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SUPREME COURT OF VIRGINIA



IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. 730142

SEABOARD COAST LINE RAILROAD COMPANY,
Appellant,
v.
THOMAS J. WARD,
Appellee.

JOINT APPENDIX

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MOTION FOR JUDGMENT

Filed October 22, 1971

The plaintiff hereby moves this Court for a judgment and award of execution against the defendant Seaboard Coast Line Railroad Company in the amount of Three Hundred Fifty Thousand (\$350,000.00) Dollars by reason of the following facts, to-wit:

1. That the defendant is a railroad corporation organized and existing under and by virtue of the laws of the State of Virginia and was, at all times herein mentioned, doing business within the jurisdiction of this Court as a common carrier of intrastate and interstate commerce.

2. That at all times herein mentioned defendant was an intrastate and interstate carrier and was engaged in interstate commerce, and plaintiff was employed by defendant as its servant and employee, and as such, was working and engaged in interstate commerce at the time of receiving his injuries, and was working in the furtherance of interstate commerce and in work which directly, closely, and substantially affected the general interstate commerce carried on by the defendant.

3. That on or about the 6th day of August, 1971, the plaintiff was in the employ of the defendant at the

Seaboard shops in the City of Portsmouth, Virginia, and while in the regular course of his duties, was injured while performing duties in the regular course of his employment.

4. That the plaintiff's action arises under the Acts of Congress of April 22, 1908, 35 Stat. 65, Chap. 149, with amendments thereto, commonly known as The Federal Employer's Liability Act (45 USCA, Chap. 2, Secs. 51-60) as amended August 11, 1939.

5. That at the said time and place the defendant, through its officers, agents, servants and employees, negligently and carelessly failed to supply plaintiff with a reasonably safe place to work; that defendant maintained its premises in a negligent manner, allowing a dangerous condition to exist which was hazardous to the safety of defendant's employees; that defendant had and maintained faulty machinery in its shops; that the defendant failed to inspect and care for its machinery; that defendant failed to adequately train its employees; that defendant failed to promulgate safety rules; that defendant failed to take action to correct a dangerous condition which it knew existed, or should have known existed; that defendant failed to warn plaintiff of the dangers involved; that the defendant failed to provide

plaintiff with proper supervision and instructions; that defendant failed to have a sufficient number of employees to adequately perform the tasks assigned to the plaintiff; and that as a result of the aforesaid carelessness and negligence of the defendant, the plaintiff was severely and permanently injured in the course of his employment.

6. That prior to the said accident, the plaintiff was a strong and able-bodied man earning and capable of earning large sums of money; but by reason of the said injuries, plaintiff has been caused to lose, and will in the future be caused to lose, large sums of money which he otherwise would have earned.

7. That he was caused to suffer, and he will in the future be caused to suffer great physical pain and mental anguish.

8. That he was caused to be unable, and he will in the future be unable to perform his necessary and lawful affairs.

9. That he was caused to expend, and he will in the future be caused to expend, large sums of money in an endeavor to be cured of his injuries.

WHEREFORE, Plaintiff prays judgment against the defendant Seaboard Coast Line Railroad Company in the amount of Three Hundred Fifty Thousand (\$350,000.00) Dollars and costs.

* * *

N O T I C E

TAKE NOTICE That on the 23rd day of November, 1971, at 9:30 a.m. in the Courtroom of the Court of Hustings of the City of Portsmouth, Virginia, the plaintiff, by counsel, will move the Court pursuant to Rule 4:9 of the Rules of the Supreme Court of Virginia, for:

1. An order enjoining the defendant from disposing of or otherwise altering the machinery on which the plaintiff was injured on August 6, 1971.

2. An order permitting the plaintiff to enter the premises of the defendant for the purposes of inspecting, surveying and photographing the machinery on which the plaintiff was injured on August 6, 1971.

3. An order requiring the defendant to produce all photographs surrounding the circumstances of the accident, including a photograph of the machinery.

4. An order requiring the defendant to produce all inspection reports of the machinery prior to and subsequent to the accident of August 6, 1971.

5. An order requiring defendant to produce all repair orders ordered on the machinery on which plaintiff was injured on August 6, 1971.

6. An order requiring the defendant to list the names of all witnesses to the accident involving the plaintiff on August 6, 1971.

* * *

MOTION TO SET ASIDE VERDICT
Filed December 22, 1972

Defendant Seaboard Coast Line Railroad Company, by counsel, moves the court for an order setting aside the verdict returned by the jury in this action on November 9, 1972, and entering up judgment for defendant Seaboard Coast Line Railroad Company, or, in the alternative, granting Seaboard Coast Line Railroad Company a new trial on all the issues in the action upon the following grounds:

1. The plaintiff's contributory negligence was the sole proximate cause of his injuries.
2. There is no evidence that defendant Seaboard Coast Line Railroad Company was guilty of any negligence which either proximately caused or efficiently contributed to the plaintiff's injuries.
3. The verdict is so excessive as to indicate passion, prejudice, or corruption, or misconception of the law and the facts on the part of the jury.
4. The verdict is so excessive as to indicate that the decision was not fair and impartial.
5. The improper communication between a juror and the plaintiff's wife during trial fatally compromises the jury verdict to the prejudice of defendant Seaboard Coast Line Railroad Company.

* * *

MOTION FOR JUDGMENT
(\$350,000.00)

Filed December 27, 1972

It appearing that the jury on November 9, 1972 rendered a verdict in the amount of Two Hundred Thousand (\$200,000.00) Dollars in favor of the plaintiff, Thomas J. Ward, against the defendant, Seaboard Coast Line Railroad Company; whereupon, motions were made to set aside the verdict of the jury as being contrary to the law and the evidence and to set aside the verdict as being excessive for the amount of injuries the plaintiff had sustained, which motions were overruled on the 22d day of December, 1972, it is therefore ordered by the Court that the plaintiff, Thomas J. Ward, recover of the defendant, Seaboard Coast Line Railroad Company, the sum of Two Hundred Thousand (\$200,000.00) Dollars with interest thereon to be computed at the rate of six per cent (6%) per annum from the 9th day of November, 1972, till paid and his costs by him about his suit in this behalf expended; and should the defendant execute a suspending bond in the amount of Two Hundred Fifteen Thousand (\$215,000.00) Dollars with adequate surety, execution of said judgment shall stand suspended until January 27, 1973 and thereafter until the petition for appeal is acted on by the Supreme Court if such petition is actually filed within the required time.

A COPY TESTE: CECIL W. JOHNSON, CLERK, * * * * *

BY: *Iris P. Holland* 64 D. C.

The Court of Hustings

FOR THE

City of Portsmouth

JUDGES
ROBERT F. MCMURRAN
R. WINSTON BAIN
ASSOCIATE

PORTSMOUTH, VIRGINIA

CLERK
CECIL W. JOHNSON

December 28, 1972

Mr. Lewis T. Booker
Attorney at Law
Hunton, Williams, Gay and Gibson
P. O. Box 1535
Richmond, Virginia 23212

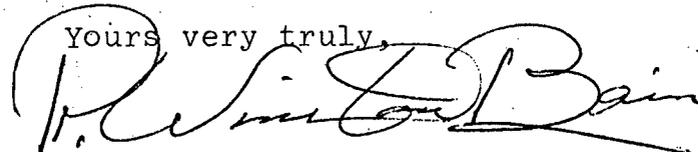
Re: Thomas J. Ward v. Seaboard Coast Line Railroad
Law Docket # 6767

Dear Mr. Booker:

Pursuant to my ruling denying defendant's motion to set aside the verdict in the above-styled law action on December 22, 1972, yesterday I entered judgment for the plaintiff in the sum of \$200,000.00 plus interest at 6% per annum, plus costs. The interest is to run from the date of the verdict, November 9, 1972. Should the defendant wish to note an appeal the suspension of execution of judgment bond is set at \$215,000.00.

With kindest regards, I am

Yours very truly,



R. Winston Bain

RWB:jwg
cc:

Mr. Willard J. Moody
Mr. Bernard Miller
Mr. Donald Kilgore

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR
Filed January 16, 1973

To: Mr. Cecil W. Johnson, Clerk
Court of Hustings for the City of Portsmouth
Portsmouth, Virginia

Defendant Seaboard Coast Line Railroad Company notes an appeal from the final judgment entered upon the jury's verdict in this action on December 27, 1972, and hereby signifies its intention to file a petition for writ of error with the Clerk of the Supreme Court of Virginia at Richmond or with one of the Justices of that court within the time prescribed by law.

Defendant assigns as error:

1. The trial court's failure to declare a mistrial, or in the alternative to grant defendant a new trial because of the misconduct of a juror.

2. The trial court's failure to set aside the verdict and enter up judgment for defendant upon the ground that defendant was guilty of no negligence and the sole proximate cause of plaintiff's injury was his own negligence.

3. The trial court's failure to set aside the verdict and grant defendant a new trial upon the ground that the verdict was so excessive as to indicate that the decision of the jury was not fair and impartial but was

motivated by passion, prejudice, or corruption, or misconception of the law and the facts on the part of the jury.

The transcript of the trial testimony is to be filed in this appeal.

* * *

EXCERPTS FROM
TRIAL TRANSCRIPT

Thomas J. Ward

"DIRECT"

BY MR. MILLER:

* * *

[Tr. 30]

Q Will you state your name, please?

A Thomas Jefferson Ward.

Q What's your date of birth, Mr. Ward?

A December the 8th, 1913.

Q How old were you at the time of the accident?

A Fifty-seven.

[Tr. 31]

Q When did you go to work at the Seaboard
shops?

A The 18th day of February, 1946.

Q And what did you go to work as, Mr. Ward?

A Blacksmith.

Q Will you explain -- I know we all know what
the old blacksmith was, but what is a railroad blacksmith?

A Well, you do forge welding and heating, bending, shaping iron, forging new pieces.

Q Shaping iron for what, Mr. Ward?

A Well, for most anything -- for a coach or a
[Tr. 32]

locomotive or a freight car at that time when I went there.

Q Mr. Ward, when did this accident occur?

A The 6th of August in 1971.

Q And at the time you were injured what kind of machine were you working on?

A Working on the shearing machine that cuts flat bars.

Q Mr. Ward, where is that machine located with reference to the Seaboard shops?

A In a little building at the side of the blacksmith shop, an open building.

Q And does that -- does the building stay open all year round?

A Yes, sir.

Q And has it stayed open all year round so far as you know ever since you went to work there?

A Yes, sir.

Q And tell me the condition of the roof on that particular building.

A Well, it leaked quite a bit, but that was about all.

Q Does the machine get wet on occasion?

A Yes, sir.

Q All right. And does the machine in the wintertime stay exposed?

[Tr. 33]

A Yes, sir.

Q Has the machine ever frozen so far as you know?

A Yes, sir. I have seen the small flywheel on it get frozen where you couldn't even use it.

Q Is there any air conditioning provided in that shed?

A No, sir.

Q Fans or anything?

A No, sir.

Q What kind of floor do you have on the floor?

A Dirt floor.

Q Is it a dirt floor?

A Yes, sir.

* * *

[Tr. 36]

Q Now, Mr. Ward, the general conditions on the floor -- are those the conditions -- these were taken on

February 9, 1972. Are these the conditions that existed on the date of your accident?

A No, sir.

Q What is missing from this photograph?

A It's been cleaned up. There was quite a few rods.

JUROR: Would you mind speaking in a mike?

BY MR. MILLER:

Q Speak a little bit louder.

A The floor had been cleaned up since the accident occurred, which there were -- I would be unable to say how much scrap iron was laying around on the floor at the time of the accident.

Q Okay. Now, Mr. Ward, this is looking at it from the front; is that right?

A Yes.

Q Now, where is the blade that cuts the steel?

A These two right here. (Indicating)

Q All right. Where is the pedal that you

[Tr. 37]

depress when you want to cut the steel?

A On the ground over on that side.

(Indicating)

Q All right. Where does the man stand who wants to cut the steel?

A He is standing right here in this position here at this side because you screw this down and secure it on top of the iron to keep the iron from buckling and bouncing when it's cut.

Q This is the right-hand side of the machine, and this is the left-hand side?

A Yes, sir.

Q Is that correct?

A Yes, sir.

Q Now, how many men were located in front of this machine at the time that you were assigned this particular duty to cut the steel?

A Well, Mr. Whittaker stood in this position here. (Indicating)

Q Who was Mr. Whittaker? Doing the cutting?

A He was the man doing the cutting, operating the metal here; and, of course, he could see the mark on the steel where you mark it. Push it on to the mark and mash the pedal, and Mr. Greenwood and myself was back where you see this. (Indicating) There is a rack that you lay the
[Tr. 38]

bar on, a heavy bar, which it has rollers on that you roll the steel through the blades. Mr. Greenwood and myself was back behind Mr. Whittaker helping hold the bars of iron straight.

Q Okay. Put that down for a second. Now,

this is Plaintiff's Exhibit Number 2. This is taken from the right-hand side of the machine?

A Yes, sir.

Q What is this large geared wheel in the back?

A It's a flywheel.

Q And what is the function of that flywheel, Mr. Ward?

A Well, the flywheel has half of the clutch made onto the flywheel where the clutch works out and engages into the flywheel, and the purpose of the flywheel is to keep the machine operating with normal pull from electric-- it's supposed to keep it in the same speed.

[Tr. 39]

Q Okay. Now, the next photograph, Plaintiff's Exhibit Number 3, is the left-hand side of the machine; is that right?

A Yes, sir.

Q And is that the side of the machine that you went around to?

A Yes, sir.

Q Now, when you were on the back or left-hand side of the machine are you visible to either Mr. Greenwood or Mr. Whittaker or the ones who are operating?

A Not necessarily unless they was to peep down through the opening.

Q Now, over here there is a belt? (Indicating)

A Yes, sir.

Q What is the function of this belt?

A That is what pulls the machine, runs the machine.

Q Okay. And where is the clutch located? Can you see it?

A On this picture -- no, sir.

Q Okay. But where would it generally be located?

A Up on top of the machine. Back there. (Indicating)

Q In order to get to the clutch would you have [Tr. 40]

to walk inside that area between these two particular items over here? (Indicating)

A Well, not -- not up in there but you would have to walk to this opening here. (Indicating)

Q Okay. Okay, Mr. Ward, you can get back up on the stand.

A (Witness complied.)

Q Mr. Ward, do you remember the length of the bars that you were supposed to cut?

A The best I can remember was about sixty inches long.

Q All right. And what was the dimensions of

that particular steel bar?

A Three-quarters by two.

Q Three-quarters of an inch thick by two?

A By two.

Q Was this considered the heaviest bar or the lightest bar or medium or what?

A I would just say medium.

Q Medium. Now, would you have any trouble with that machine cutting light half-inch stuff?

A No, sir. Half inch and three-eighths we didn't have any trouble with that.

Q When would you start having trouble with that machine, if any?

[Tr. 41]

A When you run above half an inch.

Q On this particular day how many bars had you cut before you were injured?

A The best I can remember was about four.

Q How do you start this machine?

A Well, you had -- you had a two-way switch with a handle on it. You pull it over and get the motor to running and then throw it over in the running side of it, and then the machine most of the time it wouldn't run. The motor would run and we would have to take a stick, put behind the brace that braces the motor from the bottom of the machine up to the motor as a brace. We would engage it

behind the brace and push against the belt to tighten up the belt.

Q That belt that is shown in the photograph -- you pushed against that with a stick?

A That's right.

Q I ask you to identify this photograph, Mr. Ward.

A Yes, sir. That's the stick that we push behind the belt.

Q How long have you been using that stick to start the motor?

A Off and on ever since I been there, and that's twenty-five and a half years.

* * *

[Tr. 43]

Q Mr. Ward, what is the debris or whatever it may be located on the bottom of that stick? What is that?

A You mean on the stick?

Q On the bottom of the stick.

A Oh, that's the ends that is cut off of round iron rods.

Q Is that the way it was on the day of the accident?

A Yes, sir, or a little worse.

Q A little worse. Mr. Ward, I am going to ask you to step down here again to the jury. Right over here, Mr. Ward.

[Tr. 44]

A (Witness complied.)

Q All right, Mr. Ward. I would like you to identify this photograph to the jury.

(Photograph handed to the witness for examination.)

A This is the back side of the machine where the clutch is located here.

Q All right. Is this the belt that you were referring to before?

A Yes, sir.

Q Where were you sticking that stick?

A This is the brace that comes from the motor going down to the bottom of the foundation of the machine, and we would place the end of the stick behind this piece here. (Indicating)

Q Come on up closer so the members of the jury can see it.

A And with the end of the stick behind this round brace that comes down here which put it just about in position for you to put a stick behind it and press the other end of it down like that, which carried the belt in,

acted as a roller on the belt, which pushed the belt in, tightened it up, and it would take a hold on the pulley and start the machine.

Q Now, what happened, Mr. Ward, that caused
[Tr. 45]

you to go to the back of the machine?

A Well, it wasn't because the machine wasn't running. The machine was running fine as far as speed, but when you put a particular piece of metal under it such as three-quarters by two or larger -- anything larger -- you mash the pedal. The blade would come onto the piece of metal, stop. The clutch in here would hop out, and with your pedal down it would hop right back in, hit again, hop right back out, and it would stand there and bounce for six, eight, ten -- no certain amount of time; but finally if you could hold the material to its place, it would finally cut it off.

Q Well, during that period of time -- do you have a particular line that you have to cut the metal off?

A Most of the time you have a white mark that you cut it off.

Q But if you were to wait for that blade to bounce up and down are you able to hold the line to the blade?

A I have seen it cut six times with a quarter of an inch difference so that you have a piece about like

that on the end of it.

Q Is that supposed to cut cleanly?

A Yes, on the first cut.

[Tr. 46]

Q How did you do it on this occasion?

A I walked around the machine. Now, I made the remark to Mr. Whittaker and Mr. Greenwood -- now, whether they heard it or not, I don't know.

Q The machine was running at the time?

A It was running at the time. I walked around and made the remark that I would have to put a little sand on the track. The wheels were slipping, so I walked around the machine, picked up the sand.

Q Where did you go?

A I was standing out here, and when I went back and picked up the sand I didn't go back to adjust the machine or to clean it. I went back to stand off and throw it.

Q Did you touch the machine?

A No, I did not touch it. I did not touch it.

Q Where did you throw the sand or dirt?

A Right in here. (Indicating) You have an opening in here. You can't see it for the belt, but it's

[Tr. 47]

completely coated with grease, and there is nothing to keep that clutch from jumping in and out with all that grease on it unless you throw a little sand in it.

Q How long have you been doing that, Mr. Ward?

A Ever since I been there. Off and on.

Q Twenty-five and a half years?

A Yes.

* * *

[Tr. 49]

Q Is there a guard on the left-hand side?

A There is a guard over the flywheel.

Q What, if anything, is there protecting the clutch?

A No, sir.

Q Has it been like that ever since you been there?

A Yes, sir.

Q When you threw the sand in there what did you have on your hands?

A A pair of welder's gloves.

Q And are you required to wear the gloves on the hands?

A That's what they were given to us for, what a blacksmith wears.

Q And what did you do?

A Well, I picked the dirt up in the right hand. I can't use it too much to show you how I did it, but I stood off like that to throw the dirt. (Indicating)

Q About how high? Eye level? Chest level or what?

A About head level.

Q How tall are you, Mr. Ward?

A Six foot.

[Tr. 50]

A And I threw the sand, and at the time there were two setscrews underneath.

Q Which setscrews are you referring to?

A I believe that's them. (Indicating)

Q You are identifying two screws that stick below a parallel bar?

A Um-hum.

Q What happened with those screws?

A And one of the screws caught me in the glove which was like this position. (Indicating) Came into the bottom of the glove and jerked me off the ground, over the machine, and my arm between this clutch and the housing of the machine here; and the machine at the time was still running.

JUROR: Mr. Ward, I realize your hand is hurt. You were throwing the sand with your right hand?

THE WITNESS: Yes, sir.

BY MR. MILLER:

Q Now, what is this a photograph of?

(Photograph handed to the witness for examination.)

A That's the clutch, and that shows the

[Tr. 51]

condition of the grease and the dirt where we had been throwing sand in it for years.

[Tr. 52]

Q Is there any reason why you could not throw the sand from this particular side? From the right-hand side?

A Yes, sir.

Q What is that reason?

A It was so messed up in that corner you couldn't get in there.

[Tr. 53]

Q On this occasion, Mr. Ward, why couldn't you get to the right-hand side of the machine?

A There was too much junk, scrap iron, piled up over on that side.

Q Thank you, sir. Was there anything between you and the right-hand side of the machine aside from that junk, scrap iron?

A Well, yes, sir. This table where you lay your bars of iron on.

Q How about the bar?

A Well, there was a bar laying up on it, but this table has braces on it. You can't go over it unless you climb over the table, and it has a very small opening to go between the table and where it comes up and stops.

[Tr. 54]

Q Mr. Ward, what's in this bag?

A It's a pair of welder's gloves.

Q These are gloves similar to the gloves that you were wearing on the day of the accident?

A Yes, sir.

Q What happened to the gloves that you were wearing?

A The Seaboard Railroad Company got them I guess.

Q The railroad has them?

A Yes.

Q Have they returned them to you?

A Mr. Buchanan had them the last I knew.

MR. BOOKER: If Your Honor please, we have his gloves right here. We might as well use the ones he was wearing at the time. Okay?

THE COURT: Very well.

[Tr. 55]

BY MR. MILLER:

Q These are the gloves that you were wearing?

A That's them.

Q What is this, Mr. Ward?

A That is where the setscrew caught me in the glove and tore it up.

Q What is this material made out of?

A Leather and cloth inside.

MR. MILLER: Your Honor, is there any possible way to identify these gloves and have them introduced into evidence?

THE COURT: Oh, yes. We can tag them. All right. The gloves will be received, admitted into evidence and identified as Plaintiff's Exhibit Number 9.

(Marked in evidence by the Court as
Plaintiff's Exhibit Number 9.)

BY MR. MILLER:

Q Were these gloves provided to you by the
Seaboard Coast Line Railroad Company?

A Yes, sir.

Q And were you required to wear these gloves
at the time that you were operating this type of machine?

A Well, I think that they have a rule to that
[Tr. 56]

effect when handling steel.

Q Yes, sir. Which way do these screws turn?
These setscrews that are shown in that photograph?

A Clockwise.

Q Now, tell this jury, Mr. Ward, what would
happen when you threw sand in the machine to the blade that
was jumping?

A Well, when you would throw the sand in the
clutch, immediately the blade would start cutting off the
pieces slick immediately and would remain that way for eight
or ten, twelve cuts; and then it would start doing the same
thing again.

Q Why wasn't -- why didn't you adjust the
belt if the blade started slipping?

A The belt had nothing to do with the blade jumping.

Q Now, in the event, Mr. Ward, on this day that you had done nothing to the machine and let the blade jump, would it adjust itself?

A No, sir.

[Tr. 57]

Q What would happen if you let the blade jump? Would anything happen?

A Finally it would have chewed the piece off.

Q Accurately?

A No, sir.

Q Did you have to touch this machine at any time while you were throwing sand in it?

A No, sir. I had no intentions of touching the machine.

Q Were you attempting to adjust or repair it?

A No, sir.

Q Once the pedal that operates the blade is engaged is it possible to shut off this machine?

A Well, yes, sir, you can switch it off.

Q And what happens when it's turned on again?

A It won't start.

Q Why not?

A You have to get a rod and make the cycle. If it stops on the bottom, you have to get a rod and make a cycle to get the blade up because the motor will not pull it to start it.

Q What do you mean by getting a rod? What do you have to do?

A Well, you have to get a rod and the machine [Tr. 58] is equipped with a wheel on the front with holes in that you stick the rod in the hole and pry down, which lifts the blade up or either you can take it to the flywheel and pry the flywheel around and it will pull itself up.

Q Well, what happens when the machine is cut off and the clutch is still engaged? What happens when the machine is turned on?

A Well, it stands there and the belt slips. (Indicating)

Q Mr. Ward, is that machine regularly cleaned and maintained or had it been on the date that you were injured?

A As far as I know, the machine hadn't been cleaned since Mr. Foster had me and Mr. Whittaker to wash it down about six or eight years ago. I don't know just how long it's been. I can't be accurate.

Q Is it your job according to the agreement to clean machines?

A No, sir.

Q When the clutch is disengaged or the machine is off, where are those screws located?

A Underneath the bottom. In fact, I didn't even know they were there until after I was hurt.

Q You can't see them when the clutch is disengaged?

[Tr. 59]

A I guess if you would get down and look for them especially you could find them, but from where I was at I couldn't see them on the back side.

Q When the blade is bouncing do the setscrews revolve?

A No, sir. They don't revolve until after it quits bouncing.

Q Until what happens?

A It makes its cut.

Q Mr. Ward, you described how you were yanked into this particular machine. Now, what part of your body was taken into this machine?

A The right elbow, and the right elbow was caught between the clutch and the housing of the machine, and there was a piece of machinery on top of the machine that had to be removed after the clutch disengaged and came back out. It pushed the arm up to where this piece had to be took off of the top of the machine before I could get the arm out.

Q What position were you in after the accident happened?

A May I use the left arm to show you?

Q Yes, sir.

A In this position. (Indicating) About two foot -- I'd say from twenty to twenty-four inches off the [Tr. 60] ground.

Q Did any other part of your body get struck by this machine?

A Yes, sir, the shoulder. This shoulder was caught underneath a knuckle on the machine and wouldn't let me go any higher, and that's why it was pulled and crushed so on the elbow -- because I was being held by this knuckle on the shoulder and also as I went over I hit this side of my head and ear on this knuckle as I went by it and was caught on the shoulder.

Q How long did you remain in this position twenty to twenty-four inches off the ground?

A I would say roughly -- if you bear with me, I was scared to death. I'd say roughly twenty to twenty-five minutes, something like that.

Q And how were you taken to the hospital?

A A cabalance. A cabalance was called, and it arrived, and one of the men in the cabalance crawled up on the machine and sat there until they got me out so he

could be there to handle the arm at the time that was released.

Q What did they do for your arm right at the scene of the accident?

A They put it in a plastic bag and blowed it up.

[Tr. 61]

Q Is that the way you were taken to the hospital?

A That's right.

Q All right. When you arrived at the hospital -- were you taken to Maryview Hospital?

A Yes, sir.

Q What was done for you when you were in Maryview Hospital?

A Gave me a shot or two. Gave me a shot to ease the pain and got my greasy clothes off and tried to clean the arm.

Q What do you mean "tried to clean the arm"?

A Well, they tried to get the grease off, and I couldn't bear it.

Q Why not?

A Because the pain was so severe. They had to move it to get the grease. They had to put pressure on it, and I told the girl -- I said, "I can't stand it. You are going to have to wait until you put me to sleep," so that's the way they did.

Q Who saw you in the hospital initially?

A Beg pardon?

Q Which doctor saw you in the hospital?

A Doctor Moore.

Q And did he refer you to another doctor?

[Tr. 62]

A Yes, sir. He admitted me and told me -- he said, "Now, your condition is not in my line of work." He said, "It's beyond my line of work." He said, "I am turning you over to a bone man which I think is as good as we have in Portsmouth," he said, "if it's agreeable with you." I said, "Well, who is he?" and he said, "Doctor Psimas," and I said, "That's fine. I would have asked for him anyway."

Q Did Doctor Psimas proceed to treat you?

A Yes, sir.

Q And were you taken to the operating room that day?

A Yes. This happened and they got me in about 8:30 or 9:00 o'clock, and I went to surgery about 2:00 or 2:30 that afternoon.

Q All right. When you came out of surgery what position was your arm kept in?

A It was set in the normal position of a broken arm, but when I was in the bed they had it propped up on a pillow and kept ice packs on it for the swelling because it swelled so tight till it would get so miserable I couldn't hardly stand it, and they kept ice on it.

Q And how long did you remain in that position, Mr. Ward, in reference to days or weeks or anything like that?

A For two weeks they kept the ice on it, and, of course, I would be allowed to get up, sit up just [Tr. 63]

a little, but when I would lay back down they would want me to put it back in the same position.

Q Now, you were discharged from the hospital when?

A Two weeks later.

Q All right. And when you were sent home what were you told to do?

A I was told to not try to do anything at all. Only just take care of that arm and not hurt it until I went back to the doctor, and this continued for some time.

Q Approximately how long?

A I think it was about twelve or thirteen weeks.

Q Okay.

A But -- at about eight weeks I believe it was he split the cast.

Q Why, if you know?

A That I might go back to the hospital and receive therapy on the arm. They could open the cast, take the cast off, ease the arm down in the therapy tub and then replace the cast, and they had an Ace bandage that they wrapped it with to hold it in place.

Q What else did they do to the arm beside whirlpool baths?

A I had to take all types of hand twisting
[Tr. 64]

exercises. The arm up, down, and normal. Exercises for an arm I guess. (Indicating)

Q What was put in in surgery?

A Pins. Wires and screws he says.

Q After this hospitalization when you got out could you feel and see the screws and pins in your arm?

A Yes, sir. They gave me quite a problem. The cast was hard and as the swelling went down in the elbow the pins began to stick through the skin, you know, push the skin out, and it left a knot sticking up with a hard pin about so tall and that cast would rub on it, and it was like somebody would take a handkerchief and drag it through your eye. It was painful, and there was two of these extracted out when the swelling went down. Two of them that stuck out that would hurt real bad.

Q Now, were you eventually returned to the hospital?

A Yes, sir.

[Tr. 65]

Q Approximately when was that?

A It was in January.

Q And what was done in January?

A I went back to surgery. They opened up the old incisions, went back in the old incisions, and opened them up and taken the pins out.

[Tr. 66]

Q Um-hum. Mr. Ward, I notice one arm is much thinner than the other. Was your arm like that before the accident?

A No, sir. The right arm was a little larger than the left one before the accident.

[Tr. 67]

Q Mr. Ward, after these pins were removed did you have any further difficulty with your right arm?

A As far as movement. Yes, sir. And, of course, as long as I didn't try to move it, there was no severe pain; but if I tried to move it, of course, I had pain.

Q This is after the pins were removed?

A Yes, sir.

Q And did you regularly visit Doctor Psimas?

A Yes, sir. Yes, I did.

Q And what did he suggest to you in the way of therapy or improvement?

A He told me to get some type of a weight about two pounds, use it in the right hand up, down, up, down. (Indicating) He said continuously. He said just six hours a day if you can. He says exercise it. He says [Tr. 68]

the muscles have got to be built up.

Q Did you follow his instructions?

A As much as possible. When it would get painful I would have to quit.

Q Are you still seeing Doctor Psimas?

A Yes, sir.

Q And how does your arm feel now? Will you describe to the jury how your right arm is at the present time, Mr. Ward?

A May I stand up?

Q Yes, sir.

A The arm will go that far out. That's as high up. (Indicating)

Q Mr. Ward, can you -- can you return to work as a blacksmith?

A Doctor Psimas says definitely not.

Q Can you do the duties that you formerly did as a blacksmith at the Seaboard shop?

A No, sir.

Q Will you describe in detail what duties you had to do with regard to steel and hammers?

A Well, we had to use hand hammers. We had to use mauls which is known as sledgehammers, and we had to carry heavy steel and hold it to be straightened. Both hot and cold. We had to bend iron both light and heavy; and [Tr. 69]

these things I can't perform with a crooked arm that hurts to straighten it out.

Q What other things that you used to do before the accident that you can no longer do as a result of your injuries, Mr. Ward?

A Well, I can't use shovels. I can't do garden work around the house because it requires shovels and rakes and hoes, and I can't use them. I can't do handsaw work or crosscut saw work, you know.

Q Do you have any tools or toolshed at home or a workshop?

A I have a little workshop.

Q Have you been able to work in that shop since the accident?

A Nothing only what is electric like an electric saw or drill.

Q How minute detail work?

A I can't do any technical work with the

right hand because it's a clumsy hand that stays stiff in the wrist, and I -- I don't have accurate use of that hand. Such as a hammer -- I can't hit a nail. Even if I was trying to drive a small nail or a tack it's not accurate to hit the nail on the head.

Q How about such things as dressing yourself? Do you have any difficulty with doing that?

[Tr. 70]

A Well, I get along pretty good except tying neckties, buttoning shirt collars up under the neck, or washing my neck or shoulders.

Q How about putting a jacket on or taking it off?

A As long as I can get the jacket on the right arm first I get along pretty good, but that shoulder will not drop down to drop the coat or jacket off of that shoulder first. I have to take it off this one first.

Q Have your sleeping habits changed any?

A Yes.

Q In what way?

A I have to sleep by myself with a pillow that when I turn on the right side that I can use that pillow in that position to rest it on. (Indicating)

Q Mr. Ward, is there any other injuries that you received in this accident aside from your -- your arm, your elbow, and your wrist and shoulder?

A Well, I don't -- don't know for sure, but I been having trouble with my back ever since --

* * *

[Tr. 72]

Q What is wrong with your back?

A After I got able to get up and start stirring around and taking this exercise that he asked me to take on the arm and move, get up out of the chair and move.

Q When was this, Mr. Ward? Approximately how long after the accident?

A January.

Q Okay.

A Then I had trouble with my back, which I went to Doctor Psimas on the regular appointment and explained it to him that I was having trouble, and he made papers up.

Q What kind of trouble have you been having?

A I couldn't bend up and down to start with, which lasted three days. Then it went into the left leg. It left the back and went into the left leg, and the left leg, the hip -- all the way down from the hip to the leg was painful. I can move up and down now with the back, but the pain is still in the leg.

Q Mr. Ward, do you have a high school education?

A No, sir.

Q How far did you get in school?

A Seventh. I finished the sixth and went into the seventh, but I didn't finish.

[Tr. 73]

Q Aside from whatever is related to this accident, Mr. Ward, did you suffer from any physical infirmities before this accident?

A Well, I had a spell of thyroid trouble.

Q When were you treated for that?

A I believe that was in '68 I believe it was, and I was treated in Charlottesville, the university in Charlottesville. I was given a dose of radioactive iodine.

Q Did you return to work after that?

A Yes, sir, about a month or six weeks after I had taken the treatment, and I got along pretty good, but they gave me too much, and I had to remain on two grains of thyroid medicine daily.

Q Do you suffer from any hearing loss?

A Yes, sir.

Q How long have you been suffering from a hearing loss?

A Umm, roughly four or five years I guess.

Q Have you returned to work at all since August 6, 1971, at the Seaboard Coast Line shop?

A No, sir.

Q Will you be ever able to return to work
doing your job?

A No, sir.

Q Are you right-handed or left-handed?

[Tr. 74]

A Right-handed.

* * *

"CROSS"

BY MR. BOOKER:

* * *

[Tr. 131]

Q And I now show you a booklet entitled
Rules and Regulations of the Mechanical Department of the

[Tr. 132]

Seaboard Coast Line Railroad Company. Do you recognize that
book?

A Yes, sir.

Q Did you receive a copy of that book?

A Yes, sir.

Q And did that in part govern your activities
and duties as a blacksmith with Seaboard?

A Yes, sir.

Q I direct your attention to Rule 439 in the safety rules and let me read that rule to you. The rule provides, "Before attempting to adjust, repair, clean or oil hydrolic, air or electric or other mechanical tool or machine, it must be shut down or source of power disconnected, bled off if necessary, and machine be allowed to stop." Had you ever heard of that rule before?

A Yes, sir.

Q Have you heard of that rule?

A Yes, sir.

Q And is it the usual practice when you are working about machinery either at home or anywhere else to cut it off before you work on it?

A Yes, sir, if I was going to work on it.

Q Turning now to the date of your accident, how long had you been working there that morning when you were hurt?

[Tr. 133]

A Roughly fifteen or twenty minutes.

Q How much work did you have to do that morning? How many cuts did you have to make?

A I don't remember accurately.

Q Can you tell us about how long you thought it was going to take you to finish the job when you started it?

A No, sir. I hadn't given it any thought at that time.

Q Did you have any other deadlines to meet that day?

A I don't recall it.

Q You were given ample time to do the job, were you not?

A Well, we was told to get it, but he was in a hurry for it.

Q Who told you that?

A Mr. Foster.

Q Can you tell me who else was working with you?

A Mr. Whittaker and Mr. Greenwood.

Q What was Mr. Whittaker's position?

A At the time of the accident he was cutting the material.

Q And what was Mr. Greenwood's job?

[Tr. 134]

A Well, he is the hammer runner or helper.

Q And who was in charge of the three of you working there together?

A Well, we have a boss, Mr. Buchanan; but Mr. Foster was over --

Q But I am talking about just the three of you who were there. Mr. Whittaker and Mr. Ward and Mr. Greenwood.

A Me and Mr. Whittaker had the same rate.

Q And about the same seniority?

A Well, I had a little more seniority with the Seaboard Railroad Company than he did.

Q Were you sort of in charge of the group?

A No, sir.

Q You were all just cooperating together?

A Yes, sir.

Q You all knew what had to be done and all working together?

A Right.

Q Nobody was boss and nobody was worker. When did you decide that something was wrong with the machine and needed to be fixed?

A Well, I mashed the pedal, and it wouldn't cut the material up.

Q And what did you decide you would do about that?

[Tr. 135]

A I made the remark -- now, I can't be accurate that they heard it because the machine when it's running makes a noise, as you know; but I said, "Machine needs a little sand on it. It's slipping." And I walked around to throw the sand in it.

Q Where were you standing when you made that remark?

A I don't recall.

Q Do you know?

A Look, I was back with Mr. Greenwood holding the bar on the table.

Q How close to Mr. Greenwood?

A I can't say. I can't recall right off.

Q Can you tell us how close you were to Mr. Whittaker?

A We was all within about eight foot of each other.

Q Did either one of them give you any indication that they had heard what you said?

A Not that I recall.

Q Did you ask either one of them to shut off the machine?

A No, sir.

Q Did you know how to shut off the machine?

A Yes, sir.

[Tr. 136]

Q Who had started the machine that morning?

A I had.

Q You have testified as I understand it that you had thrown sand into the clutch before; is that correct?

A Yes, sir.

Q How many times have you done that before?

A Oh, a hundred or two.

Q Over how long a period of time?

A Oh, I don't know. Five, ten, fifteen years.

You see, I didn't work at that trade all the time as cutting material. There was several years that I was a blacksmith-welder and didn't do any blacksmith work at all. All I did was weld.

Q Excuse me. Go ahead.

A But as far as I know, this procedure was going on many years before I threw sand in.

Q But insofar as you are concerned, you have told us how many times you did it over what period of time; is that correct?

A Yes, sir.

Q All right. Did Mr. Whittaker ever see you do that?

A Yes, sir.

Q Did Mr. Greenwood ever see you do it?

A Well, in other words, I did it while they

[Tr. 137]

was out there. If they didn't see it, it was because they wasn't looking.

Q Did anyone else see you do it?

A Not that I know of.

Q So over the period of time when you were doing that, the only people who would have seen you do it were Mr. Whittaker and Mr. Greenwood?

A Yes, sir, the ones that were helping.

Q I am not talking specifically about this

day. I am talking about other times in the past also.
Would you normally be working with those two gentlemen?

A Yes, sir.

Q And with the other blacksmiths also or were
you the three primary blacksmiths?

A Well, at this time we was all there was
there.

Q So over the years Mr. Whittaker and
Mr. Greenwood were the ones that you normally worked with;
is that correct?

A Well, for the last four or five years.

Q And over that period of time you threw sand
into the clutch; is that correct?

A Yes, sir.

Q And they were out there with you and so far
as you know saw you do it; is that correct?

[Tr. 138]

A Yes, sir.

Q Did you ever have any discussions with them
prior to the day you were hurt that you were going to throw
sand into the clutch?

A No, sir.

Q And did any of them have any discussions
with you that they were going to throw sand into the clutch?

A No, sir.

Q Did you ever see Mr. Whittaker or

Mr. Greenwood throw sand into the clutch?

A I don't believe I have because most of the time I let Mr. Whittaker cut and Mr. Greenwood would help me hold.

Q You could approach the clutch either from the right or from the left, could you not?

A Well, yes, sir; but not easily.

Q As I understand it, on the day of your accident you said there was some debris there on the right-hand side?

A Yes, sir.

Q Had there ever been debris on the left-hand side?

A Yes, sir.

Q Had you thrown into the clutch from both sides in the past?

[Tr. 139]

A No, sir.

Q You had always done it from the left?

A Yes, sir.

Q But you could have done it from the right but for the debris?

A Well, there wasn't any loose dirt on the right-hand side.

Q But had you picked up some loose dirt you could have done it from the right?

A Yes.

Q And if you had done it from the right-hand side you would be directly in the vision of the person operating the cutting blade, would you not?

A That's right.

Q But doing it the way you did, you were blocked from the vision of the cutting blade, were you not?

A Yes, sir.

Q So when you went back around the machine would Whittaker know where you were at any particular time?

A No, sir.

[Tr. 140]

Q I believe you said that you had not noticed the setscrews before; is that correct?

A Had never seen them.

* * *

[Tr. 142]

Q Well, don't you remember when we were out there taking the photographs the machine was stopped and it was started and then it was stopped?

A Yes.

Q Does that refresh your recollection that at

this time the machine was stopped?

A I can't look at it and tell whether the clutch is engaged or not, and that way I can't tell -- but the setscrew looks like it's sticking out a little bit to the right side.

Q Now, that's the setscrew that you are talking about? (Indicating)

A As far as I know.

Q And that's down at the bottom of the clutch,
[Tr. 143]
is it not?

A Yes, sir.

Q And there are two of them -- one sitting next to it?

A Yes.

Q Is that the way that this would normally appear to somebody looking at it?

A As far as I know, it would.

Q Did you yourself ever make any comment to Mr. Foster or to Mr. Sebrell or to any of the other management about -- about throwing the sand into this machine?

A I never did make any.

Q And the day you were out there, as I understand it, your concern was because the blade was

bouncing; is that correct?

A Yes, sir.

Q The belt was all right, wasn't it?

A Yes, sir.

Q So you understood the problem to be with the clutch rather than with the belt?

A Yes, sir.

Q And it was that problem which you were [Tr. 144]

undertaking to remedy at the time your injury occurred?

A Yes, sir.

* * *

[Tr. 147]

Q I believe you came to work for Seaboard in 1946, did you not, Mr. Ward?

A 18th of February.

Q And prior to that where had you been employed?

A Norfolk Navy Yard. I worked one day with the Atlantic Coast Line in Rocky Mount.

Q You are a native of North Carolina?

A Yes, sir.

Q And you worked for the shipyard all during World War II?

A Yes, sir.

Q What kind of positions did you have with the shipyard?

A Blacksmith work.

Q The same general kind of work that you did when you got over to the Seaboard?

A Yes, sir, but it was on a different class of work, but such as heating, bending, forging and so forth.

Q And prior to your going to work for the shipyard, where were you employed?

A With the Counsel Tool Company.

Q Where is the Counsel Tool Company located?

[Tr. 148]

A In the eastern part of North Carolina near Wilmington, North Carolina. About thirty-six miles from Wilmington.

Q What kind of work did you do for Counsel Tool Company?

A Blacksmith work; making turpentine tools.

Q And before that where were you employed?

A Well, I didn't exactly have employment before then. Only such as logging and lumber companies and things like that.

Q All right. You stated that your formal education ended after the sixth grade?

A Yes, sir. I started in the seventh but didn't finish.

Q Did you take any schooling on the job or get high school credits in any other way?

A No, sir.

Q Are you aware of the fact that your Seaboard employment shows that you had three years of high school?

A No, sir. I don't know how they got it.

Q Do you remember what you told Seaboard at the time that you were employed about how much education you had?

A I didn't tell them I had three years of
[Tr. 149]
high school.

Q Do you remember telling them anything about the education you had when you were employed?

A No, sir. I don't recall them even asking.

Q You have earlier identified and said you received a book called Seaboard Coast Line Railroad Company, Rules and Regulations of the Mechanical Department. I call your attention just to one rule in that booklet, Number 25, which provides that, "Employees of every grade are warned to see for themselves, before using them, that the machinery or tools which they are expected to use are in proper condition for the service required; and if not, to put them in proper condition, or see that they are so put, before using them. The Company does not wish, nor expect, its employees to

incur any risks whatever from which, by exercise of their own judgment and by personal care, they can protect themselves, but enjoins them to take precaution in all cases to do their duty in safety whether they may at the time be acting under orders of their superiors or otherwise." Have you ever read that rule?

[Tr. 150]

Q Mr. Ward, do you remember ever having heard that rule or read it before?

A Yes, sir.

Q And did you attempt to follow that rule in your activities?

A Yes, sir.

Q When something went wrong with any machinery which you were using in the blacksmith shop, did you attempt to repair it or fix it?

A No, sir.

[Tr. 151]

Q Whose responsibility was that?

A That was the machinists'.

* * *

[Tr. 154]

Q And did you use your gloves primarily when welding?

A Yes, sir.

Q And was there any reason why you could not have taken off your gloves at this particular time to have picked up the dirt?

A Nothing other than it had a lot of grease in it, and you don't like to get your hands dirty and put your hands back in your gloves.

Q But that is a requirement? That you keep your gloves on at all times?

A Not that I know of.

Q On the particular day of your accident when the machine blade began to bounce, was there any reason for you not to call a machinist to come over and work on the machine?

A For the simple reason that we have called them before and nobody did anything about it.

"REDIRECT"

BY MR. MILLER:

[Tr. 155]

Q Mr. Ward, the rule states you must not -- you have to shut off the machine before attempting to adjust, repair, oil or clean. Were you adjusting the machine?

A No, sir.

Q Did you touch the machine?

[Tr. 156]

A No, sir.

Q Were you repairing the machine?

A No, sir.

Q Were you oiling the machine?

A No, sir.

Q Were you cleaning the machine?

A No, sir.

Q And what is the reason that you did not call a machinist?

A Because we couldn't get one to do the work when you asked for it because they say, "Well, we will send one when we can."

Q Have they ever sent a machinist for you -- to repair the machine?

A Well, sometimes they would send a machinist. If they had a man they could send, they would send him.

Q When was the last time that machine was cleaned so far as you know?

A Roughly six or eight years ago.

Q And who was required to do it then?

A Me and Mr. Whittaker.

Q Mr. Booker mentioned something about an equilibrium problem. Did you have it on the day of the accident?

A No, sir.

[Tr. 157]

Q When was the last time before this accident that you had had any equilibrium problem?

A A little over a year.

Q Well, that would put it a little over two years ago?

A About two and a half years.

Q Before the accident?

A I think. The best I can remember.

Q And were all the medical records sent to the Seaboard?

A What?

Q Did you have medical records sent to the Seaboard Coast Line?

A I didn't.

Q Were you seen by a Seaboard doctor?

A No, sir.

Q Were you ever asked to take a physical by Seaboard doctors?

A No, sir.

Q Did you return to work after you had this equilibrium problem?

A Yes.

Q Did anyone at Seaboard ask you to have a physical?

A No.

[Tr. 158]

Q Did you ever have any problem about that again?

A No, sir.

Q Are there such things as Seaboard doctors?

A Yes, sir.

Q Do you have regular physicals with Seaboard doctors?

A Well, I never had one by the Seaboard doctor.

Q Did you have one when you first went to work?

A No, sir.

Q Did they ever request you to have one?

A No, sir.

Q Did you ever have any problem with dizziness in the ear before this accident?

A Nothing only just the two spells of equilibrium.

Q Mr. Ward, I would like you to read from the Rules and Regulations of the Mechanical Department. Read Rule Number 9, please.

A Tools and machinery must be kept clean and in order and all portable tools returned to the proper place after being used.

Q Okay. Okay. It says tools must be -- must be kept clean and in order?

[Tr. 159]

A Yes.

Q Now, you've identified the Seaboard Coast Line Agreement. Will you read, please, what Seaboard Coast Line Railroad has agreed to with regard for the safety of its employees under 36g? Just go ahead. What is it entitled? What is the title of that particular section?

A Oh. Rule 36 - Safety of Employees.

Q Okay. Read 36g, please.

A "The management, with the cooperation of the employees, will keep shops and yards in a clean and sanitary condition and all machinery and tools in a safe and working condition."

Q All machinery and tools in a safe and working condition. Was this machinery in working condition?

A No, sir.

Q At the time you were injured?

A No, sir, not in working condition.

Dr. George N. Psimas

"DIRECT"

BY MR. MILLER:

[Tr. 76]

Q State your full name and your profession, please.

A Doctor George N. Psimas, and I am an orthopedic surgeon.

Q Where are your professional offices located, Doctor Psimas?

[Tr. 77]

A 3315 County Street.

Q Are you in partnership with other doctors?

A Yes, I have two associates, Doctor Weitzman and Doctor Durica.

Q Where did you receive your medical school training?

MR. KILGORE: Your Honor, we will concede that Doctor Psimas is a well qualified orthopedic surgeon practicing in the City of Portsmouth.

Q Doctor, at the request of Doctor Grover Moore, did you see the plaintiff in this case, Mr. Thomas Ward?

A Yes, I did.

Q What was the first occasion that you were called in to see him?

A I saw him on August the 6th, 1971.

Q And where was that, sir?

A It was at the X-ray room at Maryview Hospital.

Q And do you know why you were called in to see him?

A I was called because he had sustained an

[Tr. 78]

~~injury to his right elbow which consisted of a severe fracture, and I was asked to see him in reference to continuing his treatment and care.~~

Q What's the first thing you did when you saw Mr. Ward?

A I examined him.

Q What were your findings at your examination?

A The primary findings were that he had a severe fracture involving the right elbow joint. His fracture was immobilized in an air bag at the time. As I say, it was quite a severe fracture of the elbow.

Q And what did you do in order to treat him and further diagnose his condition?

A Well, he was X-rayed, of course.

Q And do you have copies of the X-rays that you made at Maryview Hospital?

A Yes, I do.

Q Would you show them to the jury, please.

A I will be glad to.

MR. MILLER: Judge, the doctor indicated to me that it would be difficult to point out the precise nature of the fracture lines from that distance so he requested that we put it over here.

THE COURT: All right, sir.

A (Continuing) These are X-rays taken of

[Tr. 79]

Mr. Ward on August the 6th, 1971, identified by his name; and they include an X-ray of the right elbow and forearm. They show a severe fracture involving the elbow joint with a fracture area beginning here with this entire joint turned around ninety degrees. The fracture extends up across here to involve the inner side of the elbow. (Indicating) There is a fracture line that begins here and crosses into the major fracture line. (Indicating)

BY MR. MILLER:

Q What do you call this type of fracture?

A This is called a comminuted or broken-up-into-many-pieces fracture and what we call not a compound fracture. It did not connect with the skin.

Q And on the basis of these fractures, what did you decide to do?

A Well, he had such a severe fracture that he had an open reduction done and performed medically.

Q And what did you then do? How do you do an open reduction?

A He was prepared for surgery, routine laboratory tests, and given premedication for surgery and taken to the operating room. Here his arm was draped and prepped, and an incision was made on the outer aspect of the elbow, and an incision was made on the inner aspect of the

[Tr. 80]

elbow, and with these incisions, bone was exposed. Bone was being placed in an anatomical position. That is, in the position they were in prior to the injury.

Q And how did you place these bones in an anatomical position?

A There was so many. By actually using an instrument to hold the bones in proper position and after doing this we had to immobilize these fragments, hold them together.

Q Um-hum.

A So we used several Kirschner wires to hold them together.

Q And do you have a picture of what the Kirschner wires looked like?

A I have a film identified here by name.

MR. MILLER: Just a second, Doctor. Can

we have this X-ray introduced into evidence, please?

THE COURT: Very well. The X-ray will be received, admitted in evidence and identified as Plaintiff's Exhibit Number 13.

(Marked in evidence by the Court as Plaintiff's Exhibit Number 13.)

THE WITNESS: This shows the film taken on the -- on September 24, 1971. It shows the position of the fracture fragments after they have

[Tr. 81]

been replaced and a number of wires placed in a -- in varying positions here. The reason for that being the fracture fragments were so small they could not be held together except in this manner. These wires are threaded wires like a screw, but they are a wire and being threaded. They hold small fragments together.

BY MR. MILLER:

Q What do you do with regard to the fragments? Do you put the wires through the bone?

A The wires -- drill through the bone.

Q With a drill of some sort?

A With a drill.

Q I see.

A A hand drill. Then the bones are held in

the anatomical position, the proper position, and the wires are driven across the fracture site to a stable piece of bone, and by doing this the fracture is fixed.

* * *

[Tr. 84]

Q Doctor, will you explain to this jury what bones connect to the elbow or form the elbow joint?

A Well, the elbow joint is formed by the upper arm or humerus above and two bones in the forearm --

[Tr. 85]

the radius on the outer side and the ulna on the inner side-- and where these three bones come together is the elbow joint.

Q Now, are there any particular names to the end of the humerus or the beginning of the radius?

A The ends of the humerus are called the lateral epicondyle and medial epicondyle.

Q Medial means closest to the body?

A Yes.

Q Which bones were involved in this fracture?

A His fracture involved the lateral epicondyle, the shaft of the humerus as it enters into the elbow joint. The medial epicondyle as well. In close proximity to the medial epicondyle is a major nerve to the hand.

Q What is that nerve called?

A That nerve is the ulna nerve, and this nerve was contused in the elbow at the time of surgery -- at the time of injury. Correction.

Q What is the function of the ulna nerve as it passes through the elbow?

A Well, the function of the ulna nerve is a nerve that supplies the muscles in the forearm and hand. Essentially those that go to the fourth and fifth fingers.

Q I ask you if this is an accurate diagram of the way the ulna nerve passes through the shoulder and elbow joint.

[Tr. 86]

A Yes, it is.

MR. MILLER: I ask that that be introduced.

THE COURT: Very well. The diagram of the nerves in the human arm is received, admitted in evidence and identified as Plaintiff's Exhibit Number 17.

(Marked in evidence by the Court as Plaintiff's Exhibit Number 17.)

BY MR. MILLER:

Q Doctor, why did you decide to explore the ulna nerve?

A Well, he had a complaint of numbness in the ulna nerve. The fracture involved an area where anatomically the nerve is in close proximity. Accordingly.

the nerve could have been damaged as a result of the injury. It was my feeling that I should expose the nerve to see if it was damaged. Should this have been the case, it would have been repaired surgically right then and there. It was found to be bruised and contused by a fracture fragment involving the medial epicondyle, which had rotated on itself and stretched the contused nerve.

Q Doctor, what was his course in the hospital the next two weeks? What did you have done for him? What were your orders?

[Tr. 87]

A Well, I would like to add one other thing.

Q Yes, sir.

A During the surgery it was necessary to insert an endotracheal tube which is used to control breathing during anesthesia if this became necessary so in doing so a small cystic lesion was found in his vocal cord. This was not related to this injury, but I thought it ought to be brought out. I did ask Doctor Eberly to see him later.

After his surgery he was placed in a long-arm case. This was split. He had the kind of swelling that one expects following an injury of this sort so it was necessary to observe his hand and fingers very closely. He had pain for which he was given demerol, a routine narcotic, on several days; and then he later

received codeine as a narcotic for relief of pain, which he took during most of his hospital stay.

Q Was he immobilized in the hospital?

A He was immobilized in the long-arm cast.

Q What is put on the cast? Anything to relieve swelling?

A Well, of course, in an attempt to reduce swelling, we use ice, and we give an enzyme, chymoral, which is used to reduce swelling of soft tissues.

Q What was his condition on discharge from the hospital on September 18th?

A Ambulatory, wearing a long-arm cast.

Q I said September 18th. Was the date of discharge --

A September 20, 1971.

Q Did you request to see him periodically in the hospital?

A Yes. It's necessary to follow injuries of this sort fairly regularly and frequently, and he was seen on the 24th of August, 1971.

Q What were his complaints on that day?

A At that time the cast was removed. The wound was inspected. It was found to be healing well. A new long-arm cast was applied. X-rays were repeated at that time.

Q And what's the next occasion that you saw him?

A He was next seen on September the 7th, 1971. The cast was checked again. He had some compression of the cast about the wrist for which the cast was trimmed. He was advised to return again in a period of four weeks.

Q Did you then see him around or about September 24, 1971?

A I saw him again on September 18th because he was complaining of swelling in the right forearm. The
[Tr. 89]

cast was split further. A section of the cast was removed. Foam rubber padding was inserted to protect this split portion.

Q Um-hum.

A The patient was asked to return to see me again should he have symptoms.

Q Did he complain of pain in the wrist on this occasion?

A Yes, in the wrist and in his elbow as well.

Q Now, you also saw him on October the 8th and October the 22nd. Can you summarize what those visits entailed?

A Yeah. I saw him again on the 24th of September, and his cast was removed and a new cast was applied. On September -- on October the 8th he was again checked, and

at this time a portion of the cast was removed. It was lined with tape, and it was put on in such a way as to protect his arm and give him some freedom of movement at the same time.

On October the 22nd he was told he could begin eliminating the use of the splint and told to try to increase his functional range of motion. He was complaining of soreness and pain in his shoulder at that time, and he had some stiffness here with restricted range of motion. Accordingly, he was injected with Novocain and steroid to [Tr. 90]

try to relieve the stiffness in the right shoulder.

Q In the shoulder joint?

A The shoulder area. Yes.

Q Will you describe the other visits that he had to you, Doctor, and characterize what his complaints were?

A He later was seen again on November the 16th, 1971. The range of the elbow motion at that time was considerably restricted. An X-ray was taken, and it showed the pins in good condition, and alignment seemed very acceptable. There was some question in my mind about the degree of healing that occurred at the fracture site, but because of the stiffness in the elbow I felt it necessary to proceed with increasing activity.

I had advised him to -- to try to stop

using his sling in order to get a little more extension in the elbow, and I stressed that he should not carry out any unusual activities that might put a strain on or injure the elbow joint.

Q What was his condition on December the 3rd, Doctor?

A On this date he seemed improved. He still had considerable restriction of elbow motion. For this reason he was injected again. This time with Novocain and cortizone into the elbow joint. The purpose of this being
[Tr. 91]

to try to reduce adhesions which occurred in the joint following an injury of this sort. He was asked to return in January, at which time I planned to remove his pins.

Q Did he in fact go into the hospital in January?

A Yes, he was admitted on the 16th of January, and the four pins were removed at that time.

Q At the time that he was admitted to the hospital, Doctor, did you take a history from him and perform another physical examination?

A Yes, I did.

Q What were his complaints then with regard to the other parts of his anatomy that were not initially involved?

A This patient continued to have complaints

referable to the right shoulder, the right lateral flank, and the low back area.

Q You talk about the right lateral flank. You are talking about the side underneath the right arm?

A Yes.

Q What about his low back did you say?

A He had complaints referable to his low back area at that time.

Q Doctor, assuming that this man was caught in a machine and was hanging for approximately forty-five [Tr. 92]

minutes at a height of two feet, would complaints of pain in the low back in January be consistent with this type of injury?

A Yes.

Q Okay.

A As a matter of fact, he was X-rayed at that time to note progress. That is on the 24th of January, and his pins had been removed, and the wound sutures were removed at that time, and his wound was redressed, and he was asked to return in a couple of weeks.

Q In order to remove the pins what did you have to do?

A He had to be given anesthesia. An incision had to be made. The ends of the pins were located, and using a drill again -- because these are threaded wires -- drilled out.

Q And after his release from the hospital in January did you continue to see him again?

A Yes, I did.

Q Now, during this period -- during this period was he under any type of physiotherapy program?

A Yes. He was under a physiotherapy program including the admonishment of no activity, no attempt at strain -- that sort of thing.

Q Um-hum.

[Tr. 93]

A He was urged to increased flexion and extension.

Q Any treatment at Maryview Hospital that you prescribed?

A I don't have any record of that.

Q Okay. Would you care to refer to the hospital record?

A That would be nice.

You are talking about the time when his fracture -- the pins were removed?

Q Yes, sir.

A At that time he was in the hospital two days, and he was simply instructed in exercise.

Q What about prior to that time? Was he undergoing physiotherapy at Maryview Hospital?

A Yes.

Q And what did you instruct the physiotherapist to have done to him?

A I wanted him to build up the elbow strength, the upper arm strength; and he was urged to carry out extension-flexion exercises in this fashion and also supination-pronation exercises to restore hand function in this fashion.

Q And so far as you know, did he carry out those exercises in accordance with your instructions?

[Tr. 94]

A Yes.

Q Did he continue to improve under your direction?

A Yes, sir.

Q Okay. Doctor, did you follow him in your office subsequent to his second hospitalization?

A I did.

Q How many times did you see him in January of 1972?

A I saw him on the 10th, of course, and he was hospitalized 1-16 through 1-18, and I saw him on the 24th.

Q Um-hum.

A I then saw him again February the 7th.

Q And what did you do for him on February the 7th?

A He continued to have stiffness in the elbow,

and I injected his elbow again with Novocain, a cortizone compound, in an attempt to restore elbow function. He was urged to continue his PT program. He was told to continue his periodic exercises and to use intermittent heat about the elbow and to return in two weeks.

Q Did you see him in March of 1972?

A Yes.

Q By the way, during this entire period of

[Tr. 95]

time that you were seeing Mr. Ward were you keeping the Seaboard Coast Line Railroad doctors advised of his condition?

A I believe so. They had periodic reports.

THE COURT: Excuse me. Was it in January that you removed the pins?

THE WITNESS: Yes, sir. January the 17th.

Q What was his condition, Doctor Psimas, on March 13, 1972?

A He seemed to be improving at that time. He still had some restriction of extension. His flexion seemed to be improving in that he was able to now get his hand -- his fingers to the mouth and to his nose. He was encouraged to continue his exercise program and repeat X-rays were taken. X-rays at that time showed that for the most part the fracture had healed bone to bone. In one area the fracture had healed with what we call fibrous union or scar union. That was not bone to bone but bone with scar with bone, and this area extended into the elbow joint.

Q What about the shoulder? Was the shoulder improving?

A At this time he continued to have soreness about the shoulder, and he was still having restriction of shoulder motion, and I again advised him to continue to exercise his shoulder as vigorously as possible to restore this movement. I indicated if it did not improve we would have to reinject it again.

Q Did you find other intra-articular adhesions at his elbow joint?

A At the site of the union where it extends into the elbow joint. In this area there was fibrous union present, and I felt that this represented an area where intra-articular adhesions had occurred and were the reason for his loss of range of elbow motion.

Q Is this anything akin to arthritis?

A In this particular area this represents the early stage of a postinjury arthritis.

Q Is that what you refer to as posttraumatic arthritis?

A Posttraumatic arthritis.

Q Is this condition still in his arm?

A This condition is present and is permanent.

Q Doctor, in your other visits that Mr. Ward

[Tr. 97]

made to you did you eventually reach a conclusion as to what total per cent of disability Mr. Ward had in respect to his returning to work in the duties of a blacksmith?

A It was my opinion that he would not be able to resume work as a blacksmith involving the duties that he indicated to me he performed.

Q Insofar as his arm is concerned then, what is his total disability with regard to work?

A He is totally disabled as far as the right upper extremity is concerned in reference to pursuing his work as a blacksmith.

Q Doctor, when did you have occasion to see him last?

A I last saw him on October the 24th, 1972.

Q Now, when you saw him what particular test did you perform on him?

A At the time I saw him I indicated -- I examined him to determine the range of motion in the elbow.

Q All right. Now, when you say range of motion, what are you referring to?

A The degree of extension and the degree of flexion.

Q What is the normal degree of extension and flexion for a human being Mr. Ward's age of fifty-seven years?

A Extension complete would be a hundred and

[Tr. 98]

eighty degrees. Flexion complete, approximately thirty degrees.

Q What direction of flexion and extension did he lack?

A The patient showed a total of one hundred-forty-five degrees of extension, and he showed a flexion of sixty-five degrees.

Q So he lost thirty-five degrees in extension did you say?

A You could say he lost thirty-five degrees in extension and flexion.

Q Is this loss permanent, Doctor?

A In my opinion, it is.

Q How does Mr. Ward carry his arm as compared to the normal person?

A He is unable to extend it completely so he carries it with the arm bent to his side.

Q Something to this effect?

A In this manner at 145 degrees. (Indicating)

Q So is it possible for him to push it further back or bend it further back?

A No, it is not.

Q Is that a permanent deformity?

A It is.

Q Did you test his hand grip on this particular

[Tr. 99]

occasion?

A Yes, I did. The Jamar hand grip is a mechanism we have to determine strength, muscle strength; and his test on the right side was seventy, and his test on the left side was a hundred.

Q Now, what would you expect in a right-handed gentleman aged fifty-seven to be on the right? Would it be stronger than the left?

A You would expect it to be ten or twenty stronger than the left hand if he was right-handed.

Q So his reading was a hundred on the left and only seventy on the right so he suffered a loss of reading of either thirty or forty -- of forty or fifty --

A That's correct.

Q -- on the right hand? Did you test his ability to throw his arm up in the air like that? Abduction?

A Yes. Of course, the limitation of extension of elbow also limits his ability to get the arm overhead and use it overhead. I also checked the measurements of his biceps, and there was a difference in the right side compared to the left of a half inch in circumferential measurement. I checked supination-pronation of the hand, and this seemed to be complete.

[Tr. 100]

Q Doctor, do you have any estimate as to the total number of outpatient visits made by Mr. Ward to you?

A I say about twenty-two or twenty-three visits. I am not sure.

Q On his last visit did he complain of any discomfort?

A He still has some vague discomfort about the elbow with activity, with changing weather.

Q Is this discomfort or with changing weather going to be permanent or not?

A It will be.

"CROSS"

BY MR. KILGORE:

[Tr. 100]

Q Doctor, if you will indulge me for a few minutes as a layman on some of the conversation that you had with Mr. Miller and perhaps for the benefit of some of the jurors that don't understand these medical terms, as I gather from what you have told him and from what you have shown on the various diagrams, the man's right elbow had been fractured. Now, you call that I believe a comminuted --

[Tr. 101]

A Comminuted fracture.

Q Fracture. The inside of the elbow. Is that a usual type fracture, Doctor?

A No. This type of fracture is unusual in that it is -- it's just quite comminuted, you know.

Q And in treating this man you indicated I believe that you had to put some pins there or some wires or something to attach these various chipped bones back to their proper place. Is that a usual treatment for that type of injury?

A Well, in his specific case this is the usual type of immobilization required.

Q And I believe you indicated that when you were doing this that it was necessary that he be placed under a local anesthetic or some sort of a general anesthetic. He was unable to -- had no feeling of pain at the time that you were doing all this work, was he?

A No. He was under anesthesia, general anesthesia.

Q And all of the pins and wires and that sort of thing that you had to do to get this fracture back together have now been removed?

A They have now been removed. Yes, sir.

Q A person can receive an injury of this nature from a fall in a bathtub, couldn't they, Doctor?

[Tr. 102]

A It's possible.

Q Or playing tennis on a tennis court?

A It's possible to sustain this kind of injury although it was obviously a violent injury I think.

Q I see. Now, your diagnosis at the time that you first initially treated him on the 6th of August was that he had this fracture and you also felt that there was a contusion or bruise of the nerve that served that portion of his right arm?

A That's correct.

Q In your opinion has the damage to the nerve been repaired or has it healed itself?

A My feeling was that the nerve -- the nerve had repaired. At the time of surgery the nerve was infiltrated with blood within its sheath, and this I think has been absolved, and I think it is repaired.

Q And there is no disability with reference to that nerve?

A I see no reference to that -- to any ulna nerve lesion today.

Q And I believe you also said to Mr. Miller that the man had a cyst or tumor on his throat or in the throat area?

A Yes. He had a cyst of the vocal cord which was revealed at the time that we did our surgery at

[Tr. 103]

the time of putting a tube into his lungs so that we could breathe for the patient.

Q And that was not in any way connected with the injury in this patient; is that correct?

A No, it was not.

Q All fractures have a certain amount of pain that generates to that particular fracture, do they not?

A That's correct.

Q And this was not unusual in this man's particular case, was it?

A He had pain. One would expect it.

[Tr. 104]

Q None in the wrist or his shoulder --

A That is correct.

Q -- or his low back? Do you think that is more of a strain than perhaps was occasioned by the --

A I think -- I think the shoulder symptoms were relative to the mechanism of injury. The yanking of the extremity as it were. I believe that they -- that the shoulder symptoms were also aggravated by the use of the cast which was necessary, and when one wears a cast one tends to limit movement in the shoulder, and so he was treated to try to restore movement as fully as possible.

Q And on the last visit that you saw him -- on the 24th of October, I believe you indicated at that time that you estimated that his loss of permanent partial

disability on the extension of his arm was seven per cent; is that correct, sir?

A That is correct.

Q And on the flexation or flexion of his arm, the right arm, you indicated that he would have a permanent partial disability of nine per cent?

A That is correct.

Q And the conclusion that you drew was that there would be a sixteen per cent partial disability to the upper extremity or upper range of motion of his arm?

A Yes. This evaluation -- I would like to

[Tr. 105]

qualify -- is made using the guide that we use issued by the American Medical Association, and this guide represents percentages of disability relative to loss of range of motion. It does not take into consideration loss due to muscle weakness or loss associated with pain or anything other than loss of range of motion, so this figure of sixteen per cent is some attempt to reach a figure representing the loss of range of motion in the elbow.

Q Well now, on range of motion that you have referenced to and being able to flex the arm and to be able to extend it, does that have -- does that prevent him from reaching, say, to the left side of his body with his right arm?

A Well, in reaching to the left side of the body he would have to carry out some flexion of the elbow. If it gets to sixty-five degrees it stops at that point.

Anything past that point he would not be able to do.

Q But he does have normal except for the limitation of flexation? He has a normal point that he can move his arm from left to right and up and down within those limits of flexation and extension?

A Yes, sir.

Q And he can reach behind his head within those limits?

A He is limited in flexion to sixty-five

[Tr. 106]

degrees, but what --

Q But what I had reference to, this is nothing in his shoulder -- his right shoulder operation?

A His shoulder restriction of motion which was more marked in the beginning is no longer present.

Q Same thing is true with his wrist?

A The wrist motion is active and present.

Q Now, you made -- I believe I understood you to say in answer to an inquiry of Mr. Miller's that in your opinion this man would not be able to perform his duties, work duties, as a blacksmith?

A That is correct.

Q You are not saying, are you, Doctor, that he could not perform normal work duties of something other than a blacksmith?

A No.

Q He could perform a great many other duties?

A He can perform any duties within the range of motion of that elbow and within the strength of his upper arm.

Q I see. He has made remarkable recovery from this injury. Would that be a fair statement, Doctor?

A I would say he has made a very good recovery. I would have liked to have seen more flexion and more extension, but in this kind of an injury one expects [Tr. 107]

some permanent disability.

Q And as far as the extension and flexion is concerned that -- you feel that would be permanent, but his other activities with his right arm you feel have been completely healed?

A I think that they have been. Yes.

* * *

Nick J. Moore

"DIRECT"

BY MR. MILLER:

[Tr. 160]

Q State your full name, please.

A Nick J. Moore.

Q Where do you live, Mr. Moore?

A 425½ High Street, Apartment 1.

[Tr. 161]

Q Are you employed at the present time?

A No.

Q What is your age, sir?

A Seventy-one.

Q Are you retired at the present time?

A Yeah.

Q Where are you retired from?

A Seaboard Coast Line.

Q Did you work for them?

A Yes.

Q When did you first go to work at the
Seaboard Coast Line?

A July the 7th, 1917.

Q What was your job title at the Seaboard
Coast Line Railroad Company, Mr. Moore?

A Pardon?

Q What was your job title? What was your
job?

A I went there as a hammer operator.

Q And what did you retire as?

A Blacksmith.

Q Are you familiar with a certain shearing
machine that Mr. Ward was hurt on on August the 6th, 1971?

A Yes.

Q Specifically I am referring to Plaintiff's

[Tr. 162]

Exhibit Number 1, this particular machine.

A Yes, sir.

Q Was that machine there on the date that you left the Seaboard Railroad Company?

A Yes, sir.

Q And when did you leave the Seaboard Coast Line Railroad Company?

A September 26, 1969.

Q And was the mechanical condition in the same type of shape then as it was -- when -- when you first came there was it -- was this machine there?

A Yes, sir, it was.

Q And was it there before you got there?

A I don't know.

Q In 1917 it was there?

A It was there in 1917.

Q And did that machine ever become replaced by any other machine ever since you were there?

A No, no.

Q As a blacksmith, Mr. Moore, were you required to do any shearing?

A Yes.

Q And what were your duties as a blacksmith with regard to shearing? What would you shear?

A Material to make jobs out of it.

[Tr. 163]

Q Um-hum. For what purpose?

A To make jobs. Different things.

Q Do you know where that machine that I just showed you is located?

A Yes, sir.

Q Where is it located?

A Located underneath the shed outside the blacksmith shop.

Q Now, are you familiar with the operation of that machine?

A Yes.

Q How do you start the machine or how did you start it when you were there, Mr. Moore?

A Started with a switch.

Q All right. Then what would you do?

A Well, when the belt would slip off take a stick and -- and press up against the belt with a stick to make it pull.

Q Is that in order to get the machine running?

A To get the machine operating.

Q When did you start doing that, Mr. Moore?

A We been doing it since I been there the last time.

Q When did you start doing that?

A '51.

[Tr. 164]

Q 1951 you were putting the stick up against the machine?

A Um-hum.

Q Now, you would then cut material; is that right?

A Yes, sir.

Q Would anything unusual happen while you were cutting material?

A Well, it wouldn't always cut it unless you threw some sand up in the clutch to make it come down.

Q What do you mean it wouldn't always cut? What would happen?

A It would just bounce up and down, wouldn't go all the way down -- the blade wouldn't.

Q It wouldn't cut the material?

A Not unless you threw sand.

Q How would you get the machine to operate?

A Throw the sand in there.

Q Would that get it to work?

A Yes.

Q Did it work?

A Yes.

Q Did it always work?

A Yeah.

Q What caused the machine if you know to

[Tr. 165]

bounce up and down? The blade to bounce up and down?

A I wouldn't know.

Q And when you threw the sand in, where would you throw the sand, Mr. Moore?

A Throw it in the clutches I guess. The clutches I guess you would call it.

Q Now, if the machine started to bounce up and down and wouldn't cut would you -- would it have anything to do with the belt?

A No, not -- I don't think so. No.
Unh-unh.

Q Now, when did you start throwing sand in this machine?

A When?

Q When?

A When it got to bouncing up and down.

Q How long ago was that when it started bouncing up and down?

A Around '51.

Q And how long did it continue to bounce up and down?

A It was doing it when I left there.

Q 1962?

A Um-hum.

Q Do you know this gentleman right over here?

[Tr. 166]

Mr. Foster?

A Oh, yes. Yes, sir.

Q Is he an official of the railroad?

A Assistant superintendant or assistant to the superintendant.

Q Has he ever seen you throwing sand in the machine?

A Yes, sir.

Q Did you ask him to get it fixed or anything?

A No.

Q Did he say anything to you?

A He said that that was dangerous, that machine was dangerous but nothing he could do about it.

Q This gentleman sitting right here?
(Indicating)

A Yes.

Q And when was the first time he told that to you?

A I don't recall the date. I guess about six or seven or eight or ten years ago.

Q What do you mean there was nothing he could do about it? Did you have any further conversation about it?

A No, sir.

[Tr. 167]

Q Did you ever call a machinist before you threw the sand in the machine?

A No.

Q Why not?

A Because he said he couldn't get nothing done about it, and it had been reported so I heard.

Q Would others throw sand in the machine?

A Yes.

Q Was it a practice done to throw sand in that machine?

A Yes.

[Tr. 168]

Q Now, when you threw sand in the machine, Mr. Moore, did you have gloves on?

A Yes.

Q Are those gloves provided to you by the Seaboard Coast Line Railroad Company?

A Yes.

Q Does the speed of the machine have anything to do with the clutch?

A Well, it had to be run at a certain speed before it would cut the material.

Q All right.

A It had to have a good start.

Q If the machine slowed down was there any way to get it to speed up again?

[Tr. 169]

A Yes. By pushing a stick up against the belt.

Q You wouldn't throw sand in the machine to get the clutch back?

A No, no, no. That wouldn't have anything to do with it.

Q What did you do if the machine started slowing down?

A Go around in the back and push up against the belt with a stick.

Q What stick are you talking about? Was there a stick that was in use back there when you were --

A Oh, yes. We kept it back there for that purpose.

Q Where was that stick kept, Mr. Moore?

A Right back by the belt.

Q Showing you Plaintiff's Exhibit Number 4, does that look familiar to you?

A Yeah, that looks like the stick.

Q And when did you say you started using that stick?

A '51.

"CROSS"

BY MR. BOOKER:

[Tr. 170]

Q Mr. Moore, you said that you have seen other people throw sand into the machine; is that correct?

A Correct.

Q Can you tell me who else you have seen do that?

A Mr. Porter -- two Mr. Porters.
Mr. Greenwood, Mr. Wiggins and Mr. Whittaker.

Q And are they all blacksmiths that are now working at Seaboard?

A Some of them are not there now. The Porters are not.

Q Where are the Porters now?

[Tr. 172]

trying to put words in his mouth, and I don't think it's fair to the witness to attempt to do so in light of his answer.

THE COURT: I think it's true with that line of questions. If he doesn't know, he doesn't know.

BY MR. BOOKER:

Q Was it more than once?

A Yes, it was more than once.

Q Now, how many times have you seen Mr. Greenwood throw sand in the machine?

A I wouldn't know.

Q Was that more than once?

A Yes, it was.

Q Over how long a period of time?

A Since '51. I think it would be twenty-one years, wouldn't it?

Q And during that period of time at least more than once you saw Mr. Whittaker do it?

A Yes.

Q And Mr. Greenwood?

A Yes.

Q And how many times have you seen Mr. Wiggins throw sand into the machine?

[Tr. 171]

A They are around Portsmouth someplace here.

Q Are they special friends of yours?

A No. Not special friends.

Q I mean you don't know where they are now?

A No, no. Unh-unh.

Q Mr. Greenwood and Mr. Whittaker and Mr. Wiggins are still with Seaboard, are they not?

A As far as I know.

Q And at least when you left there they were still employed by Seaboard, were they not?

A Yeah.

Q And how many times have you seen Mr. Whittaker throw sand into the machine?

A I haven't the slightest idea. I don't know.

Q Could you give us an estimate?

A No, I couldn't truthfully tell you how many times I had seen him.

Q Well, would it more than a hundred?

A I don't think it would be that many.

Q Would it be more than fifty?

A I wouldn't know.

Q Well, would it be less than fifty?

MR. MOODY: Your Honor, I think he said he didn't have the slightest idea, and now he is

[Tr. 173]

A About the same number of times.

Q But you can't tell us how many that is?

A No.

Q So at least on three occasions over that twenty-one-year period you saw others throw sand in the machine; is that correct?

A Right.

Q And over that period of time how many times would you say you threw sand in the machine?

A I don't recall.

Q More than once?

A More than once.

Q But that's --

A Seven or eight times or a dozen times because I had right much cutting out there.

Q Seven or eight times or a dozen times over a twenty-one-year period?

A Yeah, or more.

Q So this wasn't something you did every day?

A Well, if I had material to cut.

Q But if you did it only seven or eight times in twenty-one years, that would be one time in three years?

A Yes.

Q So how many times during a year's time

[Tr. 174]

would you have to cut material?

A I don't know. I didn't keep good track of it.

Q Did you do it once a week?

A Well, sometimes. Yeah.

Q You certainly would do it as much as once a month, wouldn't you?

A Sometimes I guess.

Q And so over that period of time sometimes you would put sand in and sometimes you wouldn't; is that correct?

A I don't recall of ever cutting material out there that I didn't have to use sand.

Q And you think you used sand as many as twelve times over twenty-one years; is that correct?

A At least. Yes.

Q And is that your best estimate as you sit here today?

A Yeah, I guess so -- or more. Or more.

Q Well --

A I can't -- I didn't keep track of it.

Q All right, sir. But it's around twelve times I take it?

A More or less.

Q You said seven or eight or twelve, so that

[Tr. 175]

would be a few one side or the other of twelve?

A Yeah, more or less.

Q Over the twenty-one-year period of time?

A Yes.

Q And you saw Mr. Whittaker do it at least once and Mr. Greenwood at least once and Mr. Wiggins at least once?

A Yes.

Q What about Mr. Porter?

A About the same thing. I didn't keep track of it.

Q Did you ever see Mr. Ward do it?

A Yes, I have seen him do it.

Q How many times did you see him do it? At least once?

A Or more.

Q Can you tell us how many more?

A No, I can't.

Q But at least once?

A Yes.

Q So it would be fair to say that you saw everybody who worked in the blacksmith shop that we have talked about here today put sand into the machine at least once?

A Yes.

[Tr. 176]

Q When you did it did you do it from the right side of the clutch or the left side?

A Either side.

Q Did it make any difference which side you used?

A No.

Q When you did it was the machine running?

A Yes, it was.

Q Did you ask whoever was operating the machine to cut it off while you did it?

A I was operating the machine. That's why I threw the sand.

Q And you would leave the machine running and go put the sand in it?

A Yeah.

Q You could have cut the machine off?

A Not very good because you wouldn't spread it and get it equally on the clutch in there.

Q But you knew how to cut the machine off, didn't you?

A Yes, sir.

Q Was there ever any time when you were out there with somebody else and the two of you were working and you threw sand into the machine?

A Yes.

[Tr. 177]

Q And who was with you?

A Mr. Greenwood for one and a fellow named Boone.

Q Now, did Mr. Greenwood see you do it or did you see Mr. Greenwood do it?

A Both. Both.

Q On that occasion both you and Mr. Greenwood at one time or another have thrown sand into the machine?

A Yes.

Q And the other has witnessed your doing that?

A Yes.

Q And was that done from the right side?

A I guess he saw it. I don't know whether he saw me throw it. I know I saw him do it.

Q Were you working there together closely?

A Yes.

Q And there wasn't any reason for him not to see it?

A Not that I know of. I can only speak for myself.

Q When did you first comment to Mr. Foster about this situation?

A Never did.

Q You never mentioned using the sand with the

[Tr. 178]

machine?

A No.

Q With Mr. Foster?

A No.

Q Did you ever make any complaint to Mr. Foster about the machine?

A No.

Q So you and Mr. Foster have never had any conversation about the condition of this shearing machine?

A No.

Q And under no circumstances did you tell him anything about it or did he tell you anything about it?

A He told me that it was dangerous but there was nothing he could do about it.

Q Well now, did you mention to him that you were putting sand into the machine?

A No.

Q So far as you know, he knew that's what you were doing?

A He was standing there looking at me and saw me do it.

Q He saw you do it?

A Yeah.

Q And did you have any conversation with him about that?

[Tr. 179]

A No, sir.

Q And when did he see you doing that?

A (No response)

Q More than once?

A Once that I know of. I don't know how many more times.

Q You can recall one instance in which Mr. Foster was standing there and saw you put sand in the machine?

A Yes.

Q And at that point he told you that that was a dangerous practice for you to be doing?

A He said the machine was dangerous -- the shears or the equipment -- but there was nothing he could do about it.

Q And can you tell us about when this was?

A No, I can't.

* * *

[Tr. 183]

Q Were there some setscrews on the bottom of that clutch?

A There was some setscrews on the clutch.

Q Do you know what the purpose of those screws was?

A No, I don't.

Q Could you see them as you were working about the machine?

A Never -- never when it was running.

* * *

Timothy C. Kenney

"DIRECT"

BY MR. MILLER:

[Tr. 206]

Q State your full name, please.

A Timothy C. Kenney.

[Tr. 207]

Q Mr. Kenney, what is your address?

A 4703 Lafayette Court, Alexandria, Virginia.

Q And what is the nature of your occupation, sir?

A I am a safety engineer.

Q What do you mean by a safety engineer?

A Well, the profession requires you to use the arts and sciences and the management practices in the prevention of accidents within our environment and the exposure to the environment, and in the main it's looking into the matters to prevent accidents. Mine primarily is in the occupational field.

Q How many years of professional engineering experience have you had?

A Thirty-nine years.

Q Do you have a college degree?

A No, sir; but I have a registered -- I am a registered engineer out of the State of Illinois. Registered professional engineer.

Q How many years did you spend as a safety engineer for the United States government?

A Thirty-seven, sir.

Q Where was this?

A In various places. Right now I am employed with the Naval Materiel Command in Washington. I

[Tr. 208]

been with them since '68 in this particular position. Then prior to that I was with the Office of Civilian Manpower and Management as assistant to the safety director for the industrial safety throughout the Navy.

Q How long a period of time were you there?

A That was about a year and a half, and previous to that I was the safety director for the Naval Ship Systems Command which was in charge of all -- which command has all the shipyards in the United States and in Hawaii. There were eleven at that time. Previous to that I was safety director for the Engineer Board at Fort Belvoir, Virginia, and that was an organization that developed equipment for the U. S. engineers. They had a plant there up around 3,500 people, and I was the safety director for the industrial safety there and also had the consultation and advisory relative to the safety of the equipment that was being developed.

Q Do you have any connection with the Norfolk Naval Shipyard here in Portsmouth, Virginia?

A Yes, sir.

Q What was your position there?

A Following the Fort Belvoir job I was here at Norfolk Naval Shipyard for sixteen years as their safety director, and that covered all the occupational safety within the shipyard and the various trades and -- that are

[Tr. 209]

there in the various shops and then the review of some -- most of the structures, plans for structures, and equipment that was installed.

Q What societies, Mr. Kenney, are you a member of?

A Well, I am a member of the American Society of Safety Engineers as a professional member and of the System Safety Society, and I am a certified Safety Professional by the -- of the Americas.

Q Did you have any connection with the Hampton Roads Federal Safety Council?

A Yes, sir. While I was here I was the executive chairman for that organization, and that's an organization composed of all the Federal activities within this Hampton Roads area.

Q And did you have any connection with the Navy Field Safety Association?

A Yes. I was the president of that organization for a year and also the secretary of it for a year.

Q Mr. Kenney, at my request did you proceed along with myself, Mr. Booker and other representatives of his firm and go to the Seaboard shops here in Portsmouth, Virginia, to inspect a certain shearing machine on February 9, 1971?

[Tr. 210]

A I did, sir.

Q I ask you to look at these photographs and state whether or not you are familiar with those photographs.

A Yes, sir. This is the shearing machine that we looked at, and this is the front of the machine as we are looking at it here. The cutting -- point of shearing.
(Indicating)

Q All right. Mr. Kenney --

A You want me to describe all of them? I recognize these are pictures, and this is the machine that we looked at, sir.

Q Was the machine operated at your request and in your presence and in the presence of all the attorneys and Mr. Foster on this particular date?

A Yes, sir, it was.

Q Did you observe how the machine worked?

A Yes, sir.

Q Did you observe all the moving parts?

A Yes, sir. Yes, sir.

* * *

[Tr. 216]

Q Mr. Kenney, in your duties as a safety engineer at the United States Naval Shipyard and other

places, were you called upon to inspect for safety reasons these shearing machines?

A Yes, sir.

Q And during the times that you would inspect these machines would you become completely familiar with the operation of the machinery?

A Yes, sir.

MR. BOOKER: If Your Honor please, I object to that as leading.

THE COURT: I don't think there is any harm in that. Go ahead and ask your questions, Mr. Miller, and qualify him.

BY MR. MILLER:

Q And do you feel -- although you never saw
[Tr. 217]

this particular machine -- have you seen similar machines?

A Yes, sir.

Q And have you seen them throughout your experience as a safety engineer?

A Yes, sir.

Q And did you see these machines in your capacity as a safety engineer?

A Yes, sir.

Q And did you make recommendations to the people that you worked for with regard to the safety practices on these machines?

A Safety practices in guarding and other aspects to keep people from getting hurt.

Q And were these recommendations carried out by the United States government?

A Yes, sir.

[Tr. 218]

Q Mr. Kenney, will you describe in detail the operation of this particular machine? Would you like to do it with photographs in front of the jury? Would it help

[Tr. 219]

you?

A Well, yes.

Q Okay.

A Let me select those that -- I looked at the machine to find out where the usual guards were on the devices of the machine before we operated it. In looking at the machine right from the front and -- and this is where the man stands I believe you must have been told. (Indicating) He stands on this side to operate this machine. This is -- this is the operating lever that he uses with his hand. This is another one right here at the foot. This is the foot pedal. He can use either. He can use either the hand lever or the foot lever to operate this device.

* * *

[Tr. 221]

Q Go ahead, Mr. Kenney. Confine your remarks to the belt and the clutch mechanism.

A Very well, sir. There were several things pointed out here.

Q Just eliminate those and talk about the clutch.

* * *

[Tr. 224]

A (Continuing) The machine -- what I am testifying to now is to show where the guard and where the clutch is in this machine and between here and this belt is where Mr. -- where one could step up, say; and the idea was to throw sand, and this was told to us there in this clutch-- this right here. (Indicating) Let me say this now. The position that he had to do it -- you throw -- right in here is a shaft so he had to step -- so he could not step on that shaft but throw sand up in here to keep this clutch from slipping, and by doing that anyone that did that would be exposed to this belt because this is not high enough. This should be at least shoulder high or head high. This is the customary way of guarding -- it's only partly guarded as you can see here.

Now, this other one is up high enough.

You see that? That guards against that sprocket wheel and that's good, but it's incomplete because you see here -- the clutch -- this mechanism here is unguarded.

JUROR: May I ask a question?

MR. MILLER: Your Honor, one of the jurors wants to ask the expert a question -- Mr. Kenney a question.

THE COURT: All right, sir.

JUROR: How high -- what's the height of the whole machine?

[Tr. 225]

THE WITNESS: Well, this is about -- this lever is about shoulder high so this is about head high. Six feet, about six feet. Yes, sir.

JUROR: From the top?

THE WITNESS: Just about. Yes, sir. Yes, sir. I see this device is unguarded, and then on this --

BY MR. MILLER:

Q When you say "this device" --

A The clutch. The clutch is unguarded.

Q In your opinion should it be guarded?

A Yes, sir. Yes, sir. This should be guarded at the same height as this.

Q Why, Mr. Kenney?

A To keep anybody out. To keep them away

from the clutch entirely. It's an operating piece of equipment. If this has to be guarded, like equipment in the same area should be guarded. Now, as to the belt, the belt is a moving device, and it should be guarded at the same height too, so it's an incomplete guard there, and the man or anyone would step in between there and expose himself to the belt and to the revolving clutch, and then, secondly, on the clutch is some protruding setscrews -- protruding setscrews, and you can see them. We have a

[Tr. 226]

picture with them on. Yes. Now, you have to look a little close. Right in here is a protruding setscrew.

(Indicating) This is another device. This in here -- see? Now, when that whirls around that will catch any part of clothing or anything that is near the machine, and in this case what's been reported is that a glove was being worn, a welder's glove, which is leather and a very substantial cuff to it, and it caught in the cuff, and this is one of the hazards.

[Tr. 227]

Q What situation is presented to a man that is forced to work in that particular area with regard to the setscrews?

A The setscrews will catch on clothing or anything nearby, and for years and years these things have been removed in ordinary industry to get rid of them.

Q Is that the usual custom and practice and the universal custom and practice in the rest of the industry to remove the setscrews?

A You replace them with a bolt that's flush with the object. It's not projecting in any revolving piece, and usually the name of the bolt is an arrowhead bolt. Now, that should have been done. The other aspect of this clutch in there is -- was defective from the reports that's been given. It slipped. It slipped.

* * *

[Tr. 231]

Q Mr. Kenney, will you state, please -- assuming, sir, that the clutch did slip in this case. Is it customary for a machine that is in good working condition to have its clutch slip?

A No, sir.

[Tr. 232]

Q And what can be done in the way of repairs to fix a machine that has its clutch slipping?

A Replace it, sir.

Q Did you observe this particular clutch on the day of February 9, 1972?

A Yes, sir.

Q What, if anything, did you see in the area of the clutch?

A Well, it looked like it had been worn in the notches or the slots. It was worn. It looked like it was possible for this to slip. On the date that I was there I didn't see it slip, but it was worn.

"CROSS"

BY MR. BOOKER:

[Tr. 233]

Q From your point of view is it good practice when one is working around a machine such as that to cut it off before doing any work on it?

A To repair it or just adjust it you mean?

Q To do anything to it.

A Oh, yes, sir. Yes, sir.

Q Is that just common sense as well as good practice?

A Well, that's both, sir.

* * *

James J. Linehan

"DIRECT"

BY MR. MOODY:

[Tr. 237]

Q State your name, please.

A James J. Linehan.

Q Where do you live, Mr. Linehan?

A 519 Rockbridge Road, Portsmouth.

[Tr. 238]

Q What is your present employment?

A Deputy clerk, Court of Hustings.

Q Where were you employed prior to your work here as a deputy clerk?

A Norfolk Naval Shipyard.

Q And when did you -- did you retire from the navy yard?

A Yes, I did.

Q When did you retire?

A 1968.

Q And what was your employment at the navy yard at the time of your employment?

A Well, I was a foreman or leaderman, supervisor, maintenance machinist.

Q How long had you worked in that particular position?

A Ten years.

Q And what did that work include? Describe the nature of the work, the type of everyday work that you did in that regard.

A Well, that includes supervising numerous employees, anywhere from fifteen to fifty employees, and was installation, repair, maintenance, buying of parts of machinery at the Norfolk Naval Shipyard. Would you like me to mention the different machines?

[Tr. 239]

Q Did it include any metal-cutting machinery?

A Yes. All the machines that was operated in the sheet metal shop -- the sheet metal shop and the foundry -- shears, rollers, rakes, saws, drill presses, hammers, et cetera.

Q And you were in that position for ten years?

A Yes, sir.

Q Prior to that what was your work?

A Prior to that I was an instrument maker.

Q All right, sir. Have you done any machinist work?

A Yes. I was -- I started in the navy yard as an apprentice machinist.

Q All right, sir.

A And I served my apprenticeship four years, became a machinist; and, of course, I have been employed in the navy yard since I was an apprentice.

Q And how many years did you work there as a machinist?

A Well, including the four-year apprenticeship, it was twenty-eight years and four months. That included Army time.

Q How much Army time?

A Eighteen months.

Q Other than the eighteen months you were

[Tr. 240]

these twenty-eight years and four months?

A Um-hum.

Q All right, sir. Now, during that period of time did you have occasion to work with metal-cutting machinery?

A Yes, I did.

Q Was this part of your duties during that period of time?

A Yes. I overhauled them, and I supervised the overhaul of them.

Q Mr. Linehan, I show you Plaintiff's Exhibits 1 through 8 and ask you would you look at those exhibits, please.

(Exhibits handed to the witness for examination.)

Mr. Linehan, would you state whether or not during the twenty-eight -- over twenty-eight years as a machinist you had occasion to work with machines and machinery of that nature similar to that which you have examined in these exhibits.

A Yes, I have.

Q Now, I ask you in examining those photographs and with particular reference to the screws -- or I will have to point to them I am afraid since I am not sure of the terminology that you might use. Looking at

[Tr. 241]

Plaintiff's Exhibit Number 7 and at the bottom part of a wheel that we observe in the photograph, I see certain screws projecting from that, and I ask you whether or not it was customary on the machinery that you have had occasion to work with to have any such projecting setscrews?

A No.

Q What did they have on?

A Mostly -- what I recollected had countersunk screws or Allen setscrews.

Q What is an Allen setscrew?

A An Allen setscrew is a headless screw that when it's tightened or put into the shaft or bearing or whatever you have, the head of the screw is below the surface of the metal.

Q Now, in working with those -- that particular type of equipment and of the nature of the setscrews or the screws that are shown in that photograph, what would be the difference between -- so far as using it is concerned -- difference between screws that are inserted in the wheel rather than protruding as they are?

A Well, what would be the difference?

Q Yes, sir.

A What respect?

Q With reference to the safety of the equipment?

[Tr. 242]

A Well, any type machinery you have to -- it's best -- it's best if you have ways to keep as many things away from the employees catching their clothes or hair or whatever you have in the machine, and that's why you try to make these machines as safe as possible I believe by eliminating protruding screws and so forth.

Q All right, sir. Now, Mr. Linehan, in examining these photographs would you state whether or not the machinery that you observed in those photographs has the guards on it that were on the machinery that you observed in working as a machinist.

A Well, it looks to me like the different photographs here -- that you have some guards but the guards are not in a position to cover the entire working parts of this machinery.

Q Would you pick up any particular photograph and look at the back of it and tell me the number on it and then tell us, if you will, what guards you are talking about that are not present?

A In Plaintiff's Exhibit Number 5, the belt which drives this pair of shears -- the guard is not completely around the belt, and on Plaintiff's Exhibit Number 8 there is a guard around the bull gear which should be higher. Let's see. I don't -- on Plaintiff's Exhibit Number 7 I see the clutch is exposed with no guard on it.

[Tr. 243]

Q Now, I ask you, Mr. Linehan, from your experience with this type of equipment whether or not the equipment that you have worked with and observed had the guards on it that you referred to that are not on this equipment.

A Yes, sir. To the best of my knowledge, all the machines I have been familiar with were completely guarded, and also they had extra safety features on it which would -- when the shears are coming down.

Q Mr. Linehan, if a piece of equipment such as you have observed in these photographs should -- assuming that it should require the putting of sand on the clutch in order to cause it to operate, is this -- is this customary with this type of equipment?

A No, sir.

Q What would be the effect of placing sand on it if you know?

A Well, sand as you know is an abrasive material, and it goes into a clutch, and it has a tendency to cut the surface of either the shaft or the -- or the

[Tr. 244]

clutch plates or bearings or whatever you have, and also if it's mixed with oil, grease, you can use it -- put in there as a friction base to take up slack in your clutch or bearing or whatever you have.

Gladys Ward

"DIRECT"

BY MR. MOODY:

[Tr. 245]

Q State your name, please.

A I am Gladys Ward.

Q Mrs. Ward, are you the wife of Mr. Ward,
the plaintiff in this case?

A Yes, sir, I am.

Q And you and Mr. Ward have children?

A We have two daughters.

Q Do you have grandchildren?

A One grandson.

Q What is the age of the grandson?

A Six years old.

Q Prior to this injury, before this injury
took place that we are concerned about here, what was
Mr. Ward's general condition of health insofar as his
activities were concerned?

A He was never sick until he had this first
inner ear trouble eight years ago.

Q Was he carrying out his normal duties and

[Tr. 246]

activities just before this accident?

A Yes, sir.

Q Now, could you tell us, if you will, what some of the things were that he did insofar as helping you around the house was concerned before this accident?

A Well, if you know what I mean when I say a handyman. He changed the mattress -- things I couldn't handle and anything happened to the washing machine or any appliance around the house, he always fixed those for me. Now, you can't do any of that, and if anything happened to the wiring in the house, he was always there to do that and none of that now around the house he can't do at all.

Q All right. Now, before this accident took place and he was injured, did Mr. Ward take part in any kind of recreational activities?

A Yes, sir, he did. We loved to go fishing at night on the piers and weekends at Nags Head on the pier, and now we haven't been fishing since this happened because he tried to throw the rod and reel. He can't do that, and he can't do any hammering whatsoever in repairing things. He did once in a while. Now, don't get me wrong. It was not a hobby or anything. He did play golf once or twice a year. Just got out on the golf field.

Q Before this happened?

A Yes, before this happened. Now he can't

[Tr. 247]

Q What type fishing was this? Surf casting or pier?

A Surf casting and pier fishing. He enjoyed both, and I did too.

Q Was he right-handed or left-handed?

A He has always been a right-handed man.

Q All right. In other words, I believe you hold the fishing rod with your right hand and turn it with your left hand --

A That's right.

Q -- as you -- if you are right-handed?

Now, how about any other hunting or anything of that kind?

A Well, he used to love to be hunting and he did go hunting. He bought a real nice shotgun. He can't hold it up now or do anything, and he had to give away his shotgun.

Q In other words, you -- did you go hunting?

A No, sir, I did not.

Q You just -- just know he doesn't go anymore? Is that what you are saying?

A He hasn't been since this happened because he can't shoot.

Q All right. Did he work in the yard before this happened?

[Tr. 248]

A Yes, sir. He kept up the yard. He did the raking and the mowing, planting the flowers, setting out rose bushes and everything like that. Now he can't use a shovel, rake or anything on account of that arm.

Q Did he work on his automobile before this happened?

A Yes, sir, he did.

Q Has he done any of that?

A He can't get down and change tires and work on any of the automobile at all.

Q Now, you say you have a six-year-old boy in the family. Did Mr. Ward before this happened play any kind of ball or do anything of that kind?

A Well, my grandson's father was killed when he was a small child so it fell back to Daddy to take part, you know, in playing with him.

Q You are talking about Mr. Ward?

A Yeah, Mr. Ward. I am sorry. And he would have to get out and play ball with the little grandson and run and do things with him that he didn't have a daddy to do. Now he can't do that, and the child really misses him, but he did play a lot of ball with him.

Q Did he ever go bowling?

A We used to go bowling at night once in a while. We neither one belonged to any league. It was

[Tr. 249]

more or less to get out with recreation, and he cannot bowl now.

Q Prior to this injury did you and Mr. Ward use the same bed?

A Yes, sir.

Q Do you use the same bed any longer?

A No, sir. Have not since the accident happened because that shoulder -- every time he laid so long on that shoulder he has to have a pillow put under it and the arm and throwed over to one side or he complains something terrible of it hurting, and I have to keep it rubbed for him.

Q Do you still do that?

A Yes, sir. Every so often I rub the shoulder and arm for him.

Q Rub it with something?

A Excuse me, but with Ben Gay.

* * *

Samuel Franklin Cotton

"DIRECT"

BY MR. BOOKER:

[Tr. 253]

Q Mr. Cotton, would you please state your name and residence.

A Samuel Franklin Cotton, 220 Jacqueline Drive, Portsmouth, Virginia.

Q By whom are you now employed?

A Norfolk and Portsmouth Belt Line Railroad.

Q What is your position with the Belt Line?

A General foreman.

Q And what are your primary duties as general foreman?

A Supervision of the maintenance of the locomotives and machinery.

[Tr. 255]

Q During that period of time from 1952 to 1969 did you have occasion to become familiar with the shearing machine located in a shed outside the blacksmith shop?

A Yes, sir. I performed maintenance on that machine.

Q Did you ever have occasion to operate it in the course of your doing maintenance on it?

A Only to test it out after I would maintain it. Then we would always operate a machine to test it.

Q And how frequently did you have occasion to go and work on the machine?

A Well, that's hard to say. We don't -- only when it would be reported that something was wrong with it. As far as actual time, I couldn't say.

Q Over the period of time when you were there, how did the machine generally operate?

A Well, I would say it operated normally.

Q Was it generally in good condition?

A Yes, sir.

Q Are you familiar with how the clutch on that machine works?

A Yes, sir.

Q How would you describe that clutch?

[Tr. 256]

A This particular type of clutch has a pin with a roller, and when you pull your lever the pin comes down, allowing the clutch to go together which works like your finger running in together for the drive. When the pin drops, you have a weight on a spring which pushes one part of the clutch into the other. When they go together and make one revolution, then the pin and the roller will pick it up and a cam will release it.

Q During the course of that operation is the clutch metal to metal?

A Yes, sir. Just like -- like lugs. Just hitting on one another to turn it.

Q Have you ever seen anyone throw sand into the clutch?

A No. No, sir.

Q Have you ever thrown sand into the clutch?

A No, sir.

Q Based on your experience, what would happen if sand were thrown into that clutch?

A There is a great possibility that would cause it to gall. The clutch would not operate proper. The part where it only has the weight to engage it in a matter of a short time would wear it out. It just wouldn't engage.

* * *

"CROSS"

BY MR. MILLER:

[Tr. 259]

Q Mr. Cotton, you say you have been around the other shops of Seaboard?

A Yes.

Q And have you ever seen similar machines to this in the other shops of Seaboard?

A Not the other shops I worked in. No.

Q Um-hum.

A The other shops I worked in, I worked strictly locomotive work.

Q And you have never seen any shears in the

[Tr. 260]

other shops?

A Not of this type.

Q You have seen shears in other shops but not of this particular kind?

A That's right.

Q Um-hum. Now, the other shears you saw -- did they have guards on the clutch?

A The other shears that I am referring to were in a sheet metal shop where you put your foot on a pedal and shears the metal.

Q Did you have a guard on that clutch?

A No.

Q Did you have -- did you ever see protruding setscrews on this clutch?

A No.

Q Did you have protruding screws on the other machine?

A No, the other machine didn't have a clutch. It's manual.

Q Is that a newer machine?

A Well, not necessarily. When you go back to an old foot-type operated shears for cutting small metals-- see what I am talking of? Sheet metal.

Q Now, you said you regularly inspected this machine; is that correct?

[Tr. 261]

A No, I didn't.

Q You didn't? You didn't inspect this machine periodically?

A Only when I was sent to it.

Q How often when you were working in the Seaboard shops between 1953 or '52 you said and 1969 did you regularly inspect it or were sent to inspect it?

A That would be awful hard to answer considering the amount of machinery that there was in that shop at the time. We never kept --

Q Do you have any estimate as to the number of times in any one given year that you inspected the shears at -- these particular shears we are concerned with?

A No.

Q You have no estimate?

A No estimate. Only when I was sent to it.

Q What do you mean when you were sent to it? Who would send you?

A A supervisor.

Q Who would the supervisor be?

A Mr. Duer.

Q I take it that you did inspect it when you were sent to it; is that right?

A Yes, sir.

Q Did you inspect that machine during 1968 or

[Tr. 262]

1969?

A I would have to say no, not knowing if I was sent.

Q When was approximately the last time prior to 1969 that you inspected the machine? Give me an approximate year.

A I'd say somewhere along about '66. Maybe around about in that neighborhood.

* * *

[Tr. 267]

Q You know that you are not supposed to have a protruding screw in a revolving mechanism; isn't that right?

A That's right, but this particular setscrew sets up in the air to where you couldn't touch it from the ground.

Q What about when it is revolving?

A Still you couldn't touch it from the ground.

Q You didn't touch it from the ground? It's impossible to touch it from the ground? Is that your testimony?

A Yes. You stand on the ground. You can't touch up to the top of that setscrew.

Q I am asking you when the machine is operating and you indicated the particular screws go around?

A That's right.

Q Did you ever see it do that?

A It's in the center of the machine, and if you are operating it from -- this picture will show you the foot pedal and how you should be in front of that.

Q How many men does it take to operate it?

A Should only take one.

Q And how many men feed it?

A Feeds it?

[Tr. 268]

Q Yes. Do you have just one man operating this? Is that the way they did it in the Seaboard shops? Just one man at the machine and nobody else helping him feed it?

A When I went to work there in 1943 one man operated it, and he had a helper, but the man that operated it operated it from this pedal.

Q Um-hum. Now, did you ever get complaints as a machinist about the belt?

A Yes. The belt slipping.

Q Um-hum.

A Yes.

Q Did you ever have complaints from the machinist about the clutch slipping?

A Not the machinist. No.

Q Who did you get complaints from?

A They would come from the blacksmith shop.

Q In other words, he would get complaints from the blacksmith shop while you were there about the clutch slipping?

A That's right. And about the belt slipping.

Q Did you ever replace the clutch?

A No.

Q In all the time that you were there did you ever replace the clutch?

[Tr. 269]

A No.

Q Had the clutch ever been replaced since the installation of the machine so far as you know?

A No, not so far as I know.

Q Were you ever directed by Mr. Foster or any other official of the railroad to replace the clutch?

A No.

Q Were you ever directed by Mr. Foster or any other official to replace the belt?

A Yes.

Q How many times did you replace it?

A That would be a hard question to answer -- how many times a belt had been replaced by me. I can only know that I have replaced that belt once or either relaced the belt to make it tight.

Q Or relaced the belt?

A That's right, because you wouldn't always replace a belt when you can cut a piece out and relace it and use it over.

Q Did you ever watch this machine start?

A Yes, I have started this machine.

Q You started it yourself and how did you start it?

A If I remember right, you go to the electric control panel and push the lever forward, and once the machine [Tr. 270]

picks up the momentum, then you pull the lever back to you.

Q And then it would start operating?

A Then it would be ready for operation.

Q Would the belt be revolving and would the blade be cutting?

A The blade would not be cutting until you engage the clutch.

Q I see. Did you ever watch that done?

A Yes.

Q Was anything done to the belt before the machine started operating such as pushing against it with a stick?

A Never noticed that. No.

Q You never noticed that?

A No.

* * *

Linwood T. Whittaker

"DIRECT"

BY MR. BOOKER:

[Tr. 278]

Q Mr. Whittaker, would you please state your name and address.

A Linwood T. Whittaker, 3817 Columbia Street, Portsmouth.

Q By whom are you employed, Mr. Whittaker?

A Seaboard Coast Line Railroad.

Q What is your position?

A Blacksmith-welder.

Q How long have you been a blacksmith-welder for Seaboard?

A Well, I come back. This last time about seventeen, eighteen years I guess.

Q Has all of that been in the Portsmouth job?

A Yes, sir.

Q Speak up. Everybody wants to hear what you have to say.

[Tr. 279]

Q And do you know Mr. Thomas J. Ward?

A Yes, sir. Worked with him.

Q Directing your attention to August 6, 1971, the day Mr. Ward was injured, were you working with Mr. Ward that day?

A Yes, sir.

Q And was anyone else working with you that day?

A Mr. Greenwood. One was a helper, a hammerer.

Q Can you tell us what your job was that day? What were you all doing?

A Well, we was told to get some bars and -- out from an iron rack, and I forget just what the length of them were but in the neighborhood of three foot, and we pulled them out with -- it was three-quarters by two -- pulled them out of the iron rack and put them in -- and set the gauge to cut them. I don't know how many it was. Supposed to have been twelve or sixteen of them.

Q What were you doing that day? Were you doing the cutting?

A I was doing the cutting.

[Tr. 280]

Q Where were Mr. Whittaker and Mr. Greenwood?

A You mean --

Q Excuse me. Mr. Ward and Mr. Greenwood.

A We had all three, like I say, got the iron out of the rack, and Mr. Greenwood was behind me, and Mr. Ward was helping me shove it on through up to the gauge.

Q Did there come a time when Mr. Ward left where you all were working?

A Yes, sir. Just a little before he got hurt.

Q Did you see him leave?

A Yes, sir, I seen him leave but --

Q Did he tell you where he was going?

A Not as I know of.

Q Did he tell you what he was going to do?

A No, sir, not as I know of.

Q Did he say anything to you about cutting off the machine?

A Yes, sir. Well, when his arm was in it.

Q Before that. When he left you and walked away did he say anything to you about stopping the machine at that point?

A No, sir, not as I know of.

Q And did you continue to do your work after Mr. Ward had walked away?

A Well, I had -- I had cut one -- I cut one

[Tr. 281]

piece, one bar; and I heard -- I heard Mr. Ward say that he -- holler for me to cut the machine off, that his arm was hung.

Q And what did you do?

A I run around -- had a bar across there, and I run around the edge of the bar and cut the machine off as soon as I could, and -- and I saw that his arm was hung, and I didn't know whether, you know, he would faint or fall out or something, but I knew I couldn't hold him so I called Mr. Greenwood to stay there until I could run and get help.

Q And did you do so?

A Yes, sir. I went and got help.

Q Did you know before you heard Mr. Ward holler that he had gone back behind the machine like that?

A No. No, sir.

Q Was his vision -- was your vision of that position blocked by the machine?

A Yes, sir. Yes, sir. The pedal on this side of the machine -- and -- well, I would say that machine is at least seven or eight or ten foot wide, and I couldn't see him from there. Neither could Mr. Greenwood. Mr. Greenwood was behind me.

Q So neither you nor Mr. Greenwood could see Mr. Ward after he walked away and you did not know where he was or what he was doing?

A No. No.

[Tr. 282]

Q Have you ever had occasion to throw sand into that machine for any reason?

A No, sir.

Q Have you ever seen anybody throw sand into that machine -- into the clutch of that machine?

A No, sir, I haven't, but I have heard of it.

Q Now, I am not asking you what you have heard. Have you ever seen anybody do that?

A No. No, sir.

Q Have you ever seen Mr. Ward throw sand into the machine?

A No, no, not to -- not as I can recall. Any of them.

* * *

[Tr. 284]

Q Was the machine working properly that morning?

A Well, ever since I been there the machine had a tendency to -- the belt would get a little loose on the two pulleys, and we used to put a stick in behind it to kind of tighten it up, and sometimes the momentum on the machine would have a tendency to slow down to where it wouldn't --

you know -- wouldn't cut as good as it did when we first started as long as the machine was running fast -- the big flywheel -- but I always waited and let it pick back up.

Q And did the momentum always pick back up so that it would cut properly if you waited long enough?

A If you waited long enough.

Q And did you have that problem on this particular day?

A Well, it had -- it had jumped a little bit. Yes. We were -- we were waiting for it to -- to get back up.

Q And did it normally pick back up when you waited for it?

A Well, I went on -- well, I only cut that one

[Tr. 285]

piece, like I say, when Mr. Ward got hurt, and I wasn't allowed to cut no more.

Q But at the time Mr. Ward got hurt had the momentum picked up enough so that you were able to make a cut?

A No, sir.

Q You were waiting to make a cut?

A Yes, sir, when he hollered. We were at that time when he hollered and said he had his arm hung.

"CROSS"

BY MR. MILLER:

* * *

[Tr. 287]

Q I see. And when you are doing the cutting, when you got specific instructions from your employer, I assume you attempt to get it cut right?

A Yes.

Q And if you got a chalk mark on the piece of steel, you want it right on the chalk mark?

A Right.

Q And a half inch off doesn't do much good?

A No, it wouldn't. That's right I don't guess.

Q Now, who started the machine on this particular day?

A Well, I will tell you the truth. I don't remember. I don't know whether I started or Tom started it.

[Tr. 288]

I can't remember. I really don't.

Q How do you start the machine?

A We got a switch you shove forward. After the momentum picked up then you pulled it back.

Q And what do you do to get the belt revolving around?

A Like I say, sometimes when you go out there you have to put the stick behind --

Q You did that?

A Oh, yeah.

Q Have you ever done it during the operation of the machine?

A What do you mean?

Q When it starts to slowing up did you put the stick behind the belt?

A I always did it to get it started.

Q Well now, you know that you are not supposed to adjust or repair a machine?

A I didn't figure that was repairing it.

Q You didn't figure that was repairing or adjusting it when you put a stick up against the belt to get it to run properly?

A No, no.

Q Well, when you had to start the machine and the belt wasn't operating right, did you call a mechanic?

[Tr. 289]

A I have. Yes, sir.

Q You have?

A Yes, sir.

Q Every time?

A Well, no, sir.

Q Huh?

A Not as far as the belt. Not every time.

Q Well, why not? You are not supposed to touch the machine.

A Well, I have called -- I have called -- told Mr. Buchanan to send me a machinist over to tighten the belt.

Q You didn't touch that belt otherwise? You wouldn't touch it with a stick?

A Oh, yes, sir. I have put the stick behind it to tighten it up to make it pick up faster.

Q Why would you do that if you had a machinist around?

A Well, the machinist -- all he does is tighten the belt. He didn't ever start the machine for us. Never started the machine.

Q When you put the stick up against the belt did you have your gloves on?

A Yes, sir, most of the time.

Q You wouldn't take your gloves off when you

[Tr. 290]

were adjusting the machine, would you? Doing that?

MR. KILGORE: I don't think he said he adjusted the machine.

MR. MILLER: I withdraw the question.

BY MR. MILLER:

Q When you put the stick up against the belt, the belt starts rotating, doesn't it?

A After I shove the lever in.

Q You don't take your gloves off?

A I have had them off and had them on.

Q Don't make any difference to you whether you have them on or off?

A It depends. If I had been measuring iron I might have had them off, and if I didn't I might have had them on.

Q And when you are using the steel, when you are using that steel to get it cut, do you have your gloves on?

A Yes, sir.

Q Why do you have your gloves on?

A Well, because in handling iron you almost got to have your gloves on because it has a very sharp edge and you cut your hands and everything. In fact, it's a rule in cutting.

[Tr. 291]

Q Mr. Whittaker, have you ever seen the clutch
up close?

A Well, I guess so. Yeah.

Q Um-hum. Have you ever seen the setscrews?

A Yes, sir.

Q And the clutch?

A There is two setscrews down under the
bottom.

Q You have seen them?

A Set underneath the bottom.

Q When was the first time you recollect
seeing them?

A Well, I really haven't paid much attention
to it until after Mr. Ward got hurt.

Q So you didn't really know they were there?

A Yeah. Yeah. Sure, I knew they were
there.

Q You knew they were there?

A Oh, yes, sir.

Q But you hadn't paid much attention to them?

A No.

Q Did you ever watch them revolve?

A Like I say, I didn't work on them and I --

Q Mr. Ward doesn't work on them either, does
he?

[Tr. 292]

A No. That's what I say.

Q Have you ever known Mr. Ward to attempt to adjust the machine while it was running?

A No, no. No, sir.

Q Now, you said that you never threw the sand in the machine?

A No, sir.

Q Never did?

A Never.

Q Even when Mr. Nick Moore was working there you never did?

A No, sir.

Q But you have known different other ones to throw sand in the machine?

A No, sir. I said I had heard.

MR. BOOKER: Now, if Your Honor please --

A (Continuing) I had heard.

BY MR. MILLER:

Q Have you known it to be a practice to throw sand in that machine?

A Well, I don't know whether you call it a practice. Like I said, I told you that I had heard of them doing it. I never did it myself.

Q Mr. Whittaker, on August 12, 1971, six days

[Tr. 293]

after this accident occurred, did you meet with Mr. W. W. Frye, claim agent for the Seaboard Coast Line Railroad Company, and give him a statement as to how this accident happened?

A Yes, sir.

Q All right.

A Yes, sir.

Q Now, I would like to ask you whether or not you recall making the statement. The question to you was -- and in the case of the clutch slipping, what action did you take to eliminate this? Was there anything you did to help?

Answer: No. Like I said, I didn't have. I never have, but there -- I have known it to be a practice that they would usually take a handful of sand and throw it in the clutch to keep it from slipping, but I have never did it.

Did you make that statement to Mr. Frye?

A I say I have known it, but I never did it.

Q You have known it to be a practice and you said to Mr. Frye you did?

A I don't know whether you call it a practice or not, but I never have did it myself.

Q I see.

A But Mr. Frye said that he had been told that they were throwing sand in the machine and that's what made me say that I never did that.

[Tr. 294]

Q Now, the next question --

A Yes, sir.

Q All right. To make this clear, you say that this had been a practice for some years to your knowledge that different ones would throw sand or dirt into the clutch to help eliminate the slipping? And your answer was yes, yes.

Do you remember saying that?

A If -- if you got it down.

Q You don't deny making it?

A I don't know if it's a practice, but I had heard of them doing it. Yes, sir. Why, I don't know.

Q Why, you don't know?

A Why, I don't know. I know because I never did do it.

Q But the question was in the case of the clutch slipping what action did you take to eliminate this? You answer was, I have known it to be a practice that they would throw sand in the machine, and you say no, you don't know why they threw sand in?

A I don't know what good it done. I mean I don't know. I never had throwed it in there, and that's true.

Q Was the clutch slipping on this particular day that Mr. Ward got hurt?

[Tr. 295]

A Like I said, we was cutting the bars, and it would have a tendency to bounce up and down.

Q Bounce. Had the clutch been slipping for a number of years?

A The blade would do that. the belt

Q Had the clutch been slipping for a number of years?

A I had seen it doing that, like I say, ever since I been there. The belt and the momentum would slow down and it would just kick down on the bar of iron instead of coming on down.

Q It would just kick; is that right?

A Huh?

Q It would just bounce up and down?

A Until you just wait. You would wait and let the momentum come back and pick back up.

Q And how many years had you been doing that?

A Ever since I started there.

Q And when did you start?

A Eighteen or twenty years.

Q And the clutch during --

A We would have to go -- we would have to go get the foreman and tell him to tighten the belt.

Q You have made complaints about that machine, haven't you?

[Tr. 296]

A Oh, I went over several --

Q I can't hear what you are saying.

A I went over several times and had the belt tightened.

Q Now, your understanding is that the belt controls the blade; is that right?

A Well, yes, sir. It has a lot to do with it. That's what runs it. Without the speed you can't cut iron.

Q Your complaints were with reference to the blade jumping up; is that right?

A Well, if the belt got loose -- see, Mr. Miller, it wouldn't -- it wouldn't -- it wouldn't pick up the speed it should have. See?

Q Um-hum.

A And --

Q What were you complaining about? Were you complaining about the blade just bouncing up and down?

A No. Asked them to come fix the belt, tighten the belt. He would have to take it off.

Q Are you a machinist?

A No, sir.

Q Are you an expert on machines?

A No, sir.

Q Do you know whether the clutch or the blade

[Tr. 297]

is controlled by the clutch or the belt of your own knowledge?

A The blade?

Q The blade.

A The blade would be controlled by the pedal that runs the clutch. Yeah.

Q I see.

A The clutch, working this way, would come back out.

Q I see. So --

A But I am not no machinist.

Q Now, when the blade would start doing that, jumping up and down, did you immediately go and call a machinist?

A Well, I would say no. No. I went to the foreman most of the time.

[Tr. 298]

Q Right away you stopped what you were doing and went to the foreman?

A No, not all the time. I didn't do it all the time. I maybe should have, but I didn't.

Q Um-hum. Well, what was done?

A Well, a lot of time, like I said, we would have to wait for the blade to come up, and then all of us would put the stick in there to make it pick up faster.

Q Did you do that yourself?

A Yes.

Q And when you did that the machine was operating, was it not?

A You mean it was running?

Q Yes.

A Well, you had to do it to get it running.

Q Did you go around and take the plug out?

A What plug?

Q When you put the stick against the belt.

A Ain't no plug there as I know of.

Q Did you shut off the machine completely?

A If I shut the machine off, it wouldn't run.

It had to be started for to put the stick in it. See?
You had to start the machine.

Q Does the machine make noise when it runs?

A Yes, sir.

[Tr. 299]

Q Make a lot of noise?

A Yes, sir. A lot of noise.

Q Now, at the time that you were standing there and cutting the blade -- cutting the metal on the day Mr. Ward was hurt --

A Yeah.

Q Before he walked around to the back of the machine you were watching the blade I assume, were you?

A Oh, yes. Well, I couldn't help but see him because I got my foot right there near the pedal, and I am standing right in front of it.

Q Did you hear -- did you hear everything that he said to you?

A I didn't hear him say anything to me.

Q Well, was that because of the noise of the machine? Could that have affected it?

A It could be.

Q You won't deny that he didn't say something to you?

A No, I don't deny that on a bet.

[Tr. 300]

Q Did you see him walk in any direction?

A I seen him walk around the side there.

Q All right. Do you know what he was going to do in the back of the machine?

A No, I didn't.

Q What do you ordinarily do when you walk around to the left side?

A No, I don't know.

Q You don't know?

A No, I didn't know what he was going to do and whether -- like I said -- whether he said anything to me, I don't know. He could have. Like I told you, he could have. It was noisy. When the wheel goes over, it makes a lot of noise.

* * *

Harold J. Haas

"DIRECT"

BY MR. BOOKER:

[Tr. 305]

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

A Harold J. Haas, 3908 Turnpike Road, Portsmouth, Virginia.

Q By whom are you employed?

A Seaboard Coast Line Railroad.

Q How long have you been employed by Seaboard?

A Be sixteen, seventeen years, somewhere around there.

Q What position do you now hold with Seaboard?

A Machinist.

* * *

[Tr. 308]

Q Did you observe anything unusual in the clutch?

A No, sir.

Q Specifically, did you see any sand or dust in the clutch?

A No, sir.

Q Can you tell us how this clutch works mechanically?

A Well, it works on a dog. You step on a

lever, and there is a ball that rides around the cam. It makes one revolution and the ball goes up -- this knob goes up there and stops it.

[Tr. 309]

Q Is there any way for the clutch to slip while it is being operated?

A Not to my knowledge.

Q Is there any way any other part of that machine might slip?

A Unh-unh.

Q Is it possible for the belt on the machine to slip?

A Yeah, if he is cutting a real heavy piece of iron and cuts an excessive load on it, it will slip.

Q But the clutch will not slip?

A Unh-unh.

Q What would happen if you were to put sand into the clutch?

A It would tear it up. Eventually after a long period of time it would eat up the bearings in it.

"CROSS"

BY MR. MOODY:

[Tr. 313]

Q Had you ever worked on it?

A Yes, sir.

Q What did you do on it?

A Well, we tightened the belt up on it and changed the blades, and it has four-sided blades on it. You turn them over when they get dull.

Q Do you recall replacing the clutch on that machine?

A No, sir.

Q All right. You say this clutch is exposed all the time I believe you say?

A Yes.

Q And if you throw sand in it, it will throw the sand out? Some of it anyway?

A Part of it.

Q So there won't be any evidence in the clutch itself of sand even if you put sand in it?

A It has grease and a certain amount of it would stay.

Q And I notice your answer to the question [Tr. 314]

that Mr. Booker asked about the condition of the machine was very similar. He asked you if there was any accumulation of grease on it, and you said, "No more than usual"?

A Um-hum.

Q In other words, there was an accumulation of grease but it was not more than usual?

A Right.

Q Um-hum. And you were not present when this accident took place, were you?

A No, sir.

Q But you did find after coming there for the purpose of getting Mr. Ward out of the machine -- you found that you had to take up some six inches in the belt and repair the machine at that time, did you not?

A I was told to adjust the belt. I took it off and took it to the shop and took a piece out of it. Not much.

Q So the belt had too much slack in it, did it not?

A It was loose.

Q Right. And you found it necessary to actually take the belt off and shorten it and put it back together again?

A Um-hum.

Q All right, sir. And you took off -- what [Tr. 315]

parts did you have to take off in order to get Mr. Ward out of the machine where he was?

A The arm that worked the clutch in and out.

Q All right, sir. Was he -- was he in there-- in this machine up off the ground during this time while you actually took it apart?

A Yes, sir. There was four bolts we had to take off to get it out.

Q And what did they do? Hold him up there?
A No. He was standing on a bearing cap.
Q They had him standing on a bearing cap?
A Um-hum.

* * *

Lewis E. Foster, Jr.

"DIRECT"

BY MR. BOOKER:

[Tr. 319]

Q Mr. Foster, please state your name and address.
A Lewis E. Foster, Jr., 4022 Clifford Street, Portsmouth, Virginia.
Q By whom are you employed, Mr. Foster?
A Seaboard Coast Line Railroad.
Q Where are you employed?
A Portsmouth, Virginia.
Q How long have you been employed by Seaboard at Portsmouth?
A Well, I first went with the Seaboard in 1928. October the 9th. I was laid off, and I went to the Norfolk Naval Yard in March, 1938. I returned back to the railroad on April the 17th, 1946, and I been there ever since.

Q Have you been in Portsmouth all the time you been with the railroad?

A Yes, sir, I have.

[Tr. 320]

Q Can you tell us without going into great detail what positions you have held and what your present position is?

A Well, with the railroad?

Q Yes.

A Well, I have -- I served my time as a car man, and I worked as a rivet heater, a boilermaker, as an apprentice helper boilermaker and as a car man and as a car supervisor and a car foreman, assistant to the shop superintendent and as shop superintendent, my present position.

* * *

[Tr. 322]

Q Have you ever seen anyone throw sand into the machine?

A No, sir. I sure haven't.

* * *

"CROSS"

BY MR. MILLER:

[Tr. 338]

Q Will you read 36g, please?

A What?

Q 36g. What's the title of that particular rule?

A 36g, Dust.

Q Yes.

A "The management, with the cooperation of the employees, will keep shops and yards in a clean and sanitary condition and all machinery and tools in a safe and working condition"; and, therefore, if anything was reported to management they would see that it was done.

Q Who was management on August 6, 1971, at the Seaboard shops?

A Management -- I was part of management.

Q You are the management?

A I am part of the management. Yes, sir.

Admonitions to Jury

[Tr. 107]

THE COURT: Fine. All right. Well, members of the jury, we are going to adjourn for lunch now. I will ask you to be back and we will

[Tr. 108]

promptly resume the trial at 2:30. Now, let me admonish you not to go to the scene of the accident during your lunch hour and don't talk to anyone about the case. If anyone should persist in talking to you about it, advise the Court upon your return, and even though you are having your lunch together, don't discuss the testimony you have heard up to this point and, of course, should there be anything in the news media about this case, refrain from reading it or listening to it or looking at it. With those thoughts in mind, we will now adjourn till 2:30.

* * *

[Tr. 184]

THE COURT: Well, gentlemen, the hour grows late. I think it's time to adjourn.

Members of the jury, let me admonish you not to discuss this case with anyone or allow anyone to discuss it with you; and if anyone should persist in doing so, please advise the

[Tr. 185]

Court upon your return. Now, I don't want you to go to the -- to the yard up there and attempt to view the equipment at all; and should there be anything in the paper about the case, please

refrain from reading it. Should there be anything on the radio or television about it, please do not listen to the discussion.

With those thoughts in mind, we will adjourn until 10:00 o'clock tomorrow morning.

* * *

Hearing Out of Presence of Jury

[Tr. 187]

MR. MILLER: Judge, will you instruct the juror not to discuss what transpires in chambers with the rest of the jury?

THE COURT: All right. Have a seat, Mr. Mendelsohn.

All right. Now, gentlemen, we are gathered here in the conference room at this time to discuss a matter that Mr. Booker advises me took place yesterday between Mrs. Ward, the plaintiff's wife, and Mr. Mendelsohn who is one of our jurors, our trial jurors; and it's my understanding that sometime during the day -- I think when we returned from lunch -- that Mrs. Ward had occasion to speak

to Mr. Mendelsohn.

Now, Mrs. Ward, will you tell the Court if that is true and if so what you said?

MRS. WARD: That is true, but I did not know he was on jury. We spoke about the weather being so pretty and then I said he looked familiar, and he said he worked at Farm Fresh, and I said, "Well, my husband thinks there is no store like Farm Fresh. Even to buy an egg he has to go to Farm Fresh," and that was the extent of the conversation.

THE COURT: Now, Mr. Mendelsohn, is that correct?

JUROR MENDELSON: I will validate that. That is true. That was our conversation.

THE COURT: And did you all at any time have anything to say about the trial itself?

JUROR MENDELSON: No, sir.

MRS. WARD: No, sir.

THE COURT: All right. Would you like to ask some questions?

MR. BOOKER: Just one.

Mrs. Ward, I believe you said the first time we were in here that you came up to Mr. Mendelsohn first and you started the conversation?

MRS. WARD: No. I said I went to the ash tray to outten a cigarette.

MR. BOOKER: Well, which one of you originated the conversation?

MRS. WARD: Well now, I can't remember exactly which one of us spoke first to save my life. I don't want to tell a story. I can't say. Maybe he can, but I can't say which spoke first.

THE COURT: Mr. Mendelsohn, do you recall?

JUROR MENDELSON: She said something about the weather being so nice, and I said yes, it was a beautiful day for this time of year, and then she said, "You look familiar to me," and I said, "Well, maybe you have seen me where I work. I am at Farm Fresh Super Market," and that's when the conversation started about the eggs. That's as far as the conversation went. I was out there looking out the window, looking outside.

MR. MOODY: Do you have another question?

MR. BOOKER: Mr. Mendelsohn, would you describe your conversation with Mr. Ward. Tell us when it occurred and what you said.

JUROR MENDELSON: With Mr. Ward? Mr. Ward said something about a nice day being outside, and that was it.

MR. BOOKER: And when was that?

JUROR MENDELSON: During one of the recesses.

MR. MOODY: Is that all you have?

MR. BOOKER: Yes.

MR. MOODY: I want to ask you one question. Mrs. Ward, did you at any time know that you were talking to a juror in this case?

MRS. WARD: No, sir, I did not.

MR. MOODY: Did you at any time discuss this case?

MRS. WARD: No, sir. I have not with anyone.

MR. MOODY: That's all.

THE COURT: Now, Mr. Foster, I understand that you observed the conversation and you reported it to Mr. Booker here; is that correct?

MR. FOSTER: Yes, sir.

THE COURT: Did you overhear any part of the conversation?

MR. FOSTER: No, sir. I was coming down the hall, coming back from lunch; and I noticed Mrs. Ward and this gentleman standing close up. He was backed up in the window with his foot in the window, and she was standing right close to him,

[Tr. 191]

and they was having a conversation. I could see lips moving, but I don't know what they said, and I didn't stop to try to find out. I walked twenty, twenty-five feet behind them, and I was standing there waiting for the court to open, and I would say it was at least five minutes or longer that they was there. Whether they talked any more or what the conversation was, I know nothing about it.

THE COURT: Mrs. Ward, were you smoking a cigarette?

MRS. WARD: I was at the time that I stepped to the ash tray to outten it.

THE COURT: Um-hum.

MRS. WARD: And the conversation did not last any more than three or five if that.

THE COURT: Three or five what?

MRS. WARD: Minutes. I am sorry.

THE COURT: Anything further, gentlemen?

MR. BOOKER: No, sir.

MR. MOODY: NO, sir.

THE COURT: All right. Now, you all can return to the courtroom. You can go back to the jury box. Now, Mr. Mendelsohn don't mention this discussion we have had here with any of the jurors

[Tr. 192]

or anybody else for that matter. Just don't -- we don't -- none of you say anything about it.

MR. MENDELSON: Yes, sir.

THE COURT: Mrs. Ward, you can go back in the witness room.

MRS. WARD: Yes, sir.

THE COURT: All right. Fine. All right. You all can step back there, please.

MRS. WARD: I am sorry because I have never seen this man, and I did not realize or I would not have spoken at all.

THE COURT: Well, that's all right.

(Juror Mendelsohn and Mrs. Ward left the room.)

MR. BOOKER: May it please the Court, on behalf of the defendant Seaboard Coast Line Railroad Company we move the Court to declare a mistrial on the grounds that the communication between the juror and the plaintiff's wife was an improper communication. The Court had specifically cautioned jurors against discussing anything with anyone. I accept for the purposes of my motion the fact that they did not discuss the case. Nevertheless the conversation took place from three to five minutes, and Mrs. Ward commented on

the juror's store and said that her husband, who is the plaintiff in this action, enjoyed shopping in that store; and I submit that cannot help but create a biased atmosphere on behalf of the plaintiff against the defendant.

MR. MOODY: Well, Your Honor, I see no reason for a mistrial in this case. I admit that the witness -- if she had known that the other person was a member of the jury or that he had known that this was the plaintiff's wife -- in either case, they should not have had any conversation even as to the weather, but certainly the case was not discussed. That's clear. Certainly it was an inadvertent act on the part of the plaintiff's wife without knowing that she was speaking to a juror, and I do not see how this could in any way prejudice the parties with respect to the trial of the lawsuit, and I would certainly feel that it is not a cause for a mistrial and ask the Court to overrule the motion.

MR. KILGORE: If Your Honor please, what Mr. Moody has said even damns us more. Change that -- creates a problem because Mr. Ward, who was in the courtroom at all times during this proceeding, did come up to that juror himself and

[Tr. 194]

initiate a conversation.

MR. MOODY: Well, in answer to that, since that is referred to, I think that if we had a mistrial every time a person in a case said, "It's a nice day outside," then we would have probably very few cases in which we did not have some problem of this kind. Again I say this courtroom unfortunately is not so arranged that the jurors and the witnesses can always be separated; and, if it were and they went back into the jury room and went in and said something to a juror, then we would have a different set of circumstances, but here in this courtroom with the witnesses and the jurors and everyone sort of mingling at times, even though the Court cautions them about it, a witness may not know another is on the jury and may inadvertently say something, and if it's not with respect to the case in a case of this kind, I would say that we do not have grounds for a mistrial, and I would say that the fact that a person mentions the weather certainly is not a grounds for a mistrial.

THE COURT: Well, of course, the whole thrust of my admonishment to the jurors about being careful to stay pretty much to themselves is

[Tr. 195]

because they might overhear something that would be material. Now, for example, if the juror had overheard a statement to the effect that this piece of machinery was real dangerous and that Seaboard did know it or something like that during the recess, then there would be no question about proper grounds for a mistrial, but in my judgment where the only communication has been a pleasantry and nothing has been said about the case in any way, no -- obviously, no effort has been made by Mrs. Ward to influence this juror in any way. The only thing she said is that her husband likes the eggs that they buy from that store where he is an employee, and I just can't see where that is prejudicial in any way to the railroad's position, so under the circumstances I don't think it's proper grounds for a mistrial.

MR. BOOKER: We respectfully except to the ruling of the Court.

THE COURT: I overrule your motion.

Interrogatories

[Tr. 74]

MR. MILLER: The question was, Your Honor, on Interrogatories -- in accordance with the

records of the Seaboard Coast Line Railroad Company, state: (a) The date the plaintiff commenced his employment. February 18, 1946, is the answer.

(b) His title and duties on the date of the accident on August 6, 1971. Blacksmith -- duties included working generally with metal.

The amount of money earned by the plaintiff, according to the records of the Seaboard Coast Line Railroad Company for the five years preceding the accident of August 6, 1971, giving the amount earned each year.

[Tr. 75]

1966, unavailable. 1967, unavailable.
1967, \$4,490.07. 1966, \$7,563.43. 1970, \$9,465.49,
which includes \$915.35 back time; is that correct?

MR. BOOKER: You read that for '67.

MR. MILLER: 1968 it was \$4,490.07, and
1970, \$9,465.49.

* * *

[Tr. 200]

Number 8. Question: State whether or not the machinery on which the plaintiff was injured on August 6, 1971, was inspected at any time prior

to August 6, 1971, going back at least two years, and, if so, state:

(a) The reason for such inspections;
(b) the date and time of such inspections; (c) the place of such inspections; (d) the name and

[Tr. 201]

address of the person or persons making such inspections; (e) the name of the log book, document or other record where the results of such inspection are recorded; (f) the results of such inspection in accordance with the inspection report; (h) the name and address of the current custodian of such inspection report.

Answer: Inspections were routinely accomplished by the operators and mechanics. No written records were made or maintained of these inspections.

Number 11. Question: State whether or not in the five years immediately preceding the accident of August 6, 1971, in which the plaintiff was injured, any oral or written complaints were made to any supervisor or official of the Seaboard Coast Line Railroad Company concerning the operation of the machinery on which the plaintiff was injured on August 6, 1971, and, if so, state:

(a) The nature of such oral or written statements;
(b) by whom such oral or written statements were

made, giving name and address; and (c) the name and address of the current custodian of the record of any such oral or written complaints.

The answer of the Seaboard. (a) Oral

[Tr. 202]

statements regarding the belt. (b) -- that was by whom such oral or written statements were made. L. T. Whittaker, 3817 Columbia Street, Portsmouth, Virginia, and T. J. Ward, 16 Harvard Road, Portsmouth, Virginia, and (c) records of such oral communications are not customarily made or maintained, and Seaboard has no such records.

Question Number 12: State in accordance with the usual practice of the Seaboard Coast Line Railroad Company, as existed on August 6, 1971, when the machinery on which the plaintiff was injured on August 6, 1971, was supposed to be regularly greased, oiled and generally maintained and state: (a) the person in charge of such greasing, oiling or maintenance; (b) the name and address of that person's supervisor; (c) when, prior to August 6, 1971, such machine was last greased, oiled or maintained, giving dates, time and place and the name of the person performing such service including address and job title.

The answer is 12(a): The person in charge of such greasing, oiling or maintenance,

J. A. Greenwood, blacksmith helper, 258 Maryland Avenue, Portsmouth, Virginia; (b) P. E. Buchanan, foreman, 12 East Roberts Court, Portsmouth,

[Tr. 203]

Virginia; (c) and, when prior to August 6th such machine was last greased, oiled or maintained.

Answer: This is a routine task as to which no records are made or maintained, and Seaboard has no certain knowledge as to precisely when such oiling occurred prior to August 6, 1971.

[Tr. 204]

17. State the date on which the machinery on August 6, 1971, was installed at the Seaboard Coast Line Railroad Company shop in Portsmouth, Virginia, and state: (a) the name of the manufacturer of said machinery, giving the current address, if known; and (b) the name and address of the nearest representative of such manufacturer.

Answer: The shearing machine was installed in 1915. The manufacturer, Hilles, H-i-l-l-e-s, and Jones Company, Wilmington, Delaware; (b) the name and address of the nearest representative.

Seaboard has no knowledge regarding the

nearest representative of such manufacturer.

The nameplate on the machine lists the following
firm: Manning, Maxwell and Moore. Seaboard has
no address for the foregoing firm.
