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IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. 8166

NORFOLK SOUTHERN RAILWAY COMPANY,
Plaintiff in Error

v.

AMERICAN OIL COMPANY,
Defendant in Error

APPEAL FROM THE CIRCUIT COURT OF
THE CITY OF VIRGINIA BEACH

APPENDIX

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MOTION

The defendant, Norfolk Southern Railway Company, hereby moves the Court for entry of an Order setting 10:00 o'clock a.m., Eastern Daylight Time, on July 10, 1970, as the time for a hearing in this case to determine the respective rights and claims of the defendant, Norfolk Southern Railway Company, and the claimant, American Oil Company, to the funds heretofore deposited in this cause in the amount of Seventy-Three Thousand Eighty-Five and NO/100 Dollars ($73,085.00), the authority for this Motion being §25-46.28 of the Code of Virginia (1950).

Filed May 15, 1970

OPINION LETTER OF COURT ADDRESSED TO COUNSEL

The Court has now studied your respective memoranda, the transcript and all of the cases and other authorities cited by each of you. As was stated at the hearing, the court compliments both of you for your very able presentations.

Mr. Swope, in his memorandum on behalf of the railroad, has cited many cases relating to condemnation situations. However, in the opinion of the court, all of the

cases cited by him clearly relate to "condemnation situations" and the wording of the lease in the case at bar is not nearly so clear. In every case cited by Mr. Swope, with the exception of one, the clauses in the respective leases used such words and phrases as "condemnation," "eminent domain," "condemned," or "taking for a public purpose." The exception case was Iowa v. Starzinger, et al, 179 N.W. 2d, 761. In that particular case the wording was, "In case the estate hereby created shall be taken from the lessee by process of law, or by proceedings in bankruptcy or insolvency or otherwise, or in case the lessee makes an assignment for the benefit of creditors, or commits any act of bankruptcy, the lessors shall have the right at any time thereafter, notwithstanding any license or waiver of any prior breach or condition, without any notice or demand, to enter upon the premises and thereby terminate the lease and determine the estate hereby created."

In the opinion of this court, the words in the lease in the Iowa v. Starzinger, et al, case (supra) which contemplate condemnation are, "taken from the lessee by process of law." The wording of the lease in the case at bar is not so clear. The Iowa court said that it was clear that the plain meaning of the clause in the lease contemplated condemnation, bankruptcy, insolvency or assignments for

the benefit of creditors. The Iowa court then went on to say that, "... property rights of this nature are subject to contractual provisions in leases such as we have here. The terms of the contract, therefore, must control."

This court is in complete agreement with the Iowa court. Had there been a provision in the lease stating what would be done in the event of condemnation, there is no doubt that it would have to be honored by the parties. In all probability, if that were the case, American Oil Company would not be in court today. As aforesaid, however, it is not clear to this court that the wording of the clause in the subject lease contemplated condemnation. Had the parties so intended, it would have been a simple matter to have so stated in the lease.

This court is of the opinion that the lease in the case at bar does not contain a condemnation clause and that the American Oil Company deserves to share in the proceeds of the award. The amount of its share will be determined at a future hearing.

Mr. Spencer should prepare an order carrying out the provisions of this opinion letter, and upon presentation, properly endorsed, it will be promptly entered.

Dated October 12, 1971

OPINION LETTER OF COURT ADDRESSED TO COUNSEL

As you know, you gentlemen have submitted memoranda in support of your respective pre-trial contentions. You have also submitted your various positions and you have asked the court to rule in regard to these contentions prior to the hearing on March 29, 1972.

The court has carefully studied the documents submitted by each of you and is of the opinion that the following guidelines should be used at the hearing:

(1). The interests of the various parties in the subject property were fixed as of the date of taking, March 17, 1969.

(2). The rights of Norfolk Southern Railway Company and American Oil Company pursuant to the lease are to be determined as of March 17, 1969.

(3). In determining the compensation for the unexpired portion of the lease, the value thereof is to include the option periods contained in the lease.

(4). American Oil Company is to be compensated for the buildings which were on the subject property which are to be valued as of March 17, 1969.

(5). The court will have to determine the value of the buildings as of March 17, 1969,

and the fair market value of the balance of the demised term, including the option periods contained in the lease, as of March 17, 1969, and the balance of the award after fixing the tenant's share is to be the property of the landlord.

(6). The value of the interests of all parties will be limited to the sum of $73,085.00.

(7). Landlord has asked the court under the heading of "Alternative Contentions of Landlord" to decide what events would give landlord a termination right under the lease. Article One(b) states as follows: "If at any time it shall be held that Railway cannot lawfully permit Industry to use or continue to use the property hereby demised, as herein provided, Railway shall have the right to terminate this lease forthwith and shall not be liable to Industry for any damages whatsoever which may result therefrom." One interpretation of this clause which comes to the mind of the court is that if the property should be rezoned by the City so that lessee could no longer operate a gasoline service station, then landlord shall have the right to terminate the lease without liability to lessee. Counsel for the Railroad may be able

to suggest other events at the time of the hearing but he has stated in his memorandum that he can't suggest anything other than eminent domain. The court has already ruled that the aforementioned wording does not constitute a "condemnation clause."

(8). In considering tenant's share in the award, the court will take into consideration only the land under lease and not adjoining properties which are not under lease.

(9). Subject to the lease of tenant, as fee simple owner the landlord was as free to use the property for a service station as was tenant.

Insofar as (6) above is concerned, the court reached its conclusion by reading the correspondence in the file. On page 63 of the transcript of the argument on January 11, 1972, and on several pages following page 63, you gentlemen engaged in a discussion about the limitation of the amount. On page 63, beginning at line 20 and continuing through line 4 on page 64, Mr. Spencer says, among other things, "he called Mr. Swope and said we don't decide what your property is worth." As aforestated, based upon the correspondence in the file, the court feels that the total value is limited to $73,085.00. However, the court will certainly allow you gentlemen an opportunity to put on

evidence in regard to this point at the hearing since it seems to involve both questions of fact and law.

I trust that this letter sufficiently answers the various questions which you gentlemen have posed and I will look forward to being with you on March 29.

Dated March 13, 1972

ORDER

This day came the parties, Norfolk Southern Railway Company as defendant and American Oil Company as claimant to the funds heretofore deposited with this Court, upon the motion of said defendant to determine the respective rights and claims of said defendant and said claimant to said funds in the amount of $73,085.00 pursuant to the provisions of § 25-46.28 of the Code of Virginia (1950), as amended; and all matters of law and fact were submitted to the Court and were argued by counsel.

Upon consideration whereof, the Court, finding the proportions in which such money is, with due regard to the respective interests of the parties therein, property payable to be as follows, doth order the Clerk of this Court to make distribution thereof as follows, to-wit:

1. To American Oil Company the principal sum of $40,000.00 together with its proportionate share of the interest accrued on said sums since the placement of said money at interest under previous order of this Court; and

2. To Norfolk Southern Railway Company the principal sum of $33,085.00 together with its proportionate share of the interest accrued on said sum since the placement of said money at interest under previous order of this Court.

Defendant Norfolk Southern Railway Company objects and excepts to the rulings of the Court distributing said fund in the manner aforesaid; and said defendant, having indicated an intention to apply for an appeal, the Court pursuant to Rule of Court 5:9 doth order the transcript of the hearing before the Court held on March 29 and 30, 1972, to become a part of the record when such transcript is filed in the office of the Clerk of this Court.

Filed June 14, 1972

ASSIGNMENTS OF ERROR

The defendant, Norfolk Southern Railway Company, as and for its assignments of error, states:

1. That the Court erred, in its opinion letter of October 12, 1971, and in paragraphs (3) and (5) of its opinion letter of March 13, 1972, in allowing to American Oil Company compensation for the unexpired portion of the Lease, including option periods contained in the Lease, thereby holding that the Lease arrangement between the Norfolk Southern Railway Company and American Oil Company had not been terminated.

2. That the Court erred in paragraphs (4) and (5) of its opinion letter of March 13, 1972, in ruling that American Oil Company was entitled to be compensated for the fee simple value of its buildings which were on the subject property rather than allowing compensation for its removal value.

3. That the Court erred in admitting into evidence the testimony of the American Oil Company's appraisers, Mr. Pollok and Mr. Economidis, concerning the value of American Oil Company's interest in the subject parcel, said testimony being contrary to paragraph 8 of the trial court's opinion letter of March 13, 1972.

4. That the Court erred in overruling the defendant's Motion to strike the evidence of American Oil Company and to enter summary judgment for the Norfolk Southern Railway Company at the conclusion of the claimant's evidence.

5. That the Court erred in overruling the defendant's Motion to strike the claimant's evidence and to enter summary judgment for the Norfolk Southern Railway Company made at the conclusion of all the evidence.

6. That the Court erred in overruling the defendant's Motion to set aside the judgment of the Court and to enter judgment for it.

7. That the Court erred in entering judgment on June 14, 1972, in favor of American Oil Company, in the principal sum of Forty Thousand and NO/100 Dollars ($40,000.00),

together with its proportionate share of the interest accrued on said sum.

Filed July 6, 1972

STATEMENT OF COUNSEL

[Transcript, page 25]

MR. WORTHINGTON: The court has had occasion to rule on certain prehearing matters and has embodied those rulings in two letters, one dated October 12, 1971, and another dated March 13, 1972 --

THE COURT: Um-hum.

MR. WORTHINGTON: -- which we move to be made a part of the record and that the record show our exception to the court's ruling embodied -- all the rulings embodied in the letter of October 12, 1971, and to all the rulings in the letter of March 13, 1972, except those found in paragraphs numbered ~~5~~ 6, 8, and 9 of the March 13th letter. That's just purely for the sake of the record.

EXCERPTS FROM THE TESTIMONY OF THE WITNESS B. A. POLLOK

[Transcript, page 32]

Q Specifically, did you make an appraisal of the property, both land and improvements, shown on those plats as the property of Norfolk Southern Railway Company?

A Yes.

* * * * *

[Transcript, page 33]

Q But as to the entire property that belonged to Norfolk and Southern and was taken by the City, what portion of that was subject to the lease to the American Oil Company?

A Oh, I'm sorry. Approximately 9,566 square feet. Only a portion of the -- the major portion of the total area, not the entire area.

* * * * *

[Transcript, page 34]

Q In making your appraisal I ask, sir, whether you made a single appraisal of the entire Norfolk and Southern property or whether you appraised it in three separate parts, that is, the portion devoted to

use as Denny Lane, the portion subject to the American Oil Company lease, and the improvements on that portion subject to the American Oil Company lease?

A I appraised it in three parts.

Q All right, sir. Will you tell us, please, what value you placed on each of the three parts?

A All right, sir.

MR. WORTHINGTON: Well, now, Your Honor, I think we would like to object to his giving his opinion on value until we establish whether that value was arrived at in consonance with the court's ruling in paragraph number 8 of the letter of March 15, 1972, in that the property on which the station building sits is considered in isolation and not in connection with the adjoining Bonney property nor the Denny Lane property.

MR. SPENCER: All right, sir.

BY MR. SPENCER:

Q Was your appraisal of this property separate and apart and exclusive of any appraisal which you may or may not have made of the adjoining Bonney property?

A Yes, was made separately.

THE COURT: In other words, your appraisal was made for only the 9,566 square feet covered by the lease. Is that right?

THE WITNESS: Your Honor, I would like -- if you will give me the privilege, maybe I should explain a little bit exactly the procedure on that.

MR. SPENCER: Judge, excuse me. He's already testified that his appraisal as to this case dealt with the 9,566 square feet subject to the lease and the 6,535 square feet devoted to Denny Lane.

THE COURT: Right.

MR. WORTHINGTON: But, Your Honor, I think what we want to make clear is as to whether this appraisal considers the 9,566 square-foot parcel in isolation as a piece of land standing by itself with no tie-in with adjoining property. And I think the witness should explain whether he did that or not.

THE COURT: I think that's what he is just going to do now.

A Yes. At first I was required by the City of Virginia Beach to make an appraisal of both parts,

the Bonney property and the railroad property as one, which I did. They later decided that it should be done differently; that the Bonney property should be appraised separately from the railroad property. I then did that. Now, of course, the railroad property takes in both Denny Lane and a portion of the service station operation. For this particular case, Your Honor, I did make a separate value of just the portion of the railroad property that the oil company leased for the purpose of determining a lessee or lessor interest in this one segment of the railroad property.

BY MR. SPENCER:

Q Go ahead, Mr. Pollok, tell us what you did, please, and tell us what conclusions you reached?

A In appraising the property that belongs to the railroad under lease to the American Oil Company I first had to find a land value. Now, in order to do that I had to first determine what its best use would be. It was my belief, and still is, that the best use, highest and best use of this property would be as an integral part of the entire service station operation.

It had a unity in use and one portion was dependent on another. So in determining that I sought some comparable sales in the area of other oil company sites.

MR. WORTHINGTON: All right, sir. Now, Your Honor, we object to any further testimony by this witness in that he has just declared that he considered the highest and best use and the basis of his appraisal was that the station property was an integral part of the Bonney property, and this Your Honor has ruled out and we would object to any further testimony along that line.

* * * * *

[Transcript, page 39]

THE COURT: Can you tell us what the highest and best use of the property under lease was irrespective of its location right next to the Bonney property? Can you tell us that?

THE WITNESS: May I ask you, sir -- then I must assume that this strip of land we are talking about would have no association or could in no way have any association with the Bonney property?

THE COURT: That's right. Can you tell us that?

THE WITNESS: Yes, sir.

MR. SPENCER: Now -- excuse me.

MR. WORTHINGTON: I think he ought to

be allowed to answer the question the court put to him.

THE WITNESS: In that event, sir, its highest and best use would change from a portion of a service station site to some other type of commercial use, in my belief. It is zoned for commercial purposes, of course, but because of its small area and its shape and configuration, by itself separately and absolutely disconnected from everything its use would have to change from a service station -- portion of a service station site.

THE COURT: Well, now, the case that Mr. Worthington just cited he cited to me before and he read it and he cited it in his memorandum. If I remember correctly, the court upheld that proposition that he would have to consider it strictly on its own as if it were in isolation, not located next to another piece of property that was subject to a lease and therefore could make it into a larger piece of property, and that was my intention when I wrote paragraph 8.

* * * * *

[Transcript, page 44]

THE COURT: I'll let him testify over Mr. Worthington's objection.

Go ahead and let's see what you have to say.

THE WITNESS: Your Honor, maybe I can clarify it this way, Your Honor.

MR. WORTHINGTON: We save the point, Your Honor.

THE COURT: Yes, sir.

A I was instructed to use the total value of this property which was previously set by the court as $73,085.00. So actually, to get to the value of the land I merely subtracted the value of the improvements from the total of $73,085.00. So to get to the point and answer the question, my value of the two separate parts, the land, would be --

BY MR. SPENCER:

Q First of all, Mr. Pollok, if I may interrupt you, tell us what value you put on the improvements, if you will?

A All right. Yes, sir. The improvements I placed a value of $33,161.00. Now, that included the main station building, paving, curbs, sidewalks, bumper guards, and that sort of thing.

* * * * *

[Transcript, page 46]

THE COURT: This $33,161.00, does it include any improvements on the Bonney property?

THE WITNESS: No, sir.

THE COURT: All right. Well, go ahead.

A All right. So arriving at the value of $33,161.00 for the improvements --

MR. WORTHINGTON: Excuse me. We save the point on that ruling of Your Honor.

THE COURT: All right.

A -- I merely subtracted that from the total previously established value and came up with a land value of $39,924.00. So I have a total value of $73,085.00.

BY MR. SPENCER:

Q And your figure for the value of the land was $39,924.00?

A Yes, sir.

* * * * *

[Transcript, page 50]

A Denny Lane had a value I felt -- I gave it a dollar a square foot. With Denny Lane having an area of 6,535 square feet, it would be $6,535.00 just for the Denny Lane area.

* * * * *

BY MR. SPENCER:

Q All right, sir. Mr. Pollok, can you now, using the figure which you have stated to be the value of Denny Lane, tell us your valuation of the land leased to the oil company?

A As of the date of taking the value of the land only?

Q Yes.

A Yes. The value of the land only --

THE COURT: Land under lease?

A land under lease, present worth of the land which is encumbered by the lease was $11,654.00 is what it is worth under the existing encumbrances.

BY MR. SPENCER:

Q And that is what the land was worth to whom?

A To the railroad.

THE COURT: $11,654.00?

THE WITNESS: Yes, sir.

BY MR. SPENCER:

Q Give me the figure again?

A $11,654.00.

Q Now, then, will you tell us, please, the formula used by you and the manner in which you arrived at the value of the land to the railroad?

A Yes, sir.

MR. WORTHINGTON: Objection continues, Your Honor.

THE COURT: All right, sir.

MR. WORTHINGTON: Continuing until further notice.

A This land was encumbered by a lease -- original lease of twenty years, four five-year options. I treated it on a reversion method. To explain further, I used standard capitalization tables and treated it as what its present worth is as of the 17th of March versus what its worth would be fifteen to sixteen years hence.

Now, this is based on the theory, Your Honor, that if you go to the bank and borrow a hundred dollars and they charge you eight percent interest, then they actually only give you ninety-two dollars, so you are getting ninety-two dollars today, which you are willing to accept, in lieu of waiting a year to get a hundred, so that is the premise that I used and the theory that I worked on. So I took the lease, using the capitalization tables and the formula, and I worked out the value of the lease as $6,222.00. Now, at the end of the lease period

the land is to be reverted back to the railroad. The land I had estimated to be valued if free and clear, unencumbered in any way, at $39,924.00, but since it is encumbered with this lease, then the railroad has to accept or would accept less now than they would sixteen years from now, so I worked it out with the formula and I came out with a present worth of the income extreme of $6,222.00. To that I have to add the present worth of the land as if they could get it back right now, which is $11,654.00, giving a total award to the railroad between the railroad and the oil company of $17,876.00.

THE COURT: Seventeen thousand what now?

A Eight seventy-six.

THE COURT: To whom?

A To the railroad. That would leave the balance from the $73,085.00 of $55,209.00 to the oil company.

BY MR. SPENCER:

Q How much to the oil company?

A $55,209.00.

MR. WORTHINGTON: We'd like to state for the record, Your Honor, an additional ground of objection to this testimony that the legal test

of the value of leasehold is the fair market value of the leasehold and the rent reserved, and I think the demonstration by this witness that he used a different method disqualifies that testimony under legal authorities.

THE COURT: All right.

MR. WORTHINGTON: And we'd save the point if Your Honor overrules our objection.

THE COURT: All right, the point is saved.

BY MR. SPENCER:

Q Then of the $55,209.00 which you say the oil company is entitled to, $33,161.00 of that is your appraisal of the value of the improvements as of the date of the taking?

A Right, sir.

Q And you then put --

A Put $22,048.00 as a leasehold interest that the lessee, the oil company, would have, which is the same as a benefit of having a very low lease and they could in turn re-lease at a higher figure. In other words, if they could get five dollars for ten years they'd have fifty and turn around lease it for ten dollars at ten years they'd have a hundred, so they got a leasehold interest of fifty dollars.

Q And in this case you say they had a leasehold interest --

A Of $22,048.00.

* * * * *

[Transcript, page 96]

BY MR. WORTHINGTON:

Q Mr. Pollok, for convenience I hand you a paper which has got some red hash marks on it and some blue coloring on it and suggest to you -- and three letters, A, B, and C, and suggest to you that this is a replica of the plat of the subject property, but it's been marked up a little bit for the convenience of reference. Do you agree that that's the same property you have been testifying about?

A Yes, it is.

MR. WORTHINGTON: All right.

Your Honor, we offer that then as Respondent's Exhibit --

THE COURT: It will be Respondent's Exhibit 4.

All right, a certain plat marked in three parcels, A, B, and C, C in blue and A and B with diagonal red lines, will be marked Respondent's Exhibit 4.

(So marked by the court.)

BY MR. WORTHINGTON:

Q Now, Mr. Pollok, in your testimony you have assumed that parcel B is the land that the oil company has the lease on, have you not?

A Yes, sir.

Q Now, you have testified as to its -- the value of the land itself, leaving the value of the building aside, without reference to parcel A being next to it, have you not?

A Yes, that's correct.

Q But in assessing its highest and best use you have considered that parcel C is adjacent to it and is usable with it, have you not?

A Right, yes.

Q So that in order to be used as a filling station, parcel B would have to have parcel C used in conjunction with it at the same time. Is that right?

A To be a --

Q Parcel C would have to be used with it?

A To be a proper operation, yes, sir.

Q You could not have a filling station on parcel B with a street frontage of something like seventy or eighty feet on one road and maybe ninety feet on another road at the extremes of that trapezoid which is represented as B?

A No, it would be very unlikely that anybody would attempt to operate in a station like that.

Q Well, now, then, have you made any estimate as to what the value of that land would be standing in isolation as if parcels A and B -- C and A were not there?

MR. SPENCER: All right, now, if Your Honor please, it is time now for me to interpose an objection, and that is that we are past the point at which there is consideration to be given to the highest and best use. That was a matter in connection with the condemnation proceeding, which was settled by the agreement after taking, and the question of highest and best use is not involved here at all. All we are doing now is allocating the fund that is within the court.

THE COURT: All right, Mr. Worthington?

MR. WORTHINGTON: Well, Your Honor, this is cross-examination and I think it is perfectly clear that this witness has said that in trying to arrive at the allocation of these funds he had to consider what parcel B was usable for, and that he based his valuation on its highest and best use, and I'm trying to find out what he considered in making the assumption

of its highest and best use. I think it is perfectly legitimate cross-examination.

THE COURT: I think it is pertinent and legitimate.

MR. SPENCER: Note my exception.

THE COURT: All right.

(The reporter read the question.)

A No, I have not.

BY MR. WORTHINGTON:

Q And you are not prepared to do that at this time?

A No, I am not.

Q You would be prepared to say that the value of parcel B in isolation from parcel C and A would be considerably less than the assumption that you made of its highest and best use as a filling station?

A Yes, I would say that.

* * * * *

[Transcript, page 102]

BY MR. WORTHINGTON:

Q I hand you Complainant's Exhibit No. 5, which purports to be that lease, and ask you to refer to article 1, clause B, which is on I think the second page.

A Yes, I have it.

Q All right. Would you read that portion of the lease, please?

A All right. If at any time it shall be held that railway cannot lawfully permit industry to use or continue to use the property hereby demised as herein provided, railway shall have the right to terminate this lease forthwith and shall not be liable to industry for any damages whatsoever which may result therefrom.

Q All right. Now, did you take into consideration in valuing this lease the presence in the lease of that language?

MR. SPENCER: Your Honor please, I object to that. The court has already ruled that that has no effect on this, because this -- the values were fixed as of the date of the taking, and again, we are going back to an effort to use that lease clause as having some validity with reference to this condemnation, which the court has twice ruled it did not.

THE COURT: Wait a minute now. The court has ruled that that particular clause does not operate as a condemnation clause. I agree with that. But -- and I have also ruled that the rights are to be determined as of the date of taking March 17, 1969, I believe is the date, true. But you are asking to be compensated for the remainder of the value of the lease from that day on, so it is only logical to me that

the value of the lease has to be determined in accordance with the language of the lease. And that's part of the language of the lease.

MR. SPENCER: That may be so, Your Honor, but they have got to show, then, that something could intervene so that that clause could become effective, and there's been no showing of this. The situation as of the date of the taking, March 17th, that clause had not been exercised, and unless they can show that something was going to intervene, then I submit that it is not relevant as to what might have happened.

THE COURT: I don't agree with that. The only thing I agree with is that that did not operate as a condemnation clause and that if it did operate as a condemnation clause we wouldn't be here now. But that's the only thing I agree with. I think that the witness has to determine the value of that lease in accordance with the language in the lease.

MR. SPENCER: Note my exception.

THE COURT: All right.

BY MR. WORTHINGTON:

Q The question, I believe, in substance

was, Mr. Pollok, did you take into account in valuing the lease the presence of that language?

A No, I didn't.

Q Were you instructed not to regard it in any way?

A Yes, I was instructed not to.

EXCERPTS FROM THE TESTIMONY OF THE WITNESS T. J. ECONOMIDIS

[Transcript, page 113]

BY MR. SPENCER:

Q Will you state your name, please?

A Theodore J. Economidis.

Q And your address, Mr. Economidis?

A Number 3 Tidewater Executive Center, Norfolk, Virginia.

Q And your occupation, sir?

A Real estate appraiser.

MR. WORTHINGTON: We stipulated his qualifications.

MR. SPENCER: I remind the court we stipulated qualifications, judge.

THE COURT: All right, sir.

BY MR. SPENCER:

Q Mr. Economidis, at my request did you make an appraisal as a professional real estate appraiser regarding the proper division of the funds paid in to court in connection with this case?

A Yes, sir.

Q And will you tell us, please, in making your appraisal what basic premises did you assume?

A That the -- first of all, the court had set the amount of the award. This is the allocation between the lessor and lessee of the $73,085.00. And secondly, I was instructed the building -- the improvement value of $33,161.00, as Mr. Pollok has testified to, is the improvement value.

Q All right, sir. Go back, if you will. Did you at a prior time make a partial appraisal of this property for the City of Virginia Beach?

A Yes, sir. In 19 -- March of 1969.

Q And at the time you made that appraisal was the -- were structures, the improvements, still on the land, and did you walk through them and take measurements and do the things that an appraiser would normally do?

A Yes, sir, except not with the finished appraisal of that portion of the property.

Q You did not complete the appraisal of the building?

A No, sir.

Q From your recollection and your examination I ask whether you feel as an expert that you are justified in accepting Mr. Pollok's figure of $33,161.00?

A Yes, sir, this is reasonable and in line. I definitely would feel that it would be in line.

Q All right, sir. Now, then, were you furnished a copy of the lease which has been introduced in evidence between the Norfolk Southern Railway and the American Oil Company?

A Yes, sir. I have a copy of the lease.

Q Using that lease and your knowledge of the property which is the subject of the condemnation, the whole property, I ask did you make a division of the $73,085.00 which had been paid in to court?

A Yes, sir, I did.

Q How did you divide it?

MR. WORTHINGTON: Now, Your Honor, we object on similar grounds to similar questions of the previous witness, and that is, that we are dealing here with fair market values and that we object to any opinion on a fair division as not

being the lawful measure of what we are here for.

THE COURT: I assume that he did it on the basis of fair market value.

Is that how it was done, Mr. Economidis?

THE WITNESS: Yes, sir.

* * * * *

[Transcript, page 116]

A The appraisal process of course takes into account the fair market value, and the division is

a -- based on the proper appraisal process as the problem is presented, and in a case such as this with the -- where we have a figure, an assumed land value or the land allocation for this particular property as of the date of taking of $39,924.00.

BY MR. SPENCER:

Q How did you arrive at that figure?

A This is $73,085.00 less $33,161.00.

Q Which is the improvement?

THE COURT: What did you say that figure was again, thirty-nine what?

THE WITNESS: $39,924.00.

BY MR. SPENCER:

Q So that's the $73,085.00 after you take away the value of the building as fixed by --

A The improvements, depreciated value of the improvements. So what is left is an allocation of this $39,924.00 into the respective interests of the lessor and lessee. And by the appraisal -- proper appraisal methods, of course, we have an existing lease that has one year to run plus the three five-year options, or a total of sixteen years. So what I have based this on is, first of all, the evaluation of the lessor's interest by use of the interest and annuity tables, so we'll have a value for the lease plus a reversionary value of the land at the end of this lease period for a total value of the lessor's interest, and this would total $19,760.00.

MR. WORTHINGTON: Again, Your Honor, we add the objection that this is going at the thing exactly backwards and in the teeth of the law, which requires, as Your Honor has ruled, that you value the tenant's interest and what's left goes to the landlord. You don't value the landlord's interest and what's left goes to the tenant.

THE COURT: I'm going to accept his testimony for what it is worth, and I'm going to take into consideration how he reached his conclusions.

Go ahead, Mr. Economidis.

MR. WORTHINGTON: We save the point, Your Honor.

BY MR. SPENCER:

Q Mr. Economidis, Mr. Worthington spoke just as you gave the amount, so will you state that again, please. You had testified that the value of the lease plus the reversion gave you the lessor's total interest of what?

A $19,760.00.

Q All right, sir.

A And the remainder of $20,164.00 is the lessee's interest in this property. Again going back to the POOR lease that was set up, this is the reason the lessee has an interest, that the lease was favorable toward the lessee and not toward the lessor.

THE COURT: So if I understand your position, it is your feeling that the $73,085.00 should be divided -- or that the lessee should get $33,161.00 for the improvements, plus $20,164.00 for the lease. Is that right?

THE WITNESS: Yes, sir.

THE COURT: And that the lessor should receive $19,760.00?

THE WITNESS: Yes, sir.

* * * * *

[Transcript, page 128]

BY MR. WORTHINGTON:

Q Now, Mr. Economidis, did you in arriving at your conclusions consider what was the highest and best use of parcel B at all? Did that enter into your calculations?

MR. SPENCER: I object, Your Honor.

MR. WORTHINGTON: I'm just asking him whether it enters into the calculations.

MR. SPENCER: I object to even asking him.

THE COURT: Overruled.

MR. SPENCER: Note my exception.

A Parcel B and parcel C have a contiguity of use, ownership -- not ownership, but the use, service station, highest and best use for the entire parcel -- both parcels were under lease and so forth -- for a service station.

BY MR. WORTHINGTON:

Q For the purpose of the computation you have just testified you did take that factor into account?

A As a part of the whole as it sits.

* * * * *

[Transcript, page 131]

BY MR. SPENCER:

Q Mr. Economidis, you were asked on recross did you take into account the highest and best use of the land. Will you go back into your notes -- and you responded, yes, as a service station site. Will you go back into your notes and explain to us in what way you took that into account?

A (No reply)

Q Let me rephrase the question.

As a matter of fact, I ask you whether or not in determining a division of the funds and as between a lessor and a lessee it made any difference as to what the land was being used for? In determining the division between those two parties, does the use of the land enter into it or is it merely a question of the effect of the lease upon the remainder?

A Well, the use and the lease both are tied in.

* * * * *

[Transcript, page 132]

MR. WORTHINGTON: Your Honor, we move to strike out all the evidence of the claimant as regards the value of the land as being on an improper basis. Primarily on the admission of both the valuation of witnesses that the highest and best use of the land was considered to be in conjunction with adjoining land, which Your Honor has ruled out, and then for the other reasons we have assigned.

EXCERPTS FROM THE TESTIMONY OF THE WITNESS W. E. TOLSON

[Transcript, page 136]

Q Now, then, passing to the value of the oil company's leasehold interest in the parcel B land, I hand you Claimant's Exhibit No. 5, which purports to be the lease, and ask you if you examined that lease in that connection?

A Yes, sir, I did.

Q All right. Now, what period of time did you use in arriving at the value of the lease?

A Well, as everybody said, it is very

complicated. Well, it had run approximately four years of the first five years. Then it was remaining three five-year options.

Q Right.

A And at a rent of starting at five then increasing through each option period, and that was five hundred a year for all the parcel known as parcel B, which was roughly 9,600 square feet. And parcel A was not in my opinion included in the leased premises.

Q What assumption were you asked to make as to whether parcel C was to be considered in the value of the lease on parcel B?

A Appraised it so far as it is separated from parcel under the lease, but saying that Norfolk Southern had fee simple title in parcel A, appraised that separately.

Q What about parcel C, the Bonney property? What assumption did you make about that?

A As put together it was a highest and best use of B and C together as a service station use, tied together.

Q Were you asked or not to disregard the parcel C as being tied in with parcel B?

A Yes, disregarded it under the present, correct.

Q All right. Making that assumption then, what, if anything, did you find or in your opinion was the highest and best use of parcel B standing in isolation?

A In isolation according to the lease, which was strictly for oil company purposes was the use of it, it was not good for a service station per se.

Q What is the minimum square footage for a service station?

A As of that time approximately fifteen thousand square feet minimum.

Q All right. And how many square feet are in parcel B?

A About 9,700 in round figures.

* * * * *

STIPULATION OF TESTIMONY OF THE WITNESS E. B. HEATH

[Transcript, page 177]

MR. WORTHINGTON: If it please the court, for the sake of making a record in this case, we subpoenaed and brought here today a witness and Mr. Spencer and I have agreed on a stipulation as to what he would say.

THE COURT: All right.

MR. WORTHINGTON: And it bears on a subject which Your Honor has ruled out of the case, but we want to vouch the record merely to make the record.

THE COURT: All right, sir.

MR. WORTHINGTON: The witness's name is Eldon B. Heath, and he has been in the business of moving buildings for more than twenty years, and he would testify that he was familiar with the gas station building which is in issue in this case and that the fair cost of moving the gas station building, including the lifts in the bays and reestablishing the building on another site, including the lifts in the bays, would be $10,000.00. And Mr. Spencer stipulates that he would testify to that if he were present here.

MR. SPENCER: I have never seen the gentleman, Your Honor. Mr. Worthington related this to me, and I'm perfectly willing to stipulate that if called and permitted to testify that this is what he would say. I do not waive my objection to the admissibility or relevance of his testimony.

* * * * *

EXCERPTS FROM THE TESTIMONY OF THE WITNESS J. M. DILLARD

[Transcript, page 215]

BY MR. SWOPE:

Q State your name?

A J. M. Dillard.

Q Mr. Dillard, what is your home address?

A 9909 Craig Street, Raleigh, North Carolina.

Q Where are you employed?

A Norfolk Southern Railway.

Q In what capacity?

A Assistant vice-president industrial.

Q How long have you held that position?

A About sixteen years.

Q Mr. Dillard, you have heard the testimony today about the rental of the parcels set forth in Respondent's Exhibit No. 4, and specifically with reference to the rental value of parcel B in Respondent's Exhibit No. 4. Now, in accordance with the terms of the lease, the rental under the terms of the lease for the first five years was $500.00 per year and for the next five years $700.00, and the final term of five years at $800.00. Why did the railroad company acquiesce in this rental value per year to American Oil Company?

THE COURT: I understand you object.

Let the record show that Mr. Spencer objects to this gentleman's testimony throughout, and that Mr. Swope and Mr. Worthington are putting it on for the purpose of vouching the record.

A It was extremely important that we keep that property intact where we could use it when we needed it and if we needed it, by order of resolution of the board of directors of our company. Therefore, we were happy to lease it at a nominal rental with those two cancellation clauses. They were the important things to us.

BY MR. SWOPE:

Q All right. When you say those two cancellation clauses, I show you Claimant's Exhibit, I believe it is No. 5, and ask you whether you can find the two cancellation clauses which you have just referred to?

A Well, I'll mention one on sheet 2 under article 1 paragraph B.

You want me to read it?

Q No.

A That is one.

Q All right, sir.

A And let me find this other one. The one I am looking for is where we can cancel it if we need to put a railroad track on it.

Q That's one a full turn back. Here is article 1 entitled Savings Provisions. And are you now saying --

A That's right, both of those, then, those two cancellation clauses. A and B under article 1.

Q And the railroad felt it was of some importance to keep -- to have --

MR. SPENCER: If Your Honor please, I object to leading his witness.

THE COURT: I ought to sustain that no matter, although --

BY MR. SWOPE:

Q Now, Mr. Dillard, did you receive notice from the City of Virginia Beach that the railroad had to give up its occupancy of parcels A and B on Respondent's Exhibit No. 4?

A Yes, sir.

Q And do you recall who sent that notice from the City?

A I have got it here. I think it is the assistant attorney for the City of Virginia Beach, and we were to quit and vacate it by a certain date, I believe April 1st. I have that in here if it is needed.

Q And upon receipt of that notice then what did you -- what did the railroad do with respect to giving any notice to American Oil Company?

A Well, I recommended that our company immediately issue a letter of cancellation at midnight the day before we were to quit and vacate it, and I immediately called the American Oil Company to let them know what had happened and why we were doing it.

Q Do you recall who you talked to when you called American Oil Company?

A I'll have to look at the letter. I have it here. I can find it, I believe, fairly promptly.

Yes, sir, I have a memorandum here dated March 25, 1969, that I called Baltimore, Maryland, telephone 727-6700, and my memorandum says in absence of Messrs. Conley and Compton of the real estate department of American Oil Company I talked with Attorney Ryan. He says Mr. James Burnette is handling this matter, and Mr. Ryan said he would explain to Mr. Burnette why we are cancelling lease.

Q All right, sir. When was that telephone call made?

A My memorandum is dated March 25, 1969.

Q All right, sir, and let me show you what has heretofore been introduced as Claimant's Exhibit 1 and ask you if you recognize that document?

A Yes, sir, I recognize it.

Q What is that?

A It is letter of cancellation.

* * * * *

[Transcript, page 220]

BY MR. SWOPE:

Q Mr. Dillard, in response to either your telephone conversation with Mr. Ragan or this letter did you ever receive any protest from anyone with American Oil Company about vacating the premises as called for in that letter?

A No, sir.

MR. SWOPE: That's all I have. Thank you.

MR. SPENCER: Of course the court recognizes my oncoming objection.

THE COURT: I understand, yeah.

CROSS-EXAMINATION

BY MR. SPENCER:

Q Now, in order to keep the record correct, Mr. Dillard, do I understand your testimony to be that the purpose of the cancellation clauses in this lease was so you-all could preserve the land for railway use?

A That's the purpose of one cancellation clause.

Q What was the purpose of the other one?

A To cover anything where we could no longer legally lease it.

Q All right, sir. Who prepared the lease?

A It is a form lease.

Q By whose company?

A By Norfolk Southern Railway Company.

Q So it is your lease?

A That's right.

Q Is there anyplace in that lease in which it states that in the event of condemnation or eminent domain proceedings such and such will result?

MR. SWOPE: Your Honor, the lease speaks for itself. I don't think he can answer that.

BY MR. SPENCER:

Q You are familiar with the form, aren't you?

THE COURT: Go ahead, Mr. Spencer. This whole testimony is under objection anyway. So

let us -- the case is probably going to go up no matter which way I rule, so let us go up with a complete record.

MR. SWOPE: All right. We except, Your Honor.

BY MR. SPENCER:

Q Is there anyplace in there where it says anything about eminent domain or condemnation?

A I can only say that we thought this covered that.

Q You really thought that?

A Our general counsel thought that.

Q All right, sir. Why didn't you put the word "condemnation" or words "eminent domain" in it?

A When our general counsel thought this covered it I couldn't go any further than that.

* * * * *

[Transcript, page 224]

Q Hadn't you-all previously sold land in parcels that cut this so-called Kempsville Branch?

A No, sir.

Q What about the Pyramid land sale?

A To Guille Steel? Is that where you are speaking of?

Q No, not Guille Steel. Pyramid.

MR. SWOPE: Previous to when, what time?

BY MR. SPENCER:

Q Previous to 1965.

A Wasn't any of this right-of-way sold to Pyramid.

Q Wasn't it a part of the Kempsville Branch?

A No, sir.

Q All right, sir. I refer you specifically to a sale deed dated December 16, 1958, to the Pyramid Realty Development Corporation, conveying a portion of property to the center line of the railroad's abandoned Kempsville branch line track. Aren't you familiar with that, Mr. Dillard?

A I am thoroughly familiar, and it did not cut this right-of-way. Maybe that description may have included a little portion. I'm familiar with it. It is where Guille Steel Products Company is.

Q Doesn't it say it goes to the center line of the track?

A You are reading something that says that, but it did not cut this right-of-way. This right-of-way stayed intact. I know that to be a fact.

* * * * *

[Transcript, page 231]

Q All right, sir. Once you-all had it classified as side trackage you could have rented it, leased it, done anything you wanted to with it, could you not?

A Yes, sir.

Q And where did this line run? From and to where? To what place did it run?

A Kempsville Branch was Providence Junction through Kempsville to Euclid.

Q All right, sir. And Euclid is on the Norfolk and Southern line from Norfolk to Virginia Beach, old Virginia Beach proper?

A That's right.

Q And Providence Junction is on the line running south from Norfolk into Chesapeake?

A Into Elizabeth City and on into Charlotte.

Q And on into Elizabeth City, North Carolina?

A Yes. It is a main line.

Q So this was a little curved connector link?

A Yes.

Q And you-all owned all of the track from Norfolk to Virginia Beach?

A Yes, sir.

EXHIBITS

Claimant's Exhibit No. 1

Letter from City of Virginia Beach, Virginia, to Norfolk Southern Railway Company, Dated March 18, 1969

Our records indicate that you are the owner or have an interest in the above parcels of land, which are part of the street projects shown above. Since we have been unable to negotiate the purchase of your property, it was necessary for us to acquire title by eminent domain proceedings.

We have recorded a Certificate of Deposit in the Clerk's Office of the Circuit Court of the City of Virginia Beach, in Deed Book 1102, at Page 289, recorded on the 17th day of March, 1969, in the amount of $40,300.00, under Certificate Number 104. This is the amount representing the estimated value of the property and damages to the residue within the project. A copy of the said Certificate is enclosed.

This Certificate vests title to the parcels of land in the City of Virginia Beach, Virginia. Eminent domain proceedings will soon be brought to obtain indefeasible title to the property.

By recording this Certificate, the City is permitted to enter upon and take possession of the land affected. You may withdraw the funds in deposit by making application to the Court in the manner described by its rules. When the condemnation suit is commenced, you will be served with a notice advising you of the date Commissioners will be appointed to determine

just compensation due for property taken and for damages, if any, to the residue of the tract.

We regret the necessity of using this procedure, but "time is of the essence."

This is also notice to quit and vacate the premises prior to April 1, 1969.

Claimant's Exhibit No. 2

Contract of Lease Between Norfolk Southern Railway Company and American Oil Company
Dated February 1, 1965

THIS AGREEMENT, Made and entered into this 1st day of February, 1965, by and between NORFOLK SOUTHERN RAILWAY COMPANY, hereinafter referred to as "Railway," and AMERICAN OIL COMPANY, whose address is 1518 Willow Lawn Drive, Richmond 30, Virginia, hereinafter referred to as "Industry."

WHEREAS, Industry desires to lease the property hereinafter described, and Railway is willing to lease said property to Industry, at the rental and upon the terms, covenants and conditions hereinafter set forth.

NOW, THEREFORE, this contract WITNESSETH, that Railway, for and in consideration of the premises, and the terms, covenants and conditions hereinafter set forth, and the further consideration of the rents to be paid by Industry, doth lease unto Industry the following property located at Kempsville, City of Virginia Beach, State of Virginia, and more particularly described as follows:

That portion of Railway's right of way shown outlined in RED on print of Railway's drawing numbered H-9474, entitled "NORFOLK SOUTHERN LAYOUT AT KEMPSVILLE, VA.", attached hereto as a part hereof.

TO HAVE AND TO HOLD, subject to prior cancellation by Railway as hereinafter provided, said property unto Industry for and during a term of five (5) years from and after the 1st day of February, 1965, that is to say until the 1st day of February, 1970, at a rental of $500.00 per annum. Upon the expiration of the first five year term, Industry shall have the option to renew this lease for an additional term of five years, upon all of the terms and conditions contained herein, except that the rent for the second five year term shall be $600.00 per annum; and Industry shall have a like option upon the expiration of the second five year term, except that the rent for the third five year term shall be $700.00 per annum; and Industry shall have a like option at the expiration of the third five year term, except that the rent for the fourth five year term shall be $800.00 per annum. The rental shall be paid at Railway's general offices in Raleigh, North Carolina, on the first day of February of each year during the existence of this agreement. Industry shall notify Railway of its intention to exercise each option by written notice given at least ten (10) days prior to the expiration of each five year term. This lease may be terminated as

provided in paragraph (a) of Article One during any of the four five year terms.

It is expressly understood and agreed by and between the parties hereto and they mutually covenant and agree to and with each other, on behalf of themselves, their heirs, executors, administrators, successors and assigns, as follows, to-wit:

ARTICLE ONE-Saving Provisions.

(a) Railway reserves the right to terminate this lease at any time during the original, or any extended term, without being liable to Industry for any damages whatsoever which may result therefrom, by giving Industry ninety (90) days' written notice of its intention to do so, if it shall be determined by Railway's Chief Engineer that this portion of Railway's right of way is needed by Railway for the purpose of building thereon a railroad track or tracks.

(b) If at any time it shall be held that Railway cannot lawfully permit Industry to use or continue to use the property hereby demised, as herein provided, Railway shall have the right to terminate this lease forthwith and shall not be liable to Industry for any damages whatsoever which may result therefrom.

ARTICLE TWO - Improvements on Property.

Industry, at its own cost and expense, shall have the right to place or erect warehouses and other structures

and machinery and fixtures on the property hereby demised and the right to remove the same within thirty (30) days after termination of this contract, and shall have the right to use any building or structure now on said premises, provided, however, that all such rights shall be enjoyed subject to the following conditions, to-wit:

(a) Railway shall not be responsible for any repairs to any building or structure now on the premises or to any building, structure, machinery or fixture that may be placed thereon by Industry.

(b) Industry shall not remove, renew, alter or change any structure, machinery or fixture now on the premises without the written permission of Railway unless the same were placed or erected on the premises by Industry pursuant to a prior agreement with Railway or one of its predecessors in title containing the right of removal and which right of removal was and is effective on the date of the execution and delivery of this lease.

(c) Industry shall pay all taxes, levies and assessments made on or against all structures, buildings, machinery and fixtures placed or erected on the premises by Industry.

(d) Industry, at its own cost and expense, shall remove all buildings, structures, machinery and fixtures which it may have placed or erected on the premises within thirty (30) days after termination of this lease; and, for any

party of such thirty-day period any such buildings, structures, machinery and fixtures remain on the premises, Industry shall pay rent at the rate herein specified. Any and all such structures, machinery and fixtures not removed by Industry within thirty (30) days after termination of this lease shall become the sole property of Railway, or Railway, at its option, may remove the same at the cost and expense of Industry.

(e) Railway shall have a landlord's lien to secure payment of the rent on all buildings, structures, machinery and fixtures placed and erected on the premises by Industry, and no such building, structure, machinery or fixture shall be removed from the premises unless and until Industry shall have paid all rent due hereunder, and all taxes, levies and assessments made thereon up to the time of removal, provided, however, this provision (e) of ARTICLE TWO shall not extend the time within which any such building, structure, machinery or fixture may be removed from the premises after termination of this lease.

ARTICLE THREE - Loss by Fire, etc.

(a) The damage or destruction by fire or other casualty of any building, structure, machinery or fixture located on the premises and as to which Industry has the right of removal shall not relieve Industry of any of its obligations under this lease. In the event of any such damage or loss, Industry

at its own cost and expense, shall promptly remove from the premises all wreckage and debris and may, but shall not be obligated to, rebuild, repair or replace any such damaged or destroyed building, structure, machinery or fixture.

(b) In the event of damage or destruction by fire or other casualty of any building, structure, machinery or fixture on the premises owned by Railway, Railway shall have the right to terminate this lease, or to rebuild, repair or replace such damaged building, structure, machinery or fixture.

ARTICLE FOUR - Restrictions on Use of Premises.

Industry shall not use the premises nor any building or structure now on or placed or erected thereon except for the purposes of its general line of business, nor use the same in any manner that is objectionable to Railway, and specifically agrees:

(a) to keep the premises and the buildings and structures which are or may be placed on the premises hereby leased and the approaches thereto at all times in good and safe condition; and hereby releases Railway from any and all duty of exercising care to have or keep the premises or the approaches thereto in a safe and proper condition for the use of Industry or any servant, agent, employee, patron or business associate or any other

person using the premises in connection with or by reason of the occupancy thereof by Industry;

(b) that no building, structure, machinery or fixture placed or erected on the property shall be situated so as to endanger any present or future building or structure of Railway by fire or otherwise, and no inflammable material shall be stored, except in unbroken original containers, or allowed to accumulate in or near any building or structure on the property hereby leased;

(c) that artificial lighting in pump-houses, warehouses or other enclosures where oil or other inflammable supplies are handled or stored, except when in unbroken original containers, shall be by electricity, and the 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 applicable local ordinance, or State or Federal law which may be in effect during the term of this lease.

ARTICLE FIVE - Release and Indemnity of Railway

Industry hereby agrees to release, indemnify, protect and save Railway harmless from and against all liability because of any loss or damage to the person or property of Industry while upon the premises hereinbefore described from any cause whatsoever, including loss by fire howsoever caused, and from and against any liability because of any injury to any person or property whatsoever happening upon the property hereinbefore described, whether the same be in connection with the rental or use of the property or not, it being expressly understood and agreed that Industry shall, at all times, protect, indemnify and save Railway harmless from any and all claims and demands arising or growing out of or in anywise connected with the use or occupancy of the property by Industry, or by any assignee or subtenant of Industry (whether such assignee or subtenant occupies the property with Railway's consent or otherwise) or to any of its or their servants, agents, employees, patrons or business associates while in or upon the property or any part thereof or any approaches thereto.

ARTICLE SIX - Default.

(a) If the rental, or any part thereof, shall be at any time in arrears and unpaid for ten (10) days after it falls due, or upon the breach by Industry of any covenant in this

lease contained, or if the premises be deserted or vacated, Railway shall have the right to enter upon the premises at once, by force or otherwise, and take possession thereof, without being liable for any damages or prosecution therefor; and upon such entry being made, all interest and estate of Industry in the premises shall forthwith cease and determine;

(b) Railway's right of entry shall not be waived or lost by reason of Railway failing to make entry for any prior default in the payment of rent or any prior breach of any covenant by Industry, but the right of entry may be exercised by Railway at any time during the term hereof or any renewal or extension hereof;

(c) In addition to the right of entry and cancellation of this lease, Railway shall have the right to collect all rent which may have accrued under this lease up to the time of such entry, and for this purpose shall have the right of distraint and the right to maintain any action either in law or in equity given under the laws of the State wherein the property is situated for recovery thereof.

ARTICLE SEVEN - Assignment.

(Omitted in original lease)

ARTICLE EIGHT - Covenants.

Industry covenants and agrees to and with Railway that it will faithfully keep and perform all of the covenants

and conditions of this lease, and will faithfully pay the rents as herein provided, and will, upon the termination of this lease, by re-entry or cancellation or otherwise, quietly yield and surrender the premises unto Railway, and that it will deliver said premises unto Railway in the same good and proper condition they now are, reasonable wear and tear and damage by Acts of God excepted.

ARTICLE NINE - Notices

All notices by Railway to Industry concerning any matter connected with this lease shall be in writing and shall be deemed to be duly given if deposited in any general or branch post office, letter box or mail chute, enclosed in a post-paid envelope addressed to Industry at the above address.

ARTICLE TEN - Premises Subject to Mortgages.

It is understood and agreed between the parties hereto that the property hereby leased unto Industry is subject to the lien of Railway's First Mortgage to Manufacturers Hanover Trust Company, as Trustee, dated as of July 1, 1938; also, subject to the line of its General Mortgage and Deed of Trust dated as of June 1, 1960 to The Chase Manhattan Bank, as Trustee, and also subject to the lien of its Second General Mortgage and Deed of Trust dated as of April 1, 1963, to

United States Trust Company of New York, as Trustee, and that this lease is made expressly subject to the liens of said Mortgages.

This lease agreement is made expressly subject to all of the rights of Virginia Electric & Power Company under a certain indenture between Norfolk Southern Railroad Company, predecessor of Norfolk Southern Railway Company and Virginia Electric & Power Company dated as of March 1, 1930, recorded in the Clerk's Office of the Circuit Court of the City of Virginia Beach, Virginia, in Deed Book 167, page 558 and in the Clerk's office of the Circuit Court of the City of Chesapeake, Va., in Deed Book 607, page 170 and also expressly subject to supplemental indenture thereto dated April 1, 1935, recorded in the Clerk's office of the Circuit Court of the City of Virginia Beach, Va. in Deed Book 178, page 468, and in the Clerk's office of the Circuit Court of the City of Chesapeake, Va. in Deed Book 622, page 419.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed in duplicate, as of the day and year first above written.

Claimant's Exhibit No. 4

Letter from American Oil Company to Counsel for Norfolk Southern Railway Company Dated December 1, 1969

This will acknowledge receipt of your letter dated November 10, 1969.

I find it hard to believe that the position stated in your letter of October 29, 1969 is actually the position of the Norfolk Southern Railway. It seems strange that Norfolk Southern Railway would deny any interests on the part of The American Oil Company in regard to subject location particularly since a portion of the award was based on a building and real estate improvements owned and constructed by The American Oil Company. Surely you must realize that the value of your property was enhanced by these improvements. Why did you insist in your letters of October 2, 1969 and October 24, 1969 that we place a value on this property if we (according to the position you have now taken) had no interest therein?

The position you have taken is inherently unfair. It is unreasonable that the Norfolk Southern Railway would try to deny The American Oil Company its just and reasonable compensation for its building and improvements.

As we stated before, our company does not desire to litigate this matter but Norfolk Southern Railway's position might lead us to such eventuality. I deeply regret that your company is unwilling to settle this matter in a more reasonable and prudent manner.

Respondent's Exhibit No. 3

Decree of the Circuit Court of the City of Virginia Beach in two companion cases of State Highway Commissioner of Virginia v. Norfolk Southern Railway Company

This cause came again on this day to be heard on the Grounds of Defense raised by the defendant, Norfolk Southern Railway Company, in each of the above styled matters, to-wit:

1. The lands sought to be taken by eminent domain by petitioner are owned and used by Norfolk Southern Railway Company as a public service transportation company, the particular lands being held and used for the purpose of connecting railway lines of defendant and being protected from condemnation by Section 166 of the Constitution of Virginia;

2. The petitioning State Highway Commissioner is without power to acquire by condemnation under the statutes and Constitution of Virginia the lands in question by reason of their ownership by a public service transportation corporation, which itself has the power of condemnation;

And after the hearing of evidence ore tenus and exhibits filed therein and argument of counsel, both written and oral, and it appearing to the Court for the reasons set forth in a letter to counsel dated and filed August 8, 1967, that the property involved in the above condemnation matters

(1) are not devoted to a public use, (2) are not protected by Section 166 of the Constitution of Virginia, (3) that Sections 33-232 and 33-234, et seq. of the Code of Virginia, 1950, as amended, applicable to Docket No. 10070 (Route 44) clearly and specifically authorize the condemnation of railroad property, and that Section 33-57 of the Code of Virginia of 1950, as amended, applicable to Docket No. 10382 (Route 64) specifically and by necessary implication authorizes the condemnation of the property involved in that condemnation.

WHEREUPON, it is ADJUDGED, ORDERED and DECREED that the Grounds of Defense filed by the defendant insofar as they contest the right of the State Highway Commissioner of Virginia to condemn the lands in question is hereby stricken, and the matters are continued for further hearing by Commissioners on the value of the property and the damages to the residue, if any, to which action of the Court defendant Norfolk Southern Railway Company objects and excepts.

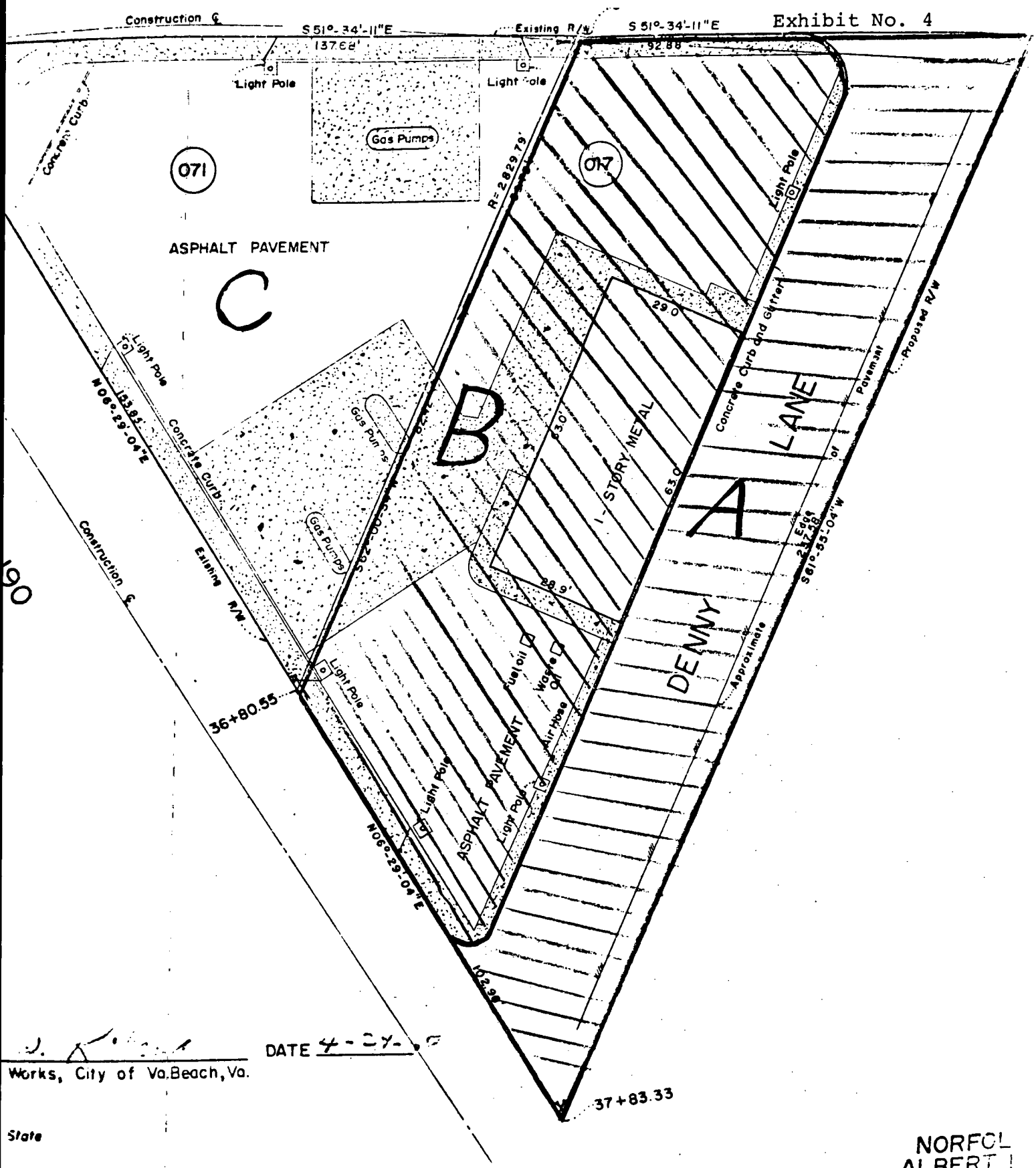
Entered September 5, 1967

Respondent's Exhibit No. 4

Plat of Property in Dispute

(See page 65)

Exhibit No. 4



DATE 4-27-

Works, City of Va.Beach, Va.

State

ILWAY COMPANY

Acre

Acre

NORFOL
ALBERT
S
FR

PARCEL 071
OWNER ALBERT L. BONNEY AND EVA MAE BONNEY
DEED BOOK 906 PAGE 447
TOTAL AREA 9018 Sq. Ft. or 0.207 Acre
TAKING AREA 9018 Sq. Ft. or 0.207 Acre
RESIDUE AREA 0.000 ACRE

REV. MAY 21, 1968

Respondent's Exhibit No. 5

Letter from Norfolk Southern Railway Company to American Oil Company dated March 25, 1969

Reference is made to that certain lease between Norfolk Southern Railway Company and American Oil Company, February 1, 1965, covering a part of the Railway Company's right of way at Kempsville, Virginia. We feel certain that you have by now received information from the City of Virginia Beach that it has recorded a Certificate of Deposit concerning the above property in connection with a street improvement project of the City. In connection with this Certificate of Deposit, the City has given notice to the Railway Company to quit and vacate the premises prior to April 1, 1969.

Accordingly, this is to notify you that Norfolk Southern Railway Company will terminate your lease above-mentioned, effective at midnight on March 31, 1969. This lease is canceled pursuant to the provisions of paragraph (b) of Article I of said lease.