Booker:

Q. Mr. Cann, what kind of work is covered by that bill?

A. This, the face of this bill, shows a summary, what is chargeable to the job.

Q. Well, what kind of equipment is it?

A. Well, we have Moore Crane Service, two occasions; we have Garrett & Company for the rental of cranes; we have

Lockwood Brothers, rental of two cranes; and then there is one telephone bill in there for $1.20, I presume, to make a phone call to procure one of these pieces of equipment.

page 18] Q. How is that bill headed?

A. The bill is headed "Hughes-Keegan, Incorporated, General Contractors."

Q. No, beneath that?

A. Purpose is to "Furnish trucks and trailers as requested by Engineer of Construction for assisting in various Maintenance of Way projects."

Q. Are any trucks and trailers included in that bill?

A. I think four of these are cranes. There are no trailers included.

Q. What is the method of compensation for Hughes-Keegan for work that it does under the contract?

A. Well, under the contract, when the Hughes-Keegan employees are involved and are working. We pay for this labor and material and 10% profit on top of those two items.

Q. How does Hughes-Keegan bill you for work that is done by someone else?

A. They bill us for the actual cost of it, to them, of the piece of equipment, plus 10%, plus the insurance coverage.

Q. What is the insurance coverage?

A. The insurance coverage is a contractual insurance that is paid for by so much per hundred of the

page 19] amount of the bill.

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By Mr. Booker:

Q. Mr. Cann, did you have any contracts with people such as Moore Crane Service during this period of time, to do the same kind of work Hughes-Keegan did for you?

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A. No, sir, we did not have, in the Richmond area. We had a similar contract like this in the Washington area.

Q. Did the Railroad deal, then, with only one contractor for this type of work?

A. Yes.

Q. Who was that?

A. Hughes-Keegan Company.

Q. What was the purpose in doing that?

A. Hughes-Keegan had been working for the Railroad Company some 19 to 20 years. At one time they did a great volume of work and at times — it had been prior to my becoming Chief Engineer — times when we had rented, found it necessary to rent pieces of equipment. But in order to have one person to deal with, and rather than the Railroad having to deal with so many different people, particularly on these emergency cases and these large construction jobs. we handled it all with Hughes-Keegan in order that there would be one billing, would be one insurance coverage, would be one person we would be dealing with — so much more inviting and interesting way for the Railroad Company to handle it.

page 25] Q. Why was it more inviting and interesting to the Railroad?

A. Simply because it cut down on the amount of administrative work, and we were not familiar with all of the different contractors in the City and what equipment they had, where Hughes-Keegan, being a contractor they were more familiar with the people and were able to procure things we needed on short notice.

Q. If Hughes-Keegan had the equipment available but rented someone else's equipment, was that agreeable to the Railroad?

A. Yes, sir. There were cases when his equipment was tied up on projects and he wasn't able to furnish it on the short notice we may have given him and he sought equipment elsewhere.

Q. And to whom did you look to get this equipment when it was necessary?

A. It was normally done through their office, through the Hughes-Keegan office, and occasionally would be handled with Mr. Sutherland, the President, but more often through their office. In some cases we didn't handle it at all, they did it on their own, without notice. If they didn't have it and it was required, they they took it upon themselves to do it because the contract covers that and it's

page 26] all understood as to how it's to be handled.

Q. Assuming that you knew Hughes-Keegan had a piece of equipment and asked Hughes-Keegan to supply it, but if the equipment was tied up, would you necessarily know from day to day whether it would be Hughes-Keegan equipment or somebody else's equipment on the job?

A. We wouldn't know unless someone told us.

Q. And that was in the agreement that had worked over the years?

A. Yes.

Q. And was the Railroad satisfied with it?

A. Yes. The only difference — you asked a while ago — there was a set rate for Hughes-Keegan equipment that was outlined in Appendix A, which they billed us. On rented equipment there was a 10% override for handling the administrative end, handling the matter for us.

Q. On this particular bill for the work involved in question, what was the basis of the charge made by Moore Crane Service to Hughes-Keegan?

A. The basis for?

Q. Would you refer to the bill, please?

A. The basis was for, on the 27th, six and a half hours at $15.00 per hour, and on the next day we used it for a period of three hours at $15.00 per hour, making

page 27] a total of $147.25.

Q. What does "hours" in that sense mean?

A. It means hours that the work, that this equipment is assigned to Railroad Company work.

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By Mr. Booker:

Q. Is there anything unsual about this bill?

A. There is one item in this bill that is unusual.

Q. Please describe that.

A. That is with the Garrett Company, who furnishes cranes, similar to Moore. They furnished two cranes to lift a very large gantry crane inside our shop, 35-ton truck cranes, and Garrett & Company billed the Railroad Company direct. In other words, they by-passed the Hughes-Keegan Company.

Q. Did Hughes-Keegan complain to you about that?

A. Mr. Sutherland brought it to my attention.

Q. Who is that?

page 28] A. Mr. Sutherland, the President of Hughes-Keegan. He told me this had been done. I told him if it had, it had been an error. I told him on his bill for the month he could include it as equipment rented and he could subtract the amount paid by us directly to the Garrett & Company. It shows $655.42 is from the Garrett Company, which is added into the total, and then they added their 10% onto that because they handled the calling of it and arranging of it, and then we deducted the $655.42 on the end as a credit because it had already been paid.

Q. What difference did it make to Hughes-Keegan whether Garrett billed you directly or Hughes-Keegan billed you?

A. They would be cut out of 10% for handling. It wasn't fair.

Q. What do you mean by that?

A. Well, I mean the normal procedure was for the thing to be handled through them, and the agreement calls for them to have a 10% profit on handling this for us and it wasn't fair for Garrett to send it to us direct and cut them out of it.

Q. And once this was called to your attention, did you remedy the situation?

A. I did, the very same day.

page 29] Q. On July 27, 1961, were you in the vicinity of an accident which occurred in your North Acca Yards?

A. I was.

Q. How far were you from the actual scene of the accident?

A. I would say I was between 300 and 350 feet.

Q. Did you see the accident?

A. I didn't see the accident when it happened. I was down on a lower level, where there was another operation with another crane, putting in a large culvert pipe, and I was down talking with those men. At the time, I heard a loud noise, a dull boom, I guess you would call it, and I rushed up the bank to determine what had happened.

Q. What were the weather conditions that day?

A. Very clear, hot as the dickens.

Q. What did you see when you got up to the top of the culvert?

A. I saw a great deal of confusion. I saw two or three men that were on the ground. It appeared one of them, the clothing was on fire, and that they were trying to smother it out, and that another one was down with people giving him attention, and there was a great deal of running around and confusion, and which I tried to quiet down.

Q. Did you see any crane in the area?

page 30] A. Yes.

Q. And whose crane is it?

A. It was the Moore Company crane.

Q. Did you observe an electric power line in the area?

A. Yes, I did.

Q. Where was the crane in relation to the power line?

A. At that time it was within a few feet of it, exact distance, I would say, certainly within ten feet of it.

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page 33] By Mr. Booker:

Q. (Before the jury) Will you describe briefly what each scene shows?

A. This is Exhibit No. 4. It shows the area north of the shop. This is the Acca Yard with the tracks moving from north to south, from Washington. This is looking east. This is a floodlight. This is our crane that was in the process of putting this culvert pipe down on a lower line.

Q. Is there a power line in view there?

A. There are the Virginia Electric and Power Company's

110,000-volt lines, I believe. This is the —

Q. The number?

A. The number is 5. This shows a further back view, back away from it. It shows the prime mover that hauled the track panels to the location. This is various material laying around on the ground. It shows the general land lookout. Here is your power line tower up there. Here are your lines going across. This is another closeup view. This is No. 6. It shows our crane, the truck, the floodlights, shows the stakes on which these panel tracks — these are engineer's stakes put in previously, in which these panels had to be set at a specific spot in order for them to line up.

This is No. 7, which is a very close view of
page 34] the switch which was being moved. It was set on
these two stakes here. That is for the straight line. These two rails go this way. This is the turn-out, going that way to your left. It shows the same crane, same truck. This is the spot where the crane was working at the time of the accident.

* * * * *

By Mr. Booker:

Q. Mr. Cann, immediately after you got to the scene of the accident what did you do?

A. I found what the conditions were and how many men were involved that were apparently injured; I got into one of our Company trucks, smaller trucks, and rushed over to a telephone in the roundhouse and called the Tuckahoe Rescue Squad and told them to meet me at the corner of Broad Street and Commonwealth Avenue in order that I could lead them into this job, because in a construction job like that if you have somebody who can lead them right to the spot it would expedite their movement. I waited there on Broad Street for approximately ten to twelve minutes and led the
Rescue Squad to the scene of the accident.

page 35] Q. Were the men then taken away?

A. The men were taken. Mr. Winston, who was badly burned, was taken in the ambulance. Mr. Beasley, I believe, was taken in a private automobile to a Company doc-

tor because he had no outward appearance of any severe burns or anything.

Q. After the men had been sent away, what did you do next?

A. This was at lunch time and everybody was naturally very much upset and concerned. We talked about what had happened, and I think I left there for lunch. Sometime either during the lunch hour or shortly after the lunch hour I called the Hughes-Keegan Company to inform Mr. Sutherland of what had happened.

Q. Did you reach Mr. Sutherland?

A. I am not clear if I talked with him or left the message for him. My recollection is he was not in because he is out a good bit on construction work. In that case, I left word with his secretary as to what had happened, for him to get in touch with me by radio. I don't remember the details.

Q. Did Mr. Sutherland come that day?

A. I believe, later that day. If not, it was early in the morning.

page 36] Q. Did you ever notify Moore about the crane accident?

A. No, sir.

Q. Would you refer to the contract which is in evidence as Exhibit No. 1, sir?

A. Yes, sir.

Q. Are you familiar with the Appendix A's?

Mr. Marks: A's, revised, he is talking about.

By Mr. Booker:

Q. Looking at the revised Appendix of January 1, 1958, is there a typographical error in that with which you are familiar?

Mr. Marks: If there is a typographical error, it certainly is a matter that shows up on the face of this thing, and to ask this witness if there is one he is familiar with in there is certainly out of order.

The Court: I think it can be corrected, if it is an error. What are you referring to?

Mr. Booker: Last paragraph, Appendix A.

L. B. Cann, Jr.

By Mr. Booker:

Q. Would you tell us what it is?

A. There is a mistake in the last paragraph, on the last page, which reads, ". . . equipment not owned by
page 37] the contractor but rented by him for us," which should be "for use," because the original contract shows the word "use" was used in the original Appendix and when it was typed in the supplement they used "us" and left out the "e."

CROSS EXAMINATION

By Mr. Marks:

Q. Was Hughes-Keegan, Inc. building these track extensions that go into your yard or into your Railroad roundhouse for maintenance?

A. No.

Q. Were they putting them in place with a labor crew and superintendent, so forth, and under any contract with you at the time?

A. They were putting it in under a laboring crew and the superintendent of the Railroad crew, under this contract.

Q. Who was in charge of the work that was going on at the time?

A. The Division Engineer was the over-all superintendent at the time.

Q. Who was the Division Engineer?

A. Mr. G. W. Guinn.

page 38] Q. And who was in charge of the particular phase of the work when the accident happened?

A. Foreman H. M. Mayo.

Q. How many employees were working on the track panels in conjunction with these things in addition to H. M. Mayo?

A. Approximately nine.

Q. How many Hughes-Keegan employees were there at the time?

A. Were none.

Q. Who is Mr. Hayes?

A. Mr. Hayes is my assistant. At that time he was Engineer of Construction.

Q. Was it his duty to requisition equipment as it became needed for the construction work that was being performed by the Railroad on its own ground with its own forces?

A. Yes, sir.

Q. Now was there any Railroad crane equipment engaged in this particular work at or before the time this accident occurred in the moving of this track panel?

A. Yes, sir.

Q. What Railroad crane equipment was being used?

A. It was a Bucyrus Erie light-weight crane.

page 39] Q. And it was a fact, was it not, and you knew it to be a fact, either from personal observation or other sources, that these track panels had been moved from what you call a prime mover into a general area and stacked?

A. Yes, sir.

Q. And then it was necessary to take them off the pile and put them in the proper place on the ground?

A. Yes, sir.

Q. And that was being done by the railroad with its own forces?

A. Yes, sir, correct.

Q. You found in the process that the Railroad's crane couldn't handle these big sections by itself?

A. I am not familiar with that. That testimony could come from the foreman.

Q. But you do know that some need for a second crane was communicated to your office?

A. Yes, sir.

Q. And when that need was communicated did you handle the requisitioning of it or did Mr. Hayes handle it?

A. Mr. Hayes.

Q. And do you know to whom Mr. Hayes talked?

A. Normally would be with Mr. Schmuck, but I couldn't testify under oath that that is who he talked to.

page 40] Q. Do you know what Mr. Hayes was told?

A. No, sir.

Q. He didn't communicate it to you?

A. No, sir.

Q. All right, sir. Now when you stuck your head up above

the level of the culvert where you were working, where was the Railroad's crane?

A. The Railroad crane was back, approximately 150 feet back.

Q. Had you seen the Railroad's crane in use in the moving of the particular track panel that was involved in this accident earlier in the day?

A. Yes. They were in the process of using both cranes back on the stack.

Q. Now you did see that the Railroad's crane was hitched to one end of the panel and the Moore crane was hitched to the other end of the panel at some point in the proceeding?

A. Yes, sir.

Q. And did you not then see both cranes start off and move toward the ultimate location where this track panel was to go, under the direction of Mr. Mayo?

A. No, sir. I wasn't there. I went down on the lower level.

page 41] Q. All right, sir. Well, now, when you stuck your head up above ground, then, where was the track panel?

A. The track panel was, I would say, immediately where it was supposed to go by the stakes, the load had been set down on the ground and the crane was approximately ten feet off the line above, with the boom sitting up in the air.

Q. The track panel was on the ground?

A. I believe it was. I was looking at the men, as to the conditions of the men.

Q. You weren't paying particular attention at that time to anything but the men?

A. That's right.

Q. Mr. Cann, subsequently it's true, is it not, that your office made a rather substantial investigation of the fact with respect to how this accident happened?

A. We make out an accident investigation on any employees that are —

Q. Right. Let's go back again to other factors at this point. Was any proceed order issued requiring Hughes-Keegan to furnish material, superintendence, labor, tools and transportation in the performance of any work?

A. I would presume so. Without the benefit of what you are reading, I would presume. I don't have that
page 42] information in front of me.

The Court: You mean this job?

By Mr. Marks:

Q. I mean on this job. Was any proceed order issued requiring Hughes-Keegan to furnish material, to furnish superintendence, to furnish labor?

The Court: It would help him if you would tell him what you are reading from.

Mr. Marks: From the first paragraph of the main contract. He ought to be familiar with that.

A. To answer your question, I don't think so.

By Mr. Marks:

Q. Well, don't you know that none was issued?

A. I'll answer, to the best of my knowledge there was none issued.

Q. All right. Now isn't it also true that no unit price agreement addressed to the contractor setting out the description of any work was ever issued with respect to this particular job out there that you wanted Hughes-Keegan to do?

A. Repeat that question.

Q. I'll ask you, is it not also true that no unit price agreement was ever addressed to Hughes-Keegan setting out a description of any work to be done in and
page 43] about the refurbishing of your mechanical shop for these units at Acca Yard?

A. I don't believe there was any negotiation on price on the Moore crane. This crane was called for the night before, to be put there the next morning.

Q. And what were the instructions that were given if you know, as to what it was to do when it got there?

A. Report to the foreman in charge, or either Mr. —

Q. That was whom?

A. Mr. Mayo, or the Supervisor, J. R. Talbott.

Q. And after it got to or reported to the supervisor, what was it supposed to do?

L. B. Cann, Jr.

A. Perform the necessary work required of them.

Q. Under the direction and control of Mr. Talbott or Mr. Mayo, as the case may be?

A. Yes, sir.

Q. All right, sir. Who did the engineering under which this job at the North Acca Yards was being constructed?

A. Any number of engineers.

Q. Were they Railroad people?

A. The building was engineered by Armco Pipe Company; the structural work was done by another company; the track work was done by the Railroad employees.

page 44] Q. Did Hughes-Keegan do any work with respect to it at all?

A. No, sir.

Q. Were they called upon to do any work?

A. No.

Q. Who made the layout on the ground as to how these tracks and track panels should be set and run?

A. My survey party.

Q. Did you say "my survey party?"

A. The Railroad survey party.

Q. Did Hughes-Keegan have anything to do with that?

A. No, sir.

Q. Did Hughes-Keegan have any connection with this particular operation other than the request relayed, as you have said, by Mr. Hayes to send a crane out there to report to the scene and do what he said?

A. We gave them no instructions. Our only instructions were through the Hughes-Keegan office.

Q. Yes. I am asking you, was Hughes-Keegan instructed to do anything else with respect to this operation out there at any time other than to send this crane out?

A. No, sir.

Q. And when you requisitioned the crane, Mr. Hayes, as you understand it, whoever he talked to, told

page 45] them to have the crane report to Mr. Mayo or Talbott and follow the directions as employees?

A. That is correct.

Q. Now, Mr. Cann, Mr. Beasley, one of the injured parties, was an employee of the Railroad, was he not?

A. Yes, sir.

Q. How long had he worked for the Railroad?

A. A good many years. I assume his service would go back at least 35, 38 years.

Q. All right. Now Mr. Winston, the other employee who was injured in this accident, was another employee, was he not?

A. Yes, sir.

Q. How long had he worked for theRailroad?

A. I would say at least 25 to 30 years' service.

Q. Well, let's go to Mr. Mayo. He occupied what status?

A. He was foreman of the men of this particular project.

Q. All right. Was he a Railroad employee?

A. Yes, sir.

Q. How long had he been with the Railroad?

A. Not knowing exactly, I would say 35 to 40 years.

page 46] Q. You mentioned Mr. Talbott?

A. Yes, sir.

Q. What is his position?

A. Supervisor of Track.

Q. He was above Mr. Mayo in the chain of command?

A. Yes, sir.

Q. How long had he been with the Railroad?

A. About eight to nine years.

Q. Who are Harry Minor and LeRoy Monroe; are they Railroad employees?

A. Yes, sir, laborers.

Q. Were they working under Mr. Mayo at the time of the accident?

A. Yes, sir.

Q. Do you know what they were doing?

A. They were assisting in steadying the load and building the track, connecting it, putting in the bolts and tightening it, whatever was normal for that type of work.

Q. What were Mr. Winston and Mr. Beasley doing?

A. At the time of the accident?

Q. Yes, sir.

A. I believe Mr. Winston had hold of a rope that was holding onto it to guide the panel as it was lowered. Mr.

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Beasley, I believe, had his hands holding onto two
page 47] of the ties, or steadying two of these.

Q. Mr. Mayo was what?

A. He was there directing the work.

Q. Telling everybody what to do?

A. I couldn't tell you. You would have to ask him.

Q. What was Mr. Talbott doing?

A. He wasn't there at the time. There was a large area of work going on. He was working, I would say, less than a quarter mile away. He was in his truck.

Q. So he had left Mr. Mayo during this particular function and had gone off and was looking at something else?

A. That's correct.

Q. Just as you had gone off to examine something down at the culvert?

A. I wouldn't say "just as."

Q. But the same idea?

A. Yes.

Q. Who was the senior Railroad employee on the scene at the time this accident occurred? I am talking about right there.

A. Mr. Mayo.

Q. And when we say "senior," do you mean senior in authority or point of time of service?

A. I mean senior in authority.

page 48] Q. And you agree?

A. I agree.

Q. What, if anything, Mr. Cann, do you say brings the furnishing of the rental crane under the terms of ". . . furnish all the materials, superintendence, labor, tools, equipment and transportation, and shall execute, construct and finish in an expeditious, substantial and workmanlike manner to the satisfaction and acceptance of the Chief Engineer of the Company, such work for the Company or any work which the Company is obligated to do for the Richmond Terminal Railway Company or the Richmond Land Corporation on their properties, as it shall be called upon to do by the Chief Engineer of the Railroad Company . . ." I read from the language of the contract. I say, what do you contend Hughes-Keegan

was doing that comes within that language at the time of the accident?

Mr. Booker: Could the witness have the contract to look at?

A. Whereabouts did you read?

By Mr. Marks:

Q. Front of the contract, paragraph 1, and I rephrase the question. I'll try to ask it substantially as I did before. What do you contend that Hughes-Keegan was doing through the furnishing of this rental crane to bring it within the language of the contract, which says,

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"The Contractor shall furnish all the materials, superintendence, labor, tools, equipment and transportation, and shall execute, construct and finish in an expeditious, substantial and workmanlike manner to the satisfaction and acceptance of the Chief Engineer of the Company, such work for the Company or any work which the Company is obligated to do for the Richmond Terminal Railway Company or the Richmond Land Corporation on their properties, as it shall be called upon to do by the Chief Engineer of the Railroad Company, his authorized representative or representatives set out at the end of this contract?"

A. Furnishing of equipment only.

Q. All right, sir. And under what order or proceed orders do you say that this crane and its operators were required to be furnished?

A. Under Proceed Order 1.

Q. Isn't it a fact when Mr. Hayes called Hughes-Keegan for this he told him to charge it to the Railroad under Proceed Order 1?

A. You will have to ask Mr. Hayes that.

Q. Wasn't it the standing instruction of the Railroad that this kind of thing should be charged under Proceed Order No. 1?

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A. The rental of the crane?

Q. Yes, sir.

A. Yes, sir.

Q. And that applied whether it was Hughes-Keegan's crane or whether it was somebody else's crane?

A. That's correct.

Q. All right, sir. Now what work was performed under clause (1), if you will look at the second paragraph of your main overall contract, as you see it?

A. Be more specific.

Q. Well, it says you are going to pay ". . . within 60 days from presentation of statement of account approved by the authorized representative of the Company for work performed under clause (1) above."

I am asking you what was performed under "clause (1) above?"

A. Furnish the equipment.

Q. That is work?

A. Well, it takes work to get it there.

Q. All right. Now, Mr. Cann, what act or omission of Hughes-Keegan do you say occurred that caused any claim or demand of loss to the Railroad?

Mr. Booker: That is the ultimate issue in the law suit.

page 51] The Court: The witness doesn't have to interpret the contract. I will sustain the objection.

By Mr. Marks:

Q. All right, sir. Let's get back to new Appendix A. That was sent to the contractor, was it not, by the Railroad, under date of December 27, 1957?

A. Yes, sir.

Q. In a letter signed by yourself?

A. Yes, sir.

Q. Will you read the letter to the members of the jury?

A. "There is enclosed herewith for your information a new Appendix "A" to be substituted as of January 1, 1958, for the rates shown in the existing Appendix "A" which is hereby cancelled. Please attach this to your copy of the contract and bill at these rates after January 1, 1958."

Q. All right, sir. And the Appendix A that is attached thereto, thereupon superseded in every way the old Appendix A, is that correct?

A. It should.

Q. And is it not true that this Appendix A is the Appendix under which anything was being done on July 27, 1961?

page 52] A. With Hughes-Keegan's equipment only, these rates.

Q. Oh. All right, sir. Well, then, if that is so, where do we come into this clause for "equipment not owned by Contractor but rented by him for use on Railroad work authorized by Railroad's Authorized Representative, will be paid for at rental cost to Contractor plus 10%, plus actual cost of repairs paid for by Contractor?"

A. Where did you get that from? I mean, what document is that language in?

Q. It's in Appendix A. If this is applicable to only Hughes-Keegan equipment?

A. The rates are applicable to Hughes-Keegan's equipment.

Q. But isn't this language I just read a part of Appendix A?

A. Absolutely, yes, sir.

Q. And isn't this language I just read set out by the Railroad with definite instructions to supersede old Appendix A with it and use this new Appendix A thereafter?

A. Yes. But this distinction between the two, between Hughes-Keegan's equipment and rental equipment, Hughes-Keegan doesn't get a 10% override over these

page 53] rates, but he does get it on the rates of equipment he rents.

Q. All right. Now so you do contemplate there will be rental equipment furnished?

A. Yes, sir. We have been doing it.

Q. And you do contemplate that Hughes-Keegan is going to furnish it for you at your request?

A. And had been very prompt in doing so.

Q. I see. And now let's get to this Garrett & Company business. Do you know whether or not the Garrett & Company cranes that formed the subject matter of this purported adjustment of the billing were ordered direct from Garrett & Company by Mr. Hayes or your organization or how they were ordered?

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A. Best of my knowledge, they were ordered through Hughes-Keegan's office.

Q. I see. Well, how did you happen to pay Garrett & Company direct for them?

A. I told you that was an error, sir.

Q. Well, were you at the time accustomed to receiving bills from other contractors in this area for equipment?

A. No, sir.

Q. How did it happen that your Accounting Department then did not say, "We don't owe Garrett & Company," and catch the error before it went through, if you weren't accustomed to it?

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A. When they saw my name on there they didn't question it.

Q. Why did you sign it?

A. I had made an error.

Q. But you knew you didn't rent anything from Moore Crane Service, according to the way you tell it?

A. That's right.

Q. Now you did know you had rented something from Hughes-Keegan?

A. That I had rented something from Hughes-Keegan?

The Court: After it was brought to your attention?

By Mr. Marks:

Q. After it was brought to your attention?

A. Yes, sir.

Q. And was there any difference by which you rented the Garrett & Company equipment from Hughes-Keegan and by which you rented the Moore's Crane Service from Hughes-Keegan?

A. No difference, other than it was billed and paid.

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Q. All right. Now, Mr. Cann, is there any formal report that is required by the Railroad or by your office or people in that capacity, in the event of injuries of this kind occurring on work done?

A. Yes, sir, a telegraphic message.

Q. Is there any form that is required to be filled out by you, or would some other office —

A. The first step is a telegraphic message, to put various Officers of the Company on notice that an accident has occurred, and then a formal investigation of the accident is conducted by the immediate supervisor of the job.

Q. In that case this is you?

A. Oh, no.

Q. Who is it in this case?

A. Mr. Talbott.

Q. Where does Form 345 fit into the picture?

A. Into the overall investigation of the accident, along with the statements.

Q. Was 345 filled out and filed with this case?

A. I would certainly think so.

Q. I ask you to take a look at this paper and ask you whether or not you recognize it as being Mr. Talbott's 345?

page 56] A. This is Mr. Talbott's signature, to the best of my knowledge.

Q. Is that a 345?

A. That is a 345.

Q. What is its title?

A. "Personal Injury Report, Non-Train Accident."

Q. And will you tell us what, if anything, that report shows with respect to the date of the accident, as covered thereby?

A. It says July 27, 1961, at 11:40 a.m.

Q. All right, sir. And does it say where it happened?

A. Acca Engine Terminal.

Q. Does it say who was hurt?

A. It says Winston, Earnest Wilson Winston and Otho Beasley.

Q. Does it say who was in charge of the work at the time this accident occurred?

A. Well, I haven't read it.

Q. I call it to your attention.

A. "Name and address of Foreman in charge of work: H. M. Mayo, 512 Princess Elizabeth Street, Fredericksburg."

Q. What does it say?

page 57] A. It says, "While moving panel with derrick in connection with constructing track for consolidated shops, Acca Engine Terminal, cable on

boom of derrick hit VEPCO high tension line causing Beasley to sustain an electric shock, knocking him to ground."

Mr. Marks: I offer that in evidence.
Mr. Booker: No objection.
The Court: That will be Defendant's No. 1.

(Personal Injury Report, Form 345, was marked as Defendant's Exhibit No. 1 and received in evidence.)

By Mr. Marks:

Q. I am going to ask you to look at a Form MW-18 and identify it, if you will.

A. This is a form of labor distribution, materials, for the date of July 27, 1961, for the *RL&B* Force, and it's got three charges.

Q. Do any of the three charges pertain to the work that was in progress at the time the accident occurred?

A. I think all three do.

Q. All three do?

A. It's retiring A.F.E., hauling material to the new construction, 18 hours, building switches for new construction, 85 hours.

page 58] Q. What is "retiring?"

A. That means taking it up, we have done away with it, we are through with it.

Q. And this is Mr. Mayo's Labor Force Distribution Report for the day of the accident?

A. Yes, sir.

Q. All right. Now you say all of it pertains to the particular job we are talking about?

A. Yes, sir.

Q. Well, were they taking up any track in connection with the moving of these track panels?

A. These track panels had been piled in an area.

Q. What I am getting at, were they retiring any track, in the sense that you say the word is used, at the location where this accident occurred?

A. I will have to get into a very complicated accounting procedure to explain all this, but a certain portion of the moving of the panels is chargeable to the retirement A.F.E.

A proportion of it that is actually put down in services is charged to construction. You have to put the hours in I.C.C. and Accounting.

Q. You say it does apply to it?

A. Yes.

Mr. Marks: We offer it in evidence.

page 59] Mr. Booker: No objection.

The Court: That will be Defendant's No. 2.

(Labor Force Distribution Report for July 27, 1961 was marked as Defendant's Exhibit No. 2 and received in evidence.)

By Mr. Marks:

Q. Now, Mr. Cann, I will ask you to identify a letter of August 21, 1962, apparently bearing your signature, and apparently on the stationery of your office, and adressed to Mr. W. V. Franck, Jr., and marked as received in the Traffic Department on August 22, 1962, with certain attachments which are mentioned as having been enclosed.

Would you look at those and see whether those are part of the investigation that was conducted under the auspices of your office and transmitted through channels?

A. Yes, sir. This is the statement of Mr. H. M. Mayo, page 1 and 2. That was done on August 1st, 1961. This is a Foreman's Safety Notice that is put out by him as Foreman. This was a supplemental statement by Mr. Mayo, taken August 17.

Q. All right. What is the date on the Safety Notice you are talking about?

A. August 1, 1961. These were in the initial

page 60] investigation by Mr. Talbott. Apparently, when it was reviewed by either my office or in the President's office there were other additional questions that were requested and a supplemental statement was asked for, dated August 17.

Q. All right, sir. And were these the enclosures with your letter to Mr. Franck on August 21?

A. Yes, sir. This is Mr. James I. Bruce, which was taken on July 25, 1962, and when the investigation was reviewed

by claims people, beyond my office, it was noted there was no statement taken from James I. Bruce, the other operator of the crane who, of course, wasn't involved at the time the accident happened.

Q. You are talking about the operator of the Railroad's crane?

A. That's right.

Q. Not the operator of the other?

A. The Railroad's crane operator. And these were transmitted. I don't believe these were all transmitted at the same time, however.

Q. Doesn't it say so in the letter?

A. Well, there may be still another statement, third statement from Mr. Mayo. But these were August of 1961. This was August 17 of 1962. These were July.

Q. This one was July 25, 1962?

page 61] A. Yes, sir. And these two probably went together, but this is the original investigation taken.

Q. Yes, sir. All I am asking you is, isn't it true all of this stuff was sent to Mr. Franck with your letter of August 21, 1962?

A. I don't believe this was.

Q. What is "this?"

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GEORGE P. HAYES, JR.,

a witness called by and on behalf of the plaintiff, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Booker:

Q. Please state your name and address.

A. George P. Hayes, Jr.; 4626 Arrowhead Road, Richmond, Virginia, 23225.

Q. By whom are you employed, Mr. Hayes?

A. Richmond, Fredericksburg and Potomac Railroad Company.

Q. What is your position?

A. Assistant Chief Engineer, Construction.

page 64] Q. What is your relationship to Mr. L. B. Cann, Jr.?

A. His assistant.

Q. Were you employed by the R. F. & P. in July of 1961?

A. Yes, sir.

Q. What was your position then?

A. Engineer of Construction.

Q. As such, did you have occasion from time to time to contact Hughes-Keegan within the scope of your duties?

A. Yes, sir.

Q. What would be the general nature of your conversations with Hughes-Keegan at that time?

A. You mean in 1961?

Q. Yes.

A. Well, call them on the phone and ask Mr. Schmuck for equipment, whatever we needed, or write proceed orders for jobs that we had for them to do.

Q. Thinking back to July of 1961, do you recall any telephone conversation you may have had with Mr. Schmuck about a crane for work being done at the North Acca Yards in connection with the new diesel shops?

page 65] A. Oh, sure. I ordered two cranes for use in the construction of the diesel shop, for setting the bridge crane out there in the shop, and it's quite possible that I ordered the crane for the track work. I mean, that originated in my office.

Q. Was that part of your duties?

A. That's right, yes.

Q. Do you recall at this time any specific conversation you had with Mr. Schmuck about the crane needed for the track work?

A. Oh, I don't believe I could recall any specific conversation, which would probably say something to the effect that we wanted a certain capacity crane to report to a certain area at 7:00 o'clock in the morning, something like that. I

mean, I couldn't — I don't think I could recall any particular conversation.

Q. Do you have any knowledge of the accident that is an issue in this law suit except what you heard from other people?

A. No. I wasn't there.

The Court: I expect this is already in evidence. I wish Mr. Hayes would tell us again who Mr. Schmuck is.

By Mr. Booker:

Q. Who is Mr. Schmuck?

page 66] A. Mr. Schmuck is, or he was at that time, the Office Manager for Hughes-Keegan.

Q. Are you familiar with the proceed orders issued to Hughes-Keegan by the Railroad, that were issued about that time?

A. Yes. At that time those proceed orders were issued out of my office as the, well, not the Contracting Officer, but the Officer that issues the work orders, and any job that we had to do, Hughes-Keegan, of course, had an annual contract, and any work that we had for them to do, we just issue a proceed order for them to go ahead and do it.

Q. Was there a general proceed order for each year?

A. No. There were proceed orders issued at the beginning of each year, numbers 1 to 4, I believe, that were standard proceed orders. For instance, I think No. 1 was for equipment or trucks, or as called for by the Division Engineer. No. 2 was, I think, for assistance in snow and ice removal. No. 3 — well, 3, I don't know whether 3 was for clearing wrecks at that time or not. No. 4 was — well, let's see. I have got copies of them. There were four general ones issued at the beginning of each year, and then any other par-

page 67] ticular job had a separate proceed order number.

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By Mr. Booker:

Q. Mr. Hayes, do you recognize Exhibit No. 2?

A. Yes.

Q. How do you recognize it?

A. Well, my signature is on there, to start with.

Q. What is that?

A. Oh, it's Proceed Order No. 1 that was issued at the beginning of January each year. This covers the furnishing of trucks and trailers as requested by the Engineer of Construction for assisting in various Maintenance of Way projects.

Q. And what contract is that issued pursuant to?

A. I believe the last contract was dated 1 January 1956.

Q. Between whom?

A. Between the R. F. P. and Hughes-Keegan.

Q. Was the same proceed order as you have in your hand as Exhibit 2 issued each year under that contract?

A. Yes, as long as I was issuing them. In 1962 they went over to another individual, I mean, this page 68] type of work.

Q. Well, directing your attention to the period of time between 1956 and 1961, was that same proceed order issued the first of each year?

A. As far as I know. I started issuing them when I came there in 1958. That was the first year that I had authority to put them out the first year.

Q. Well, they are the same all through, from 1958 through the one you hold in your hand?

A. That's right.

Mr. Booker: No further questions.

CROSS EXAMINATION

By Mr. Marks:

Q. Mr. Hayes, you say this proceed order covered furnishing trucks and trailers as requested by Engineer of Construction for assistance in various Maintenance of Way projects?

A. Yes, sir. That is the way it's written. Of course, we did from time to time — well, we got other equipment.

Q. And for convenience in accounting in your office, all of

the charges are under this proceed order?

page 69] A. Yes, sir.

Q. Now was any special proceed order issued to take care of any portion of the work that was in progress in July of 1961 out there when you were setting up your new mechanical shop?

A. No. There wasn't any other proceed order issued at that time. As a matter of fact, as I recall it, the two cranes that I asked Mr. Schmuck to get me for setting the 120-ton bridge crane, I ordered right on that same proceed order.

Q. I see.

A. I mean, I didn't refer to the proceed order as such, I just said, "Send me two No. 35-ton cranes."

Q. Now do you have any distinct recollection of any kind as to who you talked with in the organization of Hughes-Keegan at the time the crane for the track work was ordered?

A. I believe I only talk to Mr. Schmuck at the time. As far as I know, it was Mr. Schmuck, because every time I called up I got him. He was the office man and he was the only one in it.

Q. Did you ever hear of a man named "Woodle?"

A. Woodle?

Q. W-o-o-d-l-e, I guess.

page 70] A. I don't recall the name at all now.

Q. Would it surprise you to know Mr. Schmuck was on duty with the Reserves on July 27, 1961 and away from Richmond?

A. It probably would.

Q. Well, if he was away at camp, you couldn't very well have passed the word to him?

A. I agree with you. If he was away at camp, couldn't have been Schmuck. But Schmuck was the man we talked to all the time, and 1961 is a long way for me to remember back.

Q. Now, Mr. Hayes, do you recall what you told whoever it was you did talk to?

A. Well, probably not word for word, sir, but —

Q. Substantially?

A. I would guess I probably said something like this, that we needed at least a 35-ton capacity crane with probably a 40

to 45-foot boom to handle panel switches, and it should report to Acca Engine Terminal area at probably 700 hours or 7:00 o'clock the following morning, or whenever they were to be there. That was the normal way.

Q. Would you tell them who they were to report to?

A. Well, I wouldn't do that, no, because whoever was going to be there with the crane would be looking for it.

page 71] In other words, they would just tell my office, and if it was me that called — and I am not just too sure I called, it could have been my secretary — but she would call, also, and tell the crane to report out there and she wouldn't know who it was to report to, but she would know where to tell the crane to go, and whoever was going to use it would be looking for it.

Q. Now when you say "whoever was going to use it would be looking for it," you mean whoever in the Railroad's construction outfit that had requisitioned it would be looking for it and would be ready to tell the people who came with it what to do with it?

A. Well, yes, because it would be somebody from the Railroad that would call me and ask for it, had called the office.

Q. So you knew when you ordered it, then, it was going out there and it was going to report to a foreman or superintendent of some kind in the employ of the Railroad and follow his instructions as to the work it was going to perform?

A. Well, I knew it was going to work out there. Just who it was going to report to, I wouldn't know, I mean, somebody on the job.

Q. Well, you knew at the time there were no

page 72] Hughes-Keegan people out there on the job, didn't you?

A. That's right, there wasn't.

Q. They weren't doing any of the work, were they?

A. No, they weren't doing any of our work, they were furnishing equipment from time to time.

Q. And that is all?

A. Right.

Q. And their equipment was sent out there and it worked under the instructions of your supervisory personnel?

George P. Hayes, Jr.

A. That's true.

Q. And you told them when to come?

A. We told them, yes, we told them the starting hour because we wanted to coincide with the starting hour.

Q. And you told them when you were through with them?

A. That's right.

Q. And you told them when to knock off for lunch?

A. That wasn't in my bailiwick. I suppose somebody out there would. All I would tell them would be the time to report, or my office.

Q. I see. All right. Now did you ever get out on the job yourself?

A. I had supervision of the shop that's out there. I have nothing to do with track and signal work on
page 73] the R. F. & P. I have got General Construction and Survey work and all such things as that, but I do not have anything to do with track and signal work. It's beyond me.

Q. Did your crew handle the survey work necessary to locate these tracks and track sections and put in the stakes?

A. No. That doesn't all come under the one grouping. We did stake out the track locations and those were staked out probably three weeks before the tracks ever were put down. The tracks were taken up in panels at another location, brought over and set off in the new location in panels. Our man, from my office, staked the center line of track, probably two to three weeks before the tracks were moved.

Q. Hughes-Keegan wasn't doing any engineering down there in running the panels?

A. No, no engineering at all.

Q. And they were not furnishing the materials for the job?

A. No.

Q. Weren't furnishing any superintendents for this job?

A. No.

page 74] Q. They weren't furnishing any tools, were they?

A. I would rather expect not. As far as I am personally concerned, the only thing I know of is the three cranes, two that I used, setting the gantry crane in the shop and the

one that the track forces used.

Q. And there was R. F. & P. equipment being used in the work area, along with this other stuff, wasn't there?

A. Oh, yes. Our 2227 was out there on the track that I know of, and we had some R. F. & P. equipment up in the shop I know of.

Q. And you had some prime movers out there, hauling the stuff from one location to another?

A. That's right.

Q. And you had your own Construction Superintendent in charge of the job?

A. No, sir.

Q. Who was in charge of the job?

A. Well, are you talking about the whole job now or just the track job?

Q. The whole remodeling job of Acca Yard.

A. Of course, it was under the jurisdiction of the Chief Engineer and I had the shop itself and the environs. The Track Supervisor at the time had the track work.

Q. Is that Mr. Talbott?

page 75] A. That was John Talbott, that's correct.

Q. Go ahead.

A. And that was the two of us.

Q. And you had a crew of laboring men and foremen working under your supervision?

A. Well, yes, I had our bridge and building people up there and I had Armco erecting the steel, and I had the contract electrician doing conduit work at this particular time.

Q. All right. Now Talbott had a crew of Railroad employees and some foremen and other people out there on track work, didn't he?

A. He had his own track forces, yes, sir, but he had nothing to do with the shop and I had nothing to do with his work.

Q. Except to write an order or to make a call to rent a crane?

A. Well, yes. All of the orders, I was the only one authorized to counter-sign all of the orders. John Talbott was not authorized to counter-sign.

Q. If Talbott decided he needed an extra piece of equipment the Railroad doesn't have he calls you?

George P. Hayes, Jr.

A. Calls my office.

Q. Or has some one of his men call you?

page 76] A. Yes, sir.

Q. Says, "We need thus-and-so?"

A. That's correct.

Q. If you look it over and decide he needs thus-and-so—

A. I don't question him, sir.

Q. You then order?

A. Yes, sir.

Q. All right. Now when you first started testifying, sir, I believe you said there were proceed orders normally issued for any work that Hughes-Keegan was going to be called on to perform, is that right?

A. You mean other than the four that I mentioned?

Q. Yes, sir.

A. That's correct. In other words, a separate job, first, a job that would not pertain to those first four.

Q. All right. You started at one point to give us what the first four formal, general orders were.

A. Yearly.

Q. All right. You say you have them there in your file?

A. I think I have got a copy of them here, sir.

Q. All right. Well, tell us what the first four

page 77] general, initial annual orders were.

A. Well, No. 1, and that is 1-61, that is for the year 1961, "Furnish trucks and trailers as requested by Engineer of Construction for assisting in various Maintenance of Way projects."

No. 2 is, "Repair road crossings at various locations." That is between here and Fredericksburg, as far as that is concerned, when we need to repair these macadam road crossings. That was a general proceed order that was issued in January of each year, and then we would just call the office and tell them the road crossing at so-and-so needed repair and they would go ahead.

Q. And charge it to No. 2?

A. That's right.

Q. All right. What was No. 3?

A. To furnish the necessary equipment, men and materials to remove adequately snow and ice from the tracks, plat-

forms, driveways, walkways, etc., in the Richmond area of the Richmond Terminal Railway Company during the year 1961.

Q. All right, sir. What is No. 4?

A. No. 4, "Furnish the necessary men, material and equipment to clear wrecks at any point on the main line of the R. F. & P. Railroad."

page 78] Q. All right. There is nothing in any one of those four that has any reference to or bearing on the job or work out at Acca Yard on July 27, is there?

A. Not by name, no, sir.

Q. Nor by designation of what —

A. You mean those four?

Q. Yes.

A. Oh, no. Well, only the furnishing of the equipment. That would.

Q. Well, now, the equipment, it says, "Furnish trucks and trailers," doesn't it?

A. That's right.

Q. But when you call for it you tell them to charge the crane under trucks and trailers?

A. We tell them to charge it — well, it comes in billed — no, it doesn't come billed as "trucks and trailers," it comes billed as "crane" or "jack hammer," whatever we want. But it's all under Proceed Order No. 1. There is no money value on Proceed Order No. 1, it's just an authorization permitting us to get the equipment.

Q. I see. It's an authorization permitting you to get the equipment, and whose, you say?

A. The Railroad.

page 79] Q. In other words, Mr. Cann, as Chief Engineer, authorizes the Railroad to procure this equipment, is that correct, by virtue of Proceed Order No. 1, is that what you mean?

The Court: Rent it. He doesn't mean buy it.

The Witness: No, it's all rental equipment.

By Mr. Marks:

Q. I say, this is authorization from Mr. Cann, as Chief

Engineer, for the Railroad to rent such equipment as it may need?

A. That's right.

Q. During the course of 1961 from Hughes-Keegan?

A. That's right.

Q. And that is all it is?

A. That's right.

Q. Now, Mr. Hayes, you have a stack of these proceed orders, I take it, signed by Mr. Cann in the blank, and then they are authenticated and authorized by you, is that correct?

A. No, sir, just the reverse. I have got a pad of blanks in my office and I make it out in full and I counter-sign it and send it down to Mr. Cann. If he sees fit to get it, he signs it, but there are as many come back as go out.

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HUBERT M. MAYO,

a witness called by and on behalf of the plaintiff, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Booker:

Q. Mr. Mayo, please state your name and address.

A. Hubert Melvin Mayo; 512 Pennsylvania Street, Fredericksburg.

Q. Would you keep your voice up and speak slowly and distinctly so the jury can hear what you are saying?

A. Yes, sir.

Q. By whom are you employed?

page 81] A. R. F. & P. Railroad.

Q. How long have you been employed by the Railroad?

A. About 37 years.

Q. What is your present position with the Railroad?

A. Foreman for Maintenance of Way Department.

Q. On July 27, 1961, did you hold the same position?

A. Yes, sir.

Q. Where were you working on July 27, 1961?

A. At what they call "Bryan Park Terminal."

Q. What work was being done there that was involved with your crew?

A. We were laying used tracks to the new engine terminal.

Q. How large a crew did you have working?

A. With me at that time I had four men.

Q. Who were those four men?

A. Otho Beasley, Wilson Winston, Harry Minor and Monroe.

Q. What was the task that you had assigned your men to do that morning?

A. The task my men were supposed to do that morning was hold a rope to guide a panel of railway.

Q. What is this panel of rail you are talking

page 82] about?

A. This panel of rail was a part of a switch.

Q. What does it consist of?

A. The part we had consisted of rails, switch points and frogs, which makes two tracks go off.

Q. Approximately how long is that?

A. That piece we had, I think, would have been about 39, 40 feet.

Q. Did it have any ties with it?

A. Yes, it did.

Q. Can you give us an estimate as to approximately how much it weighed?

A. I would say between seven and eight tons.

Q. How was the panel being moved?

A. Being moved by a crane.

Q. Where was the panel located at the beginning of the morning?

A. The panel was located about, between 85 and 100 yards from where we wanted to use it at.

Q. How was it moved from there to where you used it?

A. It was moved by crane.

Q. Just one crane?

A. When we first started out we had two cranes.

page 83] Q. Now describe the two cranes.

A. One was a crawler crane and one was a truck crane.

Hubert M. Mayo

Q. Who did the crawler crane belong to?
A. R. F. & P.
Q. Who was operating that crane?
A. Mr. Bruce.
Q. What is the difference between a crawler crane and truck crane?
A. Well, a crawler crane operates, it rolls the crane in moving it along, and also the crane itself.
Q. Can that go out on the road?
A. No, sir.
Q. Why is that?
A. Because it has a crawler-type wheels, doesn't have rubber wheels on it.
Q. Does it have tracks like a tank?
A. Tracks like a tank.
Q. Describe the other crane that was assisting in this operation.
A. The other crane was a truck crane.
Q. Where did it come from?
A. Moore Equipment Company.

Q. Did you order that crane or ask that it be sent
page 84] to you?
A. No, I didn't order it.

Q. Did you know the day before that you would need two cranes on the job?
A. Yes, sir.
Q. Whom did you contact about getting another crane?
A. Mr. Talbott is the one I talked with about it.
Q. Who is he?
A. He was my boss at that time, my supervisor.
Q. Describe how these two cranes were moving the track panel that morning.
A. When we first started out we had one crane up to one end of the panel and one to the other end, with the boom down low.
Q. Now what direction, generally, were the two cranes going to move the panel in?
A. Moving in a northeasterly direction.
Q. And which crane was on the northern end of the track panel?
A. The crawler.
Q. And which was on the southern end?
A. The Moore Equipment crane, the truck crane.

Hubert M. Mayo

Q. What direction were these two cranes facing as they first began to move the panel?

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A. The crane it's on, the Moore Equipment crane, was facing east, the way we were moving, now.

Q. You mean northeast?

A. Northeast, we were moving the panel. The R. F. & P. crane was facing west. He was facing the panel rail. He was backing up.

Q. Which way was the driver of the truck-mounted crane facing?

A. He was facing west.

Q. Is it correct, then, both cranes were backing, originally?

A. Yes, when we first started out.

Q. And which direction was the crane operator of the R. F. & P. crane facing?

A. He was facing west, the way we was bringing the panel from.

Q. That is southwest?

A. Southwest.

Q. And what direction was the operator of the Moore Crane Service facing?

A. Northeast.

Q. How far did these two cranes move the track panel?

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A. When the two was together, they moved it about 50, 75 feet.

Q. Then what happened?

A. Then we found the panel rail we were moving had to be turned around, to face northeast, because it was the way the switch had to go in.

Q. And were you directing the cranes as to what they should do?

A. Yes, I was.

Q. And then what did you instruct the crane operators to do?

A. To set the panel of rail down on the ground.

Q. And then what was done next?

A. Then the crane moved out of the way, which was the crawler crane.

Q. Which crane was left?

A. The heavy equipment crane on the truck, truck crane on the left.

Q. Why did you leave that crane?

A. That crane was heavier and could lift more.

Hubert M. Mayo

Q. After the R. F. & P. crane unhooked from the the panel, what happened with the Moore Crane Service crane?

A. We took the four cables—before each crane had two cables to hold the end. We took the four cables, put page 87] them together to make a sling and hooked the one crane in the center so it would balance.

Q. Then what did that crane do?

A. Then turned the panel around in the direction we wanted it.

Q. Excuse me. Who turned it around?

A. The men, after they lifted the panel rail off the ground, the one crane, the men with the ropes swung it around.

Q. And then what happened?

A. Then that one crane proceeded to carry it on where they were going to carry it.

Q. What direction were you going, you, personally, going in at that time?

A. In a northeasterly direction.

Q. And where were you going?

A. We were going to —

Q. You, personally?

A. Where they set this panel of rail down.

Q. What were you looking for?

A. I was looking for ground pegs where they have put into the ground to tell me where the panel of switch was going.

Q. Did you have your back to the crane as you page 88] were going?

A. Yes, I did.

Q. What signal, if any, did you give as you were going to look for the pegs to put the panel down?

A. When I started out ahead, I gave a stop signal with my hand, my left hand, this way.

Q. And to whom did you give that signal?

A. That would have been the truck driver, driving the crane.

Q. And did you see the crane again after you made that signal until after the accident happened?

A. No, I didn't.

Q. From the time that crane picked up the panel and began to move, did you give any signals to the crane operator himself?

A. No, I didn't.

Q. Explain the signals that you gave to the truck driver and those that you gave to the crane operator. What signals did you give the truck driver?

A. Truck driver, you have to give a different signal. If you want him to back up, you give a back-up signal, with this direction with your hands. If you want him to go forward, you give directions this way.

Q. If you wanted him to stop, what did you do?

page 89] A. If you want to give a stop signal, you hold your hand out and give him this signal.

Q. Do you do that with your left hand?

A. Not necessarily, what direction you happened to be turned.

Q. What signals did you give the crane operator?

A. I didn't give him any at that time.

Q. But prior, did you have occasion to give him any signals?

A. Yes. I gave him signals to raise his boom, by giving him a thumb-up; and lower his boom by lowering by thumb down; lift your load, raising your finger up; and lower your load by pointing your finger down.

Q. At that time did you give any signals at all to the crane operator?

A. No, I did not.

Q. I show you a photograph which has been marked as Plaintiff's Exhibit No. 6, and ask you whether you recognize it?

A. Yes, I do.

Q. What is that, Mr. Mayo?

A. Well, this is a picture of where we set this panel of rail down at.

Q. Do you see any of the stobs in that pic-

page 90] ture you were looking for?

A. Main one I was looking for, you can't see it because the main rail, the point of that switch, has been covered up.

Q. I show you another picture which has been marked Plaintiff's No. 7, and ask if you can identify this?

A. Yes, I can. I recognize that.

Q. And what does that show?

A. That shows the switch, happens to have been set down, and part of it reassembled.

Q. And is that more complete than the panel was at the time the accident occurred?

A. Yes, sir.

Q. Can you identify that spot in relationship to where the

accident occurred?

A. Yes, sir.

Q. Where is it?

A. It's right under the line that goes across, near the North Yard over there, and what we call the North Yard is the main yard.

Q. What line are you referring to?

A. The high-powered line.

Q. As you were looking for the switch and heard the accident explosion, what is the next thing you did?

page 91] A. Well, at that time I turned around to see see what had happened. I don't know.

Q. What did you see when you turned around?

A. I saw the two men lying on the ground under the panel rail.

Q. And did you see the power line?

A. At that time I didn't see it at the time, I didn't know what happened, but about the time I looked it went off again, a second explosion went off.

Q. Then did you see the line?

A. Yes.

Q. And where was the crane in relation to the line?

A. The crane was pretty close to the line at that time. Whether it was touching the line, I don't know.

Q. What about the crane cable?

A. The crane cable I am talking about.

Q. Where was it, pretty close to the line?

A. Pretty close. I don't know whether it was touching it or not.

Q. What happened after the second explosion you heard?

A. After the second explosion I heard I gave the crane, the truck driver on the crane a signal to move

page 92] out of line, to move back a little bit.

Q. Did he do so?

A. Yes, sir.

Q. Then what did you do?

A. Then I went under the panel of rail the man was knocked down by.

Q. Tell us what you did.

A. One foreman went under there and Mr. Beasley was

under there. He got up and got out of there under his own power, but Winston, he was down and was on fire, so we pulled him out from underneath the panel and took a knife and cut his clothes off.

Q. What happened as you cut his clothes off?

A. The skin and meat came off with the clothes.

Q. What happened to Mr. Winston then?

A. Then I went down to the, our camp cars, which was a short distance away, and got a blanket to lay him on, and on my way down I asked Mr. Cann to get an ambulance and he did so.

Q. What ultimately happened to Mr. Winston?

A. You mean after that?

Mr. Marks: He died. We know that.

A. (Continuing) Seven days later he died.

By Mr. Booker:

Q. From the injuries?

page 93] Mr. Marks: I think we can stipulate that is so, too.

By Mr. Booker:

Q. From your recollection had Moore Crane Service been out in this area before?

A. My recollection, only that day.

Q. Had you had occasion on other times to call for equipment from Mr. Talbott or others at R. F. & P.?

A. Yes, sir. We had cranes before that belonged to other companies.

Q. Do you ever have any contact yourself with Hughes-Keegan?

A. No.

Mr. Booker: I think that is all.

CROSS EXAMINATION

By Mr. Marks:

Q. I show you a diagram, Mr. Mayo, and will ask you to

Hubert M. Mayo

take a look at it and see if you can see on there the type of thing you were engaged in moving when this accident happened?

A. Yes, sir.

Mr. Booker: We have no objection to it. It page 94] was furnished to you by us.

By Mr. Marks:

Q. Will you take my pencil, please, sir, and just point out to what you were moving?

A. We were moving about this much of a panel table switch.

Q. When you say "this much," you are talking about this part?

A. This part is the front end.

Q. And that is a correct representation of what you were moving?

A. That is correct. Had this cut in three parts when you move it.

Q. You were moving the left end of the part?

A. We were moving the left end of the part, what we call the left end — the front end of it.

Mr. Booker: No objection.

The Court: That will be Defendant's No. 3.

(The photograph was marked as Defendant's Exhibit No. 3 and received in evidence.)

By Mr. Marks:

Q. Now by reference to No. 3, as Defendant's Exhibit No. 3, take a red pencil and just put a circle around page 95] the part of that you were moving.

A. All right.

Q. Now show us which end of this thing was the Railroad crane originally hitched to?

A. This end.

Q. All right. Put an "R.R." up on that end, will you?

A. Yes, sir.

Q. Now, then, the Moore crane was hitched down here, right?

A. Right.

Q. Put an "M" down there, if you will.

A. Yes, sir.

Q. Now did I understand correctly, in the beginning, that you had a cable fastened on either side here, in the nature of a sling, that was hitched to the boom of the Moore crane?

A. We had two cables, one this side, one over here, came together at the top.

Q. And they were on a hook on the boom of the Moore crane?

A. Well, one on the boom of the R. F. & P. crane and the same on the boom of the Moore.

Q. Sort of a sling?

page 96] A. Well, only two to start with.

Q. I understand. What I am trying to get at, this thing was being carried flat?

A. That's right.

Q. With the ties more or less parallel to the ground?

A. No. It was being carried, I'd say, about as high as a man could reach.

Q. Right. But what I am talking about, the ties were more or less parallel to the ground?

A. That's right.

Q. So all you had to do to set it down was set it down, didn't have to turn it over or anything?

A. That's right.

Q. Now the Railroad crane is up here, and that is going backwards?

A. No, sir, that is here.

Q. I thought you said the Moore crane was here?

A. Well, after we turned this around.

Q. I am talking about starting out, the Railroad crane is here, on this end?

A. That's right. This panel was headed in a northeasterly direction. You have to turn it around.

Q. Well, now, northeasterly would be about so?

page 97] A. That's right.

Hubert M. Mayo

Q. So the Railroad crane is backing up this way?

A. That's correct.

Q. And it's hitched on this end, backing up this way, and the Moore crane is down here on this end, following along behind?

A. That's correct.

Q. All right. And you are where when that starts out?

A. I am on the side of this panel.

Q. You are over here somewhere?

A. That's right, on the side.

Q. And what are you doing?

A. I am giving signals.

Q. To whom?

A. To the crane operators.

Q. Both your Railroad crane operators —

A. And this other crane.

Q. And the first signal you gave them was what; after you hooked up, what was the first signal?

A. The first signal I gave him was to take the load off the ground.

Q. That means pull your cable up?

A. Pull cable up.

page 98] Q. What was the next signal?

A. Was to move along.

Q. That would be?

A. That would be to the operator of the truck.

Q. And to the one man who was on the Railroad crane, the crawler?

A. That's right.

Q. How did you do this?

A. When they backed up, I gave the signal like that.

Q. They both were backing up?

A. Both backing up.

Q. All right. You got up a distance and you find from inspection you don't want this end up first?

A. That's right. That would be turned around.

Q. What was the necessary signal?

A. I gave a signal then to set load on the ground.

Q. How did you do that?

A. My fingers this way.

Q. That means both cranes let down?

A. Let it down.

Q. After you let down on the ground, what did you do?

A. I took these two cables —

page 99] Q. You didn't do it yourself?

A. I had it done.

Q. By Railroad employees?

A. Yes.

Q. You took the two cables loose from the Railroad crane?

A. That's right.

Q. Then what did you do?

A. Took these other two cables and hooked more towards the center of it.

Q. All right. We'll turn this over, and there is a thing with some things hanging like that, with some things tied to it? I am not a very good artist, and you can see it as you watch me draw. Then you had something that sort of looked like that, didn't you?

A. Sort of looked like that, hook in here where the cable went up to the crane.

Q. All right. If that is what you had, sort of looked like, would you put your initials on it?

A. Just "H. Mayo?"

Q. Right. And that is the back of Defendant's Exhibit No. 3. Now when you got her in that situation, what is hooked up here, the Moore crane?

A. The Moore crane.

page 100] Q. What is the next thing you do, or did?

A. Well, had to turn it around.

Q. You say you had to turn it around. It had ropes on it?

A. Had ropes on it.

Q. You had a rope tied here and a rope here, a rope here and a rope here?

A. On this side.

Q. On this side? Excuse me. I beg your pardon. All right. Now take that rope out of there, then. Now your men are on these ropes, is that right?

A. That's correct.

Q. Who is on this rope? This is the end that came off the Railroad crane?

Hubert M. Mayo

A. This is your front end you are talking about.
Q. This is the end came off the Railroad's crane?
A. This end, we had two men didn't get hurt on that end.
Q. That is Monroe and who else?
A. Minor.
Q. And Beasley and Winston are down on this end?
A. That's correct.
Q. Now, then, they are pulling on ropes, right?
A. Right.
page 101] Q. Now what do you do? What is the next thing you tell your men to do?
A. After we —
Q. After you get him in this position.
A. All we have to do is —
Q. I am talking about it's still sitting in the position it was when you picked it up, man on each corner with a rope. What do you do, turn it around while it's suspended in the air?
A. That's correct.
Q. In other words, just make a revolution on the cable of the Moore crane?
A. That's right.
Q. So you end up, then with Winston and Beasley leading the way?
A. In front.
Q. And Minor and the other fellow back there by the crane?
A. That's right.
Q. Now when you got them in that position, where are you?
A. When I got them in that position, to start off with, we are still on the side of the crane.
Q. Now when you say "on the side of the
page 102] crane," what do you mean, on the side of the crane, the side of the track panel, what?
A. On the side of the track panel.
Q. Right side or left?
A. On the right side.
Q. You were going forward and you were over here?
A. Over here.

Q. And the crane, then, is behind you somewhere?

A. That's right.

Q. And where is the driver of that crane? I am talking about the driver of the truck part.

A. The driver of the truck part was back behind, and he is backing his equipment.

Q. And he is looking over his shoulder at you, like this, looking out of it like that?

A. That's right.

Q. Now the operator of the crane, the man that you gave thumbs-up and thumbs-down and fingers-up and fingers-down to is facing —

A. Yes.

Q. This track panel?

A. He was sitting in his crane pulling his panel page 103] up.

Q. Did you tell him how high off the ground to put his boom?

A. No.

Q. Did you tell him how high off the ground to pick up the section?

A. Well, ordinarily, to pick it up where a man could put his hands on it, close enough for the rope to hold it.

Q. And after you get it up where you want it, you tell him to stop?

A. That's right.

Q. And this is done by these signals?

A. That's right.

Q. How do you stop it when this one starts up?

A. Well, the crane operator does that.

Q. I mean, how do you tell him when he's got it high enough?

A. Oh, when he gets it high enough I give him a stop signal.

Q. And then you give him a come ahead signal or back up signal?

A. Depending on where you're going, that's right.

Q. And you walk along and he is supposed to keep coming

Hubert M. Mayo

until you give him another signal?

page 104] A. That's right.

Q. Now you say you did give him another signal?

A. That's right.

Q. You did not give another signal to the operator of the crane part?

A. No, sir.

Q. But you gave another signal to the operator of the truck part?

A. That's right.

Q. And at the time you gave it your back was toward him?

A. That's right.

Q. And at the time you gave it you don't know where you were with respect to the overhead power lines?

A. No.

Q. You proceed on up further away to look for some stuff on the ground?

A. That's right.

Q. Now you may sit down. Now there are survey stakes and stobs in this area of various kinds for various reasons?

A. That's right.

Q. And it's up to you to keep from knocking them out of the ground while you are moving this equipment

page 105] up there and keep your men from kicking them out of the ground, isn't it?

A. That's right.

Q. So you are looking at those?

A. Yes, sir.

Q. You are looking at the ultimate location of where you want to put the panel, looking for it, I should say?

A. Yes, sir.

Q. And you are telling your men which way to turn?

A. Yes, sir.

Q. And you are telling the crane operator how high off the ground you want it?

A. Yes, sir.

Q. And you are telling the truck — or whatever it is, the oiler who is driving across the ground when to start and when to stop?

A. Yes, sir.

Q. And during the course of this operation, in some way, either the cable contacts the high tension line or it gets close enough to it so there is an arc across, is that right?

A. Yes, sir.

Q. Now when you are handling a piece of stuff
page 106] of this kind — you said it weighed seven to eight tons?

A. I would say it weighed that. I didn't weigh it.

Q. I understand that. And you got four men to steady it?

A. That's right.

Q. To steady it?

A. Yes, sir.

Q. And this is a typical railroad yard, it isn't flat like a billiard table?

A. That's right.

Q. And the truck is hitting bumps occasionally and depressions and it is swaying back and forth?

A. That's right.

Q. And it's up to your men to keep it from swaying too much?

A. That's right.

Q. And when it stops it has a tendency because of inertia to keep moving?

A. That's right.

Q. Now do you suppose your men let it move forward far enough after the truck stopped and the crane stopped to get that cable close to the power line or not?

Mr. Booker: That is pure conjecture on the part of the witness. He already said he didn't see it. I
page 107] object, as pure conjecture.

Mr. Marks: All right.

By Mr. Marks:

Q. Mr. Mayo, when you told the truck driver or the oiler or operator to stop the equipment, had he gotten to the power line?

A. I don't know. I can't answer that question.

Q. You didn't intend for him to be in the power lines?

Hubert M. Mayo

A. No, sir.

Q. And you knew he wasn't going to stop until you told him to stop?

A. Right.

Q. Well, didn't you know the power line was there?

A. I did.

Q. Did you look to see where it was with respect to the crane boom when you told this man to back up into it?

A. No.

Q. Why not?

A. Well, I had quite a bit on my mind at the time and it was the first time I had worked in that area.

Q. Well, did you at any time warn your men, which, when I say "your men," I am saying the Railroad employees, or the Moore men you were directing in the execu-
page 108] tion of their work about the presence of these power lines?

A. Not that particular place, I did not, but I did at another location.

Q. Who had you warned at a different location?

A. I had warned the crane men that were operating the crane, but we had different cranes at that location.

Q. In other words, you had not ever warned these two men about anything, had you?

A. No, not down there, I had not.

Q. You hadn't warned the four men in your own work crew about any danger from power lines?

A. Well, they knew about it, yes, sir, we had.

Q. Now, sir, isn't it true it's a normal safety precaution in the line of work you have been engaged in for these many years, when you are moving a piece of equipment of that kind in the vicinity of a power line, doesn't anybody take hold of it?

The Court: What do you mean, "doesn't anybody take hold of it?"

By Mr. Marks:

Q. Don't you tell your men, "keep your hands off anything that is suspended from the cable of a crane when it

is being moved in the vicinity of a power line?" I mean, that is standard instructions?

page 109] A. Well, we had ropes on it.

Q. Don't they have standard instructions to keep their hands off it?

A. Yes, sir, they do, anything that is dangerous.

Q. In this case you knew Beasley had his hands on the ties?

A. No, I didn't.

Q. Well, he was violating instructions, then?

A. I don't know that.

Q. If he did not have the rope and did have his hands on the ties he was violating instructions?

A. Yes, sir. He was supposed to have hold of the rope.

Q. How long had you all been using these ropes?

A. Oh, I'd say about two weeks, off and on.

Q. And they were pretty well saturated with grease and oil, weren't they?

A. Some of them were.

Q. And you knew, didn't you, grease and oil conducted electricity and fire, didn't you?

A. If I knew I was going to put them around there, I wouldn't have put them close to it.

Q. In other words, if you had had any idea at all that you were going to maneuver this piece of stuff into

page 110] the vicinity of these power lines you wouldn't have used those ropes, would you?

A. No, I wouldn't. I wouldn't have had it up so it could hit that power line, either, if I knew it.

Q. Weren't you the man that was telling them how high to hoist it?

A. No, sir.

Q. How high to put it this way, that way?

A. No. sir.

Q. I thought you said you were.

A. No, I didn't.

The Court: He misunderstands. He thinks you are talking about the boom on the crane.

Hubert M. Mayo

By The Court:

Q. You were directing the location of the load?

A. The load itself.

Q. But the crane operator was doing the boom?

A. Doing the boom.

By Mr. Marks:

Q. Had you been doing this kind of work with these panels before the time you had this accident, or this accident was the first panel you were moving?

A. That was actually the first panel of switch we were moving where we were building track. Panels

page 111] had been taken up at other places and stored.

Q. This was the first one of these track panels, then, that was being put in location?

A. Yes, sir.

Q. That was why you needed the heavy crane and knew you were going to need it because that is what you intended to do the next day?

A. That's right.

Q. Were you on the job, Mr. Mayo, when the crane arrived?

A. No, sir.

Q. When did you first take charge of the crane operation?

A. When we first started to move that panel of rail.

Q. Who did you talk to to get the crane over there to help move it?

A. I didn't talk to anybody. The crane was sent me.

Q. I don't mean that. I am talking about after the crane arrived at the scene, at the yard. You say you weren't there when the crane arrived?

A. No.

Q. All right. Well, how soon, or where was the crane when you did arrive?

page 112] A. The crane came over to where we wanted to move the panel of rail at.

Q. And where was it when you arrived at the scene?

A. The crane was, came to me after I got where we wanted to move the rail.

Q. And who told them to come to you?

A. That I couldn't tell you.

Q. You didn't?

A. No. I couldn't tell you that.

Q. Well, where were they when you first saw them?

A. When I first saw them they were coming to me with the crane.

Q. From where?

A. From towards the old shop. I don't know where they were coming from.

Q. They had not arrived at your part of the job yet?

A. No.

Q. I see. And when they did arrive at your part of the job you took charge of them?

A. Right.

Q. And told them what you wanted done?

A. Right.

Q. And how you wanted it done?

page 113] A. That's correct.

Q. How did you learn that Beasley had been holding onto one of the ties rather than a guide rope?

A. After he got knocked down.

Q. How did you learn?

A. From what he said.

Q. He talked?

A. Yes.

Q. Were there any employees of anybody on this particular job at the time this accident happened in the area in which it happened and doing the work that you were in charge of other than the two Moore boys and your crew?

A. That was all that was doing the type of work we were doing, yes.

Q. And all of them were under your supervision and you were telling them what to do?

A. Yes.

Q. Equally one with the other?

A. Yes, sir.

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page 115]

Alton E. Lawson

ALTON E. LAWSON,

a witness called out of order by the defendants, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Marks:

Q. Please state your name.

A. Alton E. Lawson.

Q. And your middle initial?

A. Edgar.

Q. Where do you live?

A. Blacksburg, Virginia.

Q. What is your business now?

A. I am self-employed.

Q. What do you do for a living?

A. I am also a crane operator, but I am just —

Q. In 1961, were you working in Richmond?

A. Yes, sir.

Q. And for whom were you working in July of 1961?

A. Moore Crane Service.

Q. Were you working for them on July 27, 1961?

A. Yes, sir.

Q. At that time what was your job?

A. I was a crane operator, but Mr. Moore sent me out there to help this boy run the crane for him, to

page 116] back the truck up for him.

Q. You were a crane operator, but that day you were acting as an oiler, is that what you are saying?

A. Yes, sir.

Q. Mr. Lawson, what is the job of an oiler on the rig of the type you had there?

A. Supposed to back up the crane and take orders from the man on the ground.

Q. You mean you drive the truck part of it?

A. Yes, sir.

Q. That is the oiler's job?

A. Yes, sir.

Q. That is what you were doing on that day?

A. Yes, sir.

Q. Would you describe the equipment you had to the gentlemen of the jury?

A. It was a Unit crane, 20-ton capacity, picking up a section of railroad and backing up with it. I was taking orders from the section foreman, whoever he was. We was backing up and all of a sudden fire run through the wheels and the boy hollered "Stop." I stopped quick. He said, "Don't jump out of it." He said, "Pull up." So I pulled up. And this colored fellow, next I knew, he was on fire.

Q. All right. Stop there for a moment. Going

page 117] back to the time you left Moore Crane Service, did you have any instructions as to where to go?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Did Mr. Dunbar tell you where to go?

A. No.

Q. How did you know where to go?

A. Section foreman.

Q. I am talking about when you left your own shop.

A. You mean down out of the shop?

Q. Left Moore Crane Service. Did you know where you were going?

A. No.

Q. Did Dunbar tell you where to go?

A. No.

Q. How did you know how to get there?

A. Mr. Moore carried me out there. I didn't drive out there. The crane was already out there. I just worked on it.

Q. I beg your pardon?

A. I had to get you straight on it. The boy brought the crane out there, but the boy was sick out there

page 118] and Mr. Moore asked me to go out there and run it for him.

Q. You didn't drive it out there for Moore Crane Service, somebody else did?

A. No. Somebody else did.

Q. Where was the crane sitting when you got there?

A. Sitting out in the field there, sitting out in the Railroad out there.

Alton E. Lawson

Q. What was it doing when you reached there?

A. Picking up railroad sections, setting them.

Q. All right. And you got in the cab of the truck part?

A. Yes.

Q. And then after you got in the cab of the truck part, what happened?

A. This section foreman backed us on up, backed us up, was four, five colored fellows holding onto it. We was backing up, next thing I knew, was all exploding, the tires. What happened scared me and everybody else, caught this fellow on fire. I didn't see it until they carried him over next to the railroad.

Q. Had the section foreman been giving you any hand signals as to what to do?

A. He didn't give me no — he just told me to

page 119] back it up.

Q. Did he tell you to stop at any time?

A. Well, yes, sir. He said "Stop" and one thing and another.

Q. And had he told you to stop at any time shortly before the explosion?

A. No. He was just waving it on back.

Q. Where was he?

A. Standing over on my — see, I was backing up this way, and he was standing on my left.

Q. Did you have a clear view of him?

A. Yes, I had a clear view of him. I was watching him. I told him I could watch.

Q. You say he never gave you a stop signal?

A. No, until the tires blew out.

Q. Did he give you a stop signal then?

A. Didn't nobody have to.

Q. All right. And then what happened after that?

A. Well, the boy told me to pull up.

Q. Who is the boy?

A. Jessie Dunbar, the operator.

Q. Who is Jessie Dunbar?

A. He is the operator.

Q. The crane operator?

page 120] A. Yes, sir. He said, "Pull up before you jump

out of the cab." So I pulled up, got out.

Q. After you pulled up, how far from the power line were you?

A. I'd say ten foot, I guess.

Q. How far did you pull up?

A. I'd say just about ten foot.

Q. Now the seat in which you were sitting, the steering wheel by which you were guiding this rig was on which end of the rig from where the load was?

A. You mean the road where I was driving on?

Q. No. I asked you, the driver's seat and the wheel that you used to steer by, at which end of the rig was that; was it on the same end that the load was being carried, or where?

A. No. Well, you know what a truck crane is, don't you?

Q. I think I do, but I'm not sure those men over there do. You tell about it.

A. The truck is the front end and the crane on the back part of it, I think, a forty, fifty-foot boom. I'm not sure. I don't run it myself. We was backing it with a section of the railroad on it. We was watching it.

page 121] By The Court:

Q. Was the boom straight over the back end?

A. Yes, yes, sir, straight over the back.

By Mr. Marks:

Q. You were up front?

A. I was backing up, yes, sir.

Q. You were looking back over your shoulder out the door?

A. I was looking over my shoulder. I was watching.

Q. Who were you watching?

A. Foreman, section foreman.

Q. And he was telling you where to go?

A. Yes.

Q. Did he tell you which way to guide the thing?

A. Just kept backing it up, just setting it different places. I was watching —

Q. Just kept coming back?

A. Yes.

Q. The next thing you knew, you heard the explosion?

Alton E. Lawson

A. That explosion, all them wheels and fire from the wheels, that's what happened.

Q. Was this the first day you had been out there on that job?

page 122] A. The first time.

Q. And how high off the ground were you sitting? You were sitting up there in that cab?

A. Yes. I'd say about four foot above, off the ground.

Q. And how high off the ground is the crane operator in the part of the thing he sits off the ground?

A. I guess about five, six feet.

Q. He is above and behind you, then?

A. Yes, sir.

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CROSS EXAMINATION

By Mr. Booker:

Q. Mr. Lawson, how long had you been a crane operator?

A. Over 35 years.

Q. Isn't one of the first things that a crane operator learns to do is watch for overhead power lines?

A. All depends, if a man is guiding him back, we go on a job like this —

(The prior question was read by the reporter.)

page 123] By Mr. Booker:

Q. Would you answer that question please?

A. Yes, we do.

Q. The answer to that question is "yes?"

A. Yes, we do.

Q. Why is that?

A. Because we just naturally do.

Q. Because the overhead power line is dangerous, somebody could get hurt or killed?

A. That's right.

Q. So you are constantly cautious of overhead power lines?

A. We'd always been cautious. We had been cautious of overhead lines.

Q. And did Mr. Moore caution all of his operators?
A. Yes, sir.
Q. It was a matter of concern to him as well as to you?
A. Yes, sir, him as well as anybody else.

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page 124]

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Q. Did you ever see anything that looked like a stop signal from the R. F. & P. foreman?
A. No.
Q. And were you looking at him constantly?
A. I was watching him all the time.

Q. And were you aware of the fact there was
page 125] power lines in the area?

A. I seen them back there, and I didn't know they were that close to them, and the thing jumped, is what happened.

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page 127]

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REDIRECT EXAMINATION

By Mr. Marks:
Q. Mr. Lawson, tell us something about — you backed these things, over the kind of ground you were backing them over July 27 before this accident. Was that flat like a road?
A. That was pretty level ground, just little mudholes in it.

Q. Well, what happens when you drop in one
page 128] of the little mudholes?

A. Well, the load just sways to one side or the other.
Q. Sways back and forth?
A. That's right.

Q. I see. Do you know whether there were any people with ropes, tied to the load in this case, trying to keep it still?

A. It was a wet rope this colored fellow had it tied to.

Q. How do you know it was a wet rope?

A. I seen it when he hooked it onto it. It was all wet. That is how come it to catch on fire. It jumped from them to him. When I got out of the crane this other fellow — his hands was burning or something — he said he had hold of the thing, this colored fellow had hold of the tag lines.

Q. Tag lines?

A. Yes.

Q. You say that was wet?

A. Yes.

Q. He was a Railroad man?

A. I guess so.

Q. It wasn't one of Moore Crane Service's

page 129] people, was it?

A. No.

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page 130]

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JAMES I. BRUCE,

a witness called by and on behalf of the plaintiff, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Booker:

Q. Please state your name and address.

A. James Irvin Bruce; Richmond, Virginia.

Q. What is your employment?

A. Crane operator, R. F. & P. Railroad.

Q. How long have you been a crane operator for the R. F. & P.?

A. You mean up to today?

Q. Yes, sir.

A. Between seven and eight years.

Q. Directing your attention back to about four

page 131] years ago, July 27 of 1961, were you working as

a crane operator for the R. F. & P. on that day?

A. Yes, I was.

Q. Where were you working?

A. Bryan Park Engine Terminal. Ended in April, Bryan Park Engine Terminal.

Q. What were you doing that particular morning?

A. We were laying rail, switch panel, engaging a switch panel.

Q. Did you have anyone else assisting you in this?

A. Yes, we did, and one other crane.

Q. And where did that other crane come from?

A. Moore Crane Service.

Q. When you got to your job that morning was the Moore Crane Service crane already there?

A. Yes, it was.

Q. Was the crane operator there?

A. Yes.

Q. And how about the oiler or the driver of the crane?

A. Yes, sir.

Q. And is that the gentleman who just testified, who passed you coming in, or do you remember?

page 132] A. I didn't remember, seeing him come in. But there were two men there.

Q. How far was your crane from the Moore Crane Service crane at that point, when you first saw him that morning?

A. Well, we were pretty close together, pretty close, I would say 50 to 100 feet.

Q. And where were you in relation to the stack of track panels?

A. We were pretty close to the track panels. We were going to start that morning.

Q. How far was it from the track panels to where the accident happened?

A. I'd say in the neighborhood of 200 yards, 150, 200 yards.

Q. Could you see the power lines from where you were?

A. Oh, yes.

Q. Describe what they look like.

A. Well, they was — they looked like they were pretty high, but, you know, just a power line of steel cable.

James I. Bruce

Q. And what was —

A. In other words, steel towers with this big
page 133] cable running from one to the other.

Q. I show you a photograph that has been marked Plaintiff's Exhibit 5, and ask you whether you can recognize that photograph?

A. Yes, I can.

Q. What does that show?

A. That shows approximately where the accident happened.

Q. Where were you and the Moore Crane Service crane in relation to this picture when you first saw them there that morning?

A. You mean from this picture here?

Q. Yes. You see that truck over there?

A. That is — I don't know whether that is the R. F. & P. lowboy or not, but it's a crane behind that. He's at it.

Q. Well, anyway, can you fix your location that morning in relation to that truck, or —

A. I was pretty close to that point. Both cranes were. I'd say within 50 feet of that point.

Q. In other words, if you had been taking the position of taking the picture, you would have been about there in relationship to it?

A. Yes.

page 134] Q. Did you point out the power lines to the operator of Moore Crane Service?

A. As we started to work that morning, yes, I did. I pointed to the wires to this man in the crane.

Q. And did you have any other discussion with him except to point out that the wires were there?

A. No, I didn't.

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A. I was sitting in my crane. I had stopped the crane and just stopped to see.

Q. What was going to be your next job?

A. We had to go back when we laid this one piece of panel down, we was going back and get the others. We had two more pieces to hook up to the same switch.

Q. And you were going to move them in the same fashion?

A. That's correct.

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Q. Was Mr. Mayo giving you signals on this day?

A. He had given us signals on that day, yes.

Q. And when you have a man giving signals you do what he says, don't you?

A. That is correct.

Q. All right. Now let me ask you this. Who told you to disconnect your crane from the track?

A. Mr. Mayo.

Q. Why, do you know?

A. No. He never told me why.

Q. All right. After you cut loose from it, did you take your sling and go on off?

A. No. He used my sling. He had to use four slings to pick it up with. When he told me to unhook I dropped the load and moved out of the way.

Q. How did he tell you to drop the load?

A. You drop your load, you ease it down.

Q. I say, how did he communicate to you the fact he wanted you to drop your load?

A. Oh. (Demonstrates)

Q. He gave you a signal?

A. That is correct.

Q. And you followed his instructions and put page 140] the load down on the ground?

A. That's right.

Q. Now how did he tell you he wanted you to unhook?

A. Well, he had men there to do it. My cable was down. He gave the signal to drop the cables so that men could unhook the load.

James I. Bruce

Q. Mr. Mayo?
A. Yes, sir.
Q. How did he tell you to get out —
A. He gave me a signal.
Q. And told you to get out of the way?
A. Yes, sir.
Q. From that, and when you were moving up to the pile to the point where you put the thing down on the ground, how did you know what he wanted you to do? Mr. Mayo was telling you what to do?
A. From the pile where we picked up the panel to where he told me to get out of the way?
Q. Yes, sir. Where did you go?
A. To where the cranes was.
Q. How did you know where the panel was going?
A. I knew where the panels were going to start with.
page 141] Q. You were backing?
A. Yes.
Q. He told you to pick it up, though, didn't he?
A. Yes, sir.
Q. And he told you when to start back, didn't he?
A. Yes, sir.
Q. How did he tell you to start back?
A. I don't get you.
Q. How did he tell you when you were to start moving from the pile to where you stopped?
A. Well, he gave me a signal.
Q. All right. He signalled you to come on?
A. That's right.
Q. And when you got up there to this point he told you to stop, didn't he?
A. That's right.
Q. How?
A. He told me to stop.
Q. With a signal?
A. Yes, sir.
Q. And then he told you to drop it, didn't he?
A. That's correct.
Q. With a signal?

A. With a signal.

page 142] Q. And after you cut loose he motioned you off with another signal?

A. That's correct.

Q. So Mr. Mayo was giving you signals that day?

A. Yes, he was giving signals on the ground, that's right.

Q. He was giving signals to the operators of Moore Crane Service, too, wasn't he?

A. That's right, sir.

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page 143]

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Q. Now when you have a man giving you

page 144] signals, aren't you supposed to watch him and do what he says?

A. Yes, sir. That's right.

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page 145]

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OTHO BEASLEY,

a witness called by and on behalf of the plaintiff, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Booker:

Q. Mr. Beasley, speak up so everyone in the court room can hear you, and tell us what your name is.

A. Otho Beasley.

Q. Where do you live?

A. Over here, Highland Park.

Q. Are you presently employed?

page 146] A. Am I now?

Q. Yes.

Otho Beasley

A. No, sir. I am on a pension.
Q. On July 27 of 1961 were you employed?
A. Oh, yes. I was employed then.
Q. By whom were you employed?
A. What do you mean, my boss?
Q. What company were you working for?
A. R. F. & P., as far as I know.
Q. How long had you worked for the R. F. & P.?
A. Well, I was — before I took my pension, was 46 years.
Q. And what was your job on July 27 of 1961?
A. It was track work.
Q. And what, particularly, did you do in track work?
A. Well, I would put in ties and do anything would come to be done, and spike and whatever they had for me to do. See, we done I don't know how many different things a day.
Q. You were called a gandy dancer?
A. You said a what?

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page 147]

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Q. What was your particular job that morning?
A. We was handling panel rail that morning.
Q. And what were you doing with the panel rails?
A. Moving them.
Q. What was your particular job in connection with the moving of the rails?
A. Hold it steady when it be moving along, keep it from waving and guide it down to the place, when they got to the landing place.
Q. There were two cranes out there moving the panel at the beginning, were there not?
A. Yes, sir.
Q. And did you go along and steady it at that time?
A. No, sir.
Q. When did you first begin to help steady the track panel?
A. When the R. F. & P. crane unhooked from it.

Q. And that left the truck-mounted crane that was hooked to it?

page 148] A. Yes.

Q. And who was assisting or working with you on handling the track panel at that time?

A. Well, that fellow got killed, Harry Minor was one, and the other colored fellow — I can't think of him. Winston was the man that got killed.

Q. Where were you and Winston standing in connection with the panel?

A. He was on one side; I was on the other.

Q. You were in the front or back as you were going toward the tracks?

A. I was in front.

Q. Where was Winston?

A. Just about across from me.

Q. What did Winston have hold of?

A. Well, I seen him have hold of the rope and he said he had hold of the rails when it happened. I don't know. I wasn't paying so much particular notice on his side.

Q. What did you have hold of?

A. I had hold of them two long ties, where that switch stands.

Q. Those wooden ties?

A. Wooden ties.

Q. And were Minor and Monroe at the end of

page 149] the panel?

A. Well, was back behind, was two back behind me, see, on each side.

Q. In what direction was the crane moving the panel while you were helping to guide it?

A. It was going north, going on down the hill.

Q. Was Mr. Mayo in the area?

A. Yes, sir.

Q. Where was Mr. Mayo?

A. He was in front.

Q. Was he in front of you?

A. Yes.

Q. Was his back to you?

A. He was going and waving it on down, you know, and

sometimes he would be kind of going a little sideways and just waving.

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page 152]

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CROSS EXAMINATION

By Mr. Marks:

Q. Mr. Beasley, who was in charge of the work you were doing out there?

A. Hubert Mayo. He was my boss.

Q. And is he the same Mr. Mayo you have told
page 153] us about that was telling everybody else on there
that was in this gang what to do?

A. Yes.

Q. Was he giving signals to the R. F. & P. crane man, telling him what to do?

A. Yes. He was working both, directing both of them when both of them was on.

Q. He was directing both of them?

A. Yes, sir.

Q. And he directed the R. F. & P. to cut loose?

A. Well, he told them to cut her loose.

Q. And what happened after the R. F. & P., cut her loose?

A. And they turned it around.

Q. How did they turn it around?

A. I don't know, but we turned it. I don't know how, because I ain't never worked it, but we strung it around. Then he said, the contractor, whoever it was, that he could carry it on down himself.

Q. You mean Mr. Mayo asked the crane operator if he could carry it down himself?

A. No, sir. He said he could carry it down. And then Mr. Mayo let him come on.

Q. Was Mr. Mayo giving him signals as to
page 154] what to do?

A. Yes, sir.

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page 157]

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Q. Now when you were steadying this thing, Mr. Beasley, as this crane was doing what you call "inching down" the hill, the load had a tendency to sway back and forth, didn't it?

A. Oh, sure.

Q. And in front and back, too?

A. Well, it would go most different ways, if you didn't hold it.

Q. And it was putting pressure on you from all different directions from time to time?

A. Yes, sir.

Q. When it stopped it had a tendency to swing out forward?

A. Could do it.

Q. But you wouldn't naturally expect it to do that, would you?

A. No. But, of course, everybody'd hold it as much as they can, so it wouldn't.

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URCHIE B. ELLIS,

a witness called by and on behalf of the plaintiff, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Booker:

Q. Mr. Ellis, please state your name and address.

A. My name is Urchie B. Ellis; Broad Street Station, Richmond, Virginia.

Q. By whom are you employed?

A. The Richmond, Fredericksburg & Potomac Railroad Company.

Urchie B. Ellis

Q. What is your position?
A. General Counsel.

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Q. Would you describe what law covers Railroad employees who are injured while on their jobs?

A. There is special legislation that pertains to Railroad employees, called the Federal Employers Liability Act. It's a Federal law in the United States Code and it's different from State laws, which generally provide maximum limitations on the liability of the Railroad to an injured employee, or in the case of an employee who is killed, there is no maximum on the amount that his family or his estate can recover, depends on particular circumstances.

Q. What, based upon your experience as attorney in the railroad field, is the liability of a railroad for workers who are injured on business by the negligence of some third party?

page 162] A. The Railroad is responsible for providing an employee —

Mr. Marks: May it be understood my objection runs to the whole line, and exception, also?

A. (Continuing) The Railroad is responsible to an employee for providing a safe place to work, among other things, and we cannot delegate that authority by hiring an outside contractor to come in and work. If we assign an employee to work at a place where he is exposed to the activities of other people and these other people perform some negligent act, if we assign the employee to work in that place, then we also may be responsible, and there are numerous cases that have so held.

Q. Can you cite any one opinion that you rely upon as to your judgment in this field?

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Urchie B. Ellis

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Q. Have you had occasion to review and consider the claims asserted on behalf of the estimate of Wilson Winston and Otho Beasley in connection with your work?

A. Yes, I have been involved with them rather closely.

Q. And do those claims arise out of the accident which occurred on July 27, 1961, and which is at issue in this litigation?

A. Yes, they do. Winston was severely burned and ultimately died. Beasley was injured and the jury heard him testify here previously.

Q. Did the Railroad conclude it should effect settlement in these cases?

A. Yes. We felt there was no question of liability, it was just a question of how much.

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Q. Did the Railroad call upon the defendant, Hughes-Keegan, to defend and save the Railroad harmless in these cases?

A. Well, yes, we did extensive handling with them, beginning the day after or the day of the accident. There were some early meetings with Hughes-Keegan and their insurance representatives. We notified them of the suit when it was filed. We repeatedly asked them to take the responsibility for the litigation and defense of the claims. They repeatedly declined and we advised them we would do the best we could to minimize the expenses and would expect them to assume it later.

Q. Did they ever tell you that they would assume the defense at any later time?

A. Not that I recall.

Urchie B. Ellis

page 168] Q. Can you describe briefly what their position always was in response to your handling with them?

A. Well, generally, they said they just weren't responsible for it and that they weren't going to assume the defense or the responsibility for the settlement, they weren't going to indemnify us.

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Q. Now you say you based, to a degree, at least, upon the Railroad file. I take it you based your opinion, at least to a degree, on the statement of Mr. Mayo, did you not?

A. Yes, sir.

Q. And you based it to a degree upon the recommendation that Mr. Mayo made as to how to prevent similar accidents in the future, did you not?

A. Yes, sir.

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By Mr. Marks:

page 174] Q. I hand you a paper dated August 1, 1961, and apparently signed by H. M. Mayo, which has the heading "Foreman's Safety Notice." Does that contain the recommendation of Mr. Mayo with respect to the prevention of this type of accident in the future?

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page 175] By Mr. Marks:

Q. All right, sir. What did Mr. Mayo recommend be done in the future to prevent this type of accident.

A. He said, "In order to prevent this type of accident from happening in the future, I think that there should be two men looking out so that when a signal is given it would not be the responsibility of one man to have to look out for both what was on the ground and what was above."

The Court: Well, are you seriously contending that the Railroad could have won these suits?

Mr. Marks: No, sir, I am not. I will be very frank with the Court.

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IN CHAMBERS:

Mr. Marks: The defendant moves to stike the plaintiff's evidence at this stage and to enter summary judgment in behalf of the defendant and assigns grounds as follows:

Number one that under the terms and provisions of the contract in question as it has been explained and amplified and as it appears in the testimony of the various
page 181] witnesses, this is not work being performed by virtue of any contract between Hughes-Keegan and the Railroad. It is at most a simple rental of equipment covered by an Addendum prepared by the Railroad and submitted to Hughes-Keegan with its covering letter in 1958, which provides that, in effect, Hughes-Keegan will broker rental equipment for a 10% override.

Secondly, the so-called proceed order required under the contract and introduced in evidence does not refer to this type of equipment in any way and it has been admitted by the plaintiff in the course of the testimony that the billing of this type of equipment under Proceed Order No. 1-61 was at the direction of and for the convenience of the Railroad Accounting Department and not because of any intent to bring it within the terms and provisions of this agreement, the Railroad's employee having testified that Proceed Order No. 1-61 was in fact put out so that they could get equipment when they needed it.

Third, I think that the evidence of the Railroad in every respect indicates that in all phases of the work that was being performed there was no employee, agent or servant of Hughes-Keegan, Inc. on the ground or otherwise in any supervisory

or in any other capacity and that the entire job had been conceived in the office of the Railroad and was being carried out by Railroad personnel under the
page 182] over-all supervision of Mr. Cann, the secondary supervision as to this phase of Mr. Talbott, and the direct supervision of Mr. Mayo, who was the foreman in charge at the time the accident occurred.

Fourth, on the ground that the contract itself, if it be deemed applicable, when read in context and construed in proper fashion, provides indemnity only for acts or omissions of the contractor, his agents or employees in the execution of the work or in the guarding of the same, and it has not been shown any agent or employee of the contractor was guilty of any act or omission with regard to the execution of the work or in the guarding of the same. When I say "read in context," I take it the Court should construe the contract as a whole and should consider the various other provisions thereof, among which —

The Court: Why don't you reply to Mr. Booker?

(The motion was argued by counsel.)

The Court: Well, I will have to sustain the motion. I think the evidence is absolutely uncontradicted, no way I can change it.

Mr. Booker:: We respectfully note our exception to the ruling of the Court.

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A Copy—Teste:

H. G. TURNER, Clerk.

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