CLERK
SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 770483

SOUTHERN STATES COOPERATIVE, INCORPORATED,
A Virginia Corporation, *Appellant*

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
INCORPORATED and MARVIN E. CHRISMAN, *Appellees*

APPENDIX

Joseph W. White, Esquire
D. P. Rabun, Esquire
LARRICK, WHITE AND RABUN
P. O. Box 3337
Winchester, Virginia 22601

Counsel for Appellant

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RECORD NO. 770483

[1] MOTION FOR JUDGMENT

The undersigned, Marvin E. Chrisman, hereby moves the Circuit Court of Page County, Virginia, for a judgment against the Norfolk and Western Railway Company in the sum of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS, for the following, to-wit:

I.

That at all times herein mentioned, the defendant, the Norfolk and Western Railway Company, was and still is a corporation, organized, created and existing under and pursuant to the laws of the State of Virginia; that said corporation was and is a railroad corporation engaged in the business of owning, maintaining and operating a line and system of railroad for the transportation of freight for hire, extending into and through the State of Virginia and various other states, and that a part of said line and system of railroad extended into and through the Town of Luray, Page County, Virginia.

II.

That at all times herein material, plainitff was employed by Southern States Cooperative, Luray Service, Luray, Virginia; that he regularly unloaded cars of feed and other farm supplies delivered to his employer's place of business in Luray, Virginia, by defendant railroad.

[2] III.

That defendant at all times herein material was

the exclusive user and maintainer or that certain spur tract serving the said place of business of Southern States Cooperative located as aforesaid; that said spur tract was, at all times herein material, under defendant's exclusive control.

IV.

That on the 13th day of July, 1971, the defendant negligently, carelessly and wrongfully used, hauled and transported to the said spur tract for plaintiff's employer, the consignee, a certain box car, owned by defendant and under defendant's exclusive control, which box car was delivered by the defendant with a door in a dangerous, defective and unsafe condition, and which box car defendant negligently failed to use due care to inspect and maintain, and that defendant negligently failed and neglected to give adequate warning of the unsafe and defective condition of said door, which condition was known to, or in the exercise of reasonable care, should have been known to defendant.

V.

That by reason of defendant's negligence, carelessness, and wrongful conduct, while plaintiff was engaged in opening the door of said box car for the purpose of unloading its contents, said defective door was caused to fall upon and injure plaintiff, and plaintiff was caused to be severely injured as hereinafter alleged.

VI.

That by reason of defendant's negligence and carelessness, plaintiff was severely bruised, contused, hurt and injured, both externally and internally, in and about his entire body.

[3] VII.

That by reason of said injuries, and in an effort to heal, cure, treat and attempt to relieve the same, plaintiff has been and in the future will be obliged and compelled to incur and pay out considerable sums of money by way of physicians' and surgeons' services, hospital expense, nurse hire, and general medical care, the exact amount of which he is at this time unable accurately to determine.

VIII.

That by reason of said injuries plaintiff has been unable to work and earn money, and alleges that his ability to work and earn money in the future, if not totally destroyed, has been forever greatly diminished and impaired, and on account thereof plaintiff has in the past and will in the future lose substantial sums of money, the exact amount of which he is at this time unable accurately to estimate or determine.

IX.

That by reason of the facts herein alleged, plaintiff has suffered and sustained damages at the hands of said defendant in the sum of ONE HUNDRED THOUSAND

($100,000.00) DOLLARS.

WHEREFORE, the plaintiff brings this action and moves for judgment in the sum of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS, with interest from the 13th day of July, 1971, together with his costs herein expended.

MARVIN E. CHRISMAN
By Counsel

[Filed July 9, 1973]

* * * * *

[14] THIRD-PARTY MOTION FOR JUDGMENT

(1) The plaintiff, Marvin E. Chrisman, has instituted an action in this Court against the defendant, Norfolk and Western Railway Company, for recovery for injuries he sustained on or about July 13, 1971, in Luray, Page County, Virginia, as more particularly set forth in his Motion for Judgment, a copy of which is herewith filed as "Exhibit A". There is also filed herewith a copy of defendant's Grounds of Defense, as "Exhibit B", and a copy of Petition for Subrogation filed by Southern States Insurance Exchange, as "Exhibit C".

(2) On February 11, 1968, Southern States Cooperative, Incorporated entered into a lease, including an indemnity agreement, which indemnified Norfolk and Western Railway Company from all loss, damage, claims or liability for personal injury which might occur [15] on the property leased by Norfolk and Western Railway Company

to Southern States Cooperative, Incorporated, a copy of said agreement of lease being herewith filed as "Exhibit D".

(3) That the accident resulting in plaintiff's alleged injuries did occur on said leased premises, and the lease and indemnity agreement was in effect at the time the accident occurred.

(4) That Norfolk and Western Railway is entitled to recover from Southern States Cooperative, Incorporated the total amount of any damages plaintiff may recover on account of his alleged injuries.

WHEREFORE, Norfolk and Western Railway Company demands judgment against Southern States Cooperative, Incorporated, third-party defendant, for all sums that may be adjudged against Norfolk and Western Railway Company in favor of Marvin E. Chrisman.

NORFOLK AND WESTERN RAILWAY COMPANY
By Counsel

[Filed February 4, 1974]

* * * * *

[33] GROUNDS OF DEFENSE TO THIRD-PARTY MOTION FOR JUDGMENT

Comes now the Third-Party Defendant, Southern States Cooperative, Incorporated, and for a Grounds of Defense, states:

1. This Defendant admits the allegations of Paragraphs 1 and 2 of the Third-Party Motion for Judgment

except that this Defendant states that the instrument marked "Exhibit D" speaks for itself, and that the liability, if any, of the Defendant, Norfolk and Western Railway Company, to the Plaintiff, Marvin E. Chrisman, did not arise under such circumstances that this Defendant is liable to the Third-Party Plaintiff therefor.

2. This Defendant does not know whether the allegations of Paragraph 3 are true and calls for strict proof of the same.

3. The allegations of Paragraph 4 of the Third-Party Motion for Judgment are denied.

[34] 4. For a Grounds of Defense and other pleadings, to the original Motion for Judgment filed in this cause, this Defendant adopts the responsive pleadings of the Defendant, Norfolk and Western Railway Company.

5. This Defendant states that, to the extent that the Defendant, Norfolk and Western Railway Company, seeks to avoid responsibility for its own acts of negligence, by application of the terms of the contract, "Exhibit D", to the facts and circumstances of this accident, the said contract would be contrary to public policy and, therefore, unenforceable.

6. This Defendant further alleges that the acts of negligence on the part of the Defendant, Norfolk and Western Railway Company, by the terms of the Motion for Judgment, did not occur on the premises leased to the

Third-Party Defendant nor were they otherwise within the terms of the said contract so as to fall within the terms and conditions of said contract under which the Lessee agreed to hold the Lessor harmless.

PLEA IN ABATEMENT

Comes now the Third-Party Defendant and states that this cause of action should not be maintained against it for the reason that it arises out of an accident to the Plaintiff incurred in the course of his employment and as to which he was subject to the Workmen's Compensation Act of the State of Virginia, Title 65.1 of the Code of Virginia, 1950, as amended, and, therefore, recovery against this Defendant may only be before the Industrial Commission of the State of Virginia.

[35] MOTION

Now comes the Third-Party Defendant and moves the Court as follows:

1. That the Plaintiff file a Bill of Particulars stating:

(a) The serious and permanent injuries claimed to have been sustained by him.

(b) The nature and extent and location of any and all permanent disabilities claimed by the Plaintiff.

(c) The manner in which the Plaintiff has lost earning capacity and any actual earnings claimed by the Plaintiff to have been lost in the past, including the amounts thereof, the dates thereof, and the name and

address of the Plaintiff's employer at such time.

(d) The exact amounts of any bills heretofore incurred by the Plaintiff, the dates on which they occurred, and the persons with whom incurred as well as the nature of the services provided with respect to each such bill.

2. That the Plaintiff state the names and addresses of all doctors who have treated or examined the Plaintiff in connection with the injuries claimed to have been incurred by him, giving their names, addresses and the nature of the services rendered; and that the Plaintiff state the names and addresses of all hospitals or other institutions at which the Plaintiff has been treated; and further that the Plaintiff furnish to the undersigned copies of all written medical reports received by him.

3. That the Plaintiff furnish the undersigned with an authorization permitting the undersigned, his attorneys, agents or employees, to discuss with any doctors the physical condition of the Plaintiff.

[36] 4. That the Plaintiff submit to an examination by a doctor or doctors selected by the undersigned at a time mutually agreed to by the Plaintiff and the said doctor or doctors.

5. That the Plaintiff supply to the undersigned the names and addresses of all witnesses upon whose

testimony the Plaintiff will rely at the trial of this case.

6. That the Plaintiff furnish to the undersigned copies of his income tax returns for the years 1967, 1968, 1969, 1970 and 1971.

And these motions shall be considered to be continuing so that, if the Plaintiff intends to produce additional matters at trial, the said responses to the motions shall be supplied up to and including the date of trial.

SOUTHERN STATES COOPERATIVE,
INCORPORATED
By Counsel

[Filed March 1, 1974]

* * * * *

[134] THIS AGREEMENT, Made and entered into this 11th day of February, 1968, between the NORFOLK AND WESTERN RAILWAY COMPANY, of the first part, hereinafter called the Lessor, and SOUTHERN STATES COOPERATIVE, INCORPORATED of the second part, hereinafter called the Lessee:

WITNESSETH: That in consideration of the hereinafter-mentioned rental to be paid by the Lessee to the Lessor, the Lessor does hereby demise and lease unto the Lessee all that certain Freight Station Building No. H-885-A and 0.42 acre of land at Luray, Va., with permission to Lessee to maintain its existing 1,000-gal.

tank and pump, provided the tank and appurtenances shall be removed from the premises of the Railway on or before the expiration of this lease agreement, and the land be back-filled to the level of the adjacent ground Plan N-24570 Rev.5/14/68 hereto attached and made a part hereof.

It is agreed between the parties hereto:

1. That this agreement shall extend for a term of one (1) year from the date hereof; provided, however, that Lessee shall have the privilege of renewing for four additional one (1) year terms upon written notice to Lessor of its desire to renew at least sixty (60) days prior to the commencement of each renewal term.

2. That the Lessee will pay to the TREASURER of the NORFOLK AND WESTERN RAILWAY COMPANY, Roanoke, Virginia, as and for rental for said premises the sum of One Hundred Sixty-Five Dollars ($165.00) per month, the first monthly payment of said sum being payable on the 11th day of February, 1968, and a like payment on the 11th day of each month thereafter;

3. That the Lessee shall not without the written consent of the Manager Real Estate of the Lessor use the leased premises for any purpose other than for handling grain, feed, seed, auto tires, batteries, hardware, fertilizer, steel products, potatoes, etc. and shall not without such consent sublet or assign the whole or any part thereof;

4. That the Lessee will keep said premises orderly and in good repair, usual wear and tear excepted, and will not make, or permit to be made, any improvements, alterations or additions thereto without the written consent of said Manager Real Estate. The Lessee will permit the Lessor, through its representatives, to enter at any time upon the leased premises to inspect the condition of same;

5. That the Lessee covenants and agrees to indemnify and save the Lessor harmless from and against any and all loss, damage, claims or liability for personal injury occurring on the leased premises or in connection with the use thereof, including death resulting from such personal injury, to the Lessee or Lessee's agents, employees or licensees, and for damage to the leased premises or loss of or damage to property, to whomsoever belonging, on the leased premises, caused by, arising out of or incident to the condition, existence, use or occupancy of said leased premises, or by the business carried on by the Lessor, or by the negligence of the Lessor, its agents, servants or employees, or otherwise;

6. That the Lessor will not be responsible for burst or leaking water pipes, and does not undertake to furnish water, light or heat, and that the Lessee will pay all bills for water, light or heat accruing during the Lessee's occupancy of the premises;

7. The Lessee agrees that artificial lighting in pump houses, warehouses, or other enclosures where oil or other inflammable fluid supplies are handled or stored, except when in unbroken original containers, shall be by electricity, and this electrical installation and any other electrical installation on such premises shall conform to and be maintained in accordance with the PROVISIONS OF THE CURRENT EDITION OF THE NATIONAL ELECTRICAL CODE WITH RESPECT TO CLASS 1 HAZARDOUS LOCATIONS, and also in accordance with requirements of any local ordinance, or State or Federal laws which may be in effect during the term of this lease;

8. That upon default by the Lessee in the payment of said rental or in the performance of any of the Lessee's undertakings herein, the Lessor may terminate this lease, but except where it is expressly otherwise provided herein that the lease shall be forthwith terminated, the Lessor shall give the Lessee ten days written notice by registered mail of the default for which the Lessor proposes to terminate the lease, and if at the expiration of said ten days the Lessee still remains in default the lease shall be terminated without further notice by and between the parties hereto and the Lessee will peaceably vacate the premises. The failure of the Lessor to avail itself of the privilege of termination for any previous default shall not constitute a waiver of

its right to terminate for any subsequent default;

9. If the Lessee shall be adjudged a bankrupt or if it shall make an assignment for the benefit of its creditors or if a receiver be appointed for it in insolvency proceedings, or if the Lessee's interest herein shall be sold under execution or other legal process without the written consent of the Lessor, or if said interest by operation of law passes to any person or persons then the Lessor may at its option declare the lease forthwith terminated and may enter upon and take possession of the leased premises.

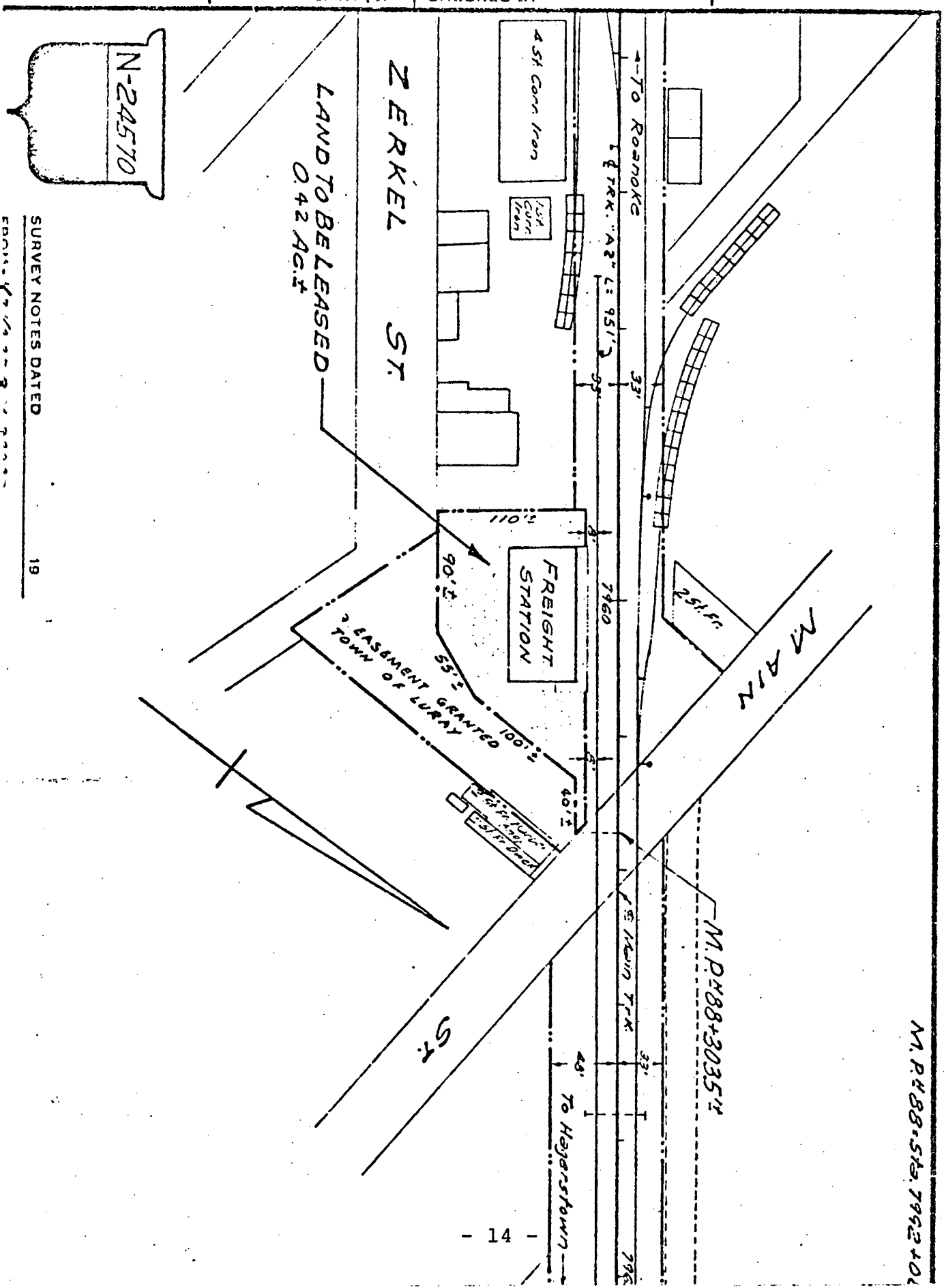
This instrument replaces agreement with Southern States Luray Cooperative dated February 11, 1963.

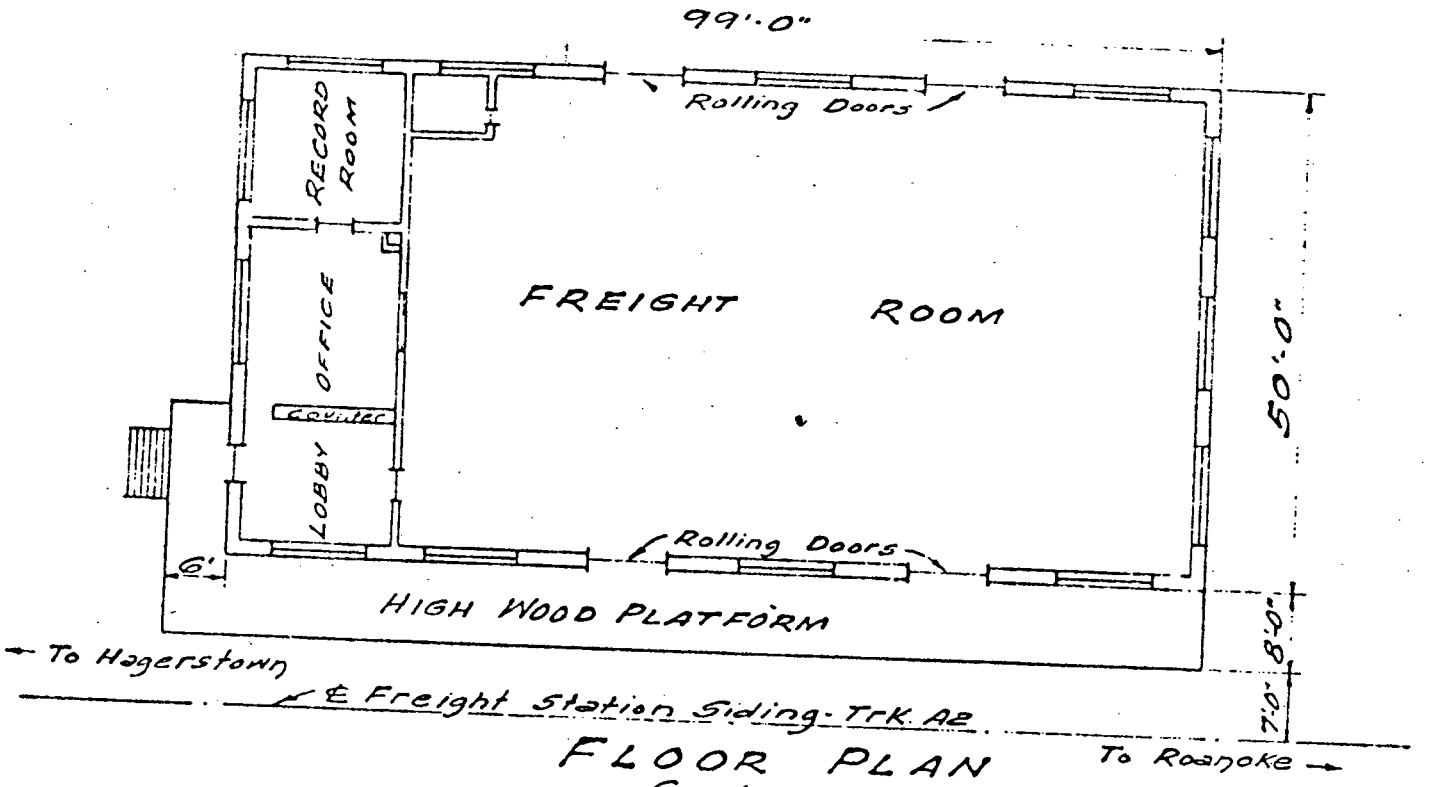
[Filed February 4, 1974]

* * * * *

[29]

AGREEMENT BOOK	PAGE
POSTED PLANS	
AUTHORITY	DATED 19
C. E. FILE NO. 20985-2	
MADE BY C.M.B.	CHECKED BY





FLOOR PLAN
Scale 1"=20'

NORFOLK AND WESTERN RAILWAY CO.

SHENANDOAH DIVISION-SHENANDOAH DISTRICT

LEASE OF LAND AND SPACE IN FREIGHT STATION
TO
SOUTHERN STATES COOPERATIVE INCORPORATED

M. P. H 88+3035'±

LURAY, VA.

SCALE 1 IN.= 100 FT.

OFFICE OF CHIEF ENGINEER, ROANOKE VA., JAN. 22, 1953

REVISED JAN. 18, 1963
REVISED MAY 14, 1968

N-24570

[241] DEMURRER AND MOTION TO DISMISS

Comes now Third-Party Defendant, Southern States Cooperative, Incorporated, and says that Defendant and Third-Party Plaintiff, Norfolk and Western Railway Company, Inc. may not have nor maintain the cause of action set forth in the Third-Party Motion for Judgment filed herein, upon the grounds (1) that it did not have at the time of the filing of the Third-Party Motion for Judgment and does not now have a cause of action against Third-Party Defendant, and will have no such cause of action unless and until it has made payment to Plaintiff, Marvin E. Chrisman, of any sum which may ultimately be found to be due him herein; and (2) that Rule 3:10 does not change substantive Virginia law with respect to the maturing of a claim for indemnity.

WHEREFORE, Third-Party Defendant moves that the Third-Party Motion for Judgment be dismissed.

SOUTHERN STATES COOPERATIVE,
INCORPORATED
By Counsel

[Filed October 12, 1976]

* * * * *

[247] AMENDED THIRD-PARTY MOTION FOR JUDGMENT

(1) The plaintiff, Marvin E. Chrisman, has instituted an action in this Court against the defendant, Norfolk and Western Railway, for recovery for injuries he

sustained on or about July 13, 1971, in Luray, Page County, Virginia, as more particularly set forth in his Motion for Judgment (as amended), a copy of which is herewith filed as "Exhibit A". There is also filed herewith a copy of defendant's Grounds of Defense, as "Exhibit B", and a copy of Petition for Subrogation filed by Southern States Insurance Exchange, as "Exhibit C".

(2) On February 11, 1968, Southern States Cooperative, Incorporated entered into a lease, including an indemnity agreement, which indemnified Norfolk and Western Railway Company from all loss, damage, claims or liability for personal injury which might occur on the property leased by Norfolk and Western Railway Company to Southern States Cooperative, Incorporated, a copy of said agreement of lease being herewith filed as "Exhibit D".

(3) That the accident resulting in plaintiff's alleged [248] injuries did occur on said leased premises, and the lease and indemnity agreement was in effect at the time the accident occurred.

(4) That Norfolk and Western Railway Company is entitled to recover from Southern States Cooperative, Incorporated the total amount of any damages plaintiff may recover on account of his alleged injuries.

WHEREFORE, Norfolk and Western Railway Company demands judgment against Southern States Cooperative, Incorporated, third-party defendant, for all sums that

may be adjudged against Norfolk and Western Railway Company in favor of Marvin E. Chrisman, and all expenses, Court costs, and legal fees incurred in the proceeding between Marvin E. Chrisman and Norfolk and Western Railway Company, and in this proceeding.

NORFOLK AND WESTERN RAILWAY
COMPANY
By Counsel

[Filed October 12, 1976]

* * * * *

[278] MOTION FOR SUMMARY JUDGMENT

Third-party defendant, Southern States Cooperative, Incorporated, moves for summary judgment in its favor on the amended third-party motion for judgment, on the ground that third-party plaintiff is not entitled as a matter of law to recover from third-party defendant the total amount of any damages plaintiff may recover on account of his injuries, or any part thereof, and is not entitled to recover all expenses, court costs, and legal fees incurred in this proceeding, or any part thereof.

PLEA IN ABATEMENT

Third-party defendant, Southern States Cooperative, Incorporated, adopts as and for its plea in abatement to the amended third-party motion for judgment the plea in abatement previously filed to the original third-party motion for judgment.

GROUNDS OF DEFENSE TO
THIRD-PARTY MOTION FOR JUDGMENT

Third-party defendant adopts as and for its grounds of defense to the amended third-party motion for judgment the grounds of defense previously filed to the original third-party motion [279] for judgment.

SOUTHERN STATES COOPERATIVE,
INCORPORATED
By Counsel

[Filed October 20, 1976]

* * * * *

[196] ORDER

At a further pre-trial conference held on March 8, 1976, Janney & Janney appeared for the plaintiff, W. W. Wharton, Esquire and Phillip E. Stone, Esquire appeared for Norfolk and Western Railway Company, Joseph W. White, Esquire appeared for Southern States Cooperative, Inc. and Robert L. Dolbeare, Esquire counsel for Southern States Insurance Exchange did not appear.

Upon motion of the plaintiff, the defendants not objecting, this case is continued and rescheduled for trial on June 10, 11 and 12, 1976, on the issues between the plaintiff and Norfolk and Western Railway Company.

Upon the plaintiff's motion to amend the Motion for Judgment by increasing the ad damnum, leave is granted to the plaintiff to file a Bill of Particulars of the motion within 10 days, and the defendants shall file

responsive pleadings thereto within 10 days from the date of filing.

The plaintiff conceded that the Grounds of Defense heretofore filed include an allegation of assumption of risk.

It was stipulated that if either party desires to introduce any documentary evidence in its case in chief not proffered at the previous trial, copies thereof shall be served on opposing counsel not less than 30 days before the trial date.

[197] Any instructions not heretofore proffered shall be served upon opposing counsel not less than 5 days prior to the next pre-trial conference which is scheduled for May 10, 1976.

ENTER: /s/ Joshua L. Robinson, Judge

[Filed March 8, 1976]

* * * * *

[207] O R D E R

At a pre-trial conference held on September 13, 1976, Robert Janney, Esquire appeared for the plaintiff, W. W. Wharton, Esquire and Phillip C. Stone, Esquire appeared for the defendant, Norfolk and Western Railway Company, and Joseph White, Esquire appeared for Southern States Cooperative, Inc.

The plaintiff's motion for leave to amend the

ad damnum to $150,000.00 is sustained over the objection of the defendant. No mention will be made to the jury of the increase in the ad damnum and counsel will be given leave to voir dire the jury on whether they have any knowledge about the previous trial of this case.

The plaintiff will file and serve copies of the instructions he will proffer not later than September 17, 1976, and the defendant will do likewise, not later than September 22, 1976.

Rule 3:3 b will be deemed to have been complied with with respect to any Exhibits which were proffered in evidence at the previous trial and with respect to any Exhibits or models to be proffered in evidence with the testimony of the plaintiff's expert Gaston Fornes, identified by the photographs marked plaintiff's Exhibits 1, 2 and 3, filed with this order. Mr. [208] Wharton and Mr. Stone will be trial counsel for the defendants, Mr. White will not participate in the trial.

This case remains set for trial before a civil venire on the 29th and 30th of September, 1976.

ENTER: /s/ Joshua L. Robinson, Judge

[Filed September 13, 1976]

* * * * *

[213] INSTRUCTION NO. 3

The Court instructs the jury that when the

defendant, Norfolk and Western Railway Company, Inc., delivered boxcar Norfolk and Western No. 388591, on the 9th day of July, 1971, to the consignee of the shipment, Southern States Cooperative at Luray, Virginia, and the consignee was to unload the contents of said boxcar, then the Norfolk and Western Railway Company, Inc., is liable for injuries to the employees of the Southern States Cooperative which proximately result from the negligent conduct of the defendant, Norfolk and Western Railway Company, Inc.

The Court further instructs the jury that it was the duty of the defendant, Norfolk and Western Railway Company, Inc., to make a reasonable inspection of the said boxcar, and to exercise reasonable care and to have it in such repair or condition that it might be used with reasonable safety. The failure to perform any of the above duties is negligence.

If you believe from a preponderance of the evidence that the defendant, Norfolk and Western Railway Company, Inc., was negligent, in the performance of one, some, or all of the above duties and that such negligence was the proximate cause of the injuries to the plaintiff, then unless you further believe that the plaintiff was guilty of negligence which proximately contributed to cause the injury, you shall return your verdict in favor of the plaintiff, and fix his damages according to the

other instructions of the Court.

[Filed September 30, 1976]

* * * * *

[214] INSTRUCTION NO. 4

The Court instructs the Jury that, while there is a duty upon the defendant railroad to make an inspection of its equipment before turning it over to a customer, it is required only to make such inspection as is reasonable under the circumstances to reveal defects. Accordingly, before you can find that the railroad was negligent in the manner of its inspection proximately resulting in injury to the plaintiff, you must find that a preponderance of the evidence establishes that there was a failure to make an inspection which would have revealed a defect at the time of the inspection, which defect subsequently was the proximate cause of the accident and injury to the plaintiff.

[Filed September 30, 1976]

* * * * *

[318] ORAL OPINION OF THE COURT; NOVEMBER 15, 1976

Gentlemen, I thank you for your excellent and thorough briefs and oral argument, not only on the questions before the Court today, but also on the other questions that were earlier before the Court in this

involved and complicated case. They certainly deserve the preparation of a formal opinion, but this accident happened in 1971; there have been 2 trials. Before each trial there were extensive arguments on questions of law and after each trial there were extensive arguments on questions of law and this case should be brought to a prompt conclusion, so I will state my opinion extemporaneously rather than wait until I have time to prepare a formal opinion, which considering my trial docket may take several months.

The first question is the enforceability of paragraph 5 of the agreement that is marked Exhibit 2. I do not hesitate to say that before C & O v. Clifton Forge came down, I would have been inclined to agree with the view that Judge Haas took in that case, that the agreement was unenforceable on public policy grounds and by reason of the statute; however, Mr. Justice Harrison's analysis of the statute in that case, persuades me that this Court is bound by the Supreme Court's opinion in C & O Ry. Co. v. Clifton Forge, etc., 216 Va. 858 (April 23, 1976). When we go back to Johnson's Adm'r. [319] R. & D. R. R. Co., 86 Va. 975, it is interesting to note, and this part of that case may not be in the Southeast Reporter, but it is on page 976 of 86 Va. or 11 Hansbrough. The language there said that the party of the first part "shall in no way be held responsible for

injury to or death of any of the members of the said firm", etc. and that was the language of the agreement that was before the Court in the Johnson case. This language is also at page 976 of 86 Va.

> "And in the event of any suit being brought against the said party of the first part, or any judgment being obtained against the same, then the said party of the second part shall resist said suit, and pay such judgment, together with all costs incident thereto."

The Court dealt with the contract in Johnson as a contract exempting a negligent party from liability and because Johnson was apparently a member of the firm that executed the contract, the question of the effect of an indemnifying agreement was not before the Court, but Johnson seems to have been considered authority for putting exemption agreements and indemnifying agreements into the same catagory. Mr. Justice Harrison traced the history of the statute in the C & O case and it is not necessary to repeat it here, but the statute now does not read as it did in the Johnson case. The statute at the time of the Johnson case said "no agreement for exemption shall be valid" and the statute did not deal with, and Johnson did not deal with, a contract for exoneration. The Court then, in Johnson, analyzed what is now Code 56-119, that "any contract that exempts a transportation company from liability of a common carrier is not valid." The statute deals with exemption and not with exoneration, and that is the distinction that must be drawn here.

Southern States argues that the exemption or exoneration that is invalid under the statute relates to the status of the railroad when the negligent act occurred. That is, whether that at the time of a negligent act the railroad was acting as a carrier or as a landlord. They further take the position that if the relationship [320] between the carrier and the lessee was one of carrier and shipper, then the statute would make the agreement ineffective. There are two answers to that question, putting aside the question of whether the carrier-shipper relationship had terminated when the car was delivered to Southern States, and at the time of the loss Southern States was merely a bailee of N & W's car. The first is that the statute invalidates only agreements to exempt the carrier from liability and not an agreement requiring the lessee to indemnify the railroad. The second answer is, that as the Supreme Court in C & O v. Clifton Forge analyzes the statute, the question is not the status of the Railroad at the time of the negligence or the loss; the question is the status of the Railroad at the time, or the capacity in which, they executed the lease. Everything that Mr. Justice Harrison points out in the opinion in C & O is applicable to this case. N & W was under no obligation or duty to lease the premises to Southern States. N & W was acting in its private capacity and not as a carrier when it leased the property to

Southern States and it could impose any condition that it desired and which Southern States was willing to accept. Southern States was under no compulsion to accept the agreement. They could have leased other property that would have served its purpose, and whether Southern States was willing for this clause to be in the contract as a matter of business practice had to be a factor that was taken into account when the amount of the lease payments were negotiated.

Since N & W was under no duty to lease any of its property to Southern States, and Southern States was not compelled to lease from the railroad, the parties stood on equal footing; each was free to make or refuse to make the contract and to bargain "at arms length" over terms and conditions. In the lease of the property N & W acted as a private property owner and not as a common carrier. Therefore this Court is bound to follow the decision of our Supreme [321] Court in C & O v. Clifton Forge.

With respect to the procedural question of the applicability of Rule 3:10, this is precisely the kind of question that is contemplated by Rule 3:10. There was a question with respect to which of the defendants bore the ultimate responsibility. The filing the third party complaint under Rule 3:10 served the same purpose as a suit for declaratory judgment to determine which of the parties was ultimately liable; perhaps the same result

could have been accomplished by N & W serving notice on Southern States, that they would expect them to defend the action. By bringing them in as a third party defendant under Rule 3:10 the questions that were determined in the trial of this case were rendered res adjudica with respect to Southern States, they having had an opportunity to come in and participate in the trial and, indeed, if N & W insisted that Southern States was ultimately liable, Southern States had the right to come in and assume control of the defense of the plaintiff's claim. However, from the way that counsel quite properly agreed to handle this case, it made no difference whether Southern States was brought in as a third party defendant or by a suit for declaratory judgment. Counsel agreed to defer decision on the question of enforceability of the indemnifying agreement until after it was determined whether N & W was liable to the plaintiff. Whether that was because counsel were aware of the C & O case was before the Supreme Court or not, the Court does not know, but in any event those questions were deferred until after determination of initial liability.

It is correct, as Southern States asserts, that they are not liable to N & W until N & W has paid the judgment, and that will be taken care of in the final order.

With respect to attorneys' fees, there is nothing

in the indemnifying agreement that gives N & W the right to recover attorney's fees and as I pointed out previously, if N & W was willing to risk [322] their liability on the ability of Southern States to defend the case and risk their confidence in their position with respect to the right of exoneration, they could have declined to defend the suit and put the burden of defending the suit on Southern States; N & W having elected to defend the case themselves, they are liable for their own attorneys' fees, and the third party plaintiff's motion for the allowance of attorney's fees will be denied. The order will then give final judgment for the plaintiff in the amount of the verdict with interest from the date of the verdict against N & W Railway Company; the order will provide that upon payment of the judgment, N & W is entitled to exoneration from Southern States in the amount of the judgment and interest they pay.

Mr. Stone is requested to submit an appropriate order pursuant to Rule 1:13.

November 15, 1976

/s/ Joshua L. Robinson, Judge

[Filed November 22, 1976]

* * * * *

[323] MOTION FOR SUMMARY JUDGMENT

Comes now the third-party plaintiff Norfolk and Western Railway Company and moves the Court for Summary Judgment against the third-party defendant Southern States Cooperative, Inc. on its Third-Party Motion for Judgment on grounds that there are no factual issues remaining between the parties and that it is entitled to judgment as a matter of law under the terms of the agreement between Norfolk and Western Railway Company and Southern States Cooperative, Inc. dated February 11, 1968, namely, paragraph 5. thereof, by which Southern States Cooperative, Inc. agreed to indemnify the Norfolk and Western Railway Company from any claim for personal injury occurring on its premises.

NORFOLK AND WESTERN RAILWAY
COMPANY
By Counsel

[Filed November 17, 1976]

* * * * *

[325] PETITION FOR REHEARING

Third-party defendant respectfully petitions for rehearing of the arguments and authorities heard and considered by the Court on November 15, 1976 relating to the questions presented by the third-party action in this case.

SOUTHERN STATES COOPERATIVE,
INCORPORATED
By Counsel

[Filed December 1, 1976]

* * * * *

[328] ORDER

This matter came on further to be heard on the pleadings heretofore filed; upon the jury verdict in favor of the plaintiff, Marvin E. Chrisman, against Norfolk and Western Railway Company; upon the Plea in Abatement, Demurrer and Motion for Summary Judgment filed by Southern States Cooperative, Incorporated, third-party defendant, to the Amended Third-Party Motion for Judgment of Norfolk and Western Railway Company; upon the Motion for Summary Judgment of Norfolk and Western Railway Company; upon the briefs filed by Norfolk and Western Railway Company and by Southern States Cooperative, Incorporated; and upon argument of counsel.

Upon consideration whereof, the Court makes the following findings:

(1) Rule 3:10 of the Rules of the Supreme Court of Virginia is valid and is applicable to this indemnity question.

(2) All parties stipulate and agree that the injury to the plaintiff occurred while he was positioned on the premises leased by Norfolk and Western Railway Company to Southern States Cooperative, Incorporated, by an agreement dated February 11, 1968, [329] which

agreement has been made an exhibit to the Amended Third-Party Motion for Judgment.

(3) Paragraph five of the lease is not ambiguous, and parole and other extrinsic evidence is therefore inadmissible to ascertain the intent of the parties.

(4) That there are no factual issues remaining in the case and that all issues between the third-party plaintiff and the third-party defendant are questions of law.

(5) The agreement dated February 11, 1968, between Norfolk and Western Railway Company and Southern States Cooperative, Incorporated, specifically paragraph 5 thereof containing a promise of exoneration, is valid and should be enforced consistent with the Supreme Court's decision in the case of C. & O. Ry. Co. v. Telephone Co., 216 Va. 858 (1976).

(6) The third-party plaintiff is entitled to be indemnified by Southern States Cooperative, Incorporated, from the jury verdict awarded to Marvin E. Chrisman on September 30, 1976, by the Circuit Court of Page County upon payment made by Norfolk and Western Railway Company to Marvin E. Chrisman.

(7) Norfolk and Western Railway Company is not entitled to recover from Southern States Cooperative, Incorporated, its attorneys' fees and costs expended to defend the suit brought by Marvin E. Chrisman.

Wherefore, it is ADJUDGED and ORDERED that the plaintiff, Marvin E. Chrisman, recover from the defendant, Norfolk and Western Railway Company, the sum of $115,000.00, in accordance with the jury verdict of September 30, 1976, plus interest thereon from September 30, 1976, together with his costs.

It is further ADJUDGED and ORDERED that upon payment by Norfolk and Western Railway Company to the plaintiff, Marvin E. Chrisman, Norfolk and Western Railway Company shall have judgment against the third-party defendant, Southern States Cooperative, [330] Incorporated, to the full extent of its payment to Marvin E. Chrisman.

It is further ADJUDGED and ORDERED that the Plea in Abatement, the Demurrer, and the Motion for Summary Judgment filed by the third-party defendant, Southern States Cooperative, Incorporated, be denied and that the Motion for Summary Judgment of the third-party plaintiff, Norfolk and Western Railway Company, against Southern States Cooperative, Incorporated, be granted except to the extent it requested attorney's fees and costs for the defense of the claim brought by Marvin E. Chrisman against Norfolk and Western Railway Company, to which extent the Motion for Summary Judgment is denied.

It is further ADJUDGED and ORDERED that all factual issues raised in the pleadings by the third-party plaintiff and the third-party defendant are

preserved except to the extent that it is stipulated that at the time of the accident Marvin E. Chrisman was positioned on the premises leased by Southern States Cooperative, Incorporated from Norfolk and Western Railway Company by an agreement of February 11, 1968.

Plaintiff is given leave to withdraw his exhibits in the proceeding upon the entry of a final, non-appealable order.

The parties object and except to the rulings of the Court adverse to their respective motions and pleadings.

All parties hereby preserve objections noted in previous orders of the Court, which orders are hereby incorporated into this order by reference.

This adjudication shall be final as to all parties on all issues presented except as to the Petition for Subrogation for Workmen's Compensation Benefits Paid filed by Southern States Insurance Exchange, which matter shall be continued generally on the docket of the Court. [331] The transcript of both jury trials of the claims of the plaintiff against Norfolk & Western Railway Company are hereby made a part of the record.

The Court has been advised by the defendant and the third-party defendant that they intend to appeal to the Supreme Court of Virginia from this final Order. Upon motion of the defendant, the execution of this Order is

suspended until its Petition for a Writ of Error has been presented to and acted upon by the Supreme Court of Virginia, or until the time for presenting such Petition shall have expired. Before this Order shall become effective, however, the defendant shall enter into a suspending and supersedeas bond in the sum of $125,000.00 before the Clerk of this Court, without surety, said bond to be conditioned according to law.

There being nothing further remaining to be determined in this action, it is dismissed from the docket except as to the aforesaid Subrogation Petition of Southern States Insurance Exchange.

ENTERED this 13th day of December, 1976.

/s/ Joshua L. Robinson, Judge

[Filed December 13, 1976]

* * * * *

[332] AMENDED PETITION FOR REHEARING

Third-party defendant respectfully petitions for rehearing of the arguments and authorities heard and considered by the Court on November 15, 1976 relating to the questions raised by the third-party action in this case, and for leave to proffer evidence to prove that Southern States was not free to make or refuse the indemnity agreement in the lease contract in question because of Southern States' inferior bargaining position,

the parties did not stand on equal footing and did not bargain at arms length over terms and conditions.

SOUTHERN STATES COOPERATIVE,
INCORPORATED
By Counsel

[Filed December 16, 1976]

* * * * *

[333] PROFFER

Third-party defendant proffers evidence to prove the following facts:

1. Southern States must ship and receive the bulk of its merchandise by rail, and cannot economically transport freight by any other carrier.

2. Southern States has approximately 200 sidings, each of which is the subject of a lease or license agreement between Southern States and the railroad in question, and all but one or two of said agreements contain clauses under which the lessee agrees to indemnify the lessor from loss.

3. Southern States is not free to refuse these indemnity agreements which are forced upon them because of the common carrier's monopolistic position.

4. In negotiating siding agreements with railroads, it is the experience of Southern States that indemnity clauses are always required by the railroad, and in recent years have tended to become more

comprehensive in scope.

5. Total freight car movements in Southern States' system are in excess of 30,000 cars per year, nearly all of these shipment both originated and were received on sidings covered by agreements containing indemnity provisions.

[334] 6. In this service area, there are no freight stations or locations furnished by the railroad for receiving or delivering freight to Southern States other than on tracks subject to an indemnity agreement.

SOUTHERN STATES COOPERATIVE,
INCORPORATED
By Counsel

[Filed December 16, 1976]

* * * * *

[335] O R D E R

This matter came on this day to be heard upon the Amended Petition For Rehearing filed by third-party defendant, leave to file the same being hereby granted, and upon argument of counsel.

Upon consideration whereof, and upon the Proffer of evidence tendered pursuant thereto, it is ADJUDGED and ORDERED that said Amended Petition For Rehearing be, and is hereby denied, to which counsel for third-party defendant duly objected and excepted.

ENTER this 17 day of December, 1976:

/s/ Joshua L. Robinson, Judge

[Filed December 17, 1976]

* * * * *

ASSIGNMENTS OF ERROR

I. The court erred in granting summary judgment to Norfolk and Western against Southern States upon its holding that paragraph five of the agreement between N&W and Southern States, dated February 11, 1968, is valid and enforceable as a matter of law.

II. The court erred in failing to grant summary judgment in favor of Southern States and against Norfolk and Western upon the ground that paragraph five of said agreement is invalid and unenforceable as a matter of law.

III. The court erred in its finding that the case of C. and O. Ry. Co. v. Telephone Company, 216 Va. 858 (1976), disposed of the question of the validity and enforceability of paragraph five of said agreement.

IV. The court erred in refusing to grant Southern States a hearing on its proffer of evidence to establish that the parties did not deal at arms length as to paragraph five of the agreement of February 11, 1968, and to public policy.

V. The court erred in holding that there are no factual issues remaining between the third-party plaintiff

and third-party defendant in this case.

VI. The court erred in holding that there was no latent ambiguity in paragraph five of the agreement between N&W and Southern States, dated February 11, 1968, and in refusing to admit extrinsic evidence to ascertain the scope of this agreement intended by the parties thereto.

VII. The court erred in holding that Rule 3:10 of the Rules of the Supreme Court of Virginia is valid as it is applied to this indemnity question.

[Filed with Appellant's Petition for Appeal and Writ of Error and Supersedeas, April 13, 1977]

* * * * *

ASSIGNMENT OF CROSS-ERROR

The Court erred in denying Norfolk and Western's claim for legal fees and expenses in connection with the defense of the personal injury claim as provided by the indemnity agreement with Southern States on the ground that the indemnity agreement did not specifically refer to such expenses.

[Filed with Petition of Norfolk and Western Railway Company in Opposition to Petition for Appeal of Southern States Cooperative, Incorporated, April 22, 1977]

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