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SUPREME COURT OF VIRGINIA
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IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. 740191

MICHAEL WAYNE NELMS
and
RICHARD C. NELMS, SR.

Plaintiffs in error,

v.

RICHMOND, FREDERICKSBURG AND POTOMAC
RAILROAD COMPANY,

Defendant in error.

APPENDIX

MILTON PAUL MILLER
ABADY, MILLER AND ROSMAN
1508 Willow Lawn Drive
Richmond, Virginia 23230
Counsel for Appellants

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MOTION FOR JUDGMENT

Filed November 4, 1971

The plaintiff demands judgment against the defendant in the sum of ONE MILLION DOLLARS ($1,000,000.00) on account of the following:

1. That the defendant is, and was at the times hereinafter named, a railroad corporation duly organized under the laws of the State of Virginia, and operating a commercial railroad through the State of Virginia especially including the Richmond, Virginia, area, carrying passengers and freight thereon for hire.

2. That on or about Friday, September 24, 1971, at approximately 10:30 o'clock p.m., the plaintiff was a passenger in a certain 1966 Plymouth automobile being operated by Charles B. Taylor in a northerly direction upon a public highway known as Dabney Road in the County of Henrico, Virginia, which highway crosses the railroad tracks of the defendant at a point approximately twenty (20) feet south of the intersection of the said Dabney Road with Par Street.

3. That at the time here involved the said railroad grade crossing was unusual and extremely dangerous to travelers upon the public roadway in that, among other things, it was a dark night, the train involved was dark in color, the street or highway was not lighted, the defendant's train and tracks were not lighted, the approaches along the tracks to the public road were obscured from vision on both sides, and the angle at which the defendant's tracks crossed the public road is such that any

headlight upon the locomotive would be shining away from the vision of the driver of the car in which the plaintiff was a passenger, and other reasons.

4. That at the time and place above described the defendant, by and through its agents, servants and employees while acting within the scope of their said employment, negligently, carelessly and recklessly operated one of defendant's railroad trains across the said grade crossing in that, among other things, they

(a) obstructed and blocked the said public highway, a much traveled thoroughfare, by a train of a dark unlighted nature at an hour of the night when it was very dark without having any signals or warning to persons using said highway that the crossing was so blocked;

(b) blocked and caused to be blocked said crossing by a moving train in the nighttime without giving any sign, signal or warning to the traveling public upon said highway, that said crossing was blocked, when the defendant knew or should have known that such blocking at such hour constituted a grave danger to the traveling public in general and this plaintiff in particular;

(c) failed and omitted to have any adequate warning of a dangerous road-crossing and of the presence of said dangerous road-crossing of a train of a dark nature, which blended into the darkness of the night in such a way that it could not be seen by one driving a motor vehicle on said highway until too late to stop or avoid a collision therewith;

suffered by the plaintiff will continue for a long and indefinite time into the future, and the plaintiff has and will continue to suffer other damages.

WHEREFORE, the plaintiff demands judgment against the defendant, Richmond, Fredericksburg and Potomac Railroad Company, in the sum of One Million Dollars ($1,000,000.00) and costs.

TRIAL BY JURY IS DEMANDED.

MICHAEL WAYNE NELMS,
an infant 19 years of
age, who sues by his
father and next friend
Richard C. Nelms, Sr.
By Counsel

MOTION FOR JUDGMENT

Filed November 4, 1971

The plaintiff demands judgment against the defendant in the sum of ONE HUNDRED THOUSAND DOLLARS ($100,000.00) on account of the following:

1. That the defendant is, and was at the times hereinafter named, a railroad corporation duly organized under the laws of the State of Virginia, and operating a commercial railroad through the State of Virginia especially including the Richmond, Virginia, area, carrying passengers and freight thereon for hire.

2. That on or about Friday, September 24, 1971, at approximately 10:30 o'clock p.m., the plaintiff's 18 year old son, Michael Wayne Nelms, was a passenger in a certain 1966 Plymouth automobile being operated by Charles B. Taylor in a northerly

direction upon a public highway known as Dabney Road in the County of Henrico, Virginia, which highway crosses the railroad tracks of the defendant at a point approximately twenty (20) feet south of the intersection of the said Dabney Road with Par Street.

3. That at the time here involved the said railroad grade crossing was unusual and extremely dangerous to travelers upon the public roadway in that, among other things, it was a dark night, the train involved was dark in color, the street or highway was not lighted, the defendant's train and tracks were not lighted, the approaches along the tracks to the public road were obscured from vision on both sides, and the angle at which the defendant's tracks crossed the public road is such that any headlight upon the locomotive would be shining away from the vision of the driver of the car in which the plaintiff was a passenger, and other reasons.

4. That at the time and place above described the defendant, by and through its agents, servants and employees while acting within the scope of their said employment, negligently, carelessly and recklessly operated one of defendant's railroad trains across the said grade crossing in that, among other things, they

(a) obstructed and blocked the said public highway, a much traveled thoroughfare, by a train of a dark unlighted nature at an hour of the night when it was very dark without having any signals or warning to persons using said highway that the crossing was so blocked;

(b) blocked and caused to be blocked said crossing by a moving train in the nighttime without giving any sign, signal

or warning to the traveling public upon said highway, that said crossing was blocked, when the defendant knew or should have known that such blocking at such hour constituted a grave danger to the traveling public in general and this plaintiff's son in particular;

(c) failed and omitted to have any adequate warning of a dangerous road-crossing and of the presence of said dangerous road-crossing of a train of a dark nature, which blended into the darkness of the night in such a way that it could not be seen by one driving a motor vehicle on said highway until too late to stop or avoid a collision therewith;

(d) operated and caused to be operated said train across said crossing, and blocked the same in the nighttime without keeping a proper lookout for the traveling public using said public highway when there were no lights or signals to warn that the highway was blocked;

(e) were guilty of other acts and omissions in violation of the duties of the defendant, both common law and statutory, to the traveling public using said public highway in general and this plaintiff's son in particular.

5. That as a direct and proximate result of the negligence, carelessness and recklessness of the defendant, as aforesaid, the automobile in which the plaintiff's son was a passenger was in a violent collision with the defendant's locomotive which collision caused severe and permanent personal injury to the plaintiff's son.

6. That as a direct and proximate result of the negligence, carelessness and recklessness of the defendant, as aforesaid, the personal injury sustained by the plaintiff's son has

caused him to be hospitalized, so as to cause the plaintiff to become obligated for hospital, doctors', nurses' and related medical expenses, for such services rendered on behalf of plaintiff's son in the past, for the present, and which will continue indefinitely into the future, and for other damages.

WHEREFORE, the plaintiff demands judgment against the defendant, Richmond, Fredericksburg and Potomac Railroad Company, in the sum of One Hundred Thousand Dollars ($100,000.00) and costs.

TRIAL BY JURY IS DEMANDED.

RICHARD C. NELMS, SR.
By Counsel

M O T I O N Filed January 3, 1973

Comes now the plaintiff, by counsel, pursuant to Rule 3:10 (a), Rules of the Supreme Court of Virginia, who states the following:

1. Heretofore plaintiff filed a Motion for Judgment against the defendant and third-party plaintiff alleging that on September 24, 1971, the plaintiff was a passenger in an automobile being operated by Charles B. Taylor, the third-party defendant, which was involved in a grade crossing collision with a train owned and operated by the defendant and third-party plaintiff in Henrico County, Virginia;

2. It was also alleged that as a direct and proximate result of the negligence of the said railroad that the plaintiff suffered severe and permanent personal injury;

3. Thereafter, the defendant and third-party plaintiff filed a Third-Party Motion for Judgment against the said Charles B. Taylor alleging that the accident and plaintiff's injuries "occurred as a result of Charles B. Taylor's gross negligence and his wilful and wanton disregard of the safety of his passenger, Michael Wayne Nelms, ... ";

4. Plaintiff now alleges that the said accident, injuries, and damages claimed in the Motion for Judgment filed against the defendant and third-party plaintiff, were caused by the concurring gross negligence of the third-party defendant, Charles B. Taylor, which said gross negligence arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

WHEREFORE, plaintiff moves the Court for leave to assert his claim as aforesaid against the third-party defendant and to ask for judgment against both Richmond, Fredericksburg & Potomac Railroad Company and Charles B. Taylor, jointly and severally, in the same amount as sued for in plaintiff's original Motion for Judgment and that the said Motion for Judgment be so amended.

O R D E R

Filed January 23, 1973

This day came the parties, by their respective counsel of record, upon the motion of the plaintiff, pursuant to Rule 3:10(a), Rules of the Supreme Court of Virginia, for leave to assert a claim against the third-party defendant arising out of the occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and after hearing argument of counsel and considering the same,

It is ORDERED that plaintiff's claim based on the allegation of gross negligence be, and the same is hereby, asserted against the third-party defendant as though plaintiff's original motion for judgment alleged concurring negligence and joint and several liability against the third-party plaintiff and third-party defendant, and the third-party defendant shall have time to assert his responses as provided in Part Three, Rules of the Supreme Court of Virginia.

It is further ORDERED that the portions of the orders entered herein on December 5, 1973, separating the plaintiff's trial against the defendant from the trial of the third-party plaintiff against the third-party defendant and the counterclaim filed thereto are rescinded and all issues now pending between all the parties hereto shall be tried and determined at the same hearing.

It is further ORDERED that the Clerk shall this day mail an attested copy of this order to counsel of record.

M O T I O N

Filed June 15, 1973

This day came again the parties, by their attorneys, and came also the Jury sworn in this case, pursuant to their adjournment on yesterday and having fully heard the evidence and argument of counsel, were sent out of Court to consult of a verdict and after some time returned into Court with a verdict in the words and figures following, to-wit: "We, the jury, on the issue joined, find for the defendant."

Thereupon the plaintiff, Michael Wayne Nelms, by his attorneys, moved the Court to set aside the verdict of the jury on the grounds that the verdict is contrary to the law and the evidence, for misdirection of the jury by the Court and for other errors committed by the Court during the course of the trial as noted in the Reporter's Transcript of the evidence, which motions the Court continues for oral argument thereon.

To which action of the Court, the plaintiff, by his attorneys, objected.

Law and Equity Court
OF THE
City of Richmond

JUDGES
ALEX H. SANDS, JR.
A. CHRISTIAN COMPTON
RICHARD L. WILLIAMS

RICHMOND, VIRGINIA
23219

CLERK
LUTHER LIBBY, JR.

August 3, 1973

Herman Abady, Esquire
Milton P. Miller, Esquire
Abady, Miller and Rosman
1508 Willow Lawn Drive
Richmond, Virginia 23230

George R. Humrickhouse, Esquire
Samuel W. Hixon, III, Esquire
Williams, Mullen & Christian
510 United Virginia Bank Building
Richmond, Virginia 23219

Re: Michael W. Nelms v.
R.F. & P. Railroad

Gentlemen:

This case is now before the court upon the motion of the plaintiff, Michael W. Nelms, to set aside the verdict rendered by the jury in favor of the defendant.

While the defendant has raised other objections to the verdict, the two points upon which the court heard argument and upon the determination of which the outcome of this motion rests are (1) whether the court erred in refusing to grant an instruction which would have sent to the jury the question of whether or not the defendant violated the statutory duty provided for by Code, §56-414 requiring the sounding of horn and bell by an approaching train, and (2) whether the court erred in granting an instruction embodying the table of speeds and stopping distances as set forth in Code, §46.1-195.

These two points have been thoroughly and excellently briefed by both counsel for plaintiff and counsel for defendant and the motion has, in addition, been argued orally. After a thorough study of the authorities submitted

by both sides and after consideration of the positions taken by respective counsel at the time that the motion was argued orally, the court has concluded that the plaintiff's motion must be overruled.

The point which gave the court the most concern was that dealing with its failure to give an instruction based on the statutory signals.

While there is some authority which can reasonably be cited to the contrary as set forth in several cases relied upon by the plaintiff,[1] yet the decided weight of authority supports the defendant's position that the statutory duty to sound the bell and horn is not applicable to cases such as that here under consideration.[2]

The case of C & O v. Folkes, 179 Va. 60, would make it extremely difficult for the court to reject the position urged by the defendant on this motion to set aside the verdict. It is quite true that the precise point here involved was not directly before the court upon appeal and that, therefore, any expression of the Court of Appeals in that case would constitute dicta, yet the case factually was almost identical to the case at bar, and the reasons given by Judge Willis Miller, the trial judge, in support of his action in refusing an instruction calculated to send the issue of statutory duties to the jury are significantly cogent and applicable to the case at bar.[3]

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1 Bowles v. C & O Ry. Co., 61 W. Va. 272, 57 S.E. 131; Southern Ry. Co. v. Riley (Ga.) 4 S.E. 2d 54; Chicago R.I. & Co. v. Richerson (Okla.) 94 P 2d 934; Rivet v. Boston and M. RR (Mass.) 67 N.E. 2d 751.

2 St. Louis Western Ry. Co. v. Robinson (Ark.) 308 S.W. 2d 282; Crosby v. Great Northern Ry. Co. (Minn.) 244 N.W. 31; Pollard v. Clifton, (Ga.) 9 S.E. 2d 782; Miles v. American Steel Founderies (Ill.) 23 N.E. 2d 754; Louisville and N R. Co. v. Branson (Ky.) 267 S.W. 2d 945; Burkhead v. Penn. RR Co. (Ky.) 122 S.W. 2d 970; Gulf C & SF Ry. Co. v. Picard (Texas) 147 S.W. 2d 303; Fleming v. Locke (Okla) 195 P. 2d 942; Schmidt v. Chicago & N.W. Ry. Co., 191 Wis. 184.

3 "THE COURT: The court refuses 'A' for the following reasons: that the track in question, the character of movement of traffic thereon, the length of the railroad train and (continued)

Inasmuch as the plaintiff prevailed in this case, the refusal of the court to grant this instruction was, of course, not made an assignment of error. The record in this case in setting forth the "material proceedings in the trial court" has this to say in reference to the court's action in refusing to send the issue of statutory signals to the jury:

> "While some evidence was presented by plaintiff in support of such charges [i.e., failure to give statutory signals] the trial court ruled that the statutes relied upon were not applicable grounds of liability. The case was actually submitted upon the defendant's common law duty to give reasonable notice or warning of the approach of its cars and locomotive to a traveler upon a public highway crossing."

The Supreme Court in commenting upon this situation states at page 65:

> "The defendant escaped the burden and requirements of Virginia Code, §3958 because the engine which was pushing this line of cars never came within the prescribed area of not less than 300 nor more than 600 yards of the highway." (Emphasis added)

---

3 (Continued)
the fact that the engine was pushing and not preceding the train of cars, and finally and particularly the fact that the engine and train of cars has never been shown to have been as much as 900 feet from the point of collision; that is, neither any of the cars nor the engine has at any time been placed within the area of 300 yards to 600 yards provided by statute as regarding the location when the signal of the whistle shall be given.

'A-1' is refused because the court is of opinion that the circumstances surrounding the point of accident, the character of railroad train and the sign boards mentioned in the statute are not applicable to the facts in this case and the instruction does not negative any negligence on the part of the plaintiff herself.

'B' is refused because it also relies upon the giving of signals at a distance of not less than 300 nor more than 600 yards and for the reasons assigned to Instruction 'A' the same is refused and also for other errors in the instruction."

There is the additional factor in the case at bar which supports the defendant's position even more strongly than any of the cases bearing on the point. This factor is that the leading boxcar in the case at bar came to a full stop at the edge of the intersection and remained in such position for several minutes while the flagman descended from the boxcar and made a determination that the approaches to the railroad were at the time clear and free of any approaching traffic. From a reading of the cases cited, both by defendant and by plaintiff, dealing with this subject, it is apparent to the court that the purpose of the Virginia statute and the statute of other states similarly worded is to apprise oncoming traffic of the approach of a train to the crossing and not to warn such traffic of the presence of a train upon the crossing. Plaintiff argues that statutory language makes the arrival of the engine at the crossing the critical moment. This, however, does not follow. For example, under the language of the statute, the signals must begin at some point between 600 yards and 300 yards from the crossing. If an engineer were pushing a line of cars 700 yards long, the forward cars would have reached and crossed the crossing and constituted a block to oncoming traffic before any duty ever devolved upon the engineer to sound the bell or whistle because it had not at that time reached the 600 yard distance from the crossing.

In summary, the conclusion is inescapable that the intention of the legislature in adopting this statute was to apprise traffic upon the highway of the approach of a train to the crossing.

As to the second point urged by the plaintiff, there have been several cases in this state dealing with the question as to when the table of speeds and stopping distances should and should not be given the jury.

Having reviewed the cases relied upon by both plaintiff and defendant insofar as the question of the admissibility of the table of speeds and stopping distances is concerned, the court is of opinion that the fact that there were three persons rather than one in the automobile in question would go only to the weight to be attributed by the jury to the findings set forth in such table rather than to its admissibility in evidence. This is the chief objection noted by the plaintiff

to the granting of the instruction, the plaintiff contending that the number of passengers in the vehicle being over one would of itself render the statute inapplicable and that the giving of the instruction under these circumstances constitued reversible error.

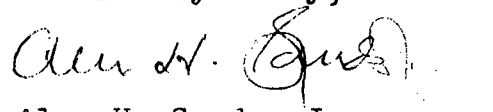
Conclusion

In conclusion, the court feels that it was not in error in granting the instruction embodying the table of speeds and stopping distances under the evidence in this case but even if the table should not, as plaintiff contends, have been submitted to the jury, it is believed that such error on the part of the court would be harmless under the circumstances of the case.

As to the failure to give the instruction outlining the statutory duties to blow the whistle and sound the bell, the court, for the foregoing reasons, believes that its action was correct in refusing to send this issue to the jury. In the opinion of the court, the railroad was guilty of extreme negligence in the discharge of its common law duties in not having made any effort to give some type of warning to the traveling public of the presence of the unloaded boxcars upon the highway. The evidence, however, in the opinion of the court, was not sufficient to warrant the court in holding the railroad negligent as a matter of law in having breached its common law duty in respect to travelers upon the highway. For the same reason, the jury having determined this issue in favor of the defendant, the court does not feel warranted in setting aside the verdict as being contrary to the law and evidence. To have adopted either of these courses, the court would have been substituting its judgment for that of the jury which, of course, the court cannot do regardless of how it views the merits.

For the above reasons, the motion of the plaintiff to set aside the verdict will be overruled. Counsel may present sketch for order to this effect reserving all proper objections desired by the plaintiff.

Yours very truly,



Alex H. Sands, Jr.

AHS,Jr/jat

MOTION FOR NEW TRIAL Filed August 27, 1973

Come now the plaintiffs, by counsel, and without waiving any other objections or motions made during the trial or after verdict, move the Court for a new trial based upon the affidavit of Archie V. Iddings, attached hereto, on the grounds that:

1. The act of the jury in fully discussing the liability insurance of the Taylor automobile, assuming that it would pay for plaintiffs' injuries, and basing their decision thereupon, amounted to positive jury misconduct;

2. Said discussions, if based upon testimony admitted over objection, would have been reversible error;

3. Said misconduct of the jury resulted in its misconception of the merits of the case, in so far as they relate to the issues of fact properly before the jury for its determination, and indicate a failure of the jury to consider the evidence of the case, and the instructions of the court, and indicates instead that the jury relied upon facts not in evidence and not received in open court, but instead received from other jurors as fact or assumed fact;

4. That said jury misconduct originated from a juror or jurors giving or creating original evidence during the deliberations of the jury;

5. That said jury misconduct resulted in considerations extremely prejudicial to plaintiffs, who had no opportunity of meeting, explaining or rebutting same;

6. That at the very least "slight evidence of influence or prejudice as a result of such misconduct of a juror" exists so as to require a new trial.

WHEREUPON, plaintiffs respectfully move this Honorable Court to convene a hearing on these issues, to elicit the testimony, under oath, of the jurors in the case, and for the reasons stated to grant plaintiffs a new trial.

MICHAEL WAYNE NELMS
RICHARD C. NELMS
By Counsel

STATE OF VIRGINIA

CITY OF RICHMOND, to-wit:

My name is Archie V. Iddings, age 56, and I reside at 1741 Alaska Drive, Richmond, Virginia. I am employed by the Virginia Transit Company but I am on leave of absence as President and Business Agent of Local Division 1220 of The Amalgamated Transit Union. I have held this position for about fourteen years.

Mr. Richard C. Nelms is a VTC driver and one of our union members and I was aware of the accident with the railroad in which his son Michael Nelms was injured and I was interested in the case and I sat in the courtroom for part of two or three days of the trial and heard most of it.

On Monday, August 20, 1973, Mr. Richard Nelms came to me and ask for my advice as to obtaining a loan for the necessary funds to appeal his son's case. During that conversation we both wondered why the jury found for the railroad and this conversation led us to

want to talk to one of the jurors, William L. Davis, who we both knew because he was also a VTC driver. I told Mr. Nelms that I would chat with him and for him not to do it.

On Tuesday, August 21, 1973, I accidently bumped into William L. Davis in the VTC drivers' recreation hall and I asked him if he would come over with me to the reporting room and chat with me a minute, which he did.

I told William L. Davis that I would like to ask him a question or two if he didn't mind concerning Mr. Nelms' son's case and he said alright. I told him that I wondered what the jury was thinking about, or talking about, to have brought out such a decision. I said that as you know Nelm's son was a passenger in the car and he could not have contributed to any cause of the accident, and someone had to be at fault, and I wondered if you would tell me what the jury was thinking about or talking about back there that could have brought out such a decision.

He told me that the foreman of the jury and one other fellow did most of the talking and most all of the conversation was concerning the insurance on the automobile which they felt would pay off.

Then I broke in on him and said did you not know, or did the jury not know, that the automobile had been released from the case? He said, "no". And I said "did the judge not explain this to you?" And he said "no, we did not understand it that way."

As I was walking back to my office I thought that I should call Mr. Miller and give him this information because I thought there was something wrong and he should know about it.

Archie V. Iddings

ARCHIE V. IDDINGS

Circuit Court
OF THE
City of Richmond

ALEX H. SANDS, JR.
JUDGE

COURTS BUILDING
1001 EAST BROAD STREET
RICHMOND, VIRGINIA 23219

October 25, 1973

Herman Abady, Esquire
Milton P. Miller, Esquire
Abady, Miller & Rosman
Central National Bank Building
Richmond, Virginia 23219

George R. Humrickhouse, Esquire
Samuel W. Hixon, III, Esquire
Williams, Mullen & Christian
510 United Virginia Bank Building
Richmond, Virginia 23219

Re: Nelms v. R.F. & P.

Gentlemen:

The single issue before the court for determination is whether the affidavit filed by plaintiff in support of his motion that the jury be reconvened and questioned is sufficient upon its face to justify the court in following such course of action.

The two allegations in the affidavit upon which plaintiff appears to principally rely are (a) that the jury discussed at length the question of the insurance upon the vehicle of the co-defendant Taylor and concluded that Taylor was, in fact, insured against liability and that such insurance would "pay off" and (b) that the jury misinterpreted the action of the court in striking plaintiff's evidence as to Taylor and did not understand that he had been released from the case.

Plaintiff argues that the action of the jury in considering the question of Taylor's insurance and concluding that it would "pay off" amounted to basing their verdict upon evidence outside of the case and that such action constituted misconduct upon the part of the jury. Secondly,

argues plaintiff, the statement by the juror to the affiant, Mr. Iddings, that the jury did not understand that Taylor had been dismissed from the case constituted a misconception on the part of the jury of the merits of the case insofar as they related to the issues of fact properly before the jury, indicating the failure of the jury to consider either the evidence or the instructions of the court.

The rule consistently followed in Virginia has been that the testimony and affidavits of jurors are generally inadmissible to impeach their verdict, especially when the ground of impeachment is their own misconduct.[1] As to the uniformity and strictness with which this rule has been adhered to, our Supreme Court has said:

> "No courts have been more careful than those in Virginia to protect the secrecy of their jurors' deliberations or adhered more strictly to the principle that the statements, affidavits or testimony of jurors should not be received to impeach their verdict other than in exceptional cases and to prevent a miscarriage of justice."[2]

The discussion by the jury, during their deliberations, of insurance and the effect of such discussions upon the verdict was held in the Campbell case not to justify a new trial, the court saying:

> "Adhering to the declared principles in the above authorities, we conclude that the jurors could not impeach their verdict after their discharge by stating and testifying as to their beliefs, assumptions, deliberations and considerations of whether or not defendant was insured, and the effect of that circumstance upon their verdict." (Emphasis added)

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1 Watson v. Coles, 170 Va. 141; Margiotta v. Aycock, etc., 162 Va. 557; Fuller v. Commonwealth, 190 Va. 19; Phillips v. Campbell, 200 Va. 136.

2 Phillips v. Campbell, supra.

It is further significant that in Campbell and other cases of similar holding, the question of insurance was considered by the jury directly upon the issue of liability of the complaining defendant, whereas in the case at bar the question of Taylor's insurance is completely unrelated to any issue involving the liability, if any, of R.F. & P.

As to the reason and justification for this rule, which sometimes may lead to harsh results, the court in Campbell says:

> "We are convinced that the evil that would result from permitting jurors, after return of their verdict, to impeach it by divulging and then testifying that they had considered and speculated upon whether the defendant was protected by liability insurance and state what effect their consideration of that circumstance had upon their award would be more detrimental and injurious to the administration of justice than the harm that may at times result from their assumption, discussion or consideration of the fact that a defendant is or is not protected by insurance."

It would, therefore, appear that even though all of the allegations relating to the injection of the question of Taylor's insurance into the jury's deliberations and of its effect upon the verdict were found to be true upon a reconvening of the jury, such fact would not constitute grounds for a new trial.

Turning now to that portion of the affidavit which concerns an alleged misunderstanding upon the part of the jury of the court's action in striking Taylor's evidence, even were such statement of the affiant accepted as true, this could not form any basis for setting aside the verdict upon the ground that it constituted a misconception on the part of the jury of the facts or of the evidence.[3] But, aside from this, the fact that the jury actually found a verdict for the defendant C & O is of itself strong evidence that their deliberations as to Taylor's insurance could have had no relation to the negligence or lack thereof of R.F. & P.

---

[3] Fuller v. Commonwealth, 190 Va. 19.

Plaintiff says, though, that the jury did not understand that Taylor had been dismissed from the case. Why then did not the jury bring in a verdict, one way or the other, as to the defendant Taylor? But even had they misunderstood the case as to Taylor and believed that he and/or his carrier would ultimately "pay off," this misconception would not warrant a new trial even though its existence be established.[4]

Finally, plaintiff suggests that because of the jury's belief in the ultimate liability of Taylor that the issue of R.F. & P.'s negligence may never have been considered by them. Were this an affirmative allegation in the affidavit, it might well give substance to plaintiff's motion, but this is not the situation. Certainly it could never be said that the reconvening of a jury for questioning could be justified as a means of allowing an unsuccessful litigant an opportunity to probe into the deliberations which led to a given verdict.

Plaintiff relies upon Dozier v. Morrisette, 198 Va. 37, Kearns v. Hall, 197 Va. 736. Dozier involved a situation where an outsider, a third party, by his communications to the jury, had injected an issue into the case which was not properly before the jury. It was this fact which prompted the court to deviate from the general rule. The court says at page 40:

> "We, however, subscribe to the exception that private communications, possibly prejudicial between jurors and third parties, are forbidden and invalidate the verdict unless their harmlessness is made to appear."

This distinction was emphasized in Phillips v. Campbell in distinguishing the two cases.

Where the court had refused to admit the results of experiments into evidence and where the jury, during the taking of a view (the court and counsel being absent) performed the experiments and made tests themselves, the court in Kearns stated that the jury should have been reconvened and questioned because, if true, this action on the part of the jury indicated that some members had taken

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4 Fuller v. Commonwealth, supra.

evidence and made tests in the absence of other members and reported their findings to those who had not participated in some of the experiments and tests.

CONCLUSION

For the above reasons, it must be held that the affidavit submitted upon which plaintiff's motion is predicated, is not sufficient, even if established to be true, to justify a new trial and, for this reason, it is felt that to reconvene the jury for questioning would not be justified.

Plaintiff's motion will, accordingly, be overruled and judgment entered on the verdict. Counsel for defendant, after notice to plaintiff's counsel of the time and place of presentation, may present sketch for order in accord with the above ruling.

Yours very truly,

Alex H. Sands, Jr.

AHS,Jr/jat

O R D E R

Filed November 2, 1973

The Plaintiff, by his attorney, having made, on June 15, 1973, a motion to set aside the verdict of the jury rendered on that day on the grounds that the verdict is contrary to the law and evidence, and without evidence to support it, for misdirection of the jury by the Court, and for other errors committed by the Court during the course of the trial, and the Court having

continued the motion for oral argument thereon by order of the Court dated June 15, 1973;

And this motion having been argued, both by written memorandum and orally before this Court on July 26, 1973, and this Court being of the opinion that the motion should be overruled for the reasons set forth in the written opinion of this Court dated August 3, 1973, and filed herein, it is hereby

ORDERED that the motion of the Plaintiff to set aside the verdict of the jury be, and the same is hereby, overruled;

And the Plaintiff having filed on the 24th day of August, 1973, an additional Motion for New Trial, to which was attached the affidavit of Archie V. Iddings relating to the alleged misconduct of the jury, and the Court having heard argument on the same on the 22nd day of October, 1973, and having considered the Motion and attached affidavit and argument thereon, is of opinion, for reasons stated in this Court's letter opinion dated the 25th day of October, 1973, and filed herein, that the Motion for New Trial, including the subsidiary Motion to reconvene the jury for questioning, should be overruled, it is accordingly

ORDERED that the plaintiff take nothing of the Defendant, Richmond, Fredericksburg and Potomac Railroad Company, but that the defendant recover of the plaintiff its costs in its behalf expended

To which action of the Court, the Plaintiff, by his attorney, objected.

ASSIGNMENT OF ERROR

Filed November 30, 1973

The following are assigned as error:

1. The Trial Court erred in overruling Plaintiff's Motion to Set Aside the Jury Verdict as contrary to the law and the evidence in this case because defendant, based upon the evidence, was guilty of negligence as a matter of law, in violating both the statutory and common law duties to the plaintiff, whereas plaintiff, as a matter of law, was free from contributory negligence, which, in any event, would not have been a bar to his recovery on account of defendant's breach of its statutory duties, but only in mitigation thereof.

2. The Court erred in granting defendant's motion for a view of the scene of the accident because the allegations of negligence were unique in that they were all conditioned upon or caused by defendant's negligence in the operation of its train in the night-time, and a jury view in the day-time was prejudicial to plaintiff in that it depicted an innocuous day-time scene, and thus created evidence which is contrary to the law regarding jury views.

3. The Court erred in overruling plaintiff's motion that he be found free of contributory negligence as a matter of law because he was a passenger and there was no credible evidence of his contributory negligence to go to the jury.

4. The Court erred in striking the evidence against the Defendant, Charles B. Taylor, and in entering summary judgment on his behalf because there was substantial evidence of his gross negligence to submit to the jury, upon which reasonable men might differ.

5. The Court erred in reversing its previous ruling in which it sustained plaintiff's motion and ruled as a matter of law that defendant, Richmond,Fredericksburg and Potomac Railroad Company, had failed to exercise its statutory duties of ringing its bell and sounding its horn, and thereafter reversed its said ruling and held that the defendant, Richmond, Fredericksburg and Potomac Railroad Company was not obligated to perform said duties. This was error in that the Virginia Statute, §56-414 requires said bell and horn and the facts of the case require its imposition upon said defendant.

6. The Court erred in refusing plaintiff's tendered instruction C, requiring the Railroad defendant to sound its horn and ring its bell, pursuant to §56-414, Code of Virginia, as amended, because said statute is mandatory under the facts in evidence in the case.

7. The Court erred in refusing plaintiff's tendered instruction D which set forth the common law duties required of the defendant Railroad under the facts in evidence in this case, and to the granting of the instruction D as changed and modified by the Court because such changes and modifications qualified and removed the common law principles from the instruction contrary to the law and the evidence.

8. The Court erred in refusing plaintiff's tendered instruction L because it is proper and justified by the facts of the case and the law, and it is different from and not covered by plaintiff's instruction M.

9. The Court erred in granting instruction 10 because the facts assumed therein were not present in the case and the

instruction does not fit the theory of liability upon which the case was tried, and is highly prejudicial to a passenger plaintiff.

10. The Court erred in granting instruction 12 because it is not supported by any evidence and is highly prejudicial to a passenger plaintiff.

11. The Court erred in granting instruction 21 because it is not supported by the evidence. Also, there is evidence indicating to the contrary. Furthermore, portions of the instruction are not in accordance with the law.

12. The Court erred in granting instruction 6 because the evidence in the case is not in accord with the test giving rise to the statutory table upon which the instruction is based. Also, the instruction requires the jury to engage in speculation and conjecture.

13. The Court further erred in granting instruction 6 because it is hopelessly in conflict with the prior action of the Court in striking the evidence in favor of the driver of the automobile, defendant Taylor. The granting of said instruction created the very evidence against defendant Taylor which the Court instructed the jury did not exist as a matter of law, and allowed counsel for the Railroad to argue to the jury, based on the instruction, that defendant Taylor caused the accident by driving at a high rate of speed, which, if true, would be evidence of Taylor's gross negligence.

Furthermore, the Court had previously ruled that the information contained in the instruction was irrelevant and incompetent when it refused to allow the investigating police

officer to testify to the information contained in the instruction.

14. The Court erred in overruling plaintiff's Motion for a new trial because of the misconduct of the jury as based upon the Affidavit attached to said motion, and in failing to convene the jury for interrogation: According to the affidavit the jury considered improper evidence which if admitted in open court over objection would create reversible error.

A transcript of the testimony and other incidents of the case is to be hereafter filed.

INSTRUCTION NO. X

"Negligence" is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person would not have done under the existing circumstances.

"Reasonable care" or "Ordinary care" is a relative term, and varies with the nature and character of the situation to which it is applied. The amount or degree of diligence and caution which is necessary to constitute reasonable or ordinary care depends upon the circumstances and the particular surroundings of each specific case. The test is that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury to another.

The "proximate cause" of an event is a cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the event, and without which the event would not have occurred. It is an act or omission which immediately causes or fails to prevent the event; an act or omission occurring or concurring with another act, without which the event would not have occurred, notwithstanding such other act; provided such event could reasonably have been anticipated by a prudent man in the light of attendant circumstances.

Given

INSTRUCTION 6

The Court instructs the jury that the following tables of speed and stopping distances, which raise no presumptions, show the results of experiments made with automobiles, unloaded except for the driver, equipped with four-wheel brakes, in good condition, on dry, hard, approximately level stretches of highway free from loose material:

SPEED IN		AVERAGE STOPPING DISTANCES		TOTAL STOPPING DISTANCES
Miles Per Hour	Feet Per Second	Automobile Brakes (In Feet)	Average Driver Reaction Time (3/4 Second) (In Feet)	Automobiles (In Feet)
10	14.67	5	11	16
15	22.0	12	16	28
20	29.34	21	22	43
25	36.62	32	27	59
30	44.0	47	33	80
35	51.3	63	38	101
40	58.7	82	44	126
45	66.0	104	50	154
50	73.3	128	55	183
55	80.7	155	61	216
60	88.0	185	66	251
65	95.3	217	71	288
70	102.6	252	77	329
75	109.9	289	82	371
80	117.2	328	88	416
90	132.0	425	99	524
100	146.6	514	109	623

Given

INSTRUCTION NO. K

The Court instructs the jury that the following table shows the number of feet a moving object will travel in one second at any given speed:

SPEED IN

Miles Per Hour	Feet Per Second
3	4.4
4	5.87
5	7.34
10	14.67
15	22.0
20	29.34
25	36.62
30	44.0
35	51.3
40	58.7
45	66.0
50	73.3
55	80.7
60	88.0
65	95.3
70	102.6
75	109.9
80	117.2
90	132.0
100	146.6

Given

INSTRUCTION NO. D

The Court instructs the jury that it was the duty of the defendant railroad in the operation of its train to exercise ordinary care:

1. To give adequate, reasonable and timely warning of the presence of its train on the crossing if you believe that the crossing in question was of an extra hazardous nature;

2. To keep a reasonable lookout for vehicles approaching the crossing;

If you believe from a preponderance of the evidence that the defendant railroad violated any one or more of the foregoing duties, then it was guilty of negligence; and if you further believe from such evidence that any such negligence was a proximate cause of the collision, then you shall find your verdict in favor of the plaintiff.

Given

INSTRUCTION NO. E

The duty to exercise ordinary care to keep a proper lookout requires not only the physical act of looking with ordinary care, but reasonably prudent action to avoid the danger which a proper lookout would disclose. If a person looks and does not see what an ordinarily prudent person would have seen under the circumstances in time to take the necessary precautions to avoid danger, he is as guilty of negligence as if he failed to maintain any lookout.

The Court instructs you further that the duty to exercise ordinary care to keep a proper lookout involves not only the duty to look when such looking would be effective, but also the duty to see what an ordinarily prudent person exercising ordinary care would have seen under the circumstances then and there existing; and a person who keeps a lookout but fails to take advantage of what it reasonably discloses is as negligent as one who fails to keep a lookout.

Given

INSTRUCTION NO. F

Where peculiar and unusual conditions render a crossing extra hazardous, it is the duty of a railroad company to keep a flagman at such crossings or to provide such other signal devices as are reasonably adequate to warn a driver of the approach to or presence of a train on such crossing.

If you believe from a preponderance of the evidence that there were peculiar and unusual conditions which rendered the crossing involved in this case extra hazardous, and that the defendant violated the foregoing duty, then it was negligent; and if you further believe from such evidence that any such negligence of the defendant was a proximate cause of the accident, then, unless the plaintiff was guilty of negligence which proximately contributed to cause his injuries, you shall find your verdict in favor of the plaintiff.

Given

INSTRUCTION NO. B

In this case, if the jury believes from a preponderance of the evidence that the defendant railroad was negligent and the defendant Taylor was also negligent and that both acts of negligence as defined in other instructions of the court efficiently contributed to proximately cause the accident, then unless you further believe that the plaintiff was guilty of negligence which efficiently contributed to cause the collision, you shall return your verdict in favor of the plaintiff.

Given

INSTRUCTION NO. 21

It is the duty of one about to cross a railroad track at a public crossing to use both his eyes and ears to avoid danger to himself. A railroad track is a proclamation of danger, and a person approaching a railroad crossing must look and listen for the presence of a train, and it is the driver's and passenger's duty to exercise ordinary care to make the act of looking and listening effective, and he must exercise a higher degree of care where the crossing is known by him or should be known by him to be dangerous than where it is not.

The law does not permit anyone to shut his or her eyes to danger in blind reliance upon the unaided care of another, without assuming the consequences of the omission of such care.

If the jury shall believe from the evidence that the plaintiff did not use such reasonable care, or if the jury shall believe from the evidence that the driver of said car was guilty of negligence which proximately contributed to the accident, and that the plaintiff acquiesced in the negligent acts of the driver, or had knowledge of the danger, and accepted the risk by continuing to ride in the automobile, or without protest, remonstrance or other effort to reduce such risk, they shall find for the defendant, R.F. & P.

Given

INSTRUCTION NO. M

If a passenger sees that the driver of the vehicle in which he is riding had seen a train approaching or in the crossing and with full appreciation of the impending danger was doing all in his power, under the circumstances, to avoid a collision, there is no duty on the part of the passenger to warn the driver of such train.

The burden is upon the defendant to prove contributory negligence of the plaintiff by a preponderance of the evidence unless any such negligence appears from the plaintiff's own evidence or all the circumstances of the case; and unless you believe from the evidence that the plaintiff saw or by the exercise of ordinary care should have seen the defendant's train at a time when the driver had not seen it, or that the driver had seen the train but was not doing all in his power, under the circumstances, to avoid a collision, and that the plaintiff failed to warn the driver of the apparent danger, you cannot find the plaintiff guilty of contributory negligence.

And if the jury are uncertain as to whether the plaintiff was guilty of contributory negligence, or if you believe that it is just as probable that the plaintiff was not guilty of any such negligence as that he was, then you cannot find the plaintiff guilty of contributory negligence.

Given

INSTRUCTION NO. 14

The Court instructs the jury that every railroad company shall cause to be erected signal boards, well supported by posts or otherwise at such heights as to be easily seen by travelers from both directions of the highway, and not obstructing travel, containing in capital letters, at least five inches high, the inscription "railroad crossing."

No railroad company is required by law to install any particular type of lights or reflectors until ordered to do so by the State Corporation Commission.

This does not, however, relieve the railroad of its duties, if any, in respect to extra hazardous crossing as set forth in Instruction F.

Given

INSTRUCTION 19

The Court instructs the jury that the burden is on the plaintiff to prove by a preponderance of the evidence that peculiar or unusual conditions existed which rendered the crossing extra hazardous, and unless you believe that the plaintiff has thus proven by a preponderance of the evidence that the crossing was extra hazardous then there was no duty on the defendant railroad to have a flagman or to maintain gates, semaphores, or other similar signals at such crossing.

Given

INSTRUCTION 12

The Court instructs the jury that the head lamps of a motor vehicle shall be so constructed, arranged and adjusted, that they will under normal atmospheric conditions on a level road produce a driving light sufficient to render clearly discernible a person at least two hundred feet ahead.

Given

INSTRUCTION 10

The Court instructs the jury that whenever any person driving a vehicle approaches a railroad grade crossing and a train is plainly visible in the crossing, the driver of such vehicle shall stop within fifty feet but not less than fifteen feet from the nearest rail of such railroad, and shall not proceed until he can do so safely.

Given

INSTRUCTION NO. C

The Court instructs the jury the following statute was in full force and effect at the time of the accident involved in this case: 1950 Code of Virginia, as amended §56-414

> "Bell and whistle or horn; when sounded. - Every railroad company shall provide each locomotive or diesel engine passing upon its road with a bell of ordinary size and steam whistle, or horn, and such whistle or horn shall be sharply sounded outside of incorporated cities and towns at least twice at a distance of not less than three hundred yards nor more than six hundred yards from the place where the railroad crosses upon the same level any public highway or crossing, and such bell shall be rung or whistle or horn sounded continuously or alternately until the engine has reached such highway crossing, and shall give such signals in cities and towns as the legislative authorities thereof may require."

And if you believe from a preponderance of the evidence that the defendant railroad failed to give the foregoing signals, then the defendant was guilty of negligence, and if you further believe from such evidence that any such negligence proximately caused or contributed in any degree or in any way to cause the injuries of the plaintiff, then you shall return your verdict in favor of the plaintiff.

And the foregoing is true even though you may further believe from the evidence that the plaintiff failed to exercise ordinary care under the existing circumstances, as any such failure on his part does not bar his right of recovery where the railroad fails to give the foregoing signals, but in such a case any failure by the plaintiff to exercise ordinary care must be considered by the jury in mitigation of damages.

Refused

INSTRUCTION NO. L

In the absence of any notice that the defendant Taylor was operating or about to operate the automobile in which the plaintiff was riding in a negligent manner or was incompetent to operate it, the plaintiff was under no duty to direct or control the operator, but was entitled to trust him until it became clear, or in the exercise of ordinary care under the circumstances should have become clear, that such trust was misplaced.

Refused

[TR 13] Secondly, we have stipulated that the length of the train on the night in question, which would include the tank cars and the locomotive, from front to rear, was 255 feet 5 inches.

* * * *

[TR 16] A. The crash happened on Dabney Road, approximately 40 feet south of Par Street, it would be in the western part of Henrico County.

* * * *

[TR 17] Q. All right, sir, I'm going to hand you a black felt marker, and ask you to draw on there a rectangle, where you think, the best of your recollection, the Goldman Paper Stock building is.

A. [Marking].

Q. Put a "G" right in the middle of it, just for "Goldman." Very good, Officer.

Now take that same pen and put an "X" right in the intersection, right where you found, from your investigation, the collision occurred.

A. [Marking].

* * * *

[TR 18] Q. While you are standing there, what, if anything, was in the space, when you arrived, between the building marked "G", Goldman Paper Stock, and the track on the, what I call, west side of Dabney Road?

A. Are you referring to this area here?

Q. Yes, sir.

A. Several--I don't know the amount--trailers, rather tractor-trailers were stored in this area right here.

* * * *

[TR 19] A. Upon my arrival, I found the alignment, which would be straight and level, road conditions were straight and level, surface condition of the road was dry. The traffic lanes are marked, there was no defects in the road. The locality was open country, with the exception of the one building, and it was dark at the time, and there was no street lights.

* * * *

A. The weather was clear, and the surface of the road is a gravel and tar mixture.

Q. Tell the Court and jury what vehicles you saw, and how they were aligned.

A. All right, Vehicle 1 I designated as the Plymouth Barracuda, as Vehicle 1. I determined the operator was a Charles Brendon Taylor, residence on Woodman Road, Henrico County. It was sitting parallel with the engine from the R. F.& P. Railroad. The engine had been pushing, I believe seven tank cars, and they had all cleared the intersection, except the engine itself.

Q. Did you make some photographs on that night, Officer, or you or someone under your direction?

A. Yes, sir, I supervised some photographs to be taken.

MR. GARRETT: No objection.

MR. HIXON: No objection.

MR. MILLER: I hand you a group of four photographs, and, Your Honor, I don't know how they should be numbered for identification, whether it's all one, or 1 through 4, but in any event--

MR. GARRETT: It wouldn't be 1 through 4. What is the number of that?

THE COURT: You introduced that as No. 2.

MR. HUMRICKHOUSE: Medical bills is 1.

A. After you get out of the curve, it's straight and level approximately three-tenths of a mile; there is a stop light right there by the--there is a building supply company there, three-tenths of a mile.

Q. That's on further down?

A. Yes, sir.

Q. Describe the curve you just alluded to. Is that shown completely on that chart?

A. Yes, sir, just about.

Q. How far from the crossing is the curve, based on your observation and measurement?

A. Approximately two-tenths of a mile.

Q. Based on your observation of the area, can a motorist on the Broad Street side of the curve, before he rounds it, see the grade crossing?

A. Which one are you referring to? There is two; there is one with the four tracks and one with the single track.

Q. I'm sorry, pardon me, I'm talking about the one where you put the "X", where the accident occurred. Can a motorist on the Broad Street side of the curve, before he rounds it, see that crossing?

A. No, sir.

Q. In night time, could one standing at or near the crossing then see the headlights approaching of a motorist

approaching from Broad Street, before the motorist rounds the curve?

A. It would have to be just about in the center of the curve. There is a lot of undergrowth in the area.

Q. What is in the line of sight of No. 13?

A. Portions of the Goldman Paper Company, and also the intersection of Dabney Road and the railroad tracks.

Q. Where is the photographer standing, approximately?

A. Standing on the, I'd say, northeast side of Dabney Road, appears to be approximately a hundred feet northeast.

Q. Well, is he right on the railroad tracks?

A. Yes, sir, he is standing between the rails.

Q. Well, is the picture taken just looking right on down the railroad tracks?

A. Yes, sir.

Q. Is that the railroad track the train was on at the collision involved--

A. Yes, sir, it is.

Q. And the direction in which you are looking on 13 is that the direction the train was coming or going?

A. It was coming.

[TR 43] Q. Northeast?

A. Yes, sir.

Q. Is that the Dabney Road grade crossing right in front of you?

A. Yes, it is.

Q. Where the accident occurred?

A. Yes, sir.

Q. And, with reference to where the train was going, [TR 44] how would you be looking in 14?

A. Would be going away from the photographer.

* * * *

A. This is the scene of the accident, where the "X" is. Here is Par Street, here.

Q. Point on the plat to roughly the area where the photographer is standing who took 15.

A. He would be standing in the right-hand lane of Dabney Road, southbound.

Q. Would he be north or south of Par Street?

A. He would be north.

Q. And which direction is the picture looking?

A. The picture is looking south, this direction.

Q. All right, sir, thank you. Now with reference again to 15, is the curve that you previously testified to as being two-tenths of a mile down Dabney Road, south of the grade crossing, visible in this scene?

A. Yes, sir.

Q. And I call your attention to Exhibit 15, to a line of telephone poles that run along the side of Dabney Road; do you see them?

A. There is a correction sir, these are Vepco poles.

Q. Vepco poles?

A. Yes, sir.

Q. Tell the jury which side of the road they are on.

A. From the direction the picture was taken, they are on the left-hand side.

THE COURT: Yes, sir, would you need a recess?

MR. MILLER: I think it would be all right if he just goes.

MR. ABADY: Pardon me, Judge.

BY MR. MILLER:

Q. Is that the type car used in the train in question, from your observation?

A. All I can say, these were tank cars involved in the accident.

Q. All right, sir, how far apart are the two cars shown in 16, approximately?

A. The space in between is approximately 10 foot, they are linked together.

Q. Are they linked together in that picture, coupled together?

A. Yes, sir.

Q. All right, go to 17, what does that show?

A. Shows one whole tank car and the end of another.

Q. Is that of the general type that was in the train the night in question?

A. Yes.

Q. Go to 18, what does that show?

A. It shows multiple railroad tracks, also shows two whole tank cars, and a portion of another one, linked together.

Q. Are they again the same type tank cars that were involved on the train the night of the collision?

A. Yes, sir.

MR. MILLER: Now I offer those in evidence, Your Honor, 16, 17 and 18.

THE COURT: Very well, same objection?

MR. HIXON: Yes, sir.

THE COURT: They are received and your exception is noted.

(A photo of half of each of two tank cars was received as Plaintiff's Exhibit No. 16.

A photo of one whole tank car and the end of a second tank car was received as Plaintiff's Exhibit No. 17.

A photo of two tank cars and a portion of a third was received as Plaintiff's Exhibit No. 18.)

BY MR. MILLER:

Q. What is the approximate distance from the rail to up underneath the car, not talking about the wheels but in the center of the car?

A. Approximately five foot.

Q. Now those are black and white pictures, so they make no representation as to true color; what was the color of

the cars you actually observed the night in question?

A. I don't recall the color exactly. I could say it was dark color.

Q. What was the color of the street?

A. It was a dark--

Q. Tar, didn't you describe it earlier as gravel with tar in it?

A. Gravel and tar mixture.

Q. I call your attention to Plaintiff's Exhibit 11, which you have already identified. What direction are you looking in that picture?

A. Looking north.

Q. Is that the scene that the driver of a car would see as he drove north toward the tracks?

A. Yes, sir.

Q. What topography is there in existence, at the time of the accident, on the right-hand side of the road, as a driver would go north, and on the left-hand side of the road?

A. Could you repeat that now?

Q. I'm not talking about any man-made objects, but the topography, the lay of the land, describe it at the almost immediately at the tracks where the "X" is, on both the right-hand side of Dabney and the left-hand side of Dabney, as a driver would approach.

A. There is banks of road on both sides.

Q. Banks?

A. Yes.

Q. What was the color of those banks, as you observed them the night in question?

A. Sir, I don't recall. I believe it was in the fall of the year, but there was no foliage on them at the time.

Q. Were there any lights on them, in any way, shape or form, as you observed them the night you got there?

A. No, sir.

Q. Have you worked that area before this accident, as an officer?

A. Yes, sir.

Q. Have you ever observed oil tank cars of this nature, parked on or near the road while coupled together?

A. Yes, sir, I have.

Q. Describe the amount of vehicular or automobile traffic that goes back and forth on Dabney Road in the night time at that time.

A. I'd have to compare it with other roads. Most motorists use it as a shortcut between Broad Street and Staples Mill Road, for a two-lane road, and that area, it's heavy at times.

Q. Heavy you say, because of the shortcut?

A. Yes.

Q. The pictures show some markings to indicate RAILROAD, without looking at the pictures, unless you need to do so, describe, from your recollection at the time of the accident, what, if anything, was along the road as you would approach it from Broad Street, to indicate RAILROAD, or anything to-do with railroads.

A. Going north you would--driver could observe one cross-bar for RAILROAD CROSSING at the double tracks.

Q. That would be before you get to the scene?

A. Yes, sir.

Q. All right.

A. Also, it's painted on the street, a large "X" indicating RAILROAD, and at the track, where the collision occurred, there is also another cross-bar indicating RAILROAD CROSSING.

Q. Before you get to the double tracks, is there a round highway marker with an "X" on it, that says RAILROAD marker or something?

A. I don't recall, sir.

Q. If it's there, it's in the picture. I think it probably is in here. Mr. Jackson, at the time of this accident, and before it, do you recall ever seeing a sign prior to the double tracks where the accident did not occur, reading, in any manner or description, DOUBLE TRACKS AHEAD, or TWO TRACKS AHEAD, or anything like that?

A. I don't recall any, sir.

Q. Were there any, other than what you have described, were there any at the crossing where the "X" is? Were there any signal lights or cross-bars that lower, or automatic or manual devices of any kind, which would be activated

when a train is coming across that crossing?

A. There is no mechanical signals at that traffic--

Q. Are there any light signals of any type?

A. No, sir.

Q. When you arrived at the scene, had there been any warning devices put in the street, or near the street, before your arrival, by anybody?

A. There was some fusees or flares, I don't recall who put them out.

Q. They were there when you got there?

A. Yes, sir.

Q. What color do they burn?

A. They burn a bright red.

Q. Approximately how many were out on the south side of the train, that would be the side going towards Broad Street?

A. I don't recall, sir.

Q. Were there some out there?

A. Yes, sir, they was on both sides.

Q. On both sides. Tell the Court and jury approximately how far one can see them. How far are they visible, as a driver approaches?

A. I would just have to guess, more than 500 feet.

Q. Were you the first officer to arrive?

Q. What is the speed limit for automobile traffic, as Taylor was going, coming down Dabney Road towards this crossing, on the night in question?

A. It's posted at 45 miles per.

Q. Do you know, at the time of the accident, where that 45 miles per hour sign was posted with reference to the accident site?

A. It is south of the curve.

Q. South of the curve; would not be, therefore, on that chart, would it?

A. No, sir.

Q. Would it be very far south of the curve?

A. Maybe a tenth of a mile.

Q. Were there any skid marks or marks of any kind that you observed, from your investigation, that you attached to the Taylor car?

A. Yes, sir.

Q. Describe them to the Court and the jury, what they looked like, where they were, how long they were.

A. There was two sets, indicating front and rear

wheels. If I may refer to my notes--

THE COURT: Yes, sir

A. (Continuing) --it's two sets, indicating front and rear wheels. The distance measured by the tape measure was, from the point they started to the point of impact, was 159 feet.

Q. Which set made those, from your observation?

A. It started in at the front set.

Q. Are you certain of that? I ask you to check carefully, and see if that's accurate.

A. Oh, it would be a correction on that. I will have to get another set of notes, these are not too clear.

Q. Surely. I have photocopies of yours, if they will help.

A. The main part of the skid was made by the rear wheels.

Q. The rear wheels, and how far was it?

A. This was taped, the distance of 159 foot.

Q. One fifty-nine, and were you able to measure the skid marks left by the front set of wheels?

A. Yes, sir.

Q. How far were they?

A. Taped off was 107 foot.

Q. A hundred seven. With reference to the locomotive,

where did the skid marks terminate or end?

A. They ended at the railroad tracks.

Q. At the railroad tracks?

A. Yes, sir.

Q. Had the locomotive moved, based on your investigation, from the point of impact until it finally came to a stop?

A. Yes, sir.

Q. Describe the way the skid marks run down Dabney Road; are they to the center, right, left, straight or crooked?

A. They stayed mainly in the right-hand lane. The front skid marks, the 107 foot, veered over the center line.

Q. Over which direction, to its left or to its right?

A. Over to the left.

Q. To its left, would that be towards the Goldman building, or away from the Goldman building?

A. Towards the Goldman building.

Q. Just using it as a reference point--

A. Yes.

Q. Can you tell the Court and jury whether the marks were of the same blackness at the beginning of them as they were at the end?

A. Skid marks started off black, and--

Q. Started off black?

[TR 58] A. And they got darker as they went on.

* * * *

Q. Were there any lights on any of the tank cars?

A. I did not see any lights.

Q. Were there any lights on the locomotive?

A. There was, I believe, one in the cab, and also there is one towards the front, a small one on the side.

Q. Headlights, that type thing?

A. No, this was a side marker light.

Q. Side marker, and does it have a headlight type--

A. That is unknown, it could have been switched on or off, I don't know.

* * * *

Q. Go ahead, sir, can you point out, or identify, where these specific signs were located?

A. Do you want them marked?

Q. Yes, if you would.

A. The two I have just marked are RAILROAD CROSSING signs, just two cross-bars, and the wordage is RAILROAD CROSSING, a white background with black letters on it.

Q. Do you know, are these commonly referred to as a crossbuck?

A. Yes, sir.

Q. All right, go ahead.

A. Also it's painted on the pavement here, a large X for RAILROAD CROSSING here also. There are two other crossings, the same as the X at the scene here.

Q. Did you observe a round sign with a railroad signal on it, placed on Dabney Road?

A. I don't recall one, sir; there may be one there, but I don't recall it.

Q. Are you familiar with the County of Henrico regulations governing railroad warning signs?

No, sir.

Q. Officer Jackson, you have testified that the condition of the road on this particular night was dry, is that correct?

A. Yes, sir, it was.

Q. And you have also testified that the condition of the road was hard, is that correct?

A. Yes. sir. it's a hard-surface road.

Q. Is this an approximately level stretch of highway?

A. Yes, sir.

Q. Was there any loose material on the highway?

A. No, sir.

Q. Officer Jackson, are you familiar with Section 46.1-195 of the Code of Virginia, which sets forth the table of speed and stopping distances for automobiles?

A. To an extent. I know the Code by the number, and I know there is a table that relates to that particular Code, that's just about it.

MR. GARRETT: That Code Section only applies when the vehicle is unoccupied by anyone other than the driver. We would object to it for that reason.

THE COURT: Yes, I was going to ask him, Mr. Hixon, does it not say a vehicle--

MR. HIXON: Yes, sir, my question I intended to direct to him is to testify to the minimum skid marks which would be left by an automobile traveling at a certain rate of speed, when the automobile is occupied by only one person, with four-wheel brakes, under the conditions I have just given him.

MR. GARRETT: That has no relevancy in this case, Your Honor, we are dealing with an automobile occupied by three. I don't think the Officer can testify what the statute is.

THE COURT: I sustain the objection, Mr. Hixon, on the basis that how far or the stopping distance of a vehicle occupied by just the driver alone, it seems to

me, would be inapplicable to this case where you have got the three passengers, or rather two passengers and the driver.

MR. HIXON: Well, sir, I think in support of the question, I would submit that the number of passengers may be material to the weight that the jury gives to the table of speed and stopping distances, but that it would be admissible, and the Officer should be allowed to testify as to his knowledge of the table, and to answer certain questions that I have got about that table.

THE COURT: Well, I sustain the objection to that and your exception, of course, is noted.

Q. Now these 15 photographs here, you did not take, did you?

A. No, sir, I did not take those.

Q. And you don't know who took them, do you?

A. No, sir, not to my recollection I don't.

Q. And you do not know when they were taken?

A. No, sir.

Q. But it's been your testimony that topographically they fairly depict the scene of the collision, is that correct?

A. Yes, sir.

Q. What about the presence in these pictures of certain trailers, certain shadows? Of course you have no knowledge of how they happened to be there when these pictures were taken, do you?

A. As I stated before, the vehicles--I didn't have

any knowledge of the vehicles, where they were at each time.

* * * *

[TR 79] how far was it from there to where you found these trailers parked?

A. All I could say was, as I remember there was enough room for my vehicle, Sergeant's vehicle and also one ambulance was parked parallel to the road at the time of the accident. They were parked closer to the trailers.

Q. You mean there was the width of a car between the edge of the road and where the trailers were parked?

A. At least, if not more.

* * * *

Q. Do you know how much more?

A. No, sir, I do not. When I exited my vehicle, I could--

Q. Were these vehicles to the north of the Goldman Paper Company?

A. They were parked between the Goldman Paper Company and the railroad tracks, all along in this area here.

Q. Would you write on there the word "trailer" just generally where they were? "Trailers" I guess.

MR. MILLER: I'm not sure the gentlemen of the jury can see through the officer as he points out this position.

A. All right, trailers were parked in this general area here. I don't recall exactly where; they were between the Goldman Paper Company and the railroad tracks.

Q. How close were they to the railroad tracks?

A. I don't recall, sir, there is several tracks in here, and I don't exactly recall.

Q. Okay, now you say you don't know whether the headlight was burning on the train engine?

A. No, sir.

Q. And you found, I believe you said, a light in the cab of the train?

A. I believe it was a small amount of illumination

into the cab.

* * * *

[TR 81] Q. And there is some sort of side light?

A. Towards the front of the engine itself.

Q. How big a light is this?

A. Just as far as I could tell, it was a small light. I wouldn't know how to describe it, or how big it was, really.

* * * *

[TR 83] Q. I will rephrase it slightly, to make it more limited. Can you tell the jury at the time of the accident, what type of vehicle you used?

A. Operating a '71 Plymouth four-door sedan.

Q. Did it have standard type headlights?

A. Yes, sir.

Q. To your knowledge, were those headlights any different from any other factory headlights on any Plymouth?

A. No, sir, not to my knowledge.

Q. Tell the Court and jury then, prior to that accident, when you worked that beat that night, if your headlights, as you just described them, caused any reflection, bounce-back, illumination, as depicted in these pictures?

A. Not quite as much as in the picture. You can, of course, see the signs.

Q. Of course you can see the sign, but does it glow like that?

[TR 84] A. Yea, sir, it does.

* * * *

Q. Were you on the train before and at the time of the collision?

A. Yes, sir.

Q. What was your job designation that night?

A. I was a Yard Brakeman.

Q. Yard Brakeman?

A. Yes, sir.

Q. And do I understand correctly that the locomotive left the yard going west, there were no other cars being either pushed or pulled, is that accurate?

A. Well, when we left the yard, yes, sir, going to get oil, get empty cars for the oil track.

Q. The locomotive had nothing but people on it?

A. That's right, yes, sir.

Q. How many, besides yourself?

A. Three.

Q. What were the other positions?

A. Another Brakeman, Conductor and Engineer.

Q. So there was two Brakeman, a Conductor and an Engineer?

A. Yes, sir.

Q. All right, have you ever seen the chart before, which was prepared by somebody at the R.F.& P. Railroad, which is on that board? You can step down. You can open the gate

Q. No, sir, let me interrupt you. Are you aware of the fact Goldman Paper Company has a brick building located nearby?

A. Yes, sir, but it doesn't--

Q. Is it in the approximate location of that black square or rectangle with the "G" in the middle of it?

Q. And would the "X" that you have already talked about be right about there, in the middle of Dabney Road at those tracks?

A. It's in that area of Dabney Road.

Q. Then I point to a building right here, and ask if you recognize the building I'm pointing to?

A. Yes, sir.

Q. See that building right there?

A. Yes, sir.

Q. Is that not Goldman Paper Company?

A. That's the Paint Shop, R.F.& P. Paint Shop.

Q. That's the west side of the highway?

A. Yes, sir, between Goldman Paper and Dabney Road.

Q. That's the R.F.& P. Paint Shop?

A. Yes, sir. These two tracks go into the Paint Shop, they cross Dabney Road.

to Broad Street by car.

A. Well, you--Dabney Road would make some turn at Westwood and then go into Broad.

Q. Okay, sir, go back up there and sit down if you will.

On the night in question, Mr. Borkey, as you were, you went to the oil station, if I understand, you started to say, and there were how many oil tankers sitting there?

A. Six.

Q. What color are they?

A. They are black.

Q. Are there any lights on them?

A. Not on the cars, no, sir.

Q. And what did you do with them, make them up into a train?

A. Well, they are spotted at unloading pipes, and we couple them together, and put air on them.

Q. Air is for the brakes, is that right, sir?

A. Yes, sir.

Q. And what was it your intention to do with them?

A. Well, we bring them back to the yard, they go to be reloaded again, they have been emptied.

Q. All right, I hand you three small photographs, Plaintiff's Exhibits 16, 17 and 18, and ask you what they are.

A. They are fuel oil tanks.

Q. Fuel oil tank cars?

A. Yes, sir.

Q. They may not be identical--

A. I think the ones we had were R.F.& P. cars; these are G.G.X., we have some of both.

Q. These fairly show the kind you were pushing around that night?

A. Yes, sir, it is.

Q. On the way back towards the yard, after you made up the train, put air in them, the locomotive was at the rear, pushing the six tanks forward, ahead of you, is that right?

A. That's right.

Q. As you made that return trip, as I have just described it, where were you located?

A. I was on the lead tank.

Q. Were you on the front of the train?

A. On the front of the lead tank.

Q. Front of the lead tank?

A. Yes, sir.

Q. In other words, you were going forward, there was nothing in front of you but--no cars in front of you?

A. No, sir.

1 Q. Is that right?

2 A. That's right.

3 Q. What was it your job to do?

4 A. Well, I'm supposed to--well, in this particular
5 case, coming to the road I was supposed to stop for the road,
6 and secure the crossing.

7 Q. Did you stop for the road?

8 A. Yes, sir.

9 Q. How did you tell the Engineer, who was in charge
10 of operating the locomotive, how to stop? He was right far
11 from you--

12 A. I have a radio, we have walkie-talkie radios.

13 Q. He had one, you had one?

14 A. There is one on the engine.

15 Q. As you approached Dabney Road, what did you say?

16 A. I brought him down to the edge of the road. I
17 said, well, "We are two car lengths from Dabney Road; one
18 car length," and when we got down within five or six, seven
19 feet of the road, "that's far enough," he stops.

20 Q. He stops?

21 A. That's right. I get off the tank, walk to the
22 middle of the road to observe the traffic, and there is no
23 traffic in sight in either direction.

24 Q. No traffic, was it darkness of night?

1 A. It was at night, approximately 10:30.

2 Q. So the way you would have observed traffic

3 is headlights?

4 A. Yes.

5 Q. You saw none?

6 A. I saw no lights in either direction.

7 Q. How long did you stay in the road?

8 A. Long enough to look both directions.

9 Q. All right, sir, you went back to the--

10 A. Back to the car, told the Engineer the road is

11 clear, not a car in sight, come ahead.

12 Q. Did you carry anything with you, in your hand?

13 A. I have a railroad light I use.

14 Q. Is that red or white?

15 A. White.

16 Q. Is it not true in railroad matters the white

17 lantern is for you to see with?

18 A. Yes, sir.

19 Q. The red lantern is for you to signal motor

20 vehicles, and what have you, with, is that right?

21 A. Well, we use the white operation to flag.

22 Q. Don't your own instructions say to signal with

23 the red for traffic, and the white lantern is just so you won't

24 stumble over something?

A. We don't have any more red lanterns.

Q. That's right, you used to have red lanterns, and when you had them you had the white ones at the same time?

A. Yes.

Q. What was the difference, just so the jury will understand, back when you had lanterns, between red and white?

A. You use both of them when you were flagging, to stop traffic.

Q. Isn't red a signal of danger?

A. Well, it is, but in switching and giving signals to the engine, between the engine and the movements of the yard, we only used white; we never used red.

Q. That's right, for a trainman; if you wanted to signal a motorist coming down the road, which would you use, back in those days?

A. You have a red and a white.

Q. That's the difference between them, primarily, red is for danger, isn't it?

A. Yes, sir.

Q. What do you have to take the place of the red?

A. We have fusees.

Q. The fusee burns brightly red, doesn't it?

A. Yes.

Q. On the night in question, when you walked down

the road, did you have a fusee with you?

A. I had one in my pocket.

Q. You did not have one lit?

A. No, sir.

Q. Well, have you testified previously you had one lit?

A. I may have said that I did, but I was mistaken.

Q. Well, if you were mistaken, and the other trainmen said they saw it, would they have been mistaken?

A. He would be mistaken too. He may have seen a red reflection.

Q. So you had one in your pocket?

A. Yes, sir.

Q. How do you light them?

A. They have a cap, same as a wooden match, where you light -- you take one and strike it against the other.

Q. Don't have to light them, do you?

A. Just like a safety match.

Q. How long is it?

A. We have different sizes, you have five minutes, we have five, ten and fifteen minutes.

Q. If you had been inclined to do so, you could have pulled it out of your pocket, struck it on the street and thrown it down, couldn't you?

A. I could have.

Q. If you had done that, it would burn with a bright red glare for what, five minutes?

A. Yes, sir.

Q. I see. Now on the night in question, as you stood in the street, was Broad Street to your right or to your left?

A. Broad would have been to my right.

Q. To your right?

A. Yes, sir.

Q. All right, as you looked to your right then, generally speaking, towards Broad Street, down Dabney Road, which we have been talking about as south on Dabney Road--

A. Yes, sir.

Q. Tell the Court and jury how far you think you could see.

A. Well, Moore's is close to a mile; to Moore's, to that crossing.

Q. Do you think you could have seen all the way to the cross street?

A. I would have seen a car light, yes, sir. I would have seen a light that far.

Q. It's a curve in the road, isn't it?

A. It's a slight bend, yeah, no curve; a slight bend

in the road.

Q. There is no obstruction?

A. There is a field on both sides, yes, sir.

Q. You say you saw nothing coming?

A. No lights, no car lights coming in either direction.

Q. Now to your left would be north, see if I'm not correct; Dabney Road ends a little bit to your left or north, and then makes a sharp right angle turn to the left, and becomes Bethlehem Road, is that correct?

A. Yes, sir, Overmyer and Georgia Pacific is right there in the curve.

Q. How far do you reckon that is to your left?

A. Not quite as far as Moore's, probably three-quarters mile.

Q. You certainly couldn't see beyond that?

A. No, sir, I could see Overmyer's building.

Q. That's where that road ends, but joins up with Bethlehem there, doesn't it?

A. Yes, sir.

Q. People could come east along Bethlehem, make a sharp right turn down Dabney, near the scene of this accident--

A. Yes, sir.

Q. After you saw nothing coming, I think you said you got back in the car, told the Engineer to go ahead?

1 A. Come ahead the road was clear, yes, sir.
2 Q. Your train started off?
3 A. That's right.
4 Q. Do they start off right slowly?
5 A. Well, it starts off much as an automobile, it's
6 very similar, I mean, you can--
7 Q. What was the maximum speed you attained by the
8 time you heard or felt the impact, or stopped? The train
9 stopped very soon after that, didn't he?
10 A. I was on the lead car, and we were going up a
11 small grade, very small grade on another curve.
12 Q. The curve is away from Broad Street, isn't it?
13 A. Yes, sir.
14 Q. To the north?
15 A. Yes, sir.
16 Q. All right, sir.
17 A. And I would say we try to run it around yard
18 speed, which is approximately four to five miles an hour.
19 Q. So you had to go from zero to a maximum speed
20 of four to five?
21 A. Yes, sir.
22 Q. So you certainly couldn't have averaged four or
23 five, starting at zero, could you?
24 A. No, sir.

1 Q. All right, sir, tell the jury, did there come
2 a time you started up, you got across the road and the train
3 stopped abruptly?
4 A. Yes, I was up on the hill when the train stopped.
5 Q. Tell the Court and jury, the best you can remember
6 it, approximately how long a time transpired between the
7 starting up and the stopping.
8 A. I'd say between two and four minutes in between
9 time.
10 Q. Well, is it not true that the locomotive was struck
11 someplace in Dabney Road?
12 A. Yes, sir.
13 Q. Because the car didn't leave the road, so far as
14 you know, did it, the automobile?
15 A. No, sir.
16 Q. And there were only six cars ahead of you?
17 A. Yes, sir.
18 Q. You don't think it took six cars, or your car
19 two to three minutes to go the length of six cars, does it?
20 A. I'd say between two and three minutes, I can't
21 time it exactly, no, sir, I didn't think it would take over
22 two or three minutes to go over that distance.
23 Q. All right, sir, now at the time the lead black
24 tank car that you were on went across the road, there were

1 no lights or flares, or signals of any kind once you got back
2 on the car, is that correct?
3 A. That is correct.
4 Q. And, in addition to you, and you had to be
5 up on the lead car, didn't you?
6 A. Yes, sir.
7 Q. And there was a man driving the train, you
8 called him Engineer; were there two other persons?
9 A. Yes, sir.
10 Q. Do they have anything to do with keeping that train
11 going?
12 A. Yes, sir, the other Brakeman was on the rear of
13 the engine.
14 Q. What was he doing?
15 A. He was riding.
16 Q. What were the others doing?
17 A. Brakeman on the engine, the Conductor was in
18 the cab with the Engineer.
19 Q. What was the Conductor doing?
20 A. He would, mainly he was standing looking out, to
21 see if there was anything he could see.
22 Q. To the best of your knowledge, when you started
23 to go across, you had Brakeman 2 riding on the rear, just hanging
24 on, and the Conductor, he doesn't wear a dark suit like he does

1 in a movie, does he?

2 A. No.

3 Q. Has work clothes on, like you do?

4 A. Yes, sir.

5 Q. And isn't it true, on this night in particular,

6 you had a box or some kind of receptacle in the cab, where

7 they all three were, where you have fusees in it?

8 A. We carry a supply of fusees, and torpedoes, yes,

9 sir.

10 Q. Would the movement of the train have been impaired

11 or in any way made difficult if the man hanging on the rear had

12 gotten one of those fusees and held it when the train passed

13 a crossing? He didn't have any buttons to turn or dials, when

14 you, as you all went?

15 A. No, sir.

16 Q. As he started, from one side, would it have

17 impaired the train or stopped it from moving if the Conductor,

18 on the other side of the window, had gotten another fusee and

19 held it? The train would have still gone across all right,

20 wouldn't it?

21 A. Yeah, the train, that wouldn't have stopped the

22 train, no, sir.

23 Q. The engineer was still there to step on the gas,

24 as they say?

Q. So they went across in darkness, that is the upshot of it?

A. Yes, sir, went in darkness.

Q. There were no lanterns put out?

A. No.

Q. You had one of them?

A. Yes, sir.

Q. Nobody was hanging on to one of them?

A. No, sir.

Q. If he wanted to, he could have lit one of these fusees, thrown it in the street, and it would have burned five minutes, wouldn't it?

A. If he put it in the street, it would burn five minutes, yes, sir.

[TR 106] isn't it true the railroad people put the fusees out?

A. The conductor and myself and the Brakeman.

Q. Yes. Are you through?

A. Yes, sir.

Q. Tell me, approximately, how many on each side of the train, before the policeman got there, if you recall?

A. How many people or fusees?

Q. No, sir, fusees I'm talking about.

A. Well, I know the Conductor, the other Brakeman and myself, three of us, had fusees, trying to keep traffic from running into the obstruction in the street.

Q. What would you place them there for after the accident?

A. We hang on to them, trying to direct the traffic around the engine and the car.

* * * *

[TR 107] Q. I'm going to read to you a part of your testimony, as it appears on page 37 of that transcript, starting on line 15.

* * * *

I asked the question,

"Q. Tell me about the fusees."

"A. I didn't use any fusees that night, because, as I said, there were no car lights in sight."

"Q. But the rule said that you are to use your lantern and fusees to protect a crossing, and you didn't use any fusees that night, is that correct?"

"A. After I left there, no, sir. I had a fusee, but I didn't leave it there, carried it with me."

"Q. Did you light it?"

"A. Yes, sir.

"Q. How did you light a fusee? How do you put it into operation?"

Top of page 38 now.

"A. Well, we have a cap on the end of a fusee, just like striking a match, an old country match, like this [indicating] and it will light."

And then we will skip down a few lines, save time, down to line 8 or 9, your answer,

"A. I had one with me, yes, sir."

"Q. Was it lit?"

"A. Yes, sir."

"Q. When did you light it?"

"A. When I got to this road crossing."

Now that's different than your testimony right now, is it not, sir?

A. Yes, sir.

Q. I ask you if your memory on the 4th of January, '72, you think, was better than it is here today, so long after the accident?

A. I'm a little over a year older, but I don't think it's that bad.

Q. I don't think it's bad. Which is accurate?

A. I had a fusee with me, but I didn't light it.

Q. Why did you say you did?

A. I heard some talk about I better say I lit the fusee.

Q. You say you heard some talk about--

A. Yeah, some fellows I worked with.

Q. Who did you hear say that, sir?

A. My Conductor.

Q. Pardon?

A. My Conductor.

Q. So you said that, because your Conductor--

A. Yes, sir, I'm sorry I did that; I know it was wrong. He said it might jeopardize my job if I didn't say that.

Q. Did he tell you to say anything else?

A. No.

Q. Now you previously testified, at this same time, you recall, that you at no time on that night heard the whistle or the horn and the bell ring. Do you recall--you recall such testimony, do you not?

A. Well, I recall I didn't hear the bell ringing. If it was ringing, I didn't hear it where I was at.

Q. All right, and when the car stopped you didn't hear it?

A. No, sir.

Q. When the train stopped you didn't hear it?

A. I didn't hear it, no, sir.

Q. And you also testified you never heard the horn, is that correct?

Q. On the night in question, did you ever hear the horn blow, prior to the accident?

A. Not prior to the accident.

Q. Very well, sir. Now was Mr. Bass your Conductor that night?

A. Yes, sir.

Q. Was there a light on the lead oil tank car that you were riding?

A. The only one, I had.

Q. The lamp?

A. Yes.

Q. As you rode along, where was it?

A. I had it in my hand.

Q. Was it lit?

A. Yes, sir, always at night.

[TR 113] Q. When you got down off of the car, you stopped the car just--

A. Clear of the road, yes, sir.

Q. Just before it got to the road?

A. Yes, sir.

Q. Do you remember some trailers parked to your left?

A. I believe it was two of them there, yes, sir.

Q. That would be on the side of the train that was towards Broad Street?

* * * *

[TR 114] A. Yes, sir.

Q. And were those trailers fairly close up to Dabney Road?

A. They were probably 10 or 12 feet clear of the road.

Q. Of the hard surface?

A. Yes, sir. I didn't measure them, I know that they were there. That's why I had to walk into the road to see.

Q. You had to clear those trailers?

A. To see the distance in the road, yes, sir.

* * * *

Q. And you would have to walk gack, go up the ladder onto the platform, and then call the Engineer and tell him to go ahead?

A. Yes, sir.

Q. Would you have any idea how long that would take you?

A. No, I never timed it, but it wouldn't take you a minute.

Q. Might take almost a minute, wouldn't it?

A. No, I wouldn't say it would take that long.

Q. Well, would it take less than 30 seconds?

A. I have never timed it; I have never timed it.

Q. It could take--

A. Yes, sir.

Q. --up to a minute, you think?

A. It could take up to a minute, yes, sir.

Q. And, at 45 miles an hour, a car could travel three-quarters of a mile in a minute, couldn't it?

A. I imagine so, yes, sir.

Q. Did you ever look again, after you got back up on that platform?

A. When I left the road, there was no car light in site.

Q. You never testified to that before, did you?

A. Yes, sir.

Q. Did they tell you not to say that when you testified before?

A. No, sir, there was still no car light in sight when I crossed that road.

Q. Which way did you look?

A. Both directions.

[TR 119] Q. Were you a member of the train crew that was involved in the collision at the Dabney Road crossing on September 24, 1971?

A. Yes, sir, I was.

Q. What was your position or job?

A. I was the Yard Conductor.

Q. Yard Conductor?

A. Foreman.

Q. Is that like a foreman, more or less?

A. Yes, sir, foreman.

* * * *

[TR 121] Q. Now take your finger, if you will, and put it on that black rectangle with the "G" on there.

A. Yes, sir.

Q. Are you familiar with the building located there?

A. That's old Goldman Paper Company.

* * * *

Q. That is correct. Okay, take your seat. I ask the bailiff to hand you a document. Mr. Bass, glance at that and see if that's not part of the railroad operating rules that your own railroad people give to trainmen to go by?

A. Yes, sir, this is about the same thing we have.

Q. All right, sir. I ask you not to read it all, it's too lengthy, but read to the jury the very first paragraph.

A. "At point where employees, other than crossing watchmen, are required by rules and special instructions to protect highway crossings, red flag by day and red lantern by night

will be used to stop highway traffic."

Q. Put that aside. Red lanterns by night; now they don't use red lanterns any more on the railroad, do they?

A. No, sir, I haven't seen one in a long time.

Q. What do they use to take its place?

A. We use the white lanterns and fusees.

Q. The white lantern, if you show it up the street, somebody in a car might not know what it was, might think it was a white headlight, isn't that true?

A. Yes, sir.

Q. That's why they have the difference between red and white, isn't it?

A. Yes, sir.

Q. And it's the duty, if I understand, of the Brakeman on the front of the train to protect the crossing, protect the people using the crossing, to expose some kind of red light, is that correct?

A. It's his--he is supposed to protect the crossing.

Q. Right, sir, what type of red light did he use on this night?

A. Well, I saw a light, it looked like from a fusee, but I couldn't say it was a fusee, because I'm so far away from him, see, six tanks away from him, I couldn't tell whether it was a fusee or reflection from any other light somewhere.

1 Q. There weren't any other lights, were there?
2 A. Not as I know of.
3 Q. You previously testified, you said there was a red
4 fusee?
5 A. I said fusee, but the best of my knowledge, I
6 couldn't say it was a fusee definitely, because I couldn't see
7 Mr. Borkey definitely that far away at night. I saw a flash
8 of red light, I don't know whether it came from a fusee or
9 some other light someplace.
10 Q. Do you remember testifying in Mr. Humrickhouse's
11 office, when I asked you, questioned you like this under oath,
12 with a court reporter present, on January 14, 1972?
13 A. Do I remember?
14 Q. Yes, sir, do you remember?
15 A. Yes, sir, I remember.
16 Q. All right, I refer to your testimony as it
17 appears on page 98 of the transcript, and I asked you a
18 question,
19 "Q. What happened on that night?"
20 Starting at line 13, and you answered,
21 "A. When we approached the crossing, the
22 Brakeman always says, 'that is far enough' or 'stop here.'"
23 "Q. Always? I want to know if you remember
24 hearing him say it on that night."

"A. Yes, sir, on the radio. I saw the flare of the fusee we call them."

"Q. What is the purpose of the fusee?"

"A. The fusee is to protect the traffic, the railroad, to protect everybody. You use it for protection."

"Q. What do you do with it?"

"A. Stop traffic."

Do you remember that as your testimony?

A. Yes, sir.

Q. Okay, sir, and then again, I refer you to page 105 of the same transcript. On line 11 a question by me,

"Q. Could you see Borkey?"

Your answer is,

"A. I couldn't see Borkey, but I could see the flare from the fusee."

"Q. Where was he?"

"A. Out on the end of the tanks on the street."

Do you remember that as being your testimony?

A. Yes, sir.

Q. Very well, the red fusee then, that you refer to, is to satisfy the paragraph of your own rules or railroad rules that you read to us, since they don't have red lanterns any more?

A. Yes, sir.

[TR 128] BY MR. HUMRICKHOUSE:

Q. Do you know where the R.F.& P. Paint Shop is, next to the crossing?

A. Yes, sir.

Q. Go to the diagram and show the jury where it is.

A. Well, the paint show now, I'm not being used to no maps--

Q. Are you saying you don't understand the map?

A. I don't--if I seen it on the map, I can't tell just where--it's a Goldman Paper and the Paint Shop is right back in here, it seems like.

* * * *

[TR 129] Q. Is the Paint Shop nearer Dabney Road or nearer Goldman?

A. Yea, it's near Dabney Road.

Q. It's before you get to Goldman, isn't it?

A. Yes, sir.

Q. All right.

A. Yes, sir.

* * * *

1 Q. You were--of the four crew men, you were the boss,
2 I take it?
3 A. I was the Yard Conductor on that job.
4 Q. Well, you are the senior man in the crew?
5 A. Yes, sir.
6 Q. What did you tell Mr. Borkey to testify about,
7 in connection--
8 A. I didn't tell Mr. Borkey how to testify.
9 Q. Did you all discuss the matter of whether or not
10 the flare was lit, the fusee was lit?
11 A. Well, yes, we did discuss it some. I asked him
12 if he had a fusee burning.
13 Q. What did he say?
14 A. He told me he didn't have one burning, at one time,
15 and he told me he did have one burning.
16 Q. He gave you two different stories?
17 A. Yes, sir.
18 Q. And you saw a fusee burning?
19 A. Well, now, I couldn't say definitely right now
20 that it was a fusee, but I saw a flare.
21 Q. How long have you worked on the railroad, Mr.
22 Bass?
23 A. About thirty years.
24 Q. Well, you know, certainly, what it looks like when

[TR 132] Q. Did you tell him to say anything about how far he could see down the road?

A. Well, he said--I said, "Borkey, could you see anything?"

He said, "I didn't see nobody coming nowhere." He said, "There wasn't a car in sight noplace."

Q. Did you tell him to give a distance of how far he could see?

A. No, I did not.

* * * *

[TR 133] Q. Well, tell me this, you usually put out flares, don't you?

A. Yes, sir, we use our flares, supposed to use our flares at the crossings.

Q. You are supposed to use them there, aren't you?

A. Yes, sir.

Q. Was it for that reason that you told Borkey to say he lit a flare?

A. I don't remember telling Mr. Borkey to say that he

lit a fusee.

Q. Fusee, normally those fusees are left at the crossing, aren't they?

A. Not now, they used to but they don't do it now.

Q. When did you change the rule? What does that rule change?

A. Some time ago they had that on the book it wouldn't be no fusees left burning.

Q. Has that been since this accident?

A. I think it was before this accident.

Q. You don't know?

A. Yes, sir.

Q. Hum?

A. No, sir, I don't know. I think it was before this accident though, I think.

Q. Well, you made the statement.

A. It's on the book at Acca, I could find out. We have a little board book.

Q. Have you ever made the statement that the fusee was supposed to be lit at that crossing?

A. We are supposed to light a fusee at all crossings at night, particularly if you stop the traffic. Now, so far as using a fusee if there is no traffic in sight, I don't know the rules on that. If there is no traffic in sight no way,

once your train gets across the crossing, why then I don't think they use the fusees.

Q. But you used to put them down at the crossings?

A. If there is any traffic coming in any direction, we put our fusees, or stop the traffic and then we make our move.

Q. How long was it between the time that you started moving, and you felt the impact? Just a matter of a minute or so?

A. Yes, sir, it wasn't very long; it was very short.

Q. Do you think it would have been less than a minute?

A. Well, I don't think it would have been less than a minute, because six tanks is about 200 or more feet.

Q. Would it have been more than a minute?

A. Yes, it was more than a minute.

Q. How much more?

A. I would say it would be two minutes or maybe two and a half, something like that.

REDIRECT EXAMINATION

BY MR. MILLER:

Q. Mr. Bass, I'm confused. First you said that building was, and you identified it as probably looking to you like Goldman Paper Stock?

A. Goldman building is the nearest to where the accident happened.

Q. I thought you said something different to Mr. Humrickhouse.

A. Goldman is nearest where the accident happened, and the next one nearer to Broad Street is the Paint Shop.

Q. Broad Street is to the left, as I understand, the area--can you see the chart where you sit? Broad Street is here, this is Goldman, as I understand there are no buildings here, it's open field, bushes and trees. If there is a Paint Shop, I don't know where it is.

A. It's just before you get to Goldman's.

Q. Before where? I mean where is it before, north, east, west or south to Goldman's?

A. It's south to Goldman's, to me.

Q. This way?

A. Yes, sir.

Q. Is it beside it? Is it the same distance from Dabney Road?

A. It's right on the side of Dabney Road.

Q. The Paint Shop?

A. Yes, sir, this is the Paper Company, the Paint Shop, and right on down here to Broad Street.

Q. All right, sir, I'm going to show you--I don't know why it matters, but I'm confused. I tell you to speak up a little, you are looking south towards Broad?

A. Uh-huh.

Q. This is Goldman's, isn't it?

A. Yes, sir.

Q. You go between Goldman's and that huge machine?

A. Yes, sir.

Q. Can you see any Paint Shop in that picture?

A. Paint Shop is on up there.

Q. The Paint Shop doesn't play any part in this diagram or this scene then, does it?

A. I don't think it would, not as I know of. It's a railroad across there that might warn them that there is traffic in that area.

Q. Okay, sir, that diagram where it shows the hand-drawn square or rectangle with a "G" is supposed to be where Goldman is, does it look about right to you?

A. Yes, sir.

Q. On the night in question, in between Goldman and the

track were some trailers?

A. Yes.

Q. They were parked near to Dabney Road?

A. Yeah, the yard comes up to Dabney Road, they were all parked in there.

Q. As the trainman, whether it be the lead man, Borkey, or the last man on the tail as they come down east, they can't see down to there, right down Dabney Road until their face gets out from behind the tractors?

A. Almost on the road.

Q. Can't see through Goldman's?

A. No, sir.

Q. As soon as you get through Goldman you are confronted with the trailers?

A. Yes, sir.

Q. You've got to be almost out in the road before you can see?

A. Yes.

Q. As far as the first six cars, they weren't lighted?

A. That's right.

Q. Any lights at all would have to come from the locomotive?

A. Yes, sir.

Q. Now you said someplace in time, whether before or after the accident, I don't think you were sure, the railroad changed the rule and instructed you men not to throw the flares down in the street any more, is that correct? Is that what you said?

A. Yeah, was instructed not to leave no burning fusee on that road crossing. I think the policemen or Henrico or

somebody asked them not to leave any more lighted fusees burning.

Q. Once a train starts across the road, by your own testimony it took two to two and a half minutes to stop being on the road, is that right?

A. I think approximately two minutes.

Q. Let's talk about two minutes.

A. I don't know exactly.

Q. If it was two minutes, let's say almost entirely the two minutes would be the black oil cars, the last little bit would be the locomotive?

A. That's right.

Q. The last little bit is when it attained full speed?

A. Yes, sir.

Q. It's going as fast as it ever is going to get when the locomotive comes into view, isn't it?

A. Yes, sir.

Q. Most of the two minutes is taken up with the black oil cars coming across?

A. Yes, sir.

Q. So the only way you could let a motorist have some good advance warning, if they won't let you throw the fusees down in the road, is for a trainman to stand there and hold them,

and when the locomotive comes by, throw them and jump on there. That could be done, couldn't it?

A. Yes, sir, that could be done.

Q. There is no rule that tells you not to do that, is there?

A. There is no rule tells us to do that.

Q. But there isn't any rule telling you not to do it?

A. No, I don't think there is.

Q. The rule just tells you to protect the public?

A. Rule says protect the crossing.

MR. MILLER: That's all.

RECROSS EXAMINATION

BY MR. HUMRICKHOUSE:

Q. Mr. Bass, if you left the man flagging the traffic, to be effective you would have to have one on each side, wouldn't you?

A. Well, to protect it in the proper manner, if you are going to leave a man, you would have to put a fusee out on this side, one on this side, and the men on the back of the train would have to stop and take them up, to extinguish them.

Q. If you didn't have a fusee, put a man out to wave traffic down--

A. Yes, sir.

Q. You would have to have a man on each side, in order

to properly protect--

A. Yes, sir.

BY MR. GARRETT:

Q. Mr. Bass, you told me a while ago that you don't light fusees unless you see something coming, I believe you told me. Did you make this statement in the deposition? You were asked the question:

"Q. If they saw nothing coming, would they have lit the fusees?"

And your answer:

"A. Well, usually we light fusees whether we see anything at night or not, at all crossings at night."

A. Well, we usually do.

Q. You usually do?

A. We usually do, until they started--

Q. Is that the reason you think you saw the glow from that fusee that night?

A. No, it wasn't any put down that night, I mean we didn't pick up any when we crossed over, there was none there to pick up.

Q. That surprised you, didn't it?

A. Sir?

Q. Did that surprise you?

A. Well, no.

Q. In view of your rules, and what you said here?

A. Well, I will tell you that when we go to a crossing, when we stop at the crossing, if there is any traffic coming, we get the fusees at night. And, of course, the white flag or red flag by day, and get out and flag the crossing, until--

Q. Well, here you said "Well, usually we light fusees whether we see anything or not."

A. Well, I have been up there many many times and lit them, and there wasn't a car in sight nowhere.

Q. You usually light them whether you saw a car coming or not?

A. I have lit them, yes, sir, on many times, and throwed them out in the street.

Q. You knew it was a dangerous crossing?

A. Well, it's a railroad crossing, and it's not used too much, I reckon. Now Dabney Road, I don't know just how much Dabney Road is used, but it's a city street, I would guess, and people does use it, but it's not any--I wouldn't say it's heavy traffic on it.

Q. But in your experience, you usually light them whether you see cars coming or not; that's what you say here?

A. Yes, sir, I do.

Q. And you understand the rules say you should do that?

[TR 144] A. The rule says the crossing will be protected by a red light.

Q. Red light?

A. By night.

Q. And that red light, you have just told us, is now a fusee?

A. Well, then, you see, you don't leave that red light burning there, because it might blow away into somebody's building, to burn up a building.

* * * *

[TR 149] Q. What was your job or employment status?

A. I was Engineer.

Q. You were driving the train, were you?

A. I was running the engine, yes.

* * * *

Cecil C. Frayser-direct

[TR 152] Q. You know indeed there were no lights on the tank cars, were there?

A. I don't know of any lights on the tank cars.

Q. Your familiarization with that crossing tells you at the crossing itself there are no blinkers, lanterns, gates that close or light warnings of any kind?

A. No, there is only the cross arm.

Q. The crossbuck?

A. Yes.

* * * *

Q. All right, sir, I hand you a pencil. We have got ink on there, red and black, I'm going to hand you a common every-day lead pencil, I'm going to ask you to actually mark that route, starting at--draw a little circle here, around the junction of those two tracks, just draw a little circle right there.

A. Right here?

Q. Yes, sir. No, bigger than that, about as big as

a quarter. That's fine, now start at that circle, take that pencil and sketch the route you took, first going backward with an empty locomotive--just go on, do the best you can do for us.

A. Well, that won't be but so good.

Q. Well, it will be good enough.

A. And there is another track that goes back in here.

Q. You weren't on it, were you?

A. We didn't go on it.

Q. But an "X" across the one you didn't go on.

MR. GARRETT: Wait a minute.

Q. Now reinforce the line, so we can see it a little bit. Pick it up and make it a little heavier going back. Okay, thank you.

MR. HUMRICKHOUSE: Let me ask one question. Do you understand the scale on this map?

THE WITNESS: No, sir.

MR. HUMRICKHOUSE: Look down there and see what it is, at the bottom.

THE WITNESS: One inch equals 50 inches, is that correct?

MR. MILLER: Fifty feet.

MR. HUMRICKHOUSE: So is it possible the place you are talking about is off of the map, and was never

drawn on there, where you went back up at the "Y"?

THE WITNESS: Back up here?

MR. HUMRICKHOUSE: No, the other one.

THE WITNESS: Well, I'm not very good at reading maps, but this track the oil station leads down into is not far from Dabney Road. I don't know how far it would be, but it wouldn't be over the end of that map, 200 feet I would think.

BY MR. MILLER:

Q. That would be four inches?

A. That would be four inches.

Q. Well, you didn't draw it to scale?

A. No.

MR. HUMRICKHOUSE: That's all.

Q. Let me ask another question, you see the top of the line? I will put a check mark there, so you know what I'm talking about, that is the furthest you got away from the grade crossing, wasn't it, in distance? Is that right? Do you understand my question?

A. Yeah.

Q. That's the furthest your engine and your crew--

A. When we went the other side of the crossing?

Q. Yes, sir, after you picked up the empties, you backed up this way, didn't you?

[TR 159] Q. When you looked to your right, as you sat, was that not towards Broad Street?

A. Yes, when I looked towards my right.

Q. In the stopped position, when Borkey stopped you, you couldn't see the street, because of the Goldman building, could you?

A. Yes, sir.

Q. Am I correct?

A. I could not see the street.

* * * *

[TR 161] Q. How close were you to the edge of the street when you were free and clear, so that you could see?

A. Oh, 50 to 75 foot.

* * * *

[TR 164] Q. Now the railroad rules that you are given require you to use a red lantern or fusee now, by night, to protect a crossing from cars, automobiles, is that correct?

A. A fusee by night.

Q. Were there any fusees, to your knowledge, used on this night, before the impact?

A. I did not see any.

* * * *

A. I don't quite understand the question.

Q. Did you see anything coming?

A. When I received the signal to--

Q. No, sir, after you had started, and as you got into Dabney Road.

A. No, sir.

Q. You didn't see any; when did you first see anything coming?

A. About the time the front of the engine was at the road crossing.

Q. And what did you see?

A. I seen the headlights of an automobile.

Q. Where did you first see them?

A. Approximately where the tracks lead into the Paint Shop, which shows on that scale or map.

Q. Do you know how far that is from the other crossing?

A. It would be five or six car lengths. When I refer to a car length, I'm referring to a box car length on the railroad, not an automobile, but a car length.

Q. All right, now what did you observe, if anything, about the automobile?

A. I observed it was moving at a high rate of speed.

Q. Now explain that to the jury. Why do you say that?

A. Well, I could hear the brakes squealing on the automobile, it was closing on me very fast. It was closing very quickly, and I feel that I can just speed--part of my job.

Q. That's what?

A. It's part of my job, as running the engine, to judge the speed of a moving vehicle.

Q. Did you see the car change its course, or go up and down or anything, along the road?

A. It was vibrating up and down, you could see the headlights.

Q. After you saw it hit the first crossing, going into the Paint Shop?

A. Yes, sir.

Q. And where did it hit the engine?

A. Hit the engine just behind the front trucks of the engine.

Q. When did you realize that it might hit the engine?

A. When he was about 20 foot from the engine.

Q. Was he still moving along?

A. Yes, sir.

Q. Slow rate of speed?

A. He was moving right fast.

Q. What did you do?

1 A. I went back inside of the cab, for fear that
2 something might come in the window.
3 Q. Did you immediately stop?
4 A. Yes, sir.
5 Q. What did you then do?
6 A. I called the yard office for assistance, on the
7 radio, talked to Yardmaster Johnson.
8 Q. Let's go to the chart, Mr. Frayser.
9 A. Yes, sir.
10 Q. And will you point out to the Court and the
11 jury the first set of tracks you are talking about?
12 A. The set of tracks into the Tank Shop.
13 Q. Into the Paint Shop?
14 A. Yes.
15 Q. And that's where you first saw the automobile?
16 A. Yes, sir, somewhere in this vicinity.
17 Q. All right, now will you take this pen and put
18 a circle and a big "X" around the whole crossing, all around
19 the whole thing?
20 A. Both sides of the track?
21 Q. Yes, and put an "X" in there. That's where you
22 first observed the headlights of the car?
23 A. I might clarify something here, if you would like
24 me to. I refer to that as the "Tank shop," it's now Paint

Q. You think this car was anywhere from 250 to 300 feet away when you first saw it then?

A. Could be.

Q. And you are telling the jury that you were as much as 75 feet from this crossing when you first saw this car; you said 50 to 75 feet.

A. Fifty to seventy-five.

Q. You could have been as much as 75 feet from this crossing, regardless of the fact that there was a building there, and there were trailers sitting there, you could see when you were 75 feet back?

A. I don't know the exact distance of the trailers. There were trailers sitting there. I had just estimated this figure.

Q. Weren't some of them as close as 10 feet to Dabney Road?

A. They could have been.

Q. They were, weren't they? You were there that night.

A. They could have been that close.

Q. Are you saying they were or were not 10 feet from Dabney Road? Mr. Frayser, you were there, you were the Engineer,

now you certainly can tell the jury how close those trailers were to Dabney Road that night. You have got the distance of this young boy down to a tee, now why can't you tell us that distance with precision?

A. I have made statements before; I did, I said how far they were then. Possibly it was fresher in my mind at that time than it is now. That's been two years ago.

Q. Well, what did you say before, how far they were?

A. I don't know how far I said.

Q. Did you say they were 10 feet from that road?

A. I don't know how far they were, I said. If I said 10 foot, that would be nearer correct than what I would say now, because I have thought nothing of this thing for the last two years.

Q. For the last two years; you testified just a year ago in Mr. Hummickhouse's office, didn't you, a year and four months ago?

A. January 4, 1972.

Q. Five months then. Well, how far was that trailer, were those trailers, the closest trailer to Dabney Road? Tell us how far it was away, give us your best estimate. Ten feet? Fifteen feet?

A. I can't give you any estimate, I really don't know.

1 Q. And those trailers could have been as close as
2 ten feet to Dabney Road?
3 A. They could have.
4 Q. Then your statement that you were 50 to 75 feet
5 from Dabney Road when you first saw this car approaching,
6 that's probably not true, is it? Do you want to change that
7 now? Now is the time to change it; do you want to leave
8 this jury with the impression you were 50 to 75 feet from
9 Dabney Road when you saw this car, or would you like to
10 change that?
11 A. I believe I would like to change that.
12 Q. Well, tell us now what you are going to tell us.
13 A. Excuse me, I'm just trying to give you as near
14 a truthful answer as I know.
15 Q. That's what we are trying to get out of you too,
16 sir.
17 A. That's,and I'm trying to picture it in my mind--I
18 would say I was about 25 foot from the crossing when I seen
19 the automobile. That I was--
20 Q. You?
21 A. Where I was seated in the cab.
22 Q. Not the front of the engine, but you?
23 A. Not the front of the engine, but I was.
24 Q. And if this engine--you have given us a rather

precise figure on that--is 50 feet long, less 7 feet, you have the seven foot cab which you are mid way of, you were 25 feet from the road, the front of your engine would be almost across the road, wouldn't it?

A. In the road crossing, yes, sir.

Q. When you first saw this car?

A. Yes, sir.

Q. Do you still insist the car was five or six car lengths away when you first saw it?

A. Yes, sir.

Q. Would you like to change that figure?

A. No, sir, the car was approximately where the tracks lead into the Tank Shop, Paint Shop.

Q. Could it have been closer or further away?

A. No, sir, I don't believe so, about where the tracks lead into--

Q. And you saw when you saw it, it was then skidding, you heard the squealing?

A. I heard the squealing.

Q. Did you hear the squealing before you saw it?

A. No, I saw it an instant before I heard the squealing.

Q. Well, was it--were you hearing the squealing when

Q. Was it after you heard the squealing that you saw it dip down?

A. About the same time.

Q. You heard the squealing, you said something about you saw it dip up and down?

A. Well, no, I seen it bouncing up and down on the railroad tracks, that's what I meant by the up and down motion of the headlights.

Q. Is that a rough crossing there?

A. Well, it's not a smooth one.

Q. I see. Well just about any car would bounce up

A. Sir?

Q. How long have you been with the R.F.& P.?

A. Thirty years this month.

Q. Were you employed with the R.F.& P. on the night of September 24, 1971, when a collision between a train and an automobile took place at the Dabney Road grade crossing?

A. Yes, sir.

Q. What was your job position?

A. Well, I was supposed to be, I am on that job the Head Brakeman.

Q. I call your attention to the part of the trip just before the collision, when the locomotive was pushing the six empty cars from west to east, going toward Dabney Road; are you familiar with what I'm talking about?

A. Yes, sir.

Q. As the train rode along, Mr. Fleming, and before it came to any stop, where were you physically positioned?

A. I was on the back platform of the engine.

Q. And as the train rolde along, besides holding on, what were you doing?

A. I was looking around, and that was about all I was doing.

Q. You didn't have any physical part to play in

making the train go, did you?

A. No; no, sir.

Q. All right, sir, do you recall when the--scratch that, please. Do you have a walkie-talkie radio, where you were in that position at the rear?

A. Yes, sir.

Q. Do you remember Trainman Borkey saying something about we are at Dabney Road, stop?

A. Yes, he did.

Q. And do you remember the train stopping?

A. Yes, sir.

Q. How long would you say it remained stopped, before it started up?

A. I would say approximately a minute.

Q. Approximately a minute, and were you still continuing to look around during that minute?

A. Well, I don't know exactly what I was doing; I was on the rear platform. I probably was looking around.

Q. That was about your only duty, wasn't it?

A. Yes, sir.

Q. During the minute it was stopped on the west side of Dabney Road, and you were looking around, did you see a lit fusee either in the road or in the hand of Mr. Borkey?

A. I did not.

ght.

After the collision occurred, is it not true that lit fusees were put down in the street on both sides of the crossing, to protect the public from the obstructions that were there?

A. That is true.

Q. And where did those fusees come from?

A. Well, the only one place they could come from is off of the engine.

Q. They have a box in the engine where they store them?

A. Yes, sir.

Q. And is it not true they burn with an exceedingly bright red glare?

A. Yes, it is true.

MR. MILLER: Okay, sir. Witness with you.

CROSS-EXAMINATION

BY MR. HUMRICKHOUSE:

Q. Mr. Fleming, did you hear anything right before the collision?

A. Yes, I heard something that sounded like brakes, I mean tires crying--I mean like somebody put on the brakes right hard, and the tires made a fuss.

[TR 196] Q. You are employed by the Richmond, Fredericksburg and Potomac Railroad, are you not?

A. Yes, sir.

Q. What is your capacity?

A. Claim Agent.

* * * *

[TR 197] Q. Tell us--you don't have to get up, I don't think--tell us the furtherest distance from the crossing that the train ever got, and that would be, of course, on the west side.

* * * *

[TR 199] Q. Does that not indicate to you, according to your answer, the train was never as much as a half a mile, but a quarter mile, and maybe something in between?

A. Yes, sir, that's what it would indicate, yes.

* * * *

the circuitous route, going up, down, backing up and coming back?

A. Yes, sir.

Q. Does that coincide with your investigation, as the approximate route?

A. I never went into that part of it.

Q. You never went into it?

A. No, sir.

Q. Okay, sir, when you made your estimate of between a half and a quarter mile distance, do you know the furthest--can you see on that chart the furthest point from the crossing that they went, to your knowledge?

A. Not to my knowledge, no, sir.

Q. Do you have any reason to believe then that the circuitous route that Mr. Frayser showed us is other than accurate?

A. No, sir.

Q. Now, of course, that's not to scale, is it?

A. No.

Q. All the activity he drew there with the pencil would indicate very close to Goldman Paper, and, in order to be a quarter mile, it would have had to have gone considerably further, wouldn't it?

A. Yes.

17 Q. Now did you have your own car?

18 A. Correct.

19 Q. And did he have a car?

20 A. No.

21 Q. And, to your knowledge, did he have a driver's

22 license?

23 A. He had a learner's permit.

24 Q. A learner's permit, so he could only drive then, if

you would let him drive your car, for example, while you were in it, isn't that the rule?

A. Correct.

Q. Or his daddy could drive if he was in it. Did he drive much, to your knowledge, at that time?

A. He never drove my car.

Q. He never drove your car?

A. No.

Q. So, to your knowledge, you don't know when he ever drove a car, do you?

A. It's possible I recall seeing him maybe drive once or twice, under the instruction of his father or mother.

Q. He was definitely a learner in driving at that time, he wasn't any more than a learner is what you mean?

A. Correct.

Q. Do you have any recollection, yourself, of the accident, so you can tell us when it occurred?

A. No, I don't.

Q. You have to depend on what people tell you?

A. Correct.

Q. Well, we have heard the officer testify pretty clearly, I guess, you sat here, heard him read the time off his notes, so I don't know any better than that. I would ask you, assuming that that's probably accurate, if you can remember then, what did you do after you left Angelo's, at about 8:00 o'clock, other than stop by Linda's house and she wasn't there?

A. If there was no other place to go, we just generally rode around in the area.

1
2 Q. Average? Was it ever your habit to have it real
3 loud?
4 A. It would be loud in respect to--excuse the expression-
5 but an older person.
6 Q. We will excuse you, I know you are right, very
7 candid. Can you remember then, without belaboring it,
8 timewise by me, can you remember any other events particularly,
9 leading up to the accident?
10 A. No, I don't.
11 Q. Now you understand and have been told, of course
12 the accident occurred at this Dabney Road crossing?
13 A. Correct.
14 Q. Were you, at that time, familiar with Dabney
15 Road?
16 A. I had traveled the road quite a number of times,
17 yes, sir.
18 Q. It has been suggested by some that it is frequently
19 used as a shortcut, because it angles off between Broad and
20 Staples Mill Road.
21 A. A lot of traffic can be avoided by that route too.
22 Q. Did you use it for that reason?
23 A. Yes, sir.
24

[TR 221] Q. In other words, what is the last thing you remember, definitely remember?

A. Stopping by Linda Atkinson's apartment.

Q. You don't remember after that any more?

A. No, sir.

* * * *

[TR 222] Q. After you, as you approach the accident site, do you recall that there is a curve in the road?

A. I don't recall approaching the accident site.

Q. I'm certain of that, but I mean from the other recollections, is there not a curve?

A. Of course.

Q. Before you get to the accident site, were you aware that when you got around that curve and went on, that you crossed two or three sets of spur tracks?

A. Correct.

Q. Did you know that at the time?

A. Yes.

Q. And were you aware there were some signs, the usual type crossbuck sign on the road, and painted in the street?

* * * *

1 A. Yes, sir.

2 Q. Had you ever heard the horn of a diesel--have
3 you ever heard the horn of a diesel locomotive, or the
4 bell or whistle of a train?

5 A. I don't recall any of these facts.

6 Q. I'm not talking about on the night in question.

7 A. Any night.

8 Q. Have you ever heard a whistle or horn from a
9 train?

10 A. No, sir, I have never seen a train on the tracks.

11 Q. Not talking about right there, I'm talking about
12 in your lifetime, riding in an automobile or walking?

13 A. Have I ever heard a train?

14 Q. Yes, sir, blowing its whistle or horn?

15 A. Correct.

16 Q. When you are driving a car, and in the vicinity
17 of a railroad track, and hear a horn or whistle of a train,
18 what do you do?

19 A. Stop immediately.

20 Q. You have already testified you don't recall any
21 of the events on the specific night in question, do you?

22 A. No, sir.

23 Q. Do you remember anything of the night, any more
24 of anything than I have asked you about?

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Q. My question, sir, was, do you know how fast you

1 were driving that night, right before the collision?

2 A. I do not recall.

3 Q. Do you remember making a statement in your

4 deposition as to how fast you were going?

5 Now I will read it to you, on page 34, on line 12--

6 well, we start with line 8:

7 "Q. What is the speed limit on Dabney Road?"

8 "A. Forty-five."

9 "Q. Sir?"

10 "A. Forty-five."

11 "Q. How fast were you going that night, when

12 you got on Dabney Road?"

13 "A. I don't know, I would say 45 or maybe a

14 little more, maybe 50."

15 "Q. You were trying to stay within the speed

16 limit?"

17 "A. Yes, sir."

18 Now, do you remember saying that?

19 A. Correct.

20 Q. Well now, which is correct?

21 A. I said I probably was going, I don't recall

22 exactly. I never made a statement saying that I was going any

23 certain speed.

24 Q. Well, why did you say 50?

A. I just said approximately 45 or 50.

Q. Well, 50 would have been above the speed limit.

A. I guess it would have been.

Q. You knew that there were two sets of spur tracks there?

A. Correct.

Q. And how about your passengers, did they know?

A. I'm very sure they did.

Q. Why?

A. They had traveled the road before too.

Q. Mike and Judy?

A. Correct.

Q. What would there be to call it to their attention, the fact that there are spur tracks there?

A. Could you repeat that, please?

Q. What would there be to call to their attention the fact that there are spur tracks there?

A. A sign.

Q. Is the road smooth?

A. Fairly smooth.

Q. Either of the crossings rough?

A. Not extremely.

Q. Speed limit, you say, was 45?

A. Correct.

Taylor-cross

[TR 242] Q. These times that Mike was with you, coming down Dabney Road, was that purely coming from work, or was that at other times, night and day?

A. Numerous occasions we would take Dabney Road.

Q. Night and day?

A. Yes, sir.

* * * *

Taylor-redirect

[TR 266] Q. Have you ever seen an R.F. & P., or any other kind

* * * *

of train on any of those crossings?

A. On the crossing itself?

Q. Yes.

A. Never.

MR. MILLER: That's all.

RECROSS EXAMINATION

BY MR. HUMRICKHOUSE:

Q. Ever seen any cars on the siding?

A. There is a large yard off to the side of Dabney Road, headed towards Staples Mill, and it looks like a place they clean them, or what it is, that's as close--there are engines over there, that's all I have seen.

Q. You knew they were moving--

A. I have seen them in the yard, yes, sir.

THE COURT: Anything further?

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16 MR. MILLER: It happened at night. The Supreme
17 Court of that state backed him up and said that he could grant
18 a view at day. I haven't read the case, I don't know on what
19 it turned. It may have turned on something that didn't matter
20 whether it was day or night, I just don't know, but I would
21 say, briefly, as I said before to the Court, that the
22 plaintiffs' pleadings are certainly postured, in fact they
23 are almost like a bill of particuars, they spell out the acts
24

1 of negligence and the extra-hazardous facts upon which we
2 relay. Proof to date has certainly supported that.
3 THE COURT: Well, supposing that you are entitled
4 to an instruction on the extra-hazardous nature of the
5 crossing, and, as I recall, that's a matter that depends
6 entirely on the evidence in the case, as to whether it's
7 extraordinarily hazardous--assuming you were entitled to that
8 instruction, wouldn't that be all the more reason that the
9 defendant railroad should have a view?
10 MR. MILLER: Well, I guess it could be debated.
11 I would answer, you know, Your Honor, respectfully, because it
12 may be, as I said yesterday, in the sunshine,in the daylight,
13 very innocuous. I have been there, as the officer testified,
14 at midnight, and it is just slightly different, it is jet
15 black, very gloomy, you can't see anything. The way the
16 hills and the surrounding terrain at nighttime just strikes
17 me, as one individual, that is just vastly different, and it
18 creates a different impression at night. And I'm just afraid
19 if they see it in the daytime, when it looks just like a nice
20 road, little country road, it may create an impression that
21 they would not otherwise have, and the impression would not
22 be one based on the evidence, but based on seeing it in the
23 daytime. And I think the cases say that the view is not one to
24 create evidence or to make evidence.

THE COURT: That's true. Now also, the cases are very emphatic that the conditions must be the same.

MR. MILLER: And it's also entirely in your discretion.

THE COURT: But they don't say whether or not they mean by that the physical conditions.

MR. MILLER: No Virginia case, that's right.

THE COURT: I tell you what we do, let me have the name of this case. We do have an A.L.R. back in our library here--

MR. GARRETT: 85 AIR 2d, at page 528. The case is Blewett v. Barnes, And the West citation is 309 Pacific 2d 976.

MR. MILLER: That's right.

MR. GARRETT: 62 New Mexico 300.

MR. HUMRICKHOUSE: What did you say the ruling was in there?

MR. GARRETT: They held although it was a collision with a switch engine, they held that even though the accident happened at night, that a view by the jury in the daytime was within the discretion of the judge.

The only thing I would like to comment, I certainly agree with Mr. Miller, and advance the same argument, that the cases in Virginia have repeatedly said that the conditions have

1 to be substantially the same, and the physical setup has to
2 be substantially the same. And it seems to me that to say
3 that going out there in the day is the same as what happened
4 at night just doesn't make sense.
5 Plus the fact, and the burden is on the plaintiffs
6 to show these same conditions--
7 MR. MILLER: The moving party, not the plaintiff.
8 MR. GARRETT: The moving party, right. We know
9 that there were some tractor-trailers parked in the area that
10 would be in the sight line between the cab of the engine and the
11 approaching car, and there has been no effort to say that those
12 trailers are still there, or that they are in the same position
13 they were at that time. And I think that is a vital fact;
14 it's just like going to an intersection accident between two
15 automobiles, if at the time of the accident there was a building
16 on the corner, and since then the building has been removed,
17 there would be a tremendous difference. And I advance to the
18 Court that unless that condition can be somehow recreated, and
19 I don't know how it could be, really, that you are showing the
20 jury something entirely different from what existed the night
21 of this accident, and I object.
22 MR. MILLER: I have one more point to make, Your
23 Honor: you asked me something about the foreign case, I was
24 getting ready to conclude--Jack just reminded me, one other

very important element in this case is, the testimony is back and forth on this, involves the headlights of an approaching automobile, whether they can be seen around the curve, and when. We have got direct testimony from one who measured it, one who is accustomed to making measurements. That is a nighttime condition, headlights would be inapplicable, of course, to any other time of day.

And I have been there since this case started, since I was retained, I'm just going to say, I don't think I'm too far wrong, 25 times. I have studied the area, been there with photographers three times, and people, and it's just 100 percent different. It's innocuouc, it doesn't look extra-hazardous, and I indeed don't think it is, in daytime conditions, but at nighttime, it's so vastly different, because of everything that is there, that I think it would create evidence, which it's not supposed to do, according to Virginia cases.

If those jurors saw it in the daytime, they may say it's a reasonable place, they have sign posts up and all that. You just can't miss it in the daytime; go by there at night, and I swear, it's just so completely different, you wouldn't know it's the same place.

MR. HUMRICKHOUSE: The only thing I say is I certainly agree it's within the sound discretion of the Court,

there isn't any question about that. And so was the introduction of the photographs, which showed objects other than the crossing, which Your Honor directed the jury to disregard, the trucks and vehicles there. That was a scene that the plaintiff put on, showing the crossing, and in, he said, the same condition. Well, we can certainly have evidence that the crossing was in the same condition now as it was then, that is no problem. The problem is, if you go at night, that's conducting a test,which is not proper.

The reason for the view is to assist the jury in determining the true facts of the case.

THE COURT: Well, I'm not going to, under any circumstances, award a view at night. It would either be a daylight view, or no view at all.

MR. HUMRICKHOUSE: Yes, sir.

THE COURT: I didn't mean to cut you off.

MR. HUMRICKHOUSE: I think we are entitled to the view, for the reasons we have already advanced.

THE COURT: All right. Well, gentlemen, that is a matter that would come at the conclusion of all of the evidence anyway. I would like to read this case, and I will have both books in here and on my table out there, so all counsel can read them too. I will do that either during the recess, or during the lunch hour, which would be before we are

A. Well, as far as I know, we rode around a little while, and then, with this riding around, that's just, I guess, when the accident happened.

Q. Can you recall any particular place you went, or any particular thing you did, between leaving the apartment, after you ate, and before the accident occurred?

A. No, sir.

Q. Pardon?

A. No, sir.

Q. Do you remember anything about the accident? And, if so, what?

A. What do you mean, "anything?"

Q. Do you remember actually being in the car that ran into a train on Dabney Road on that night?

A. I remember everything just before the accident happened.

Q. You do remember everything?

A. Just before it, just about.

Q. What do you recall before it?

A. We were going down the road, you know, just talking and everything, and just before, I guess this was just before he hit us, a glimpse or something of a train. That's all I can remember.

Q. Were you close to the train at that point?

A. I can't say.

Q. Were you injured in the accident?

A. Yes, sir.

Q. Were you hospitalized as a result of your injury?

A. Yes, sir.

Q. Do you recall, prior to the impact, hearing anyone yell or scream, or any exclamanations of any kind?

A. No, sir.

Q. Have you ever heard a diesel locomotive horn?

A. Yes, sir.

Q. As best you can, describe to the Court and jury what they sound like.

A. They are real loud, you can hear them far off.

Q. Have you ever heard a bell on a locomotive ring?

A. Yes, sir.

Q. Can you hear them clearly from the times you have heard them?

A. Well, not as loudly as the horn.

Q. On the night in question, soon before the accident happened, very soon before it happened, as you were going down Dabney Road, were conditions such that you were able to hear a horn, a locomotive horn?

A. Yes, sir.

Q. If one had sounded, would you have been in a position, in your opinion, to have heard it?

A. Yes, sir.

Q. On the night in question, as you went down Dabney Road, approaching the scene of the accident, did the Richmond, Fredericksburg & Potomac locomotive sound its horn?

A. No.

Q. If it had sounded its horn, would you have heard it?

A. Yes, sir.

Q. Did it ring its bell?

A. No.

Q. If it had rang its bell, do you think you would have been in position to and have heard it?

A. Yes.

Q. What is your answer?

A. Yes.

Q. Did you know at the time, before the impact, what the speed limit was, within the last, say, half a mile before you got to the tracks?

A. No, sir.

Q. Have you learned, by perhaps going back to visit it since, what the speed limit was?

A. Speed limit is 45 miles per hour.

Q. Can you shed any light, before this Court and this jury, as to the speed that the Taylor car was going, within the last, say three to four to five hundred feet before impact?

A. I really don't know. He could have been going a little fast, but if he was really going, I mean, really speeding real fast, I would have probably said something.

Q. You probably what?

A. Would have said something.

Q. Did you say anything?

A. No, sir.

Q. Did you see any lights, flares, fusees, signals, lanturns or any other kind of warning device ahead of you, before the impact occurred, and I'm talking about at the train crossing?

A. No, sir.

Q. Which way were you facing, as you rode?

A. Front.

Q. Were you talking some to Michael?

A. Yes, sir.

Q. When you were talking, was he on your right or your left?

A. He was on my right.

Q. When you talked to him, would you look at him, do

A. No, sir.

Q. Then what did you do, if you remember?

A. Rode around.

Q. Rode around where?

A. I don't know, just all over around.

Q. All over where?

A. Down near Broad Street all through there and everything.

Q. You mean that the three of you rode up and down Broad Street?

A. Not up and down, just all around, just riding around, you know, passing time.

Q. You didn't go anywhere else?

A. No, sir.

Q. Well, did you decide to try to check to find out what happened to Steve?

A. Well, I guess we were going to ride around a little, and maybe look for him later, and before that happened, before we could go look for him, that's when the accident happened.

Q. You know now what time the accident did happen, don't you?

A. Ten-thirty.

Q. Ten-thirty, so you rode around for two hours and a half?

A. I can't say what time it was we left that girl's apartment, see, but we rode around, I don't know how long it was, but we rode around.

Q. But Miss McLauchlan, according to your statement, that's what it is, is that your best recollection?

A. Yes, sir.

Q. Two hours and a half, you could get to Norfolk in that length of time. And you rode around the city, right?

A. Yes, sir.

Q. Did you go out in the county?

A. Not as I know of, no, sir, we just stayed around--

Q. What do you mean, "not as I know of?" You keep on saying that.

A. We stayed around and rode around town, we didn't go anywhere else except around town.

Q. About 50 miles an hour?

A. About.

Q. Well, do you call that fast, or real, real fast, or what?

A. I call that fast, but not real, real fast; it's five miles over the speed limit.

Q. Well, you know the speed limit?

A. Forty-five miles an hour.

Q. So it's five miles over the speed limit?

A. Yes, sir.

Q. Why do you estimate it to be 50 miles an hour? Have you got any reason for that?

A. Well, I can--when I'm in a car, I kind of can guess at about how fast they are going. I'm just guessing, I can't say positively.

Q. You are guessing about that; you can't say positively, but you did say, in answer to Mr. Miller's question, he could have been going real fast, I don't know?

A. Well, he--I don't think he could have been going, I mean 65 miles an hour, but over the speed limit, yeah, probably going right fast, but not--

Q. Going faster than he should have been going, and the speed limit is 45, right?

A. Yes, sir.

Q. Do you remember seeing the train?

A. Before the accident?

Q. Yes.

A. I had a glimpse, just a glimpse of a train, just in my mind I had a glimpse of seeing a train or something, before the accident happened.

Q. Do you remember seeing any signs out there?

A. Well, there was a RAILROAD CROSSING sign.

Q. That was in plain sight, wasn't it?

A. Well, it's right up, if you are going real fast it would be impossible to stop.

Q. If you are going real, real fast, you couldn't stop?

A. But not real, real fast, I mean if he was really speeding, I would have said something to him, but I mean, but the sign is right before you get up to the train.

Q. One sign. Is there another sign there?

Q. Miss McLauchlan, you have been rather indefinite about this speed thing. You say you were not going real fast, and you were only guessing that you were going maybe 50?

A. Yes, sir.

Q. Well, could it have been less than 50?

A. It could have been.

Q. Well, do I understand that as you approached the area where the railroad tracks were, you slowed down from that speed?

A. Not really slowing down.

Q. Well, you said you were going the regular speed by the time you got to the first railroad tracks.

A. That's where I'm guessing the speed

Q. Well, are all these figures you have given, 45, 50, and so forth, these are all just guesses on your part?

A. Yes, sir.

[TR 326] Q. Now the last question I have to ask you is did you make any complaints, while you were driving, about Mr. Taylor's speed, manner of driving, or the way in which he approached the railroad tracks that you came to, any railroad tracks that night?

A. No, sir.

Q. Did you see any reason or necessity to make such a [TR 327] complaint?

A. No, sir.

Q. If he had been doing anything which you considered dangerous or unsafe, would you have made a complaint?

A. Yes.

* * * *

they had a view of the track for, they said, an unobstructed view for over a mile. And I don't see how they could very well not have held the passenger and the driver guilty of negligence under those circumstances.

In any event, I'm going to overrule that motion.

MR. GARRETT: And we, of course, except.

THE COURT: And your exception, of course, and yours, are noted, Buck. And on the motion as far as the statutory duties are concerned, I don't think there is going to be any authority on that, but in looking at some of these cases, they say over and over again, the purpose of the statute is to protect travelers, and I don't think, Sam, while you may be right, probably that the legislature had not contemplated at the time engines pushing cars, or the blocking of the highway, never the less, the language I think of the statute is brought enough to cover this situation and, as far as proximate cause is concerned, I think it would be a jury issue, assuming that there was a duty to sound the bell and whistle, which I think is a very close question, but if there was a duty, the question of proximate cause doesn't give me as much concern as the application of the statute does. If they had sounded the horn or the bell, I think the jury could certainly find that that would have been heard, and would have put the people on notice. Of course they all had notice of the track

itself, and that's not the point. They certainly had the crossbucks, and they had the other sign, and they knew the track was there, all of them admitted that, but whether or not they were charged with the knowledge that a train was going to be coming over there at that time, of course that does not follow. And had they been given the statutory warning, it seems to me the jury could certainly conclude they would have heard it. And so, for that reason, I'm going to overrule your motion on that count also.

I have also given more thought to the view, and I'm going to give a view, gentlemen. Now I realize the concern that you entertain about that, Milton and Jack too, about the difference between night and day, but I think that's a matter that could be emphasized in argument to the jury, how much more of a hazard it was at the time, and that the daylight doesn't really reflect the true danger. I think that would be a matter of argument. I think from the standpoint of physical location, the jury ought to see this. I'm going to give a view and your exceptions, of course, are noted, unless you want to put some other reasons on the record.

William L. Wheatly-direct

[TR 379] Q. What is your specific field of supervision?

A. Supervisor of Locomotive Maintenance and Repairs.

* * * *

Wheatly-cross

[TR 383] Q. What kind of horn is on this?

A. It has an air horn.

Q. Is it driven by air, not an electric horn?

A. No, sir, it's air.

Q. Can you give me any idea of the volume of this horn?

A. No, sir. You mean--

Q. How far you could hear it.

A. Oh, for a mile or better.

* * * *

[TR 384] Q. Hits one side. How big is this bell?

A. About 15 inches in diameter at the bottom of it.

Q. That's a rather large bell; how far could that be heard?

A. Oh, six, eight blocks.

Q. That's something in the area of a half a mile?

A. I would say roughly, yes, sir.

* * * *

CROSS EXAMINATION

BY MR. MILLER:

Q. The noise of the horn that you described a minute ago for Mr. Garrett; when a diesel yard locomotive and empty cars in the train are moving, they rumble and make a certain amount of noise, just the moving of the train, don't they?

A. Yes, sir.

Q. You have heard this very horn after the accident, and you said it was working good?

A. Yes, sir.

Q. In your opinion, what did you say you were, Supervisor of Maintenance and Repair?

A. Yes, sir.

Q. If the engine was rumbling along, moving, making the usual noise jostling along as I have described, and the air horn sounded, and the bell, what do they do, ding--would a trainman, do you think, be able to hear that on the train?

A. A trainman?

Q. Yes, sir.

A. Yes, sir.

Q. At any place on the train, assuming the train is six cars in addition to the locomotive?

A. As far as the horn is concerned, yes, sir. Now the bell, I wouldn't say on that.

Q. The horn, that air horn is--how long is it?

A. Oh, 24 inches.

Q. Is it activated by a diaphragm inside?

A. Yes, it is.

Q. And what is the diameter of that diaphragm?

A. About six inches.

Q. It's a large horn, isn't it?

A. Yes, sir.

Q. A large diaphragm?

A. Yes, sir.

Q. It's particularly designed so you can hear it for a long ways, can't you?

A. Yes, sir.

MR. MILLER: No further questions.

MR. HUMRICKHOUSE: No further questions.

(Witness stood aside.)

W. M. TRIBBLE was sworn, and testified in behalf of defendant R.F.& P. Railroad, as follows:

DIRECT EXAMINATION

BY MR. HUMRICKHOUSE:

Q. Please state your name, age and occupation.

A. W. M. Tribble; 55 years old; Trainmaster, R.F.& P.

Q. Briefly, what is the position of Trainmaster?

A. Trainmaster has direct supervision of the operation of trains, terminal agencies, supervision of train crews, and, in general, the operation of trains.

Q. Do the rules regarding the operation of trains come within your jurisdiction?

A. The interpretation and enforcement of those rules, and supervision to see if they are abided by, carried out by trainmen.

Q. Now, Mr. Tribble-

A. And enforceable

Q. Mr. Tribble, it's in evidence there was a locomotive, No. 91, at Dabney Road crossing in Henrico County with four members of the crew on it, doing some switching operations. Will you tell His Honor and the gentlemen of the jury why there were four men on there?

A. Our train and engine service people are represented by the Brotherhood of Railroad Workers representing the train crew; the Brotherhood of Locomotive Engineers representing the engine crew, and their minimum requirements would be a four man crew on this job, so that's why we have the four men on this job.

Q. And what would be the four men?

A. It would be an engineer, running the engine, a conductor-foreman and two brakemen.

Q. What is the function of each?

A. Well, to start with, the engineer, of course, his function is to operate the engine, and there are some rules that make him responsible, to a certain extent, for supervision of the crew, along with the conductor foreman. But his primary responsibility is to operate the engine.

The conductor is the foreman of the job. He plans the work, receives his instructions for the eight-hour tour of duty from the Yardmaster, and then supervises his crew to see that the work is carried on according to the instructions of the Yardmaster, and then, within the scope of the operating rules.

Q. How about the brakemen?

A. The two brakemen, they are the laborers, you might say. They do the job, switching cars, throwing switches, applying brakes, anything that's necessary in connection with physically performing the work, that's their job.

Q. Well, in connection with crossing a highway, do they have any specific duty?

A. Yes, sir.

Q. What is that?

A. Well, we have different situations in crossing highways. Of course at a grade crossing with through station to-station movement--

MR. MILLER: Your Honor please, I object to this

1 responsibility of the crew members would be to protect the
2 highway crossing. That is, their responsibility would be to
3 stop any oncoming traffic, before they proceeded over the crossing.
4 That would be the responsibility of the entire crew, the
5 conductor and the two brakemen. But normally the conductor
6 would instruct one of the brakemen to do this, perform this
7 job, and he would have to see that any oncoming traffic was
8 stopped before he proceeded over the crossing.
9 Q. Well, once he started proceeding, what is he
10 supposed to do?
11 A. Once he occupies the crossing, he isn't supposed
12 to do anything except go on with his movement. Normally he would
13 be riding the engine, if it happens to be the engine, or if
14 he was pushing cars, normally he would be riding the lead end,
15 and he would continue on with the movement once he got the
16 crossing occupied.
17 Q. Do you know the number of the rule regarding
18 protection of crossings?
19 A. Yes, sir.
20 Q. What is it?
21 A. I imagine you would be talking about Rule 103,
22 which is highway protection.
23 Q. This is the one there has already been testimony
24 about. Will you read the first part of it as it is now in

effect.

Q. Read the rule as it is now in effect.

A. "At points where employees, other than crossing watchmen, are required by rules and special instructions to protect highway crossings, red flag by day and lighted fusee by night will be used to stop highway traffic."

was to the leading form, I think, but at any rate, go ahead, he has asked the question.

A. The duties of these two men, or the three-men crew, the conductor and two brakemen--leave the engineer on the engine--as they approach a crossing such as Dabney Road crossing, their responsibility is to protect any oncoming traffic. Now, by doing this, they come up to the crossing and stop, and if there is any oncoming traffic, it is their responsibility to stop that traffic if they want to proceed. Now they can certainly sit there and wait until all oncoming traffic has passed, and then, when everything is clear, they will proceed over. However, if the traffic is so heavy that they can't wait forever, and it's necessary to proceed, they have to stop traffic. And in order to stop traffic, they use a red flag by day and a red burning fusee by night to stop this traffic. And then it's only when the traffic is stopped that they are allowed to proceed over the crossing.

Now, as the crossing is occupied, we do not require any further protection. The train crew members proceed on with their movement and, of course, once the crossing is cleared, they are gone and it's forgotten.

MR. HUMRICKHOUSE: Thank you. You may examine.

MR. MILLER: Who goes first?

THE COURT: Well, I think ordinarily, I believe,

Q. Once you get the foot in the door, so to speak, you give no more concern to oncoming cars, as I understand your testimony?

A. Once we occupy the crossing.

Q. You could care less about whether any cars are coming, regardless of the nature of the crossing?

A. We do not require our men to do anything further toward protecting oncoming traffic.

Q. And it's your position, I think, if I understood you correctly, and I want to, so correct me if I don't have it right, but if I understood you correctly you were telling about the union requires four men, not the railroad, and I think you were trying to say you don't think really four men have to be there, but for union requirement, is that right?

A. I didn't say that; I was asked why we had four men.

Q. And you said because the union concract, minimum requirements make you, if I understood you correctly?

A. That's the answer.

Q. Are you saying the railroad, if there wasn't any union in the world, wouldn't have four men?

A. I don't think I can answer that, for management of the railroad.

Q. Why did you answer that's what the union required?

A. Because that's why the four are there.

Q. You don't know whether the four would be there or not, if the Union didn't require it?

A. We have operated with less than four members, when it was permissible.

Q. Well, let me ask you your opinion then, do you think on Dabney Road, that little empty oil car operation, going up to the oil station and picking them up, bringing them back, do you think that requires four men?

A. No, sir.

Q. You do not?

A. No, sir.

Q. Well then, since the four men were there, because the union made them, and since you don't think they were required to be doing anything, there wouldn't have been anything wrong with them standing in the street with little fusees, the two you didn't need, until the train completely cleared the crossing, would it?

A. I wouldn't see any point in them doing it.

Q. I didn't ask you, sir, whether you saw any point; I'm saying it wouldn't interfere with the duties of the extra men, because they don't have any, is that accurate?

A. If you are asking me whether these men were available to do that if it had been necessary, yes.

Q. I'm not asking you about any necessity, I'm asking you a simple question, Mr. Tribble. You have said to the Court and jury the union required four men, not the railroad, and you didn't think on this particular little job four men were necessary. We agree that's what you testified so far?

A. Yes, sir.

Q. I asked, would it impair the movement of the train of the unnecessary men we just established were unnecessarily required by the union, would it impair the function of the train

any, if they stood on each side of the train, one facing north, one facing south, with a little fusee in their hand, until the train cleared the crossing? Would that impair the movement of the train?

A. To this extent, and I'm certainly going to do my honest best to answer the question: one man had to be on the lead end, you understand, this man doesn't have any seat to sit down, he has to position himself on the leading car; the other man had to have a place to ride, so he was on the back of the engine. Now, if these men had chosen to do so, and had stopped that movement and walked six, seven car lengths to do what you are saying they should do, it wouldn't have impaired the movement of the train any more than just the time that it took them to walk up there and--

Q. And it would have afforded safety and protection to oncoming traffic that came around the curve after the train started, couldn't it?

A. I couldn't say.

Q. Why couldn't you say, sir? You have seen a lit red fusee, they are very very bright, aren't they?

A. That's right.

Q. Why couldn't you say whether or not that would afford some safety to an approaching vehicle?

A. My job is to enforce operating rules, and these

men were carrying out the operating rules of the company, and I didn't see any need for them to go beyond that.

Q. Let's talk about the rules a second. You read the first paragraph of Rule 103, and it was read yesterday, and it says that the railroad employees are required to protect highway crossings at night with a lighted fusee to stop highway traffic, is that correct?

A. If it's necessary to stop highway traffic.

Q. Where does it say in there, "if it's necessary to stop..."? Just find the word for me. Read the first paragraph again to the jury, of Rule 103.

A. "At any point where employees, other than crossing watchmen, are required by rules and special instructions to protect highway crossings, red flag by day and lighted fusee by night will be used to stop highway traffic."

Q. That's all it says, doesn't it?

A. That's all it says.

Q. Now you testified a few minutes ago that--I can't repeat your words exactly, but something to the effect that once a train starts off, they have no further duties in this regard, isn't that what you said?

A. Once it occupies the crossing.

Q. Well, what does that mean, once it starts?

A. Not necessarily, once they occupy the crossing

with any of the equipment.

Q. Well, let me put a specific example to you, because we are really only concerned here with one example: on the night in question, when the train with the locomotive in the rear, pushing six black, empty, oil cars, no lights on any of them, came to an unlighted crossing, at Dabney Road, and stopped, and Mr. Borkey got off, went out into the street and looked both ways to see if any traffic was coming, and he saw none, at that point the train was not occupying the crossing, was it?

A. No.

Q. Once he got on the walkie-talkie, "Let's go," and they started up, and the first car got into the public highway, I think you are trying to tell us it then occupied the crossing?

A. Right.

Q. And it continues to do so until the last car, and in this case it would have been the locomotive, gets off the public highway?

A. Yes, sir.

Q. Show me anything in these rules that says anything about while it is occupying the highway it is not necessary to protect traffic. Just find it for me.

A. Well, of course, I don't know that I can explain it any more than this.

[TR 401] Q. I don't ask you to explain it, it says what you are supposed to do in the first paragraph you read to us; at night you use a lighted fusee to stop highway traffic. Just find me anything in the rules that would lead anybody who can read to think you don't have to do it once they start, once they occupy the railroad crossing. In railroad language, find it; it's not there, is it?

A. Well, of course we--

Q. Sir, is it in the rule, written in the rule?

A. Just when they start and when they stop is not clearly written in the rule.

* * * *

Lawrence B. Cann, Jr.-direct

[TR 405] Q. In that capacity, are you familiar with the development of Dabney Road and the industrial area around Dabney Road?

A. Yes, sir, I am. I was Chief Engineer at the time it was developed.

* * * *

[TR 406] Q. Did you work in cooperation with the County of Henrico in establishing the road?

A. Yes, sir, I did.

Q. Did they--

A. This was a joint venture.

Q. Did they give you any instructions as to the type of railroad crossing warnings you should place on any of the crossings?

* * * *

A. We were given no specific instructions as to the crossing protection.

Q. Have you ever been given any by them?

A. Well, we have a number of crossings on the R.F.& P. system in the county.

Q. Henrico County, let's limit it to.

A. Henrico County, the law requires that the railroad install crossbuck signs, and the county installs the warning sign, which is a smaller sign with the X across, black on yellow with RR. And those were installed at this crossing at the time it was built, because this is standard procedure.

Q. Would you state, for the jury, your name, your present address and present occupation?

A. A. T. Dotson, Jr., R.F.D. 5, Box 284, Richmond, Virginia; County Engineer for the County of Henrico.

Q. What are your duties as County Engineer for the County of Henrico?

A. I'm in charge of the design, construction and maintenance of all county highways.

Q. Does that include construction of warning signs, et cetera, of all highway signs used?

A. I have jurisdiction over all traffic signs erected, subject to the laws of the State of Virginia.

Q. Are you familiar with the crossings on Dabney Road in the County of Henrico, where the R.F.& P. tracks cross that road?

A. There are a number of crossings of Dabney Road; are you speaking specifically of the one at Goldman Paper Company?

Q. Yes, sir, are you familiar with the subject of this suit?

A. I am familiar with it, somewhat, yes.

Q. Are you familiar with the site or crossing on Dabney Road at which an accident occurred on September 24--

A. Yes, I am.

Q. You are?

A. Yes, I am.

Q. What requirements has the County of Henrico established for warning devices at that particular crossing?

A. Well, of course, the warning devices are established by state law, and the railroad is required to erect and maintain the cross-arm sign at the crossing, and the county is required to erect an advance-warning sign.

Q. Would you describe to the jury that advance-warning sign that the county has maintained and erected?

A. It's a round sign that indicates railroad ahead.

Q. And would you describe the sign which is required, that the railroad maintains and erected?

A. It's the standard railroad crossbuck that's erected at all--by law--crossings within the state.

Q. Now, is that the only requirement for signs or devices that the County of Henrico has established at this particular crossing?

A. At this particular location, yes.

Q. Sir, can you come up to the chart with me, and I

Q. My question to you, sir, was, in your opinion, have you ever thought that it was necessary that there be any signs or warning devices used on Dabney Road, other than the three that you have just pointed out to the jury?

A. If you are referring to the establishment of flashing signals or electronic signals--

Q. Yes, sir.

A. There is a definite mark that has to be established for those, and we do determine, from our staff in our Traffic Engineering Department when that is justified; and when it is justified, we initiate the procedure which would lead to the establishment of an electronic signal.

Q. All right, sir, if you would, speak to the jury. Have you ever determined that situation on Dabney Road warranted the establishment of additional signals, in your department, that you have just described?

A. No, we have not.

Q. Do you require, as County Engineer, that there be painted white X's on highways before the crossing?

A. We do paint advance-warning on our pavement, on the main roads.

Q. And this is done by the County of Henrico?

A. Right.

Q. Can you point out for the jury, on this drawing we have, approximately where the X mark is?

A. Normally it's 15 to 20 feet from the tracks. It's just a double white line with an X that says RR on the pavement.

1 MR. MILLER: The plaintiffs would move the
2 Court to strike the evidence of the defendant R.F.& P.
3 Railroad on the issue of whether or not it complied with the
4 statutory signals, as they applied to the bell and the horn;
5 not, of course, as to causation, as the jury will be properly
6 so instructed. The trainman Borkey, who was the trainman
7 examined by the plaintiff, and who was the brakeman on the
8 lead car, testified he didn't hear anything, and, because he
9 was on the first car, of course, he was 250 feet away, and
10 the engine rumbled. And I then asked whether he heard anything
11 when they stopped, he said no, and he heard no horn.
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21 MR. HIXON: I believe the evidence in the case,
22 Your Honor, is there is no evidence that the horn or the whistle
23 was heard. It's all negative evidence in the sense that several
24 witnesses who have testified have said that they did not hear

[TR 425] THE COURT: I believe the only evidence in the case is to the effect it was not blown, and I will sustain the motion, and your exception, of course, is noted.

MR. HIXON: So I understand the motion, it has to do with what, Your Honor?

THE COURT: With the statutory signals, which would only leave the question of proximate cause for the jury.

* * * *

[TR 426] MR. MILLER: My second motion, I would move the Court, as a matter of law, to rule that the plaintiff, Michael Wayne Nelms, be deemed free of any contributory negligence. I make that motion based on the fact that the only evidence in the case even suggestive, even remotely suggestive of any wrongdoing on his part would be the fact he was a passenger in the car.

I state to the Court I have read perhaps a hundred Virginia cases, and every one I have ever found made good

* * * *

common sense. It's like the ones we discussed earlier today, when Mr. Garrett made a similar but not identical motion on a similar subject, and that is where the passenger had every opportunity to see, like the driver did, normally it's at a right-angle crossing, broad daylight, and they can look either way, right or left, up the track, and see the train coming like a half mile or whatever. I have not found any cases which would expect a passenger to do more than the driver did in this case; namely, it was at night, the passenger was not expected to be in control of the car. That's the law in this state, he was not expected to assume that his driver was not driving good, unless and until something came to his notice. There is no evidence of that, and it is an uncontroverted physical fact in this case that the driver, from his headlights I presume, saw the train or something to make him slam on his brakes back 159 feet plus reaction time away from the train.

THE COURT: Well, Milton, I'm going to overrule your motion for this reason: that there is evidence with which the jury could believe the car was going 50 miles an hour, approaching what was known to be a railroad crossing, and I think from that the jury could find, and there is further evidence he made no complaint about the driving, and I think the jury could infer from that that he should have made, knowing that

the crossing was there, although he didn't know that the train was approaching, that he could have made some complaint. I think, though it's not a strong case by any manner or means, I think it's enough to take the question to the jury, and I overrule your motion.

MR. MILLER: Very well, exception noted for the reasons stated.

June 15, 1973

Fourth Day

(The Court, counsel and the reporter retired to chambers at 10:00 a.m., and the following proceedings were had:)

THE COURT: Let me say something, before we start. I worried about this thing last night, and I came down at 7:00 o'clock this morning about it; that's on my ruling yesterday that the signal, the statutory signals were an element in this case. And I have come to the conclusion that that's going to be just a built-in reversal if I do that. I say that for this reason--

MR. MILLER: If you do what, sir?

THE COURT: You know, yesterday they made the motion that the statutory signals --

MR MILLER: Shouldn't be a part of it.

THE COURT: Should not be a part of it, right, and we had argument on that, and we could find no cases directly on the point. They took the position that that statute was applicable not to this case, but to a case of a train actually approaching a crossing in open country, and it was not intended to cover a situation of this sort. We had no authority on that.

In view of the fact the statute used the word

1 "crossing", I felt it meant what it said, any crossing;
2 any train, outside of the city limits, approaching the
3 crossing, no matter whether it was shifting, or if the yard
4 happened to be close by, and crossing the public highway,
5 even a shifting operation, it would apply.
6 That was my first thought, and I ruled it
7 was an element in the case, and I have been able to find no
8 cases directly on that point, but it seems to me in this
9 case that it should not apply, the statutory signals, for
10 several reasons:
11 The first point is in going out and taking the
12 view, I have forgotten exactly the measurements in evidence
13 on this, but I'm not at all sure that that train even, if it
14 had started through and was going to be a through train, and
15 had gone right on across the crossing, I'm not sure he would
16 have had 300 yards--
17 MR. MILLER: Yes, sir, the evidence was quite
18 clear, from Mr. Franck, the Claims Agent, who made sworn
19 answers to interrogatories that the furthest point back from
20 the crossing was less than a half mile and more than a quarter
21 mile. Even a quarter mile, the smaller of those figures, is
22 longer than the yardage you measured. We are dealing with the
23 length of the train at 255 feet, by stipulation.
24 THE COURT: I was first speaking of the entire

1 distance.

2 MR. MILLER: Well, that's the evidence, and the

3 entire distance, of course--

4 THE COURT: Well, here is the thing that I

5 think really, to my mind, is conclusive, and that is that

6 this train comes to a full stop, there is no question in the

7 evidence about that, Milton.

8 MR. MILLER: Right.

9 THE COURT: That's uncontradicted. The man got

10 out and made an inspection of the highway, and says that he

11 saw--whether he didn't keep a proper lookout, of course is one

12 element in the case, but he came to a complete stop at the

13 highway before starting across, and then started across and

14 blocked the highway, and the accident resulted. And I

15 don't think that this statute, by the greatest stretch of the

16 imagination, could be held to apply to a situation of that

17 sort.

18 I just can't see it, and if I inject that into

19 the case, I just create error; it's reversable error without

20 any question.

21 MR. MILLER: We don't want any reversable error,

22 at least the plaintiff doesn't, unless he loses.

23 THE COURT: As I see it, the whole case boils

24 right down to this: if the railroad is guilty of negligence,

1 it is that they blocked the highway; it was a dangerous crossing
2 and the two things they did not put out--they didn't take the
3 steps that they should have taken to have warned oncoming
4 traffic of the existence of that train blocking the highway.
5 And, Number 2, that they didn't keep a proper
6 lookout. And to have gone ahead into the crossing, even
7 though the way was clear, I think the testimony was that it
8 was some two minutes, I believe, wasn't it?
9 MR. MILLER: That's what he said.
10 THE COURT: And that he should have, the Conductor
11 or whoever was in charge, certainly should have known that
12 even though the coast was clear at that time, that in two
13 minutes, a vehicle, completely out of sight, could have come
14 down the road, and, under those circumstances, it was absolute--
15 I mean the jury could certainly find that that was the rankest
16 negligence, in not having that, plus the fact the man had
17 the fusee in his pocket.
18 But it seems to me that that is the involvement
19 or extent of the plaintiff's claim, they blocked the highway
20 without giving warning when they knew or should have known
21 the road was heavily traveled, and they should have known it
22 was a dangerous crossing. I don't think the statutory signals
23 part of that would apply to a train outside of the city limits--
24 I don't think that that is applicable.

1 MR. MILLER: In view of Your Honor's ruling, I
2 would certainly be permitted, would I not, that, because if the
3 statute didn't apply because of the peculiar situation, still,
4 in the exercise of ordinary care, for the sake of ordinary care
5 crossing, they could have blown the horn and rung the bell?
6 I'm not foreclosed from mentioning it?
7 THE COURT: Well, you are not to mention the
8 statute, but you can mention that, among the others. Because
9 if the statutory duty doesn't apply, then I don't think that
10 that should be brought in the case. But the instruction I'm
11 going to give, on the dangerous crossing, it leaves a number
12 of options open. They could blow appropriate signals if they
13 want, although the Corporation Commission hasn't required
14 it, but that doesn't relieve them of the duty of taking proper
15 steps to protect the public in a situation of this sort.
16 I think you could argue to them in many different
17 ways, that they could have sounded the bell and blown the
18 whistle.
19 MR. MILLER: That's what I wanted to know: I'm
20 still permitted to use that as an example of safety?
21 THE COURT: Any warning. It's up to the jury to
22 determine whether or not they had that duty, but I'm going to
23 rule out the statutory signals, because, as I say, it's given
24 me a great deal of trouble, and I have tried to find some cases

helpful, and I can't find one.

MR. MILLER: I haven't found one on it.

THE COURT: I don't mean just Virginia, but I'm sure the question must have come up somewhere else. This is--I'm not arguing the point, but the same argument, it seems to me, could be made--I don't think this is a switching operation, but it would apply to any switching operation in the yard that had a public highway they traversed, it would mean they had to give the statutory signals for 300 yards. And, granted this distance, they may have had distance, it's perfectly feasible the switching operation, where the yard crosses the road, it may not be able to apply. In any event, I'm going to withdraw that as an element in the case.

MR. MILLER: A statutory element.

THE COURT: Yes.

MR. MILLER: I must respectfully note my exception to the ruling of the Court.

THE COURT: Now, to save time, Milton, let the record show that you object to my refusal of--in addition to

your other objections, you object to my refusal of every one of your instructions relating to your statutory duty.

MR. MILLER: I so move the Court to note my exception.

THE COURT: "A" received, no objection. "C", bell and whistle, refused, exception noted for the reason stated by plaintiff.

Now, "D" with the first line taken out. "The Court instructs the jury that it was the duty of the defendant railroad, in the operation of its train, to exercise ordinary care. Now this, '1. To give adequate, reasonable and timely warning of the approach of its train to the crossing." I think instead of "approach of its train to the crossing" it should read "give adequate, reasonable and timely warning of the presence of its train on the crossing."

MR. MILLER: I don't object to that language. I will simply except to the Court changing the instruction, for the reasons previously stated.

THE COURT: And keep a reasonable lookout for vehicles approaching the crossing, and then I'm striking out 3. I don't know that--there certainly wasn't any specific duty on them. It might be that that's one of the precautions that fall under that general duty to warn the public, but I don't think that I can tell individuals that they have to

1 maintain a light on the lead car. It may have been in the
2 exercise of reasonable care, you can argue that, that's
3 one of the things they could have done. Now, with those
4 changes, what have you to say?
5 MR. HIXON: My problem is directed more toward
6 the first one, that it's the duty of the railroad to give
7 some type of warning. It's our position there is no duty,
8 other than the statutory duty; and the presence of the train
9 is, in and of itself, enough, the way it reads now,
10 to give adequate, reasonable and timely warning of the presence
11 of the train on the intersection, on the crossing. The only
12 duty, I would think, is set forth in this Instruction X, to
13 exercise reasonable care under the circumstances. This
14 implies further we have to give a warning.
15 THE COURT: I think this is wrong in this respect,
16 Milton, this should be, "If they find it to be an extra-dangerous
17 crossing..."
18 MR. MILLER: No, sir, that's not the law. The
19 law is that even where the statutory signals would apply, which
20 you have ruled they don't--I don't mean to argue the point--
21 this instruction is still the law. I thought it was so
22 well known it wouldn't even be debated. The instruction
23 is 35.04, common law duties, right out of the book: first,
24 to give adequate, reasonable and timely warning of the approach...

1 THE COURT: The trouble is, that's the kicker in
2 this case, it wasn't the approach to the crossing, that
3 wasn't the thing that caused the trouble, was it, the approach?
4 It was the presence.
5 MR. MILLER: Well, if they had given timely
6 warning of the approach, who is to say the failure to do so
7 might not have proximately caused the accident?
8 THE COURT: Don't you consider when they stopped
9 the train, Milton, the approach was ended, then they were right
10 at the crossing when they stopped? When they started up, they were
11 entering though.
12 MR. HIXON: Isn't there an instruction on
13 extra-hazardous crossing?
14 THE COURT: Yes, I'm going to give that one.
15 MR. HIXON: That would seem to cover it, I think.
16 THE COURT: Here it is, it's "F".
17 MR. HIXON: Judge, although I pointed to this
18 instruction, it's still my position that the instruction should
19 be given somewhat along the line that if you think that the
20 railroad crossing was extra-hazardous, or there were conditions
21 there that would require the railroad to do something else,
22 then you may believe that they failed to do so, and their
23 failure to do so may constitute negligence. But to say that
24 if you find such and such facts, and we had to go out and put

1 up a gate or a signal or a semaphore, that, I think, is too
2 definitive of what our alternatives are.
3 MR. MILLER: That's the law though, sir, as
4 announced by the Virginia cases.
5 MR. HIXON: My position is that's not the law.
6 MR. MILLER: Well, I will cite the cases, I
7 have them present.
8 THE COURT: I'm going to change it in this way,
9 "...to give adequate, reasonable and timely warning of the
10 presence of its train on the crossing. If you believe the
11 crossing was of an extra-hazardous nature," and to keep a
12 proper lookout for vehicles approaching the crossing. Do you
13 want to put your exceptions on now, as we go along?
14 MR. MILLER: Yes, sir, I just state the plaintiffs
15 except and object to the Court's changing of plaintiffs'
16 Instruction D, because the instruction tendered is supported
17 by the case law, as shown and annotated at Sec. 35.04 of the
18 Virginia Jury Instructions by Doubles and others, and we think
19 the facts in this case perfectly fit and justify the standard
20 instruction.
21 MR. HIXON: I don't want to pick too much, but
22 paragraph 2, I have to object to, it places and implies duties
23 on the railroad to keep a lookout for approaching vehicles;
24 I don't think that is an issue in the case. That train

INSTRUCTIONS NO. L and M

THE COURT: All right, now "L" is covered by "M". I think "M" correctly states the law, and I think that covers it.

MR. MILLER: It probably covers what I had in "Y" too. I didn't see one, that's why I typed it, but here it is on the bottom of "M".

THE COURT: I'm going to give "M".

MR. HIXON: This language about the approaching train bothers me, in the second line. We just don't have an approaching train here, Your Honor.

MR. MILLER: Well, I agree, under the Court's previous rulings--

THE COURT: You have it again in the second

THE COURT: I'm going to refuse "L" because it's covered by "M".

MR. MILLER: I note an exception to that, yes, sir, because it does state a slightly different approach.

THE COURT: Right to assume?

MR. MILLER: Yes, sir. I think that ought to be in there, don't you?

THE COURT: No, sir.

MR. MILLER: Well, I state for the record it is proper law, and except to its not being included even in "M".

INSTRUCTION No. 10

THE COURT: Now what about 10?

MR. HIXON: I think that's the law.

THE COURT: Is that statutory?

MR. MILLER: Yes, sir, it covers four items, and none of them are applicable in this case.

MR HIXON: It's right out of the statute.

MR. MILLER: It gives four conditions, and none of them are applicable. Where this would pertain, they have to have gates down, signals flashing--I have forgotten, I made the comment there were four requirements of the statute. I read it just last night.

Here are the four in 46.1-244. The first one--that's not applicable; the second one--that doesn't fit; the third one, approaching railroad train is plainly visible and is in hazardous proximity to such crossing. Well, of

course that's the question the jury will have to determine.

MR. HIXON: That's right, that's the whole ball of wax.

THE COURT: But doesn't that--

MR HIXON: I have the train is plainly visible, that's why I have it.

THE COURT: Yes, he has. I think he comes under 4, Milton.

I'm going to give 10. Do you want to put your exception on?

MR. MILLER: May I have two seconds to read it, Your Honor?

THE COURT: Yes.

MR MILLER: Your Honor, before you say you are going to give it, let me express my thought on 4. I don't think it's present; it says, "an approaching railroad train is plainly visible and is in hazardous proximity to such crossing." It doesn't say it's in the crossing. Obviously you can't run into a train that is in a crossing if you can see it; you don't need a statute on that, that would be suicide and certainly horrible negligence.

This says "an approaching train is plainly visible." This evidence in this case is when that train approached, it could not be seen, because it was behind the

brick building and the trailers, and furthermore, the car with the passenger was around the curve, he can't see it approaching if he is not there. It's just not applicable to these facts. This means if you are going down the road and can look to the right, across the field, and see a train, like two or three hundred yards down, like in the classical cases w e talked about yesterday, this is applicable; but this case, there is no evidence anybody can see the approaching train from this car. This car was not even in a place where it was close enough to see it.

THE COURT: That's proper argument, but I'm going to give 10, and your objection is noted for the reasons stated.

1 INSTRUCTION NO. 21

2 THE COURT: Now 21 is really the guts of the
3 contributory negligence. Did you have time to look at that?
4 MR. MILLER: Yes, sir, the first paragraph, I don't
5 know the autbority. I guess it's the same statute we dealt
6 with earlier, Sec. 244. I think the first paragraph or the
7 first part of the first paragraph, the first sentence I'm
8 referring to, the long sentence, that is incorrect.
9 "It is the duty of one about to cross a railroad
10 track at a public crossing to use both his eyes and ears..."
11 That's designed when you are crossing a track and a train is
12 coming. That is not the case here.
13 THE COURT: It would certainly apply equally to
14 a train that was already blocking the road.
15 MR. MILLER: Then why wouldn't the bell and horn
16 do the same, Your Honor? You have already so ruled it doesn't.
17 THE COURT: I don't understand. I said the
18 statutory duties don't apply, those duties here, because I
19 feel that the way the statute is worded, I think just on common
20 sense, I don't think it was supposed to apply to this situation
21 where the train had already come to a stop, the observation
22 made, and then he starts on across. But here, isn't this what
23 this says, "A railroad track is a proclamation of danger,"
24 that is the track itself?

1 MR. MILLER: Yes, sir, it's in the proper form,
2 I think.
3 THE COURT: Yes, and that statement is made in
4 here, and then also, that the railroad trains have the
5 right-of-way, and a vehicle about to cross a railroad crossing
6 has an obligation to use both eyes and ears. Is your
7 objection based on the question--there is no question of right-
8 of-way involved here?
9 MR. MILLER: Yes, sir, partially.
10 THE COURT: If he is already in the intersection
11 and crossing?
12 MR. MILLER: I think under those circumstances
13 Your Honor just mentioned, right-of-way is not a factor in
14 the case, he either could see him or couldn't. He attempted
15 to yield the right-of-way, he skidded 159 feet; it's not that he
16 tried to usurp any right-of-way, because of conditions and
17 factors already alluded to. He doesn't have to stop at the
18 track.
19 THE COURT: Sam, I believe that is correct. I
20 believe you are entitled to the balance, but when we talk
21 about the right-of-way in this case, then that is going to go
22 contrary to my believe that this is not an approaching case.
23 Doesn't right-of-way really relate to an approaching case?
24 If I gave that sentence, it would put him out of court,

MR. HIXON: I think you are saying it's only been given in approaching cases; it's our position it is not only applicable to approaching cases, but also applicable in this case.

MR. MILLER: It would simply invade the province of the jury, and put the plaintiff out of court.

THE COURT: I'm going to give it, taking out the first line and a half, and start out, "It is the duty of one about to cross a railroad track..." I think the rest of it is correct, Sam. Put your objection on the record.

MR. HIXON: I have stated my reasons.

THE COURT: All right, Milton, you want to object to my giving the instruction at all, I suppose.

MR MILLER: Yes, sir, I do. I also want to object to some more portions of it. The second sentence dealing with proclamation of danger, and so forth is improper form. I don't think it's classical form. The difference in the way it's phrased seems to work against the plaintiff; it is a combination of what is embodied in Doubles' book, 35.08 and 35.09

Also, Your Honor, the second full paragraph, "The law does not permit anyone to shut his eyes to danger, in blind reliance upon the unaided care of another,"

1 There is absolutely no evidence in this case of that, as far
2 as anybody is concerned. The evidence is that, 159 feet of
3 skid marks, plus reaction time beforehand, the driver of the
4 plaintiff's vehicle made a valiant effort to stop the car,
5 and it conflicts with the other instructions that you have
6 given in favor of the plaintiff. It just seems to put the
7 jury in hopeless conflict.
8 THE COURT: I don't think so. Anyway, you have
9 got your objections on the record.
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1 MR. HIXON: As long as it's clearly understood
2 it was the duty of both of them.
3 MR. MILLER: Your Honor, now that we are back to
4 21 again, may I comment on it?
5 THE COURT: I have already given 21. Are there
6 any changes to it?
7 MR. MILLER: No, sir. Now that he has drawn my
8 attention to it, the circumstances of the case in its present
9 posture, the first paragraph he must exercise a higher degree of
10 care where the crossing was dangerous, there was no way for them
11 to know this. That's the whole point. It looks innocuous;
12 that's our whole point, for them to have known it was dangerous
13 would have assumed they knew the train was in the road, they
14 knew it was going to be unloaded, and they knew all the other
15 attendant facts I have been going through for three days
16 discussing.
17 THE COURT: That's the point of your case though,
18 the action of the train on there, though, while negligent, that
19 did not play any part in the dangerous nature of the crossing.
20 The dangerous nature of the crossing was that it was so
21 constituted as to lend itself to something of this sort by
22 having the hillock behind, the way the tracks sloped, I mean
23 went off to the north, the fack that they had things parked;
24 but that was a condition,these people said they had been by

there time and time again.

MR. MILLER: Mr. Nelms never said that.

THE COURT: Said he had been by before.

MR. MILLER: Whether he had been there before doesn't mean that -- the instruction says "assumes it would be dangerous" with the trucks there and so forth. We don't know whether he had been by there--

MR. HIXON: The degree of care one must exercise is commensurate with the danger involved.

MR MILLER: True, where he knew or should have known, is my point, of such danger.

MR. HIXON: The testimony is through Charlie Taylor that Mike Nelms was aware of the crossing and traveled on it on many occasions. The question of whether it was dangerous or something he should have known about is something for the jury.

MR MILLER: Well, that's my point, I agree with that.

MR. HIXON: At the same time, I don't see how you can argue it is dangerous or extra-hazardous and nobody knew about it.

THE COURT: This would cure your objection, "He must exercise a high degree of care where the crossing is known by him or should be known by him to be dangerous."

INSTRUCTION NO. 6

THE COURT: That brings us back to 6, doesn't it. I'm going to give 6.

MR. MILLER: You say you are going to give 6, Your Honor?

THE COURT: I'm going to give 6, because, while it's true, there were passengers in the car, it seems to me that there are about four cases, three or four cases I recall, that I don't remember the names, that discuss this; when it's proper and when it's improper to give this. And I'm under the impression that the Court of Appeals has said that where this doesn't meet all of the standards, I mean all of the conditions of the test, that that's for the jury; it goes to the weight of the evidence.

MR MILLER: Your Honor, didn't the Supreme Court rule, in many cases, at one time the trial courts should exercise great care before giving this? I don't have them in front of me, because Your Honor has never given this before. I haven't known this Court to give it before, in a long time, since the case came out that criticized it, especially where it's not unloaded but for the driver, as stated plainly in the statute, and that's one of the aspects of the criticism by the Supreme Court. And I think there are some recent cases on it. I confess, Your Honor, I didn't do any research on it,

because I'm just so accustomed to the Court not giving it, where the facts in evidence don't meet the very test of the statute. The language, it says "unloaded except for the driver," and that's just obviously not the case. We had two additional people. I don't know if he asked if it was equipped with four-wheel brakes--

MR. HUMRICKHOUSE: Yes, we did.

MR. MILLER: I remember he said something whether they were good or not.

THE COURT: I'm going to give 6; you want to put your objections on for the reasons stated?

1 believe the facts to be, you should then apply these principles
2 of law to those facts, in arriving at your verdict.
3 You first are told that you are the sole judges
4 of the weight of the evidence...
5
6 (The instructions were read to the jury.)
7 THE COURT: Now, gentlemen, let me say one further
8 thing to you: as you know, during this case the plaintiff was
9 proceeding against two defendants; against Taylor, the driver
10 of the car, and against the railroad. At the end of all the
11 evidence, the defendant Taylor made a motion to strike the
12 evidence of the plaintiff insofar as he was concerned, on the
13 grounds that it did not show gross negligence on his part.
14 Now the fact that the driver of the automobile
15 may have been guilty of ordinary negligence is not enough to
16 entitle him to recover, the plaintiff to recover against the
17 driver of the automobile. In order to recover, he would have
18 to have shown not just that the driver was negligent, but he
19 was guilty of gross negligence.
20 The Court did not feel that the evidence in this
21 case established gross negligence on the part of the defendant
22 Taylor, the driver of the car, and, therefore, the Court
23 sustained the motion ,which had the effect of letting him out
24 of the case. But the Court does not pass on the question of

whether he was guilty of ordinary negligence, that will be something you will have to consider in connection with other phases of this case.

I mention this and tell you this, that you must not let the fact that one of the defendants has been let off or let out of the case, you must not let that in any way affect your consideration of the remaining defendant, or affect in any way your views as to the liability or lack of liability of the railroad company.

In other words, the fact Taylor has been let out should not have anything to do with your consideration of the case. You should consider this case just as though the railroad had been the only defendant from the beginning.

[TR 500] MR. MILLER: Please the Court, on behalf of the plaintiff we respectfully move the Court for a new trial on all issues, on the grounds that the verdict of the jury is contrary to the law and the evidence, and for the reasons previously advanced with reference to the failure of the Court to instruct the jury on the statutory aspects of the signals, the bell and the horn, and for the other items about the instructions, about which exceptions were noted.

* * * *

[TR 502] MR. MILLER: Just for the record, if Your Honor please, I want to especially note my objection and make it a basis for my motion, again referring to the table of speed and [TR 503] stopping distances. I think that was prejudicial error in this case, and I would move the Court on that also.

* * * *

the highway for two minutes. Now, more specifically, His Honor has instructed you that there are two primary rules of law embodied in these instructions, by which the railroad can be negligent. You do not have to find them all, just one; any act of negligence, any wrongdoing which an ordinarily prudent person would have done under the circumstances, or not have done something that he did under the circumstances, one act which you think caused or helped cause this accident, that's it, that's all.

Now the first one is Instruction No. D, in which the Court tells you that the railroad, when it operates its train at this very grade crossing, is required to give adequate, reasonable and timely warning of the presence of its train on

the crossing. If you believe that the crossing in question was an extra-hazardous crossing--now I don't have to argue, with you intelligent people, about whether they gave warning or didn't give warning; you know that they didn't.

Now warning of the presence of a train, let me say quickly to you, the law is, and common sense dictates, the crossbuck sign and little round sign, is not warning of a train, it is warning of a railroad track; and it didn't matter whether Mr. Taylor saw them or not, they have no part to play in this case which--he knew the track was there, he had known it for years, and he told you very candidly; it didn't matter then that he saw it coming or it didn't tell him there was a train coming, it only told him a track was there.

When you superimpose upon that the fact that it was a heavily-traveled shortcut by cars, now that we have that agreed upon, I hope to go back to the instruction, it says, under these conditions, if you agree these are the conditions, the railroad must give an adequate, reasonable and timely warning of the presence of the train on the crossing. And if you think with me a minute, you will see that by their own admission, they didn't give any, not the first bit of warning.

submit to you gentlemen that the simple definition of negligence, and I'm reading to you now from the Court's Instruction X, first paragraph, "Negligence' is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person would not have done under the existing circumstances."

Secondly, in the same instruction, they are required to keep a reasonable lookout for vehicles approaching the crossing. Well, I'm not going to dwell on it long, because it's so absolutely common sense again, if they block the highway under these conditions, at night, with all I have described to you, and all you remember, for two minutes, is it reasonable for no trainman to stand there and have something to warn approaching cars after they leave, after they start up? Because they are going to be, by their own confession, blocking it for two minutes, and they can only see a distance, at 45, of sixteen seconds, if you understand what I mean by see a distance--they can see two-tenths of a mile, and it's a 16 second time period to travel it in a car, so they are going to be there two minutes, but they can only see away 16 seconds. And they conclude that no member of the public of the City of Richmond or Henrico County is going to come in the next minute and 46 seconds, whatever, minute and 44 seconds. That's just not in the cards, it's not reasonable. It's a heavily-

Now there is a second instruction on which you can find the railroad negligent, and it says--it's very similar, it says, "where peculiar and unusual conditions," which I think I have just described for you, "render a crossing extra-hazardous, it is the duty of a railroad company to keep a flagman at such crossings or to provide such other signal devices as are reasonably adequate to warn a driver of the approach to or presence of a train on such crossing."

Well, we know they had no devices there, so we can forget about those, but they could have satisfied this law, and

in so doing, saved this accident by having one of the unnecessary extra men that the train boss said was caused only by Union contract, and who was doing nothing but riding, just get down on the road, stand there for two minutes with a lit fusee, one on each side of the road, and, you know how they do, we have all seen it all our lives, the last car come by, they just jump on and go. They don't have to walk or go, just stand there and hold it; they could save a life.

"If you believe from a preponderance of the evidence that there were peculiar and unusual conditions which rendered the crossing involved in this case extra hazardous," and that the defendant violated the duty of having a watchman, then it was negligence. If you believe that that negligence-- if you further believe that Nelms did nothing wrong, or didn't cause it, then you find for him.

I don't think we have to explore it much more than that. I think those are the facts; I think you well remember what happened, and I think you will agree with me that the negligence occurred, but it's two other little brief points I would like to make to you before I leave the issue of negligence, and it will be brief.

It seems to me in every law case I have ever been involved with, there is one factor that stands out, that provides the clue or the tip-off of what really was being

Now gentlemen, if you agree with me that the railroad could have warned this man with these light devices, just simply standing there, then you have got to also agree with me that had they rung the bell or sounded that horn, they would have also given warning. Everybody testified that the horn raises the dead, it's so loud.

* * * *

[TR 545] I submit to you gentlemen of the jury that while in so near proximity to the highway, if they had used their common sense and banged on that air horn a couple of times, a blast or two, everybody in the car, before they ever got there, would have heard it. Taylor knew of the existence of the track, being a fairly intelligent young man he would have put two and two together and say, I know the track is there, I hear the horn blasting, I've got a sneaking suspicion the engine driver is trying to tell somebody something. He would have cut to 20 miles an hour to be at his guard.

* * * *

[TR 546] I finally, in conclusion on negligence, say to you, if they had the horn blowing and whistle blowing, common sense--that's what it says, common law--and the man with the fusee, gentlemen, we would not be in this room today and yesterday, doing what we are doing. It's that simple.

* * * *

[TR 559] SUMMATION-HUMRICKHOUSE

What is to say that if a person had been walking across the road, that he wouldn't have been struck? The fact that the cause of the accident was the excessive speed at which the automobile of Taylor was going, and that's the sole proximate cause of the accident.

* * * *

[TR 560] from the witness stand, and you consider all of it, every bit of it, as to who is negligent.

There is another exhibit, No. 2, showing a light on the rear of the locomotive, and I believe that they are the only two, but look at the force of the impact. Plaintiff's 3 3, and look at the automobile involved, Plaintiff's 4, and look at the tables of speed and stopping distance which have been given to you by the Court. Remember the testimony is undisputed that there were skid marks for 159 feet.

All right, now also remember that the engine man said that he saw the car as it rounded the curve, and it

was going at an excessive rate of speed, or about the time it rounded the curve. You will remember, but he saw it when it bounced, and that's when he heard the squealing, and the car would go up and down. What does that show to you as to the cause of the accident? Was it the railroad's negligence now, or was it Taylor's negligence that caused it? You can stop an automobile, according to Taylor's own testimony, at 45 miles an hour in 150 feet. The table will show you that 155 feet stoppage means a speed of 55 miles per hour, including 80.7 feet per second; 55 miles per hour, brakage distance 155 feet, reaction space, 61 for a total of 216, which means that if he had been keeping a lookout and going 55, he would have stopped in ample time to avoid the accident.

* * * *

[TR 568[but don't forget that the prime issue in this case is the proximate cause of the accident. And what proximately caused it? The excessive speed of Mr. Taylor. Thank you.

MR. MILLER:

* * * *

The last thing he told you is perhaps the most important; I agree with him, that is remember the proximate cause. That proximate cause is legally, what it really means is what caused the accident. And he says it was the excessive speed of Mr. Taylor. And I say to you that I don't know how fast Mr. Taylor was going. I don't know that he was going any excessive speed. He certainly, as this Court has ruled, was not going fast enough, by the evidence before you, for the Court to

* * * *

let you consider his speed as being gross negligence. And he has been dismissed from the case. So what caused it?

If he was going one mile over the speed limit, do you think that was the only cause of the accident, or do you think that the failure to have a fusee lit, the failure to give any warning, failure to sound a horn and blocking the highway with these black tank cars, in the black of night, against the black highway, had anything to do with it whatsoever?

I certainly think it had the major cause. The description of the cars--gentlemen you have seen the locomotives,

I call your attention to the very short instruction, Instruction B. It says if in this case you the jury believe from a preponderance of the negligence that the defendant railroad was negligent in failing to do these things we are talking about, and Taylor was also negligent in the speed at which he drove, and both acts of negligence, as defined in the definitions of what is negligence, the other instructions, efficiently contributed to cause the accident--in other words, both of them, the railroad and the driver--then, unless you believe Nelms was also guilty of negligence which caused his own injury, you can find in favor of the plaintiff.

In other words, if the railroad did what we say they did, and if you find it wrong, and Taylor did something wrong, you still find in favor of Nelms. And it's a common sense approach. The railroad, if they did wrong, would not be let off the hook just because Nelms' driver did something wrong too.

[TR 574] Now Mr. Humrickhouse said to you there is no statutory duty that they sound the horn and ring the bell. And I say to you he is right, no written statute that says they must do it at this intersection or grade crossing, excuse me. But the common law duties upon which they must abide, or by which they must abide, as embodied in the Court's instructions to you, tells you that irrespective whether there is or whether there ain't a statute, they have to exercise due care, ordinary care, common sense, if you will, to warn the public of their presence in the middle of that intersection, blocking it as they are moving slowly across.

If they are not going to do it with a fusee, according to their interpretation of their own rules, then what is left to do? It says give a warning with a horn and a bell, but there is no statutory duty, just common sense.

* * * *