

A. Yes.

Q. I show you a picture, a little snapshot. Look at that closely. I call your attention to where I am pointing. What is that?

A. That, sir, is that pipe that goes under the railroad.

Q. You are looking—

A. Toward Searle Street.

Q. You are looking west in that picture, are you not?

A. Yes.

Q. You see also that I am pointing now to the sign post. Am I not?

A. Yes, sir.

Q. When the automobiles or the teams drive in there, it has already been testified that you drive between the tracks and the sign post?

A. Yes, sir.

Q. The reason for that is what? Why don't they drive below the sign post?

A. You can't get over the ditch.

Q. This thing you see starting up here (indicating) ends up where?

A. On the other side of the sign post.

Mr. Hunt: I offer this picture in evidence.

Mr. Kiendl: I have no objection to that picture.

(Marked Plaintiff's Exhibit 4.)

Q. I show you another little photograph, a little snapshot. [fol. 124] If you can't see I will ask you to stand up and look at it closely and tell me whether or not you are looking squarely into that ditch and if you can see it on that photograph.

A. Yes, sir.

Q. It extends, does it not, from the sign post all the way down to your house, to your picket fence?

A. Yes, sir.

Mr. Hunt: I offer that in evidence.

Mr. Kiendl: No objection.

(Marked Plaintiff's Exhibit 5.)

Mr. Hunt: May I say just a word of explanation to the jury? (To the jury) Gentlemen, in this picture you are looking from the east—that is, the side the baseball field is on—to the west. In other words, you are looking in a direction

westerly on Rock Road in the direction indicated on the blueprint. I am calling your attention to a point right here on the blueprint. You will see right there a 30-inch pipe that runs under this track and goes clear over to this post (indicating). That is the beginning of what this young man has been telling us about.

On another little snapshot I will call your attention to—you will have to look closely—I will direct your attention right along where I am pointing my pencil, and, if you will, examine it carefully. We will get a lens if necessary before the trial is over. You will see you are looking squarely at the ditch.

Q. Now, Mr. Colwell, just one or two questions and then [fol. 125] I will be through. This path, you have estimated, was approximately two feet wide, is that right?

A. Yes, sir.

Q. During the years you have been there you have seen hundreds of people use it, have you not?

A. Yes, sir.

Q. Have you seen people on it when trains were coming by?

A. Yes, sir, I have.

Q. If one keeps to the outside of that path with a train coming against him there is at least a substantial two feet between the side of the train and the person, is there not?

Mr. Kiendl: I object to that as grossly leading.

The Court: It is leading.

Q. If a person keeps to the outside of the path what is the approximate distance between him and the side of the train?

A. Well, there is easily a foot.

Mr. Hunt: That is all. Thank you.

Recross-examination.

By Mr. Kiendl:

Q. Did you at any time, when you saw these people walking along this path with a train going by, warn them?

A. Warn them?

Q. Yes.

A. No, sir.

Q. You told me it was dangerous to walk on that path when a train was going by, didn't you?

Mr. Hunt: I object to that, your Honor. We are here to get facts and not conclusions of a witness as to what is or is not dangerous.

The Court: Objection overruled.

Mr. Hunt: Exception.

[fol. 126] Q. You told us it was dangerous to walk on that when a train was going by, didn't you?

A. Yes, it is, but I wouldn't tell nobody to get off the path when I saw a train coming.

Q. You would see human beings walk on that path with a train going by them and you would know it was dangerous and you would not warn them?

A. Supposing we take, for instance——

Q. Is that right?

A. Repeat the question.

Q. You would see human beings walking on this path with trains going by, when it was dangerous, and you would not warn them?

A. Well, the only danger there would be——

Q. Is the danger of getting hit, isn't that it?

Mr. Hunt: Do not lead a witness.

A. No, not exactly.

Mr. Kiendl: I am cross-examining. I am permitted to lead on cross-examination.

The Witness. The only danger there would be if there was something sticking out from the cars to hit them.

Q. If the cars were a little wider than the average car would that be dangerous?

Mr. Hunt: There is no evidence that any car was wider than another car, your Honor.

The Court: I sustain the objection.

Mr. Kiendl: I withdraw the question.

Q. Have you noticed that the cars vary in size and in width on railroad trains?

A. Well, I know there are some smaller and some larger.

[fol. 127] Q. You say that a man walking on the outside of this path with a train moving alongside of him would have a clearance of about a foot?

A. Yes, sir.

Q. Or perhaps a little less?

A. No; a foot at least; at least a foot.

Q. How much more than a foot, if you want to make it more?

A. Well, I couldn't say, but I know they would have a foot, anyway, because—

Q. You would say it was about a foot?

A. Yes, approximately a foot.

Q. Those trains go through there at the rate of 30, 40 and 50 miles an hour, don't they?

A. Well, they do at times, yes. I have already told Mr. Gannon they did, before this.

Q. Is there any difficulty, Mr. Colwell, with a man walking along that path, when a train comes, stepping away five or ten feet?

A. Well—

Q. Just yes or no. Is there or isn't there?

Mr. Hunt: Objected to as incompetent. It does not get us down to facts. All we are entitled to from the witness is facts, not his opinion about things.

The Court: Overruled.

Mr. Hunt: Exception.

Q. Is there any, Mr. Colwell?

A. Well, they could step out a foot or so.

Q. Or two feet or three feet or 30 feet, couldn't they?

A. Yes, they could.

By Mr. Hunt:

Q. What did you say about a Mr. Gannon?

A. I said I have already told Mr. Gannon about the train going so fast down there nights.

[fol. 128] Q. Who is Gannon?

A. Well, he is a company officer.

Q. The defendant, a railroad officer?

A. Yes.

By Mr. Kiendl:

Q. Mr. Gannon is a railroad officer, is he?

A. Well, I am sorry I said that. I don't know for sure, no. Mr. Gannon is for the railroad.

Q. He is here in court?

A. Yes, I know. That is why I have made that remark.

Q. You told us, I understand, that railroad trains were going too fast through there?

A. That Ashley freight, yes, sir.

Q. The Ashley freight?

A. Exactly.

Q. You told Mr. Gannon that the Ashley freight goes through there too fast?

A. Sure it does.

Q. You have seen it go through night after night?

A. I have seen it going through and I have seen it coming back, yes.

Q. Quite a few times?

A. Quite a few times since I am living there.

Q. How fast have you seen the Ashley freight go through there at night?

A. Well, what night?

Q. Any night.

A. Well, I drove a car for the last fourteen years and I know 30 miles when I see it, and I have seen that Ashley go 40 easy.

Q. 40 easy toward Ashley?

A. Yes, sir.

Q. It is a big train usually, isn't it?

A. Well, at times, yes, and at times he has a pusher.

Q. When you have seen it go 40 miles an hour have you seen it with a pusher?

A. No, sir—well, no, I don't know. The pusher goes off before he gets to our house sometimes.

Q. But you have seen that train go over this territory with two locomotives on, one pulling and the other following?

A. Yes.

[fol. 129] Q. Living there, you know that the reason why they had a pusher on was because the grade was all up-grade?

A. Well, there is a grade until you come almost to our house, but it is a slight grade.

Q. As a matter of fact, there is a grade until you come over Rock Street, isn't there?

A. No.

Q. There isn't?

A. No, I don't believe so. Maybe there is, but I don't think so.

Q. But there is a grade almost to your house?

A. Yes.

Q. So a train coming from Avoca, the Ashley Special, is going uphill?

A. Yes.

Q. And it comes up and proceeds by the point where this accident happened?

A. Yes.

Q. You have seen freight trains with pushers, Ashley Specials, going up there at 40 miles an hour?

A. Yes, I did.

Q. You were so alarmed about it that you talked to Mr. Gannon?

A. When Mr. Gannon was there the morning after the accident I told Mr. Gannon the same as I am telling you, that that train—I don't say the night of the accident, because I didn't hear it, but I have saw that train going that fast.

Q. What you told him was that some time you saw the Ashley Special go 40 miles an hour?

A. Yes, exactly.

Q. You complained to him about that?

A. Not exactly complained about it.

Q. You told Mr. Hunt you complained to the railroad about the speed of this train?

A. No, I didn't say I complained; I said I told Mr. Gannon.

Mr. Hunt: I object to counsel thinking he is going to get anywhere by shouting at the witness.

[fol. 130] The Court: It is proper cross-examination.

Mr. Hunt: Let us quote this record correctly. He did not say he made any complaint; he said he told Mr. Gannon. I didn't ask him the circumstances when and where.

The Court: The jury will recall what he said.

Q. You told Mr. Gannon at one time that the train was going 40 miles an hour?

A. Yes.

Q. Do you think it was too fast?

A. Yes, I do, for that type of rail.

Q. What is the matter with the rail?

A. Well, I will tell you what is the matter. If you fellows would go down there and look that over you would see it has been reconditioned—

Q. Did you ever see me down there looking it over?

A. No, but I say if you did you would not ask that question.

Mr. Kiendl: I submit we do not want a speech from the witness as to what we should have done.

The Court: You must confine your answers to questions. Listen to counsel.

The Witness: I am sorry.

Q. You have told us that you have told Mr. Gannon that the trains were going too fast because of the rails?

A. Yes, sir.

Q. Is that right?

A. Yes, sir, and that is right on a curve and our house is right there at that curve, and I would hate to have them come through that at night.

Q. You would hate to have them go through your house at night?

A. Yes, sir.

[fol. 131] Q. Are you being serious, sir?

A. Well, no——

Q. Are you being serious?

A. Well, certainly I would hate to have that engine jump the road and go through our house.

Q. Has the engine ever jumped the road down there?

A. No, but there is always a first time.

Q. These are the rails that you are talking about, that you see on these pictures (indicating)?

A. Them are the same rails, yes, sir.

Q. Those are the rails that go right past your house (indicating)?

A. Yes, sir.

Q. Here is the curve coming down here, Plaintiff's Exhibit 2 (indicating)? That is the one?

A. That is the curve, yes, sir.

Q. You were a little concerned for fear that this train coming 40 miles an hour might jump off the rails and go into your house?

A. Yes, sir.

By Mr. Hunt:

Q. Let me ask you first, in the light of these questions: Did you ever make a complaint to Mr. Gannon?

A. No, I didn't. I didn't make a complaint. He was there the morning after the accident.

Q. This is on a curve?

A. Yes.

Q. Your house is at the end of the curve?

A. Right at the end of the curve.

Q. Mr. Kiendl has just asked you if you thought it was too fast and you told him you did, for that particular condition?

A. Yes.

Q. You never told Mr. Gannon that or anything of that kind? Did you tell Mr. Gannon about that?

A. I didn't make a complaint to Mr. Gannon about that. I just said (laughing) pardon me, I just said that they went too fast.

[fol. 132] The Court: Aren't we going a little far afield?

Mr. Hunt: I thought my friend did. I tried to stop it. I have got to straighten it out every time.

Q. The next morning Mr. Gannon was right there on the job?

A. Yes, he was.

Q. He is the claim adjuster for the railroad, or don't you know?

A. I didn't know. I thought he was an officer.

Q. You went out to tell him what you knew about it the very next morning while the injured man was over in the hospital?

A. Yes.

Q. You told him what you knew about it?

A. I told him what I knew about it.

Q. You told him what you told these gentlemen?

A. I told him what I told these gentlemen. I told him what I told that gentleman there (indicating).

Q. What gentleman is that?

A. Mr. Glass.

Q. That is another gentleman?

A. Yes.

Q. At that time the next morning, keeping in mind the next morning when Gannon was there, did he ask you how fast the train usually went through there?

A. No, I don't believe he did. It has been a long time ago and I can't say for certain.



Q. You remember that something was said about the speed of the train, do you?

A. Yes.

Q. Did you tell him at that time you had seen it go through at least 40 miles an hour?

A. Yes.

Q. Did Gannon make any claim at that time that this train was going around the bend at ten miles an hour?

A. No.

Q. He didn't make any claim like that?

A. No.

Q. Did you ever see it go around the bend at ten miles an hour?

A. Yes, I have.

[fol. 133] Q. Is that the usual thing or not?

A. No, it is not.

By Mr. Kiendl:

Q. Mr. Colwell, when you made this statement to Mr. Gannon was there a stenographer there, like this stenographer, taking down the questions that were asked you?

A. No, that morning there was nobody there, only Mr. Gannon.

Q. Mr. Gannon didn't ask you about the speed of the train, did he?

A. No, because I couldn't answer him, because I didn't hear him.

Q. He didn't ask you about the speed of the trains on other nights going through there?

A. I just told him.

Q. "Your Ashley Special goes through too fast"?

A. I did, yes.

Q. You did that with the intention of complaining about the speed of that train, did you?

A. I did, yes, sir. Well, deep down in my heart I did.

Mr. Kiendl: That is all.

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EDWARD M. HARRINGTON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hunt:

Q. Mr. Harrington, you are a resident of Hughestown?

A. Yes, sir.

Q. The home of Bucky Harris?

A. Yes, sir.

Q. What is your business? What do you make your [fol. 134] livelihood from?

A. Well, at the present time I am employed in a supervising capacity on the W. P. A.

Q. Prior to that time your work had been what?

A. Why, a miner.

Q. At one time you did hold a public office there, Chief of Police?

A. Yes, sir.

Q. This whole territory we are speaking of is how large a place? I mean, what is the population of Hughestown Borough?

A. Well, I judge it to be about 2800.

The Court: How long are you a resident of Hughestown?

The Witness: Why, I will be a resident of Hughestown Borough 32 years the 14th of this coming January.

Q. Now, sir, you have been here in court while the trial has been progressing, have you?

A. Yes, sir.

Q. Coming right down, I want to ask you with respect to the condition between Rock Street and Hughes Street, what was there used there by pedestrians, if anything, and how long has it been there and who uses it?

A. There is a foot path runs from Rock Street to Hughes Street. It has been used ever since I can remember.

Q. That would be over a period, to put it safely, of how many years?

A. Well, I could safely state 20 years.

Q. That foot path, you say, starts at Rock Street and runs over to Hughes Street?

A. Yes, sir.

Q. Hughes Street; is that a dead end street?

A. Yes, sir.

Q. Is that footpath down in the low ground or is it up [fol. 135] on the level with the railroad tracks?

A. Why, I imagine it is just about level with the ties. It sets off to the left of the ties.

Q. It is about how wide? Show me with your hands.

A. Probably two feet.

Q. Indicating, I should say, at least two feet?

A. Yes, sir.

Q. That path runs along at the end of the ties, does it not?

A. Yes, sir.

Q. Does that path join with another other path, and if so where?

A. Yes, sir, there is a path coming from Hughes Street that crosses that diagonally and crosses the railroad.

Q. Crosses the railroad track and goes where?

A. Why, it goes to Rock Street and crosses Rock Street and goes off over what is known as Weitz Hill and comes down at Center Street in Hughestown Borough.

Q. Those two paths, Mr. Witness, if you could tell us, join about where; I mean approximately without being too accurate?

A. Well, I would judge at the upper end of Hughes Street, right at this end of it (indicating); that is, going from Rock Street to Hughes Street as you meet Hughes Street.

Q. Going back over the path that runs from Rock Street to Hughes Street, over this period of years that path has been used by whom, to your knowledge?

A. I have used it in my capacity as Chief of Police in making the rounds of the Borough.

Q. What other people besides yourself have used it?

A. Miners going to work have used it for years, and people—children going to school; even going to the town hall they use it.

Q. That has been going on for years, hasn't it?

A. Yes, sir.

[fol. 136] Q. The path that leads across the tracks diagonally, the one that joins up with that, has been used for years by whom?

A. By the miners. The school children cross that to go to school too.

Q. Is there a baseball field over here in the lot (indicating)?

A. Yes, sir.

Q. Something has been said here by Mr. Kiendl on cross-examination as to whether it was possible to use the low land down near the picket fence. Of course anything would be possible, would it not?

A. It is possible.

Q. What we want to know is the fact of the matter. People coming from Hughes Street to Rock Street travel on what part?

A. They always travel on the path.

Q. Of course the condition of the lower land was not always the same day in and day out?

A. No; it is subject to washouts of the rain. It is very rough terrain.

Q. You are familiar with the ditch that runs from the post, that is, that railroad signal, that post (indicating), down to the picket fence? You know there is a ditch?

A. I am not familiar with it at the present time.

Q. I beg your pardon?

A. Not at the present time. I haven't seen that part of the country in a couple of years, but in my capacity as Chief of Police I was very familiar with it at that time.

Q. Now, sir, on the night of this accident you had been where?

A. We were at Harvey's Lake.

Q. Where is that?

A. Harvey's Lake. It is in Lucerne County; I judge it should lie about 20 miles northwest of Wilkes-Barre. I believe that would be northwest.

Q. With you at the time was whom?

A. Wilbert Schultz.

[fol. 137] Q. Is he also a resident of this little community?

A. Yes, sir.

Q. On your way home from the lake did you eventually come to Rock Street?

A. Yes, sir.

Q. Prior to that time what would you have been on? Searle Street?

A. Yes, sir.

Q. Tell these gentlemen in your own words if on your way home you saw anybody on the street, or on the road, or where was it? Tell us just what happened, briefly.

A. Yes, sir. In crossing the Fort Jenkins Bridge—Mr. Schultz was a personal friend of Mr. Tompkins, and Mr. Tompkins was walking over the bridge, and as he passed

him he says, "There is Harry Tompkins." He says, "We will stop and pick him up"; so we stopped and picked him up.

Q. Schultz called to Tompkins, did he?

A. Yes.

Q. Mr. Tompkins got in your car and you proceeded on your way?

A. Yes, sir.

Q. You let him out where?

A. Just above the crossing on Rock Street.

Q. When you say "just above the crossing on Rock Street," I think it will be conceded that it was just as you went over that crossing.

A. Yes.

Q. Coming up that crossing there is quite a grade?

A. Yes.

Q. The path starts there right alongside the track?

A. Yes.

Q. You stopped right there at the tracks and he stepped out?

A. Yes, sir.

Q. You said goodnight and went on your way?

A. Yes, sir.

Q. The next you knew that Harry had been struck was when? The following day?

A. The following morning, yes, sir.

[fol. 138] Q. You have no interest in the case at all?

A. No, sir.

#### Cross-examination.

By Mr. Kiendl:

Q. Did the railroad come to see you about the case, Mr. Harrington?

A. Why, yes, they did, I believe, the two gentlemen in the house there, yes.

Q. You refused to tell them anything?

A. I told them that if my testimony was wanted I would give it.

Q. They asked you to give it and you refused to give it to them, didn't you?

A. I believe I did. I don't believe I even asked them to sit down.

Q. You know you refused to give them any information when they called and asked you what you knew about this accident?

A. I told——

Q. Listen to me. You refused to give them any information when they asked you what if anything you knew about this accident; isn't that so?

A. I am answering it the best way I can. I told you that I told them that if my testimony was wanted I would give it in court when the time came.

Q. They said to you in substance, "So you refuse to tell us anything about it" and you said, "I do"? Isn't that what occurred?

A. Well, am I being tried? I don't understand.

Q. Are you being tried? I am trying to get some information from you as to what you said and did. Did the railroad come to you and ask you for some information and did you point blank refuse to give them any?

A. Just as I told you. I told them that I would give it if I were called as a witness.

Q. Didn't they ask you to give it to them?

A. In other words, I refused, if that is what you mean, yes, sir.

[fol. 139] Redirect examination.

By Mr. Hunt:

Q. You told them you would tell what you knew about this when you got to court, didn't you?

A. Yes, sir.

Mr. Hunt: That is all.

By the Court:

Q. What position did you hold at that time? Were you Chief of Police at that time?

A. No, sir, I was not.

Q. Do you know Mr. Tompkins?

A. Well, I know him.

Q. How long do you know Mr. Tompkins?

A. Probably 15 or 18 years.

Q. Are you on intimate terms with him?

A. Well, I don't see him. We are not intimate; just that I knew him.

By Mr. Hunt:

Q. Did you ever visit his home or did he ever visit yours or anything like that?

A. No, sir, I have never visited his home.

Q. Do you meet socially or in business in any way at all?

A. No, sir.

Q. You know him as a citizen of Hughestown?

A. Yes, sir.

Recross-examination.

By Mr. Kiendl:

Q. This path that you told us about runs right along the end of the ties, is that right?

[fol. 140] A. Well, it does—it doesn't run along right at the end of the ties. I have walked the path. There is lots of room.

Q. There are two feet there?

A. Yes.

Q. You have the end of the ties and then you have the end of the path that runs two feet wide?

A. Yes, sir.

Q. Then into this rough terrain that you have described?

A. Yes, sir.

Q. Can you walk on the rough terrain?

A. Well, I could, yes, if I had to.

Q. So far as you observed that rough terrain, anybody else could walk on it?

A. Well, it isn't very comfortable, I will say that.

Q. I didn't ask you whether it was comfortable or not, sir; I asked you whether it was walkable?

A. Yes, sir, it can be walked on.

Q. That is the terrain shown in this picture, Plaintiff's Exhibit 3, isn't it, between the railroad track and the fence?

A. Yes, sir, that is a picture of it as far as you can see.

Mr. Kiendl: That is all.

The Court: (To the jury) Gentlemen of the jury, please do not discuss this case among yourselves or with anyone else. Try to be here promptly at ten-thirty tomorrow.

(Adjourned to October 6, 1936, at 10.30 a. m.)

[fol. 141] New York, October 6th, 1936, 10:30 a. m.

Trial resumed.

ALOYSIUS THOMAS McHALE, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Hunt:

Q. Mr. McHale, you are a resident of Hughestown, are you not?

A. Yes, sir.

Q. And you have been a resident of that village for a period of how long?

A. Three years.

Q. Mr. McHale, so that we can locate your residence, I would show you a blueprint and ask you to study that for just a moment, and I will call to your attention the railroad track and Rock Road after it crosses the track; we see some houses. Is your house shown there?

A. Yes, sir; that is it (indicating).

Q. And will you take and mark that with the letter M, please?

A. Yes, sir (witness complies).

Q. Your house is the small house in the corner, is it not?

A. Yes, sir.

Q. Along side the home of Mr. Colwell, who was on the stand yesterday?

A. Yes, sir.

Q. Then we can see just a bare corner of it in the picture?

A. Yes, sir.

Q. Now then, I would like to get right down to the question and direct your attention to that land that lies between Rock Street and Hughes Street and this space that exists between the picket fence and the railroad track; I am directing your attention to that.

A. Yes, sir.

[fol. 142] Q. Now first in regard to that, the question was raised here yesterday afternoon as to whether or not there is a ditch along Rock Street extending about as far as the railroad sign which we see in this picture.

A. Yes, sir.



Q. That railroad sign. Can you tell these gentlemen whether or not there is a ditch there?

A. There is a ditch.

Q. And somebody did give us roughly its dimensions.

A. There is a ditch there coming down from the railroad sign, which ditch is about two feet wide and is very deep and very dangerous to walk over it.

Q. As a matter of fact, did you ever see anybody, in the years you have been there, jumping the ditch or trying to get over it in that fashion?

A. No, sir; nobody would try to get over it.

Q. And the teams and the automobiles that go through, when they short-cut to reach Rock Street or come in from Rock Street and go over to Hughes Street, they have to pass, when they start on this ground, they have to pass where?

A. Between the sign and the railroad track.

Q. And then these tracks and the ruts, do they stay up nearer the railroad track after they pass beyond the pole, or do they work their way down toward the picket fence?

A. Yes, sir; down toward the picket fence.

Mr. Hunt: Now, I am trying to shorten this, your Honor.

Mr. Kiendl: I don't mind your leading until I object.

Mr. Hunt: All right; I will just lead.

Q. You heard the witnesses here in court yesterday, did you not?

A. Yes, sir.

[fol. 143] Q. You heard the description of the two paths given by the different witnesses?

A. Yes, sir.

Q. Are you familiar with those paths?

A. Yes, sir.

Q. Have they existed since you lived in Hughestown?

A. Yes, sir.

Q. And you have seen what people in the neighborhood and what citizens use these paths regularly?

A. I have used them myself and I have seen men going to Butler's Colliery, church, and children going to school.

Q. And when the pedestrians use that part of the land, what do they use, the path, or do they use the lowland where the ruts and ditch were?

A. They use the path.

Q. When was the first, Mr. McHale, that you knew of Mr. Tompkins' accident?

A. I think it came to my attention the night that it happened.

Q. Yes.

A. Yes. I was in bed and Mr. Colwell woke me up, so I just slipped on a pair of trousers and went out.

Q. And had they removed Mr. Tompkins before you got there or not?

A. No; I was right there after Mr. Colwell; he was still there.

Q. Will you tell us with respect to the place where these two paths merged, come together, where was he lying with respect to that place?

A. From the paths?

Q. Yes; from where the two come together?

A. I should judge six or eight feet.

Q. Which way, toward Rock Street or the other direction?

A. The other way.

Q. What?

A. Towards Hughes Street.

Q. You mean he was lying nearer Hughes Street?

A. Yes, sir.

[fol. 144] Q. But I mean you say six or eight feet; what do you mean by that, beyond the place where the paths converge?

A. Yes.

Q. But back towards—

A. Back towards this way it was (indicating).

Q. When you say back towards this way, that doesn't mean anything.

A. Back towards Rock Street.

Q. Yes, back towards Rock Street.

A. Yes.

Q. And his arm—that portion of his arm which was amputated at that time was lying where?

A. In the center of the railroad track.

Q. You have no interest in this matter in any way?

A. No, sir.

Mr. Hunt: That is all.

## Cross-examination.

By Mr. Kiendl:

Q. You have known Mr. Tompkins for some years?

A. No, sir.

Q. Did you know him at all?

A. Just to bid him the time of day.

Q. Just to bid him the time of day?

A. Yes, sir.

Q. For two years you lived at the corner of Rock Street, and you knew Mr. Tompkins lived within about a block of you, didn't you?

A. Yes, sir.

Q. You saw him in that neighborhood from time to time, didn't you?

A. I have seen him, yes.

Q. Wasn't it the fact, Mr. McHale, that when you actually got to the place where Tompkins was after this accident had happened, his body was about 75 feet nearer to Rock Street?

A. I just could not say the distance.

Q. Well, didn't you point out the spot at one time to the railroad representatives where you saw his body?

A. I can show you where I saw it, yes, sir.

[fol. 145] Q. And didn't you show it to them, the very spot?

A. I and Mr. Colwell talked to them; yes, sir.

Q. And the railroad representative was Mr. Dineen, was it?

A. What is that name?

Q. Dineen.

A. Yes, sir.

Q. And he came to you and asked you what you knew about this accident?

A. Yes, sir.

Q. And you told him that you came out after the accident and found this man or boy at a certain spot on the railroad track, and you pointed to it, didn't you?

A. Yes, sir.

Q. And that was about 75 feet?

A. That I could not say, just how far it was from the corner.

Q. Did you tell Mr. Dineen and the other man about the paths you had just told us about?

A. I just could not recollect it.

Q. You know you didn't say anything about any paths then, don't you?

A. I guess I didn't.

Q. Now, Mr. McHale, you lived in that corner for two years before the accident?

A. Yes, sir.

Q. And were you one of the miners down in that—

A. No, sir.

Q. What was your business?

A. I am a salesman.

Q. And you worked in the daytime?

A. That is right.

Q. And you were home at night?

A. Yes, sir.

Q. Most of the time during those two years, weren't you?

A. Yes, sir.

Q. And you were home Saturdays, Sundays and holidays, I presume.

A. Yes, sir.

Q. And you watched people walk around there?

A. Yes, sir.

Q. In the neighborhood?

A. Yes, sir.

Q. And you say there were two paths?

A. Yes, sir.

[fol. 146] Q. Are you sure there were only two?

A. Well, there was another path leading from Colwell's gate that he used.

Q. And that path went from Colwell's gate up the slope to the railroad ties?

A. Yes, sir.

Q. In a straight line, didn't it?

A. No, sir; not in a straight line.

Q. Well, practically a straight line? Practically a straight line?

A. Yes, sir.

Q. A line such as shown by the broken pen marks on this Plaintiff's Exhibit 3 from the gate to the track?

A. Yes, sir.

Q. Is that where you mean the path was?

- A. Yes, sir.
- Q. And you had seen people walking up that slope on that path, hadn't you?
- A. Well, the only one I had ever seen was Bill.
- Q. That is Bill Colwell, the witness who was on the stand before you?
- A. Yes, sir.
- Q. And he is the only man you ever saw walk up that path?
- A. Yes, sir.
- Q. But there was a path there well worn so that you could see it with your eyes?
- A. Yes, sir.
- Q. And you only saw one man in two years walk on it?
- A. Yes, sir.
- Q. Between that path and the Colwell gate up to the ties the ground slopes up, doesn't it?
- A. Yes, sir.
- Q. About two or three feet or something like that?
- A. Better than that.
- Q. How much?
- A. I should judge about four feet.
- Q. About four feet?
- A. Yes, sir.
- Q. And that slope up through there from the ties down to the fence, that runs along—you know the fence I mean?
- A. Yes, sir.
- [fol. 147] Q. The slope is about four feet, isn't it?
- A. Yes, sir.
- Q. Had you ever seen anybody walk in any of that territory at any time?
- A. No, sir.
- Q. Except on the three paths that you have told us about?
- A. Yes, sir.
- Q. I understood you to tell Mr. Hunt that you had seen automobiles?
- A. Yes, sir.
- Q. Come in from Rock Street by passing between the railroad crossing near to the railroad track?
- A. Yes, sir.
- Q. And then going down the slant toward the fence?

A. No, not going down the slant toward the fence; they run along the top of the bank and down toward Hughes Street, which I have done myself.

Q. The automobiles run right along where this path is located?

A. Yes, sir.

Q. Didn't you just tell Mr. Hunt that the autos would pass the sign and then work down to the fence after they had passed it?

A. No, I did not.

Q. Well, you had never seen any automobiles down near the fence at any time, had you?

A. No, sir.

Q. I show you Defendant's Exhibits A and B for identification. Had you ever seen a condition of that kind during the two years that you lived there, with automobiles down near the fence and men standing there?

A. No, sir.

Q. Never?

A. No, sir.

Q. Can automobiles go on that ground below the path?

A. No, sir.

Q. Do you mean to say after an automobile enters beyond that point where the crossing sign is, an automobile can't operate down to that fence?

A. It can operate, but not saying how it can operate down there.

[fol. 148] Q. It would be a little bit more convenient, and so forth, to keep up near the track?

A. Yes, sir.

Q. And they did keep up near the track, didn't they?

A. Yes, sir.

Q. You have seen trucks in there?

A. Yes, sir.

Q. And pleasure cars, all kinds of automobiles in there from time to time?

A. Yes, sir.

Q. And the wheels followed—the wheels of all these trucks went right along that path, didn't they?

A. No, they would not hit the path.

Q. Where would they go?

A. I should judge the path would be in between them.

Q. The path would be between the wheels?

A. Yes, sir.

Q. So that you say the wheels on these automobiles that you saw running alongside of this railroad track would be between the path and the edge of the ties?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. But don't you know the path was right up to the edge of the railroad ties along that track?

A. It is not right up against them. In some places it is and some places it is a foot away, two feet away.

Q. You heard Mr. Colwell testify yesterday, you heard Mr. Hunt—

A. Yes.

Q. You heard Mr. Harrington testify yesterday?

A. Yes, sir.

Q. And you heard the plaintiff testify?

A. Yes, sir.

Q. Now, Mr. Colwell has testified that they both went right along the edge of the ties. You heard that, didn't you?

Mr. Hunt: Objected to as incompetent, irrelevant and immaterial.

[fol. 149] The Court: Objection overruled.

Mr. Hunt: Exception.

Q. You heard the testimony that it ran right up against the ties, didn't you?

A. Yes, sir; in some places.

Q. Did he say "in some places"?

A. I just don't recall what he said.

Q. Did you hear Mr. Harrington testify yesterday that the path runs along the end of the ties?

A. Yes, sir.

Q. Now, you say it runs along the end of the ties in some places?

A. Yes, sir.

Q. And then it curves in and out a foot or two feet or something of that kind?

A. Yes, sir.

Q. It is not a straight path running along the ties then, according to your impression?

A. It is a straight path, but it has places it varies a foot away from the ties, two feet, three feet, right along.

Q. Does this picture, Plaintiff's Exhibit 3, show the path that you are talking about, the end of it down near Hughes Street?

A. Yes, sir.

Q. And is that path there at Hughes Street shown in the picture, the path that you are talking about?

A. Yes, sir.

Q. And does it come right up to the end of the ties?

A. Sure it does, but what about here, what is here (indicating)?

Q. Are you asking me?

Mr. Hunt: Yes.

The Witness: It is away from here.

Mr. Kiendl: I submit, if your Honor please, that the witness is supposed to answer questions and not to ask them.

[fol. 150] The Court: Yes, Mr. Witness, you must answer counsel's question.

Q. At the point I have indicated, at the end of Hughes Street, we agree that you say that the path is right along the edge of the ties?

A. I would not say it is along; in some places it is a foot away or two feet away.

Q. The point I just pointed out to you in this picture, Plaintiff's Exhibit 3, you just told us it was right on the ties, didn't you?

A. Well, here it comes up to the ties, this path coming from Hughes Street.

Q. That is the point I am directly interested in, the junction point of the two paths, the one coming from Hughes Street and the one coming from Rock Street; they join right alongside the ties; don't they?

A. Yes, sir.

Q. As shown in that picture, somewhere right in here they join, right alongside the ties as shown by the black mark on this picture; isn't that so?

A. Yes, sir.

Q. And it continues right along the edge of the ties as shown in the picture, doesn't it?

A. Yes, sir.

Mr. Kiendl: Mr. Hunt, you asked me yesterday to get the date when the two pictures were taken.



Mr. Hunt: Certainly, yes.

Mr. Kiendl: I told you the pictures were taken, Plaintiff's Exhibits 2 and 3, on the 18th day of April, 1935. Do you accept that or not?

Mr. Hunt: Oh, no; I accept it.

[fol. 151] Q. Now I show you a set of six pictures and ask you to look at them and tell us, if you can, whether they represent the conditions that existed down near that Rock Street crossing at the time of the occurrence of this accident. Of course the pictures were taken in daylight; the accident happened in the middle of the night.

A. I would say the ground is much rougher on this picture than it shows.

Q. I see.

Mr. Hunt: Will you read the answer, please?

(Answer read by the stenographer.)

Q. You mean on these pictures?

A. Yes, sir.

Q. What you mean to tell the jury is that the pictures do not show the conditions as they existed on the day of the accident, but that the fact was that the territory was rougher when the accident happened than the pictures show?

A. Yes, sir.

Mr. Kiendl: Now I ask to have these pictures, which are fastened together, six, marked as one exhibit for identification.

(Marked Defendant's Exhibit C for identification.)

Q. Now, Mr. McHale, I show you another batch of pictures, six of them, and ask you to look at that batch and tell us whether that batch shows the conditions as they existed at that place the day of the accident?

A. It is much rougher than it shows on these pictures too.

[fol. 152] Mr. Kiendl: Now I ask to have that batch of pictures marked Defendant's Exhibit D for identification fastened together as one exhibit.

(Marked Defendant's Exhibit D for identification.)

Mr. Kiendl: By stipulation, if your Honor please, it will be stipulated that the pictures comprising the Defend-

ant's Exhibit D for identification were taken on April 5, 1933.

Mr. Hunt: 1933?

Mr. Kiendl: 1933.

Mr. Hunt: Before the accident?

Mr. Kiendl: Before the accident.

Mr. Hunt: And this?

Mr. Kiendl: Was taken on April 18, 1935, after the accident.

Q. Now, you were there, living there, on April 5, 1933, weren't you?

A. Yes, sir.

Q. You were living there on April 18, 1935, weren't you?

A. Yes, sir.

Q. Now I am going to show you Defendant's Exhibit C for identification again, pictures stipulated to have been taken on April 18, 1935, and I show you the second picture in that exhibit. That shows the standard on which the crossing sign is erected, doesn't it?

A. Yes, sir.

Q. It shows in the center of the bottom part of the picture the end of the drain pipe that goes under the railroad tracks at Rock Street; is that right?

A. Yes, sir.

Q. The other picture shows what you call the drain?

A. The ditch.

[fol. 153] Q. The ditch?

A. Yes, sir.

Q. Now, you said that ditch was very deep?

A. Yes, sir.

Q. How deep is it?

A. I would say approximately about two feet.

Q. Two feet?

A. Yes, sir.

Q. Deep?

A. Yes, sir.

Q. The fourth picture shows that ditch from the railroad sign right down to the end of the fence, doesn't it?

A. Yes, sir.

Q. Does it show it correctly?

A. No, sir.

Q. You mean to say that that picture of that very ditch does not show the condition as it existed there in April of 1935?

A. No; it is deeper.

Q. How about the next one, the fifth picture?

A. No, sir; it doesn't show it; it is deeper than that.

Q. It looks right at the ditch, doesn't it?

A. Yes, sir.

Q. You say it is deeper than shown in that picture?

A. Yes, sir.

Q. Now, did you tell us, Mr. McHale, that it would be dangerous for a man to walk across the ditch at the point where the fence is?

Mr. Hunt: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Hunt: Exception.

A. Yes, sir.

Q. How old a man are you?

A. Twenty-four years of age.

Q. And you mean to say it would be dangerous for you, in April of 1935, in July of 1934, and in April of 1933, to walk across that ditch?

A. Yes, sir.

[fol. 154] Q. Why dangerous?

A. Why, you might slip down off the edge of that and fall in it and break your leg or something.

Q. The ditch is lined with paving stones, isn't it?

A. Yes, sir.

Q. And you have never seen anybody at any time walk over that ditch?

A. No, sir.

The Court: With the exception of Colwell. Did you ever see Colwell walk over that ditch?

The Witness: No, sir.

The Court: Did you ever see the man that you called Bill—that is Colwell?

The Witness: That is Colwell.

The Court: You never saw him walk across it?

The Witness: No, sir; not across the ditch.

The Court: Did you ever see anyone walk across that ditch?

The Witness: No, sir.

Q. You never saw anybody take a short-cut from the crossing sign to that gate that leads into the back porch of Mr. Colwell's house, did you?

A. No, sir.

Q. Have you looked at people walking along there very often in the daytime?

A. Yes, sir.

Q. Have you looked at night?

A. Yes, sir.

Q. And you have seen all kinds of people walking along this path?

A. Yes, sir.

Q. School children?

A. Yes, sir.

Q. You have seen school children walking along there?

A. Yes, sir.

[fol. 155] Q. And did you ever see them walking along there at night?

A. Children coming home from school; yes, sir.

Q. At night?

A. Yes, sir.

Q. After six o'clock?

A. Yes, sir.

Q. After eight o'clock?

A. Yes, sir.

Q. School is open, too?

A. No, but the children are walking along there when they are out playing.

Q. After ten o'clock at night?

A. Well, how old of a child?

Q. Any age of child; have you seen children walking there after ten o'clock at night?

A. Yes, sir.

Q. On that path?

A. Yes, sir.

Q. Have you seen them walking there after twelve o'clock at night?

A. Yes, sir.

Q. Children?

A. Not children.

Q. That is what we are talking about, only children now. You have not seen any children walking there after twelve o'clock at night, have you?

A. No, I cannot say I did.

Q. Now, have you seen any people going to church using that path?

A. Yes, sir.

Q. Have you ever seen them use it after twelve o'clock at night?

A. Yes, sir.

Q. Going to church?

A. No, not going to church.

Q. Well, we are talking about people going to church now; you haven't seen any people going to church after twelve o'clock at night walking along that path?

A. No, sir.

Q. And in 1934 most of the mines down around there were closed and working on part time, weren't they?

A. Yes, sir.

Q. Did you ever see any mine workers going along that path after twelve o'clock at night to and from work?

A. Yes, sir.

Q. And other people?

A. Yes, sir.

[fol. 156] Q. The people who used the path are the people who lived in Hughes Street?

A. No, not necessarily; people——

Q. Principally?

A. Principally, yes.

Q. If you continued walking on that path past Hughes Street, there was no place to go except on down to Lackawaxen, was there?

A. You mean going down this way?

Q. Yes, going from Rock Street to Hughes Street, if you kept on walking along the railroad track you get out in open country, don't you?

A. No, you get into a little hill called Court Lane.

Q. How far from Hughestown?

A. I should judge about a mile or a mile and a half down the track.

Q. And have you seen people walking down this path going in that direction past Hughes Street and down?

A. Yes, sir.

Q. Seen them walking at night time?

A. Yes, sir.

Q. Now, Mr. McHale, have you ever seen anybody walking along that path when a train was passing?

A. Yes, sir; I have done it myself.

Q. You have?

A. Yes, sir.

Q. Outside of yourself have you seen any other people walking along that path when trains were passing?

A. Yes, sir; and I have seen them wheel wheelbarrows with coal in them when the train was going.

Q. You mean they used the path with wheelbarrows with coal?

A. Yes, sir.

Q. And where were they taking that coal from and where were they taking it to?

A. They were taking it from what we call a strippings, which is up towards Avoca.

[fol. 157] Q. And had you ever seen them doing it at night?

A. Yes, sir.

Q. Wheeling coal at night along that path?

A. Yes, sir; up to eight or nine o'clock, yes.

Q. Well, after eight or nine o'clock have you seen them?

A. No; I would not say after eight or nine o'clock.

Q. Have you ever seen anybody walking along that path at night in the pitch dark when a train was going by?

A. Yes, sir.

Q. How many times have you seen people doing that, Mr. McHale?

A. I have seen them hundreds of times.

Q. Hundreds of times at night?

A. Yes, sir.

Q. In the pitch dark?

A. Yes, sir.

Q. Walking along that path?

A. Yes, sir.

Q. And you have walked along it yourself at night?

A. Yes, sir.

Q. And when you were walking along it, when you got to the point that we are interested in——

A. Yes, sir.

Q. (Continuing.)—where these two paths converge——

A. Yes, sir.

Q. —alongside of the ties; you have done that often, haven't you?

A. I have walked it; yes, sir.

Q. How close was your body to the moving side of the train when you did that?

A. Oh, I would say a foot or two feet away.

Q. A foot or two feet away?

A. Yes, sir.

Q. And you tell this Court and Jury that you have walked alongside of a moving train?

A. Yes, sir.

Q. At night?

A. Yes, sir.

Q. With the side of that moving train within a foot of your body?

A. Yes, sir.

[fol. 158] Q. And you have seen other people do that?

A. Yes, sir.

Q. And the trains go by there pretty fast, wouldn't they?

A. Yes, sir.

Q. Sometimes twenty miles an hour, thirty miles an hour, forty miles an hour?

A. Yes, sir.

Q. And you have done that frequently?

A. Yes, sir.

Q. Did you think that was dangerous?

A. No, sir.

By the Court:

Q. Would you do that with the train going opposite to you?

A. Yes, sir.

Q. And towards you?

A. Yes, sir.

Q. You would do it either way?

A. Yes, sir.

Q. That is the train going——

A. Either way it goes.

Q. A train coming toward you or opposite you?

A. Yes, sir.

By Mr. Kiendl:

Q. You mean, Mr. McHale, that you would be walking at night along that footpath close to the edge of the ties?

A. Oh, I would be away from the ties if I was on the path; if I was on the outer course of the path you would be away from it.

Q. We are trying to fix it on the inner course of the path where the paths approach right up to the ties, as we have agreed; do you know where I mean?

A. Yes, sir.

Q. When you were walking along there at night?

A. Yes, sir.

Q. Within a foot of a moving train?

A. Yes, sir.

[fol. 159] Q. Even if the train came toward you?

A. Yes, sir.

Q. Or whether it came behind you, you would walk through that territory?

A. Yes, sir.

Q. And not consider it dangerous?

A. No, sir.

Mr. Kiendl: That is all.

Mr. Hunt: Just a question or two.

Mr. Kiendl: He did not identify these two pictures.

Q. Defendant's Exhibits A and B have been marked for identification. Do they show the conditions as they existed there in April of 1933?

A. No, sir; it is much rougher than that.

Q. It is much rougher than these pictures show?

A. Yes, sir.

Mr. Kiendl: I will offer Defendant's Exhibits C and D in evidence, if your Honor please.

Mr. Hunt: I want to look at them for just a moment.

Redirect examination.

By Mr. Hunt:

Q. Now, Mr. McHale, you were asked by Mr. Kiendl about whether in some discussion you had with a railroad man anything was said between you about any paths. Let me ask you, did he ask you about any paths?

A. No, sir.

Q. Did he ask you how many years people had been using the paths that were there?

A. No, sir.

Q. He did not ask you anything like that?

A. No, sir.

Q. It didn't occur to you to say anything one way or the other about that?



A. No, sir.

[fol. 160] Q. Now, assuming—have you ever had any experience in amateur photography of any kind?

A. No, sir.

Q. Well, you would know that you have to be pretty careful in the way you place a lens in order to get genuinely true—

Mr. Kiendl: I submit, if your Honor please, if the witness has had no experience he can't testify.

Mr. Hunt: All right.

Q. In this picture you can judge pretty well the angle at which it was taken, can't you, or can you?

A. Yes, sir.

Q. Now, you can see the path here, can you not?

A. Yes, sir.

Q. And you can see the place, just as you told Mr. Kiendl, where it comes up to the ties and other places it does not, and that can be seen right in the photograph?

A. Yes, sir.

Q. And walking along that path you testified it was approximately, on an average, now, about how wide? Can you show with your hands?

A. I should judge about that wide (indicating).

Q. That is somewhere possibly about two feet or possibly a little more?

Mr. Hunt: It is conceded that the only trains that went through there, Mr. Kiendl, were freight trains? That is, there are no passenger trains on this road?

Mr. Kiendl: I don't know. I am perfectly willing to concede it for the purpose of the record.

Mr. Hunt: I am so advised.

Mr. Kiendl: Subject to correction we will make that stipulation.

[fol. 161] Q. You have seen the trains, you told these gentlemen, as a regular course, people using the path when some freight train would be moving in either direction?

A. Yes, sir.

Q. Now, if you were walking opposite a train and you kept to the outside of the path—naturally you would keep to the outside of it, wouldn't you?

A. Yes, sir.

Q. If you kept to the outside of the path and your freight train was here coming to you, there would be how much space, approximately?

A. About a foot or two feet.

Q. And have you ever had much experience here in New York City?

A. No, sir.

Q. You have never stood on our subway platforms when the trains come in and go by you?

A. Yes, sir.

Q. You have?

A. Yes, sir.

Q. And you have stood there, I suppose, during the rush hours?

A. Yes, sir.

Q. Haven't you?

A. Yes, sir.

Q. So you know about the average space that is left between a person when a train is going by?

A. Yes, sir.

Mr. Hunt: Now I will taken this group of pictures and I will offer them in evidence. There is no objection, or they have been offered by Mr. Kiendl.

(Defendant's Exhibits A, B and C received and marked in evidence.)

Mr. Hunt: D is a group I have not looked at, taken before the accident, in 1933.

Mr. Kiendl: That is right.

[fol. 162] Mr. Hunt: I have no objection to these pictures. Don't we agree, Mr. Kiendl, that they were taken for a different purpose, to show the section that was on the opposite side of Rock Street? I mean it just——

Mr. Kiendl: No, we don't agree on that at all.

Mr. Hunt: All right, sir.

Mr. Kiendl: We agree that the pictures were taken to show the territory that was included in both sides.

Mr. Hunt: All right, sir; they speak for themselves.

Mr. Kiendl: I think so.

(Defendant's Exhibit D for identification received and marked in evidence.)

Q. Mr. McHale, I will call your attention first to a group of pictures taken in 1933, and ask you to go over them with

me. Do you see Rock Street running through here at the upper part of the picture?

A. Yes, sir.

Q. And do you see Rock Street again here (indicating)?

A. Yes, sir.

Q. In fact, in every one of these pictures the territory, that land that we are talking about lies in the distance?

A. Yes, sir.

Q. Am I correct?

A. Yes, sir.

Q. The close-up part of the picture, one of them is on what would be the south side of Rock Street?

A. Yes, sir.

Mr. Hunt: With that explanation, gentlemen, you may see them (handing pictures to jury).

[fol. 163] I don't know what your Honor's procedure is; whether I should go ahead.

The Court: Well, you might let the jury look at the pictures before you go ahead. They can't center their thoughts on two things at one time.

Mr. Hunt: Right.

(Interlude while jury examines pictures.)

Q. Mr. McHale, I want to take this group of pictures taken in April, 1935, which is Exhibit C, and I will call your attention to the first photograph, and that shows, does it not, the space between the car tracks and the upright stanchion upon which the crossing sign is?

A. Yes, sir.

Q. Now, at that place, as appears by the picture, the automobiles and trucks and pedestrians all had to use that same place?

A. Yes.

Mr. Kiendl: I object to that. The picture shows no such thing.

Mr. Hunt: Well now, we may differ, but I will ask the witness.

Mr. Kiendl: That is all right.

Q. In the space between the stanchion and the tracks you see the ruts?

A. Yes, sir.

Q. And places where the cars have gone?

A. Yes, sir.

Q. And is that place also used by pedestrians?

A. Yes, sir.

Q. Now, as you follow along do you see the tracks of the automobiles?

A. Yes, sir.

Q. And do they gradually, not abruptly, but do they gradually pull away from the track?

A. Yes, sir.

[fol. 164] Q. And the path itself continues where?

A. To Hughes Street.

Q. And you can see where the tracks on these photographs produced by the defendant gradually pull away from the tracks?

A. Yes, sir.

Q. Now, the path itself, does that pull away from the tracks or does that continue approximately along the side of the tracks?

A. Why, that pulls away in different places. As you see here, here is a piece of ground between the path and the railroad tie.

Q. Now then, of course, down here on the lefthand side of the picture, what is this condition, do you know, where these dark shadows are?

A. Well, that is sort of a ditch or a hole there.

Q. I will show you another photograph where it possibly shows better. Now then, we have got, looking at the second picture, you have your pole, you see that?

A. Yes, sir.

Q. And you see the roadway leading in?

A. Yes, sir.

Q. And you see a part of this ditch which was questioned yesterday, do you not?

A. Yes, sir.

Q. And then you see more of the condition which I just asked you about in here, dark shadows?

A. Yes, sir.

Q. Let me ask you at this time, when Bill, as you call him,—what is it, Colwell?

A. Colwell.

Q. When Colwell would come out of the gate, he would, you have told us, go approximately straight up to the main path before he made a turn?

A. Yes, sir.

Q. He did not try to go through here (indicating)?

A. No, sir.

Q. Now, looking at the other photograph, you can see a part of this—what is that, a thirty inch drain?

A. Yes, sir; about thirty.

[fol. 165] Q. See one end of the drain, and you are looking across west of the ditch, are you not?

A. Yes, sir.

Q. You are not looking down in it?

A. No, sir.

Q. And you see something was said—Mr. Kiendl said something about—what did he say that was lined with before?

A. Stone.

Q. Well, these stones, is that a nice, solid footing, or are those loose stones lying around there?

A. Those are all loose stones there.

Q. Are those stones solid or what?

A. Some is solid and some isn't.

Q. They can be seen from the picture, can't they?

A. Yes, sir.

Q. Now, looking at the fourth photograph we see the stones better, don't we?

A. Yes, sir.

Q. Scattered all around there?

A. Yes, sir.

Q. And are you looking across the ditch there with your camera or lens looking down in it?

A. Looking across.

Q. Looking across again?

A. Yes, sir.

Q. And here you begin to see the embankment more abruptly?

A. Yes, sir.

Q. Here we have still another angle, the stones were fairly well intact according to the picture which they have put in, up until they go to the end of that picket fence; isn't that about the size of it?

A. Yes, sir.

Q. That shows right in the picture?

A. Yes, sir.

Q. Is that picture taken diagonally across the ditch or is that taken looking down into it?

A. Across.

Q. Now, in order to get at the depth of your ditch, you get it best from this last photograph, don't you?

A. Yes, sir.

Q. Because you are looking right into the side or bank?

A. Yes, sir.

[fol. 166] Q. And then you see the loose stones around there?

A. Yes, sir.

Q. That is the last photograph?

A. Yes, sir.

Mr. Hunt: That is all, and I ask that the gentlemen be allowed to study this rather carefully and have them all.

Mr. Kiendl: I join in that request. I would like them to study them carefully. May they also have and study the other two, A and B?

The Court: Yes, they may have all the photographs.

Q. These pictures, A and B, again show the place that we are interested in, show it in the distance, do they not?

A. Yes, sir.

Q. In other words, the close-up part of the two pictures——

A. Yes, sir.

Q. (Continuing.) —is to the south side of Rock Street?

A. Yes.

(Photographs handed to the jury.)

Recross-examination.

By Mr. Kiendl:

Q. Mr. McHale, it has been stipulated in this case that the distance from the railroad track where the rail is down to the fence alongside the property where you live and where Mr. Colwell lives is about thirty-five feet.

A. Yes, sir.

Q. Now I am going to ask you to assume that this room is thirty-five feet wide—that is about right, isn't it, this room from wall to wall is somewhere in the neighborhood of thirty-five feet or forty feet wide?

A. Yes, sir.

[fol. 167] Mr. Hunt: Haven't we got the actual measurements of this room?

Mr. Kiendl: Yes, I would like to have the actual measurements if we have them.

The Court: Well, I think we can measure it. We have some sort of a ruler here that we can measure it right away.

Mr. Hunt: I think the Clerk may possibly have the measurements.

The Court: Have you, Mr. O'Grady?

The Clerk: No, sir, I haven't, Judge Mandelbaum.

Mr. Kiendl: I can measure it off pretty accurately if Mr. Hunt will accept it, thirty-five feet from this wall.

Mr. Hunt: All right, go ahead.

Mr. Kiendl (pacing room): I make it just about thirty-five feet.

Mr. Hunt: All right,

Mr. Kiendl: You accept that as substantially correct?

Mr. Hunt: Yes, that is near enough.

Q. Now, this territory, thirty-five feet from the rail to the fence, you say it slopes downward to the fence about four feet?

A. Yes, sir.

Q. So that if the fence were here, the rail——

Mr. Hunt (interrupting): Wait a minute, Mr. Kiendl. Something is wrong. Your distance from that picket fence, something is wrong here (indicating blueprint). Up to the first rail of the car track, including ties and all, is less than an inch and a half, and did you tell me this is——

Mr. Kiendl: About thirty-five feet,

[fol. 168] Mr. Hunt: Wait a minute. Did you tell me this scale is twenty feet to an inch?

Mr. Kiendl: That is right.

Mr. Hunt: Well then, that distance is less than thirty feet on your own blueprint.

Mr. Kiendl: Well, do you want it thirty feet?

Mr. Hunt: Well, it is even less than that, but that will be nearer to it.

Mr. Kiendl: Well, do we agree, then, that the distance is about thirty feet?

Mr. Hunt: I will give it to you accurately.

Mr. Kiendl: We stipulated it was thirty-five. I will stipulate it any way you want it.

Mr. Hunt: Your distance is twenty-nine feet, Mr. Kiendl.

Mr. Kiendl: Twenty-nine feet?

Mr. Hunt: Twenty-nine feet.

Q. Well, twenty-five feet, Mr. McHale, would be up to the end of this rail from here to the wall. Now, you say in that

distance from the fence to the top of the rail there was an average slope of about four feet?

A. Yes, sir.

Q. And you know what four feet are, don't you?

A. Positively.

Q. You know I am about six feet high?

A. Yes, sir.

Q. Then the fact is, Mr. McHale, isn't it, that the rail would be about this much higher, indicating the rear post on this jury box, than the floor, twenty-nine feet away, if that is the exact measurement?

A. Yes, sir.

Q. Was there any reason that you know of why, in that [fol. 169] territory, a man could not walk with perfect safety, if he wanted to, outside of these ditches? Is there or isn't there?

A. Well, there isn't, but——

Q. Except what you have said there isn't?

Mr. Hunt: Your Honor, I submit the witness ought not to be shut off in his answer.

Mr. Kiendl: I asked him if that is what he said.

Mr. Hunt: Well, he had not finished, obviously.

The Witness: I said there isn't any danger of walking down there, but on account of the ditches people can't walk down in there.

Q. There isn't any danger of walking down in there; do we agree on that?

A. Well, you might slip or fall on the grade, on the cinders.

Q. You might slip or fall on this grade of four feet over a distance of twenty-nine feet?

A. Yes, sir.

Q. Were there any ditches in there such as you have shown in this photograph between the crossing sign and the edge of the fence and along the edge of the fence?

A. Yes, there is ditches there.

Q. They don't show in any of these pictures, those ditches, do they?

A. No, sir.

Q. But they are there?

A. They are there.

Q. Now, you told Mr. Hunt on your redirect examination that naturally when you were walking along that patch and a train came you would move to the outside of the path?



A. Yes, sir.

Q. Will you tell us why?

A. I would keep to the outside because there would be safe walking there.

Q. And was there anything about that ground in there as you were walking along that path that would prevent you [fol. 170] from walking off the path a foot for five, six, eight, ten, twenty feet, if you wanted to? Was there?

A. No, sir.

Q. Now, when you walked along there and you got on the outside of the path when the trains were coming to you or from behind you, you told Mr. Hunt that the moving trains would be within a foot or two of you?

A. Yes, sir.

Q. Even if you were walking on the outside of the path?

A. Yes, sir.

Q. That is what you told him?

A. Yes, sir.

Q. And that is true, isn't it?

A. Yes, sir.

Q. Now, looking at the pictures, Plaintiff's Exhibits 2 and 3, I didn't ask you, Mr. McHale, but I will ask you now whether they show the conditions as they existed there? These are photographs that the plaintiff has offered in evidence?

A. No, sir.

Q. They do not?

A. No, sir.

Q. Well, what is wrong with these pictures? Are they too rough or—

A. They are not rough enough.

Q. They are not?

A. Down in here there is more ditches (indicating).

Q. Down along here; you point to a building?

A. I am pointing right along in here (indicating).

Q. That place you point to in Plaintiff's Exhibit 2 is the place that you see, isn't it, in Plaintiff's Exhibit 3 where the path is, isn't it?

A. No; right in here, along in through here is all ditches (indicating).

Q. But that territory is all shown in Plaintiff's Exhibit 3, but the ditches do not show; is that right?

A. That is right.

Q. Are those ditches two feet deep through there?

- A. I would not say they are two feet.
- Q. Are they two inches deep?
- A. Yes, better than that.
- [fol. 171] Q. Better than that, but they don't show in these pictures?
- A. No, sir.
- Q. Now, Mr. McHale, how wide are these ties on the railroad tracks here, about eight feet wide?
- A. Yes, sir.
- Q. You see them?
- A. Yes, sir.
- Q. They show correctly the ties under the rails of the railroad track coming up to Hughes Street, don't they?
- A. Yes, sir.
- Q. And they are about eight feet wide?
- A. Yes, sir.
- Q. The path at certain points comes right up to the edge of the ties, doesn't it?
- A. Yes, sir.
- Q. When you walk along there and trains went by, was there any overlapping from the engines or any of the cars onto these ties?
- A. Just about the end of the tie.
- Q. Just about the width of the tie?
- A. Yes, sir.
- Q. Didn't you notice, Mr. McHale, that the engines have an overhang of almost one foot on each side beyond the ends of the ties?
- A. No, sir.
- Q. Haven't you noticed that some of the freight cars in these trains were as wide as ten feet, ten feet six inches?
- A. Just the overhang of them is just about to the end of the ties.
- Q. And you have never seen any of that overhang coming over the ends of these eight feet ties?
- A. Very little overhang.
- Q. But you have seen some, haven't you?
- A. Yes, sir.
- Q. You have seen it as much as a foot beyond the edges of the ties, haven't you?
- A. No, I would not say a foot.
- Q. Have you seen any engines that were over ten feet wide?

A. I just could not say how wide they were.

[fol. 172] Q. Have you seen any engines with cylinders on the sides that projected over the edges of these ties coming down there?

A. No, sir.

Q. You don't know how wide the freight cars are, do you?

A. No, sir; I never measured them.

Q. Box cars, gondola cars, furniture cars, automobile cars, merchandise cars, you have never measured them?

A. No, sir.

Q. You know they are not all alike in width, don't you?

A. Very little difference in them.

Q. Very little difference?

A. Yes, sir.

Q. Is that your testimony, that there is very little difference in them?

A. In the width of them, yes, sir.

Q. Don't they vary from nine feet up to eleven feet in width, or don't you know?

A. I just could not say how much they vary.

Q. You have had some experience on subway stations in New York in watching trains coming in, haven't you?

A. Yes, sir.

Q. And you know that subway trains are all standard width, don't you, all exactly alike? You know that, don't you?

A. I don't know whether they were alike or what they were; I just know them to see them.

Q. And when they come into subway stations in New York and you are standing there, do you stand within a foot of them?

A. Yes.

Q. Anybody warn you to stand back?

A. No, sir.

Q. Never ordered to stand back when trains came in?

A. I always stand about right on the edge of the platform.

Q. You don't mean that, do you?

A. Yes, sir.

Q. You stand on the flat edge of the station platform when subway cars are coming in?

[fol. 173] A. About that distance from the edge, I stand right there (indicating).

Mr. Kiendl: That is all.

Redirect examination.

By Mr. Hunt:

Q. Mr. McHale, have you from your observation, living along the tracks, have you noticed, or have you not, that the widest part of any train is the engine itself?

A. Yes, sir.

Q. So that if an engine—if you are in a place of safety when the engine goes by you, why, that is——

A. That is sufficient.

Q. That is sufficient?

A. Yes, sir.

Q. Unless there is some door?

A. Unless there is an object; that is different.

Recross-examination.

By Mr. Kiendl:

Q. Do you mean that, Mr. McHale, that the engines are always the widest part of the trains?

A. Yes, sir.

Q. You haven't seen any trains with different sized engines and different sized cars?

A. I have seen different size engines, yes, sir.

Q. So do you, when you walk along this track, proceed on the theory that if the cylinder of the engine clears you you are all right for the rest of the train?

A. Yes, sir.

Q. That is your idea?

A. Yes, sir.

Redirect examination.

By Mr. Hunt:

Q. Especially if there is a foot or two between you and the side of the train?

A. Yes, sir.

[fol.174] The Court: I think we have gone into that enough.

Mr. Hunt: That is all.

Mr. Kiendl: May I ask one final question, your Honor, and I will only make it one.

By Mr. Kiendl:

Q. Do you tell this Court and jury that you feel perfectly safe walking at night on this path with a train moving up to forty miles an hour?

A. Yes, sir.

Q. Passing you within one foot of the side of your body?

A. Yes, sir.

Mr. Kiendl: That is all.

(Witness excused.)

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WILBERT SCHULTZ, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Hunt:

Q. Mr. Schultz, you are a resident of Hughestown, are you not?

A. Yes, sir.

Q. And you have been a resident there how many years?

A. Thirty-nine.

Q. What is your business, may I ask?

A. Moulder.

Q. And you, as a matter of fact, knew Harry Tompkins when he worked his fourteen years at the same place you do?

A. Yes, sir.

[fol. 175] Q. What is the name of that concern?

A. Pittston Stove Company.

Q. And aside from knowing him as a fellow workman, had you ever visited at his home or had he visited at your home?

A. No, sir.

Q. Now, on the night of his accident had you and the witness Harrington been some place?

A. Yes, sir.

Q. By the way, your plant where you worked had been closed down; what is your recollection; approximately how long; how many weeks before this accident?

A. About four weeks.

Q. And you and Harrington had been where on the night of this accident?

A. Harvey's Lake.

Q. That is some distance away from Hughestown?

A. Yes, sir.

Q. What is it, a matter of twenty miles or farther?

A. Oh, about twenty or twenty-five miles.

Q. And you were returning home some time after midnight. Can you fix the time now; do you recall the time; how close to two o'clock?

A. Well, about half-past one.

Q. At any rate, on your way down, when you got to any particular place, did you see someone on the road walking?

A. Yes, sir.

Q. And did that person turn out to be Harry Tompkins?

A. Yes, sir.

Q. That was about how far outside of—I will put it this way: That was on a bridge, was it not?

A. Yes, sir.

Q. That bridge was about how far from this crossing that we were speaking about?

A. Oh, it is a mile and a half or two miles.

Q. And — you passed by did you recognize the man who was walking?

A. Yes, sir.

Q. You are not permitted to tell us what you said, but [fol. 176] did you say something—were you driving, or Mr. Harrington?

A. No, sir.

Q. Who was driving?

A. Mr. Harrington.

Q. Did you say something to Mr. Harrington after you recognized Harry on the road?

A. Yes, sir.

Q. After you said something to him, did he stop?

A. Yes, sir.

Q. And did Mr. Tompkins get in the car and go on down to Hughestown?

A. Yes, sir.

Q. And you let him out where?

A. At Rock Street.

Q. Now, sir, when you got to Rock Street and he got out,

I assume you said good-night, and that is all you knew until the following day?

A. Yes, sir; the following day.

Q. Now, during the thirty-nine years that you have lived in Hughestown, what part of the village, if you call it that, or the borough, did you live in?

A. On the upper end of Rock Street.

Q. And is that up around Searle Street?

A. It is up beyond Searle Street, up over the railroad.

Q. Well, during those thirty-nine years, let me see—how old are you?

A. Thirty-nine.

Q. You were born right there in this borough?

A. Yes, sir.

Q. You went to school there?

A. Yes, sir.

Q. You went to church there?

A. Yes, sir.

Q. Raised your family there?

A. Yes, sir.

Q. And so I take it you are familiar with that section between Rock Street and the dead end of Hughes Street?

A. Yes, sir.

Q. Have you ever used it yourself?

A. Several times; yes, sir.

Q. Have you seen other people use it?

A. Yes, sir.

[fol. 177] Q. And you know the roadway that goes between the tracks and that stanchion that holds the sign, do you?

A. Yes, sir.

Q. And you know the two paths, do you, that you heard described here in court?

A. Yes, sir.

Q. You have seen those used by whom?

A. By pedestrians.

Q. They were used how many years? How long has that territory been used?

A. Twenty years, anyhow.

Q. Now, just to anticipate one question, there is some question raised here about whether people ever used—I will show you some pictures. Do you see where I am re-

ferring to Defendant's Exhibit C, the first picture, do you see where the roadway comes in—do you not?

A. Yes, sir.

Q. I call your attention to the left of the picture, these black shadows; you can see the grade there which goes down, can you not?

A. Yes, sir.

Q. That grade, is that a uniform grade or is it steeper at some places than others?

A. Steeper, and holes in it.

Q. Now, you can see a man down here?

A. Yes, sir.

Q. No place is it exactly alike, according to the photograph, is it?

A. No, sir.

Q. Now, the question that has been raised here is whether people, your average citizens up there, do they use this path up along the tracks or do they go through down where these grades are and where this ditch is and so on?

A. They use the path.

Q. Did you ever see anybody down in here (indicating)?

A. No, sir.

[fol. 178] Cross-examination.

By Mr. Kiendl:

Q. Mr. Schultz, you only know of two paths there?

A. Yes, and the one leading out of Mr. Colwell's gate.

Q. You did not mention that until I drew that to your attention?

A. No, sir.

Q. Have you seen people walking up the path from Mr. Colwell's gate?

A. No, sir.

Q. Have never seen anybody walking up that path?

A. No, sir.

Q. At any time?

A. No, sir.

Q. Well, when did you last see that path from Mr. Colwell's gate up to the railroad track?

A. I can't recall.

Q. You have never seen it, have you?



A. Yes, sir; I see it.

Q. You saw a path there?

A. Yes, sir.

Q. Years ago?

A. Yes, years ago.

Q. And you remember now that there was a path there?

A. Yes, sir.

Q. But you never saw anybody use it?

A. No, sir.

Q. And you have been on the path alongside the railroad tracks several times?

A. Yes, sir.

Q. What do you mean by several times; three or four or a dozen or a hundred or what?

A. Not a hundred times or not three or four.

Q. Well, what is your best estimate about how many do you mean by several times?

A. Oh, maybe ten or twenty.

Q. Maybe ten or twenty?

A. Yes, sir.

Q. In the daytime?

A. Daytime.

Q. And at nighttime?

A. No, sir.

Q. You have never walked along that path at nighttime that you know of?

A. No, sir.

[fol. 179] Q. And you have never seen anybody else walk along it at nighttime, have you?

A. No, sir.

Q. And you have lived there all your life?

A. Yes, sir.

Q. In the daytime, say, other than your twenty times altogether that you used the path, that is the only time that you saw people using the path, when you were using it for some purpose or other, wasn't it?

A. Yes, sir.

Q. So the twenty times you had seen that path used, you had walked along it yourself in the daytime?

A. Yes, sir.

Q. And you had seen other people?

A. Yes, sir.

Q. And does that cover your whole experience in

this territory, what you have told us now, that about twenty times in your life you had used it and seen other people use it when you were——

A. I have used it myself about twenty times.

Q. And that is the time you saw other people using it?

A. They used it other times that I have seen other people using it.

Q. Well, you were just looking to see people using the path, or you just happened to remember you saw them use it?

A. I saw them using it.

Q. You never saw anybody using it at night, did you?

A. No, sir.

Q. In all your thirty-nine years?

A. No.

Q. Going to church and going to school, and bringing up your family?

A. No, sir.

Q. You never saw anybody use that path in the night-time, did you?

A. No, sir.

Q. Now, when you used the path on the twenty times when you used it, if it were twenty times, did you walk along that path along the edge of these railroad ties when trains were coming?

A. Yes.

[fol. 180] Q. You have?

A. Yes.

Q. When trains were coming from either direction?

A. Yes, sir.

Q. And you had been in this stove company business all your life; you had never been in the railroad business, had you?

A. No, sir.

Q. And did the trains come awfully close to you when you were walking along that path?

A. Oh, maybe a foot and a half away.

Q. Maybe a foot and a half?

A. Yes, sir.

Q. And the trains would move at a fairly rapid rate of speed?

A. Fairly good rate of speed.

Q. And they would come from behind you and in front of you?

A. Yes, sir.

Q. You did not consider that dangerous at all, did you?

A. Not if the train was in good condition and nothing sticking out from it, no.

Q. Well, did you expect things might be sticking out from trains sometimes?

A. No.

Q. It never occurred to you that things might be sticking out from trains, such as machinery or something of that kind?

A. Sir?

Q. It never occurred to you, did it?

A. Never could, did you say?

Q. You never thought about anything projecting from the side of the train?

A. No.

Q. You never thought about any wide cars containing automobiles or furniture?

A. No, sir.

Q. Or anything of that kind?

A. No, sir.

Q. You considered it perfectly safe in the daytime to walk along that path with trains moving at a rapid rate of speed within a foot and a half of you?

A. Yes, sir.

Q. Did you consider it safe for you to do that at nighttime?

A. I didn't do it at nighttime.

Q. In complete darkness?

A. I did not do it at nighttime.

[fol. 181] Q. Would you consider it safe to do it at nighttime in complete darkness?

Mr. Hunt: Objected to.

The Court: Overruled.

Mr. Hunt: Exception.

Q. Would you?

A. No, sir.

Q. In your experience in using that path, as one of the citizens of that borough for thirty-nine years, I understand you to tell this Court and Jury that, having seen the path and having seen people walking on it, you would consider it dangerous to walk on that path in pitch darkness?

A. I would not.

Q. When trains were coming toward you?

A. I would not consider it dangerous.

Q. You would consider it perfectly safe?

A. Yes.

Q. There aren't any lights in that whole territory from Rock Street to Hughes Street, are there?

A. Not that I know of.

Q. Well, you know that there aren't any, don't you?

A. No, I could not say for sure.

Q. Well, you know the territory pretty well, don't you?

A. Yes.

Q. Look at these pictures and tell us whether they will refresh your recollection as to whether there are any lights in that neighborhood of any kind at all at night?

Mr. Hunt: To save time, Mr. Kiendl, it is conceded there are no lights.

Mr. Kiendl: All right.

Q. Mr. Schultz, on that concession, there are no lights there?

A. No, sir.

[fol. 182] Q. Pitch black there at night, isn't it?

A. It all depends how black it is; it is clear some night-and moon shining.

Q. If the moon is shining there is some light, but if there isn't a moon and no stars, it is pitch black, isn't it?

A. Yes.

Q. Have you been through that territory at night at any time?

A. No, sir.

Q. Never been near there at night?

A. No, sir.

Q. Never in your whole thirty-nine years?

A. No, sir.

Q. Did you see the cylinders on the sides of the locomotives?

A. Yes, sir.

Q. Do you know how wide the ties are at the point where this accident happened?

A. No, sir.

Q. Well, you see them in the pictures, and you have looked at these pictures—about eight feet wide, aren't they?

A. Yes.

Q. Had you noticed when you were walking along the path whether or not there was any overhang from any part of the train beyond the edge of the ties?

A. No, sir.

Q. Well, you mean you did not notice it or that there wasn't any?

A. I haven't noticed it.

Q. Now, when you walked along there with the train coming alongside of you, you looked, didn't you, to see how close the train was going to come to you?

A. Yes, sir.

Q. And could you tell us whether the farthest side of the train, the engine or the cars, came over the edge of these ties?

A. Well, they came over the edge of the ties, certainly.

Q. Yes, they came over about a foot, didn't they, over the edge of the ties?

A. Probably so.

Q. What?

A. Probably so.

Q. That is your best recollection, isn't it?

A. Yes.

[fol. 183] Q. That the farthest side of the engine and cars came over the edge of the ties possibly a whole foot?

A. A whole foot.

Q. Where did you say the path ran? Did it run up against the edge of the ties, as has been testified here before, didn't it?

Mr. Hunt: I object to the form of the question.

Mr. Kiendl: Maybe it is objectionable. I will withdraw it.

The Court: Reframe it.

Q. Did the path that we are talking about, the path that ran parallel to the railroad, did it run along the edge of the ties or did it not?

A. At different points it did.

Q. As you walk along between the main street, you say Rock Street?

A. Yes.

Q. There is a path, and you have walked on it?

A. Yes, sir.

Q. And it goes substantially parallel to the railroad tracks?

- A. Yes, sir.
- Q. Down to Hughes Street?
- A. Yes, sir.
- Q. And it is substantially straight, isn't it?
- A. It is not exactly straight.
- Q. Well, pretty nearly straight as you see it in the pictures here, don't you? I think you picked it out. Substantially straight, doesn't it?
- A. Well, yes.
- Q. And at most points it runs along the edge of the ties, doesn't it?
- A. It does at points, yes.
- Q. So that you walk along that path at points where it is close up to the ties?
- A. Yes, sir.
- Q. A train coming down with an overhang of a foot beyond the point of the ties, a man would get hit, wouldn't [fol. 184] he, if he was walking in by the ties?
- A. Yes.
- Q. If he were walking on that path, wouldn't he, where the path was close to the ties?
- A. If he was close to the ties, yes.
- Q. Well, you say the path at points was right up to the edge of the ties?
- A. Yes, sir.
- Q. At many points along there?
- A. Yes.
- Q. And with a one foot overhang the overhang would go over one-half of that two-foot path that you have told us about, wouldn't it?
- A. Yes, sir.
- Q. And even if you walked on the outside of the path and the width of that path, there were points where that one-half overhang would hit you?
- A. No, sir.
- Q. There were not?
- A. No.
- Q. It would come awfully close to hitting you, wouldn't it? But you considered it perfectly safe to walk there?
- A. Yes, sir.
- Q. With trains going forty miles an hour?
- A. Yes, sir.

Redirect examination.

By Mr. Hunt:

Q. You have lived, you told me, up Rock Street, even beyond Searle Street?

A. Yes, sir; very nearly a mile.

Q. Almost a mile from this crossing?

A. Yes, sir.

Q. Did you ever have any occasion; did you know anybody down here on Hughes Street or not, during the years you have lived there?

A. Yes, sir.

Q. Well, that would be the only occasion that you would ever have to use that path, would be when you would go over there to make a visit or something?

A. Yes, sir.

[fol. 185] Q. So in other words you did not live right here in this immediate vicinity?

A. No, sir.

Q. Where you could make the same observations that some people who lived there did?

A. No, sir.

Q. Did you go to school, going back to your school days, did you go to the school that is down here east of the tracks?

A. Yes, sir.

Q. And you saw that path in those days, you saw the path that leads down toward the colliery, did you?

A. Yes, sir.

Q. And how long has this general situation existed there?

A. Oh, for twenty years; maybe better.

Q. Did you go visiting in Hughes Street in the daytime?

A. Yes, sir.

Q. Sometimes did you go there at night visiting?

A. Yes, sir.

Q. Over this territory?

A. No, sir.

Q. Which way would you go at night when you went to Hughes Street, around Searle Street and then in?

A. Down Rock Street.

Q. Down Rock Street to Searle Street?

A. Yes. Where I visited the house borders on Hughes and Rock, you can go in either way.

## Recross-examination.

By Mr. Kiendl:

Q. I understood you to tell Mr. Hunt that the occasions when you used this territory that we are talking about——

A. Yes.

Q. —where these paths are——

A. Yes.

Q. —you went down to Hughes Street to visit friends?

A. Yes, sir.

Q. And now you tell us you went down to visit friends in Hughes Street at night?

A. I did not say Hughes Street at night.

Q. You did not say Hughes Street at night?

A. No, sir.

[fol. 186] Q. You only visited the friends who lived in Hughes Street at the day time?

A. At nighttime.

Q. But when you went to Hughes Street to visit your friends you did not use the same territory that you used in the daytime?

A. Not at night, no.

Q. You never did, did you, at night; you never used that territory?

A. No, I never used it at night.

Q. At night you always went around the other way?

A. Yes; I would be going down Rock Street.

Q. So that it was daytime when you could see clearly you would go down where these paths were, and at nighttime you would go the other way?

A. Well, it all depended in what direction I was coming from. If I was going over the field, I would use the paths; if I was going down the highway——

Q. Even at night you would use the paths?

A. No.

Q. You never used the paths at night?

A. No.

Q. So it is a fact, isn't it, Mr. Schultz, that when you were going from Rock Street to your friends in Hughes Street at night, you went another way than by these paths?

A. I would be coming down the highway, yes.



Q. And when you went there in the daytime you would use the paths?

A. If I would happen to come down the open field, I would use it.

Q. Well, you did use the path for yourself for possibly about twenty times in your life?

A. Yes.

Redirect examination.

By Mr. Hunt:

Q. What Mr. Kiendl wants to develop is that you used the path in the daytime and some other way at night?

A. Yes.

Q. Is that the fact? I mean what is the reason for that? I think I understand, but explain it to us.

[fol. 187] A. Why, I lived up, at different times, at one time up over this hill through the fields, see?

Q. Yes.

A. And if I was coming down in the daytime I would go down through the field where these paths come in, the diagonal paths.

The Court: I think he has testified to that over and over again.

Mr. Hunt: Yes. I will be short.

Q. You used to live down here over the hill?

A. At one time.

Q. Then you would take the diagonal path, either day or night, down to where your friend lived?

A. Yes, sir.

Q. Now you live away up here above Searle Street, do you not?

A. Yes, sir.

Q. And if you were going down, how did you go?

A. Down Rock Street.

Q. And then how?

A. Well, I would come over and go over to Hughes Street.

Q. Come over and go over to Hughes Street?

A. Yes.

Recross-examination.

By Mr. Kiendl:

Q. Regardless of the reason, the fact is that you never did use the path at night and did use it in the daytime?

A. Yes, sir.

The Court: He has testified to that.

Mr. Kiendl: May I ask one more question, and I will promise to desist.

Q. The real reason is that you were afraid to walk along that track at night with trains coming through there?

A. No, sir.

[fol. 188] By Mr. Hunt:

Q. No truth in that reason. Is there anything in that reason at all?

A. No, sir.

Mr. Hunt: That is all.

(Witness excused.)

(Informal recess.)

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ERNEST COOK, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Hunt:

Q. How old a man are you, Mr. Cook?

A. Thirty-four.

Q. You are a resident of the Borough of Hughestown?

A. Yes, sir.

Q. Live there with your family?

A. Yes, sir.

Q. And your business is what?

A. Commissioner of Streets.

Q. Now, a commissioner of streets up there in a community of that kind also does some work, does he not?

A. Positively.

Q. Actual work?

A. Yes, sir.

Q. Your work is what?

A. Well, I take care of the streets, repairing the streets, sewers, fire alarm system and also drive the fire truck.

Q. Drive what?

A. Drive a fire truck.

Q. Outside of that you haven't anything to do until tomorrow? You also drive a borough truck, do you not?

A. Yes, sir; the borough truck.

[fol. 189] Q. Well, that is used for what?

A. Borough purposes; borough work.

Q. And what about the collection of garbage?

A. Take that twice a month.

Q. Do you do that yourself?

A. Yes, sir; with the help of two men.

Q. You have lived at Hughestown how many years?

A. Fourteen years.

Q. You are familiar with this section of the village we have been talking about during the trial?

A. Yes, sir.

Q. You know the condition of the land there between Hughes Street and Rock Street, do you not?

A. Yes, sir.

Q. Have you used it yourself?

A. Many times.

Q. And both as a pedestrian and in your work with the trucks?

A. Yes, sir.

Q. As a matter of fact, how do you get in onto Hughes Street when you are collecting the garbage?

A. Down Rock, across the railroad, pull to the right, come into the right between the sign and the railroad and come back over into Hughes Street.

Q. So that we will understand that when you—your headquarters, so to speak, if you call it that, your headquarters are east or west of the railroad?

A. East.

Q. That is down in what we refer to where the baseball field and school and church and those things are?

A. Yes, sir; right next to the school.

Q. When you start collecting garbage you say you come down Rock Street; you mean you go west?

A. Yes, sir.

Q. And when you get to the tracks, to go in onto Hughes Street, you do what?

A. Turn to the right between the track and the sign.

[fol. 190] Q. You have been doing that how many years?

A. Five years.

Q. You have heard described, and I am trying to shorten this up, the paths that the pedestrians use, both the one between Rock Street and Hughes and the one that runs up to the end of—diagonally to the end of Hughes Street down through to the colliery?

A. Yes.

Q. Now, let me ask you, directing your attention to those two paths, do they come to some point?

A. At Hughes Street.

Q. And the place where they meet, how wide is that point of them where they meet?

A. Oh, I should judge about four feet and a half.

Q. And the path that continues towards Rock, from Hughes over to Rock, is that the same width or does it narrow down somewhat?

A. It narrows down somewhat on the way over.

Q. And the path that continues diagonally across the track, does that likewise narrow somewhat?

A. Yes, sir.

Q. Some suggestion has been made that people should go across the ditch. You know that ditch that is there, do you not?

A. Yes, sir.

Q. By the way, how deep is that ditch?

A. About two feet.

Q. And it varies somewhat, I suppose, like all—it is a cobblestone ditch?

A. Well, yes, cobblestones, but the cobbles are loose.

Q. Are those cobblestones lying there between that picket fence?

A. Yes, loosened up and a lot of them is out of there, the weather has pulled them out.

Q. A lot of them out, and I just asked you the kind of footing there from where the railroad continues and you [fol. 191] say you have pretty good solid cobblestones until you get to the end, to the telegraph pole which is the end of the block, is it?

A. Yes, sir.

Q. Well now, from there over to that, is that a thirty inch pipe?

A. I could not say.

Q. That is about the condition in there, isn't it?

A. Yes.

Q. And then it has a drop in there of approximately two feet off the edge of that road?

A. Yes, in the center of the ditch.

Q. And then you see how this embankment goes up there in this place?

A. Yes.

Q. Did you ever see anybody walking down trying to go through there?

A. No, sir.

Q. The regular place where you citizens use is right up here where we have had it described?

A. The path; yes, sir.

Cross-examination.

By Mr. Kiendl:

Q. You are the Commissioner of Streets of the Village of Hughestown?

A. Yes, sir.

Q. The whole street department, aren't you?

A. No.

Q. Nobody else but you, is there?

A. I take charge of it.

Q. You are the only man in the street department?

A. I am the only salaried man in town.

Q. And your salary is quite a nominal salary, isn't it?

A. That is right.

Q. \$150 a year?

A. No, it is \$150 a month, twenty-four hour service.

Q. Anyone else in the department but you?

Mr. Hunt: How much service?

The Witness: Twenty-four hours.

[fol. 192] Q. You don't mean you work twenty-four hours?

A. I don't work actually twenty-four hours, but I must be on duty twenty-four hours in case of fire.

The Court: Do you pay out of this \$150 any help?

The Witness: No. The borough hires the help when I need men there, the borough council.

Q. You are the only man in the Street Department of the Village of Hughestown, aren't you?

A. Yes, sir.

Q. And the same thing is true of the Police Department, there is one man, isn't there?

A. At the present time. They generally have three, but at the present time there is only one.

Q. And you know the man who was here, Mr. Harrington?

A. Yes, sir.

Q. He was at one time——

A. The Chief of Police.

Q. He was the only man in the Police Department, wasn't he?

A. No; in his time there were two others.

Q. And his salary was \$150 or \$250 a year, wasn't it?

A. Something like that.

Q. You knew that?

A. I know it is somewhere around that amount. It isn't much.

Q. You have testified before in this case, haven't you?

A. Yes, sir.

Q. In Pittston, Pennsylvania?

A. Pittston, Pennsylvania.

Q. About a year ago?

A. Somewheres around that.

Q. Were you asked about the paths you have talked about this morning?

A. I believe I was, yes.

[fol. 193] Mr. Hunt: Your Honor, I think some juryman might have the idea there was a trial or something in Pittston.

Mr. Kiendl: If you will leave that to me I will see that is brought out and the jury is not deceived about it one way or the other.

Mr. Hunt: All right.

Q. Are you sure you testified in Pittston to the existence of these paths?

A. Yes, sir.

Q. And your testimony was taken with lawyers for the railroad company and lawyers for the plaintiff examining you?

A. Yes, sir.

Q. And you were sworn under oath to tell the truth there?

A. Yes, sir.

Q. And you did tell it, didn't you?

A. Yes, sir.

Q. Now, you told us this morning that you had walked over this territory many, many times?

A. Yes, sir.

Q. When you were asked about that in Pittston didn't you testify that you walked over it very few times?

A. We have done work since then.

Q. I didn't ask about that. Didn't you testify in Pittston that you had walked over it very few times?

A. Yes, sir.

Q. And that was true?

A. Yes, sir.

Q. Now so we get the testimony correct, it is the fact that you testified in Pittston, in February of 1935, isn't it?

A. I suppose it is, if it is there.

Mr. Hunt: It is conceded.

Q. That is conceded to be the date you testified?

A. Yes, sir.

Q. I will ask you once again if you were asked this question: "Have you ever walked along it," referring to this [fol. 194] express land, and your answer "Very few times"?

A. Yes, sir.

Q. So it is the fact up to February of 1935, as the Commissioner of Streets of the Village of Hughestown, you had walked over this strip of land very few times?

A. Yes, sir.

Q. But you have walked over it a great many times since?

A. Yes, sir.

Q. And is it in the same condition now as it was in in February 1935?

A. Yes, sir.

Q. And was it in the same condition in February, 1935 that it was in at the time of the accident in July of 1934?

A. Yes, sir.

Q. It has been in that condition for the last five or ten years, to your knowledge?

A. To my knowledge, yes, sir.

Q. Now, you have told us here today that you have seen people walking along this path alongside the railroad track?

A. Yes, sir.

Q. Many times?

A. Yes, sir.

Q. And has that been since February of 1935 or has it been at all times?

A. At all times.

Q. And that covers a period of about ten years?

A. Yes, sir.

Q. Well, weren't you asked about that when you testified under oath in Pittston, in February of 1935?

A. I don't recall.

Q. Weren't you asked, sir—

Mr. Hunt: What page?

Mr. Kiendl: Page 8, this question at the bottom of page 8.

Q. "Q. When you observed these people walk along this strip of land, was there any particular portion that they [fol. 195] walked upon?" Do you remember being asked that question in those very words?

A. I don't recall.

Q. Was there a stenographer talking down what was said?

Mr. Hunt: It is conceded that he was asked these questions, your Honor.

Q. Well, then, it is conceded that that question was asked you.

A. Yes, sir.

Q. And did you answer, "I never paid them much attention"?

A. I don't recall.

Mr. Kiendl: Is it conceded that he so answered?

Mr. Hunt: Certainly.



Q. Well, if you so answered, that you never paid any attention to the portion of the strip of land where the people were walking, is that true?

Mr. Hunt: I will have to ask the question to be reframed in accordance with the answer "I never paid that much attention."

Q. If it be true that you never paid that much attention to the particular portion of the strip of land where people were walking, was it true?

A. Yes, sir.

Q. And is it true now?

A. Yes, sir.

Q. You always saw them, you told Mr. Hunt, walking along this path?

A. Yes, sir.

Q. Why didn't you testify to that in Pittston?

A. I did testify in Pittston.

Q. Where is the path, Mr. Cook?

A. The path?

[fol. 196] Q. Yes, where is the path?

A. Why, it starts at Rock Street and runs over to Hughes Street.

Q. Does it run along the railroad track?

A. Yes, sir.

Q. And is it one of these paths that curve in and out, or does it run right straight along?

A. No, it follows the line of the track.

Q. It runs right parallel to it?

A. Parallel with the track, yes.

Q. And it is right alongside the track, isn't it?

A. No, I won't say it is right alongside the track.

Q. Well, alongside the ties?

A. No, sir.

Q. Isn't there—

A. No, it differs in places.

Q. Well, at most places it is right alongside the ties?

A. Not in most places, no.

Q. In some places?

A. In some places.

Q. So that you have a path running, we will call it, do you not, from Rock Street to Hughes Street, that runs parallel to the railroad tracks?

A. Yes, sir.

Q. And at some places it is right at the edge of the ties and at other places, it is a little out from the edge of the ties; is that right?

A. In some places it is close to the edge of the ties but not right at the edge of the ties.

Q. Well, within a matter of an inch or two, something like that?

A. Well, it is more than that; six to eight inches in some places.

Q. So in some places at least you as the Commissioner of Streets down there know that this path comes within six or eight inches of the ends of the ties?

A. Yes, sir.

Q. And the distance of that path from Rock Street to Hughes Street is about 120 or 130 feet, something like that, isn't it?

A. Somewhere in that neighborhood; yes.

[fol. 197] Q. And where it is parallel, and I think you said it was parallel all the way down, but where it is parallel, it comes pretty close to the ties or half to three-quarters of the distance as shown in these pictures; doesn't it?

A. From Rock Street toward Hughes, yes.

Q. And that is true of most of it, isn't it, when you walk from Rock Street to Hughes Street along this path?

A. No, sir.

Q. That most of it is right close up against the edge of the ties, within five or six inches?

A. Most of it from Rock Street going over to Hughes on the Rock Street side is close to the ties.

Q. Yes; within five or six inches?

A. I should say six or eight inches.

Q. Six or eight inches; I beg your pardon.

Mr. Hunt: On the Rock Street side?

The Witness: Yes.

Q. As a matter of fact, as you get nearer Hughes Street, it is right at the edge of the ties, as shown in the picture here with the mark on it, is it, Plaintiff's Exhibit 3?

A. Yes, sir.

Q. And where the two paths converge is right about the spot on which I put my pencil, isn't it, the path from Hughes Street up to the track and the path from Rock Street down towards Hughes Street?

- A. Yes, sir.
- Q. Now, that path at that point you say is within six or eight inches of the track?
- A. Yes, sir.
- Q. And you say from Rock Street on down to Hughes Street half way the path is within six or eight inches?
- A. It varies in places.
- Q. About that?
- A. Yes, sir.
- [fol. 198] Q. Within six or eight inches of the ends of the ties; right?
- A. Yes, sir.
- Q. And then as you go more than half the distance and you can get nearer Hughes Street, the path runs right along the edge of the ties as shown in the picture, doesn't it?
- A. No, sir.
- Q. I thought you just said it did. Let's look again.
- A. The path widens out.
- Q. The path widens out?
- A. Yes, the path widens out.
- Q. As a matter of fact, it narrows in, doesn't it? I ask you to look at the picture, Plaintiff's Exhibit 3.
- A. No. At the intersection here of Hughes, where the Hughes Street path comes up.
- Q. Well, the Hughes Street path comes up, according to one witness, the line marked in pencil?
- A. Yes, sir.
- Q. Do you see that?
- A. Yes, sir.
- Q. Do you agree with that?
- A. Yes, sir.
- Q. And the path there is very narrow and right against the ties, isn't it?
- A. No, sir; the path widens out naturally from people walking up Hughes Street when they make the turn to come out into Rock.
- Q. I am talking about the path coming down parallel with the railroad track, that is narrower at that point than it is at any other point between Rock Street and Hughes, isn't it?
- A. No, sir.
- Q. And it is not up against the ties as shown in the picture, is it?
- A. Within six or eight inches.

Q. It is six or eight inches there too?

A. Yes.

Q. Now have we got that straight, Mr. Cook, that the path that you are talking about starts near Rock Street, runs parallel with the railroad tracks half way down that block within six or eight inches of the edge of the ties?

A. Yes.

[fol. 199] Q. And then continues on down and at the intersection of the two paths it is again within six or eight inches of the ties?

A. It does in places, yes.

Q. Or about that?

A. Yes.

Q. Now, from the center, from the middle of that block down to the intersection of the two paths the average distance of that path from the edge of the ties is about what, six inches, eight inches, ten inches?

A. Oh, I will say more than that; it differs.

Q. Well, what will you say?

A. Oh, a foot.

Q. So the edge of that path is always within a foot of the edge of the ties all the way down there?

A. Yes.

Q. That you are sure of, aren't you?

A. Yes, sir.

Q. And you are testifying as the man who is in charge of the streets of that village?

A. Yes, sir.

Q. At no place is that path further than a foot from the edge of the ties, that you know of?

A. Not if I can recall correctly, no.

Q. Well, you are trying to be very accurate here, because you know it is a serious lawsuit that is being tried, don't you?

A. As accurate as I possibly can; yes, sir.

Q. And with such accuracy as you have, you tell us now that at no point is that path farther than a foot from the end of the ties all the way down to the intersection with the Hughes Street path?

A. Yes, sir.

Q. And at some point it is within six inches of the edge of the ties?

A. Yes, sir.

Q. Now, do you agree that the path is about two feet wide?

A. Yes, sir; except at the intersection.

Q. Except right where the two paths join?

A. Yes.

Q. But all the way down to the intersection point the path [fol. 200] is about two feet wide?

A. About that, yes.

Q. Now, have you walked on the paths?

A. Yes, sir.

Q. Have you walked on them when trains were going by?

A. Yes, sir.

Q. At rapid rates of speed?

A. Yes, sir.

Q. At night?

A. Yes, sir.

Q. And in the daytime?

A. Yes, sir.

Q. And what do you estimate to be the width of that path, about two feet?

A. Somewhere around that.

Q. So that if you were walking on the path and in the middle of it, the side of your body would be within from six to twelve inches from the edge of the ties; isn't that true?

A. Somewheres in that neighborhood.

Q. Now, did you notice that the overhang of engines and cars—

A. I have noticed them.

Q. (Continuing.) —going through were about a foot from the edge of the ties?

A. No, sir; I never noticed that; no, sir.

Q. Well, you heard the last witness testify that he had noticed that there was an overhang of about a foot?

Mr. Hunt: Of a foot what, over the edge of the ties?

Mr. Kiendl: Over the edge of the ties.

Mr. Hunt: Objected to. I submit there is no such testimony here of an overhang except on the engine.

The Court: I don't recall it.

Mr. Kiendl: Well, the witness testified positively to it, your Honor.

The Court: Well, can the stenographer refresh our [fol. 201] memory on that? I don't recall it.

Mr. Hunt: It so happens I know the railroad has the dimensions of every car on this train, and we can get right down to it.

The Court: Are you ready to concede counsel's claim?

Mr. Hunt: I don't know. I thought he was talking about the engine.

Mr. Kiendl: No, I am talking about Mr. Schultz's testimony that the overhang of the engine was one foot beyond the edge of the ties, and I say——

Mr. Hunt (interrupting): The engine?

Mr. Kiendl: I say he testified positively.

Mr. Hunt: That is the engine. That is not what you asked the witness.

Q. You heard the last witness testify that in trains going down through in this territory that there was an overhang of one foot at some point in the train——

A. Yes, sir.

Q. Well, do you agree with that?

A. No, sir; I do not. I can't say I do. I never paid that much particular attention to it.

Q. Oh, you didn't pay that much particular attention to it?

A. No, sir; not to the overhang of an engine or a car.

Q. You never paid any attention?

A. I have noticed it, but not to pay that much particular attention to it.

Q. Well, when you were walking along there at night that was the one and only thing you paid attention to it, wasn't it?

A. Naturally.

Q. And when you walked along in the daytime that was the one thing you paid attention to?

A. Naturally.

[fol. 202] Q. You are accustomed to measurements, aren't you?

A. Somewhat, yes, sir.

Q. In your business?

A. Yes.

Q. As the Commissioner of Streets of this town?

A. Yes, sir.

Q. And do you tell us that you don't know how far these trains would project?

A. No.

Q. Out sidewise over the edge of the ties?

A. No, sir.

Q. You know they project some, don't you?

A. I don't know whether they would project over the ties or not; I could not say.

Q. Well, when you walked along there didn't you notice?

A. I have noticed; naturally I have noticed them.

Q. And you can't tell us anything about any overhang?

A. No, sir.

Q. How wide are the ties there at that point, do you know, Mr. Cook? About eight feet?

A. Somewheres around that, I should judge.

Q. Here they are, in Plaintiff's Exhibit 3.

A. I don't quite get the question.

Q. How wide are those ties, about eight feet wide, or don't you know?

A. About eight or nine feet, I should judge.

Q. That is your best judgment, isn't it?

A. Yes.

Q. Don't you know that the engines that go through there, some of them are ten feet three inches wide and some of the cars are over ten feet wide?

A. No, sir.

Q. You don't know that?

A. No, sir.

Q. You have never observed that?

A. No, sir.

Q. Have you seen trains go through there at night frequently?

A. Yes, sir.

Q. As a matter of fact, Mr. Cook, there are only two trains that go through there at night, as a rule, aren't there?

[fol.203] A. As a general rule, when the collieries are idle.

Q. Two trains a night?

A. Somewhere in that neighborhood.

Mr. Kiendl: That is all.

Redirect examination.

By Mr. Hunt:

Q. Have you seen railroad men use this path, employees of the railroad?

A. Not that I recall.

Q. You don't remember?

A. No.

Q. In regard to your testimony up in Scranton before the Commissioner, you were asked the questions and you made these answers, did you not, sir:

“Q. Have you observed other people walking along that (referring to the path)?

“A. Yes.

“Q. Over how long a period of time?

“A. Over twelve years.

“Q. With kind of frequency?

“A. I could truthfully say very often.”

You so testified, didn't you?

A. Yes, sir.

Recross-examination.

By Mr. Kiendl:

Q. You never saw any railroad employees walking in there?

A. Not that I recall. I have seen them walking around there working, but not walking on the path.

Q. Not walking on the path?

A. No, sir.

Q. Where had you seen them walking around there, if not on the path?

A. Well, they generally do their switching on the other side of the Rock Street crossing.

[fol. 204] Q. Let's keep on the north side of Rock Street, the piece of land we are interested in here; you know the piece I mean, between Rock and Hughes Street?

A. Yes, sir.

Q. Have you ever seen any employees on that strip at any time?

A. Yes, sir.

Q. Frequently?

A. I wouldn't say frequently; I have seen them.

Q. Occasionally?

A. Occasionally, at times, yes.

Q. But you have never seen them walking on the path there?

A. No, sir; they are generally on the other side of the track.



Q. And when they were on the other side of the track, the part that we are talking about, you never saw them walk on the path there?

A. Not that I recall.

Q. Where did they walk all over that place?

A. I could not say.

Q. Well, you have seen them there, now, haven't you?

A. Yes, but on the other side of the track where I have seen them.

Q. I am talking about this side of the track; I thought I had made that clear to you.

A. Yes.

Q. North of Rock Street?

A. Yes.

Q. Between Rock and Hughes Street?

A. Yes.

Q. On the west side of the track between the track and the fence?

A. Yes.

Q. During the years that you have been there have you seen railroad employees in there?

A. I can't truthfully say that I have.

Q. Well, you know you have, don't you, Mr. Cook?

Mr. Hunt: Your witness tries to be truthful and says, "I can't remember," and counsel says, "Why, you know you have."

[fol. 205] Mr. Kiendl: Well, I conceive that to be cross-examination, your Honor. Maybe Mr. Hunt can educate me.

Mr. Hunt: Well, don't you believe the man when he says he can't remember that, Mr. Kiendl, seriously?

Mr. Kiendl: No, I don't believe him, seriously, at all; I am perfectly plain about it.

The Court: Objection overruled.

Q. Don't you know that there are railroad men in there all the time?

A. No, sir.

Q. Well now, let's see. You know that there are mines close to Rock Street, don't you?

A. Yes, sir.

Q. And you know that coal cars come out of the mines and go into the side track to the south of Rock Street, don't you?

A. Yes, sir.

Q. And you know that cars are switched in and out there all day long in the busy seasons, don't you?

A. Not all day long, no.

Q. Well, at any part of the day?

A. Part of the day.

Q. And they are switched around by railroad employees on the cars, particularly brakemen, firemen, engineers and conductors?

A. Yes, sir.

Q. And that trains may come over Rock Street and then the switch is thrown and they go back into the switch, don't they?

A. Yes.

Q. And you have seen that done many, many times?

A. Yes, sir.

Q. And the switch that I am referring to, the point of the switch, is right at Rock Street, isn't it?

A. Close to it there; yes, sir.

Q. Right at the crossing, as shown in this picture?

A. Yes, that is true.

[fol. 206] Q. And there are other tracks to the south of Rock Street, aren't there?

A. Yes, sir.

Q. How many are there, four or five altogether?

A. Three, I think.

Q. Three. Now, you have seen cars come from south of Rock Street with the engine, go up over Rock Street to the north, with railroad men on them, haven't you?

A. Yes, sir.

Q. And you had seen those cars switched back on the tracks?

A. Yes, sir.

Q. To the south of Rock Street?

A. Yes, sir.

Q. Do you say now that you never saw any railroad men on the west side of the tracks in the territory that we are talking about between Rock and Hughes Street during all the time that you have been there?

A. No, sir.

Mr. Hunt: Walking or riding on a train?

Q. Never saw them in there at all?

A. No, sir; not that I can recall.

Redirect examination.

By Mr. Hunt:

Q. And this switching operation, these brakemen when you have observed this switching operation by a train pulling across Rock Street and then coming back on the other line, any brakeman on that train, was there any occasion for them to be walking or were they on the train, or don't you know?

A. Naturally if they are switching back into them switches, into them branches, if they are going to come back, or no matter which direction they are going to go, the brakeman is always on the opposite side of the track to throw the switch.

Q. Isn't the only man that gets off the train in an operation of that kind,—you know as a layman, without being an employee or an attorney, you know the only man that is off that train is the man that is to operate the switch, don't you?

A. Yes, sir.

Mr. Hunt: That is all.

Recross-examination.

By Mr. Kiendl:

Q. What were the men doing walking on the other side of the track, then, that you saw, that is the railroad employees that you told us about a few minutes ago?

Mr. Hunt: This witness answered that he cannot remember whether he had ever seen any railroad men walking north of that crossing.

Mr. Kiendl: Quite the contrary.

Q. Didn't you tell us that you saw the railroad men walking, but on the other side of the track?

A. On the other side, yes.

Q. North of Rock Street between Rock and Hughes Street—?

A. I don't quite understand your question.

Q. What is there about it that you don't understand?

A. Are you referring to that piece of ground that is in between Hughes and Rock?

Q. Yes.

A. On the west of the track?

Q. No; now I am referring on the east of the tracks.

A. I see. Yes, I have seen men there.

Q. You have seen railroad men walking in there time and time and time again?

A. Yes.

Q. What were they doing?

A. Signalling to the engineer.

[fol. 208] Q. And you have seen men right alongside of the track, railroad men, down on the ground?

A. Yes.

Q. Walking and giving signals?

A. Yes, sir.

Q. Hadn't you seen the same thing on the other side of the track?

A. No, sir.

Q. Not once?

A. No, sir.

Mr. Kiendl: That is all.

Mr. Hunt: That is all.

Your Honor, may I recall Mr. Tompkins just for a few questions that I neglected to ask?

Mr. Kiendl: Let me ask this witness a few more questions, your Honor.

The Court: Yes.

By Mr. Kiendl:

Q. When you saw them giving signals to the engineer, where was the engine, up towards the Avoca end?

A. Avoca?

Q. Up toward Avoca?

A. Yes, sir.

Q. And, as a matter of fact, from the side of the track on which you saw the men give the signals, the engineer would be on the opposite side, wouldn't he?

A. No, sir.

Q. Don't they sometimes push those cars down into the tracks, as well as pull them down, the locomotive?

A. Yes.

Mr. Kiendl: That is all.

Mr. Hunt: Now I will straighten that out.

Mr. Kiendl: No; you will try to.

Mr. Hunt: And I probably will.

[fol. 209] Redirect examination.

By Mr. Hunt:

Q. You see Avoca is, as you look into this picture, Defendant's Exhibit A, Avoca is looking into the picture, isn't it?

A. Yes, sir.

Q. And that is looking towards the curve, isn't it?

A. Yes, sir.

Q. The curve?

A. Yes, sir.

Q. Now, the engine was towards Avoca?

A. Yes, sir; facing Avoca.

Q. Now, if a man stood on the lefthand side of the track no engineer could see him, could they?

A. No, sir.

Q. So that in order for the engineer to see this signal you told the jury about when the train went around the curve he would have to be on that righthand side?

A. Yes, sir.

Mr. Hunt: I mean anybody can see that; I mean Mr. Kiendl with his railroad——

The Court: He has testified.

Mr. Hunt: That is all.

Mr. Kiendl: May I have that little picture?

Mr. Hunt: Yes (handing).

Recross-examination.

By Mr. Kiendl:

Q. So that we will know what we are talking about here, Mr. Cook, this picture, Plaintiff's Exhibit 5, shows the track going down toward Ashley, doesn't it?

A. Yes, sir.

Q. And that shows the track on the west side of the—the land on the west side of the track?

A. Yes.

Q. And on the east side of the track?

A. Yes, sir.

[fol. 210] Q. You say the railroad men give their signals here on this side (indicating)?

A. Yes, sir.

Q. And never——

A. (Interrupting) I had never seen them over there; no, sir.

Q. Are you sure of it?

A. Positive.

Q. Why did you say a few minutes ago you did not remember seeing them there, and now you are positive that you never saw them there?

A. You asked me giving the signals. I never seen a railroad man giving the signal from that side of the track; no, sir.

Mr. Kiendl: That is all.

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HARRY JAMES TOMPKINS, recalled, further testified as follows:

Direct examination.

By Mr. Hunt:

Q. Mr. Tompkins, I neglected to ask you about your earning capacity up to the time that you were injured. Tell us about your wages; were they the same every week or was there a variation?

A. There was a variation.

Q. And I want you to tell us the minimum and the maximum, and in that way we can judge what is a fair average.

A. Well, between \$7 and \$7.50.

Q. Yes.

A. Per day.

Q. Now, you are taking the day, or what?

A. By the day.

Q. And what did that total up to? We don't know what hours you worked a week, so that if you will give it to me by the week, what was your average income, your minimum income [fol. 211] come a week, and your maximum?

A. Well, some weeks we would work three days and some weeks four.

Q. I am trying to get your wages when the plant was running.

A. Yes.

Q. You could rely upon about so much money per week, could you not?

A. Yes, sir.

Q. Now give me the minimum and maximum.

A. \$21 to \$28.

Q. \$21 to \$28?

A. Somewhere in between those two amounts.

Q. That would be a fair average?

A. Yes.

Q. Now as to the other proposition; the surgeons have sent you a bill, have they not?

A. Yes, sir.

Mr. Hunt: I know this is not strictly in accordance with the rules.

Mr. Kiendl: You know me well enough. Go ahead. Produce the bill.

Q. Do you remember the amount of the bill?

A. Yes, sir.

Q. What is the amount of the bill?

A. The hospital bill was \$89 and the doctor was \$350.

Mr. Hunt: We will find out.

Mr. Kiendl: Well, if you say that is correct, and you have those bills.

Mr. Hunt: I will have them. That is all.

Cross-examination.

By Mr. Kiendl:

Q. Mr. Tompkins, you had not worked for two months before the accident, or something like that; that is what you told us yesterday, wasn't it?

A. Yes, sir.

Q. And prior to that time you were working about three days a week?

A. Yes, sir.

[fol. 212] Q. For some years back to 1929?

A. Yes, sir.

Q. From 1929 on to 1934 you were working about three days a week?

A. Yes, sir.

Q. And frequently you did not work at all during that time?

A. Right.

Q. For weeks and months at a time?

A. Yes, sir.

Q. Now, you understand that I am asking you about from 1929 on to 1934, a period of five years?

A. Yes, sir.

Q. The truth of the matter is that you were out of work most of the time, isn't that true?

A. No, not most of the time. We would work six months out of the year, anyway.

Q. Six months, working about half the time?

A. Yes, sir.

Redirect examination.

By Mr. Hunt:

Q. Before this depression came on, during these many years you worked up until 1929, up to the end of 1929, what was your average weekly income, or what was the minimum and the maximum?

A. It was about the same.

Q. About the same?

A. Yes, sir.

Recross-examination.

By Mr. Kiendl:

Q. So that your average for all of the time that you worked was somewhere in the neighborhood of \$25 a week?

A. Yes.

Q. Mr. Tompkins, is this Mr. Nemeroff, who sits here, your attorney of record?

A. Yes, sir.

Mr. Kiendl: That is all.

[fol. 213] Mr. Hunt: And with that the plaintiff rests, may it please the Court.

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MOTION TO DISMISS

Mr. Kiendl: Then, if your Honor please, the defendant moves to dismiss the complaint in this action.

The Court: Do you want to make this motion in front of the jury?



Mr. Kiendl: It is a matter of indifference, your Honor. Whatever your Honor wants.

The Court: Whatever you want.

Mr. Kiendl: I don't care. Shall I proceed?

The Court: Yes.

Mr. Kiendl: The defendant moves to dismiss, first on the ground that the plaintiff has failed to establish any actionable negligence on the part of this defendant and, secondly, on the ground that it affirmatively appears in the plaintiff's own case that he was guilty of contributory negligence as a matter of law.

I call your Honor's attention to the fact that there is no claim made in the pleadings here that this is a case of wilfull, wanton and reckless negligence such as we sometimes know of, but even if the claim were made we would move to dismiss the complaint on the clear ground that there is no testimony not even a scintilla of evidence, to support that theory.

On all these grounds we press our motion to dismiss this complaint. We think the best that the plaintiff can possibly contend for is that he has raised some slight scintilla, and that scintilla rule is not adopted in the Federal Court. I [fol. 214] have furnished your Honor with the authorities. I do not want to discuss them more than to say that.

The Court: I have read them, and I shall continue reading them.

Mr. Kiendl: I do want to call your Honor's attention to the fact this permissive pathway doctrine is not applicable in this case under the decisions of the highest courts of Pennsylvania and under the decisions of our Circuit Courts.

The Court: I will deny your motion.

Mr. Kiendl: May I have an exception?

The Court: Surely.

Mr. Kiendl: On each and every one of the grounds?

The Court: Yes.

Mr. Kiendl: Will the engineer take the stand. Some of the jurors would rather have the adjournment. I don't mean to impose my will on anybody.

The Court: No, you are not imposing will at all. You can proceed.

Mr. Kiendl: If the jurors desire it, of course I am perfectly satisfied.

Mr. Hunt: We have only got twelve minutes.

The Court: Are all hands agreed, then, that we adjourn?  
Try to be back at two o'clock sharp.

(Recess to 2:00 p. m.)

[fol. 215] Afternoon Session—2:00 P. M.

MICHAEL BERNARD McGRATH, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kiendl:

Q. Mr. McGrath, where do you live?

A. My home is in Allentown; I board at Ashley, Pennsylvania.

Q. And by what company are you employed?

A. Central Railroad of New Jersey.

Q. And how long have you been in the employ of the Central Railroad of New Jersey?

A. May 13, 1923.

Q. And from May 13, 1923 what job have you had with the Central Railroad?

A. Started out as car checker, interchange clerk and freight clerk and freight clerk now, freight station clerk.

Q. Freight station clerk at what point?

A. At various points.

Q. What was your position in July of 1934?

A. Night clerk at Ashley Station.

Q. And is that Ashley Station in Pennsylvania?

A. Yes, sir.

Q. And as night clerk at that Ashley Station in July, 1934, what were your general duties?

A. Way billing coal, taking care of the freight bills and checking the Erie train in and out.

Q. You were checking trains coming in and going out; is that part of your duties?

A. Yes, sir.

Q. Did you ever hear of a train called the Ashley Special?

A. The Erie train.

[fol. 216] Q. The Erie train, yes sir.

A. That is how we refer to it.

Q. Now, did your duties in July of 1934 include checking that train when it came in from Avoca?

A. Yes, sir.

Q. And on the night of this accident, or early in the morning of July 27, 1934, were you on duty as night clerk?

A. Yes, sir.

Q. And performing your duties as such night clerk down there at Ashley?

A. Yes, sir.

Q. Did this Erie train, the Ashley Special, come into Ashley that morning?

A. Yes, sir.

Q. Do you know about what time?

A. Yes, sir; I have a book here, my seal record.

Q. Have you a recollection aside from your book?

A. My seal record book, which is in my brief case.

Q. Will you get your brief case, or can I get it for you?

A. Yes, sir.

(Brief case produced.)

Q. What time did that train get in, do you know?

A. It cleared Ashley yard at 4:50 a. m.

Q. 4:50 a. m.; and did you have anything to do with that train after it cleared the yard?

A. It is my duty to take the record of the initial and number and the seal records on the car.

Q. And did you perform that duty that morning?

A. I went completely around the train.

Q. Will you tell us what you mean when you use the words "seal record." What is a seal record?

A. A seal is a seal that is applied on the door after it is shut, and the seal is applied in order to keep it intact.

Q. And it was your job to inspect the seals on these cars?  
[fol. 217] A. Inspect them and also take a record of them.

Q. And make a record of them?

A. Yes, sir.

Q. You did inspect the seals on this train; you did make a record of them?

A. Yes, sir.

Q. Have you the record there before you?

A. There is the complete train (handing book).

Q. And is that record made by you in your own handwriting?

A. Yes, sir.

Q. And was that record made by you in the performance of your duties in the regular scope of your duties?

A. Yes, sir.

Q. At Ashley, Pennsylvania?

A. At Ashley, Pennsylvania.

Mr. Kiendl: I offer that record in evidence.

Mr. Hunt: No objection.

(Marked Defendant's Exhibit E.)

Q. This is the original seal record book?

A. Yes, sir.

Mr. Kiendl: Now may I go to the witness stand, your Honor, so I can make this as clear as possible?

The Court: Certainly.

Q. The record in this book marked Defendant's Exhibit E, consisting of two pages, the second page marked Defendant's Exhibit E in the seal record book is the record of the Central Railroad Company of New Jersey, is it not?

A. Yes, sir.

Q. And that shows, does it not, the initial, the number and the seal record of every car in that train?

A. Yes, sir.

[fol. 218] Q. Do you know offhand, without counting, how many cars there were in the train?

A. Thirty-eight.

Q. Thirty-eight cars?

A. Thirty-eight cars; yes, sir.

Q. Does that include the locomotive or the coal tank or the caboose?

A. No, that only includes the train.

Q. The train?

The Court: Wasn't there testimony that this was a forty-train car?

Mr. Kiendl: I said in opening to the Court that the train consisted of about forty cars. Thirty-eight cars, the caboose is thirty-nine, and the coal tender would be forty.

The Court: All right. Pardon me.

Q. All right. Now will you describe to the jury, Mr. McGrath, just what you did when that train got in and cleared the yard? Do you mean by that that it came into the yard and the Erie was through with it?

A. When it gets on our tracks, Jersey Central is responsible for it.

Q. That is what you mean?

A. It is up to me to take a seal record of every car in order to have a per diem record, and we have to get a seal record on account of damages and robberies and other things.

Q. When the train came into your yard, came into the jurisdiction of the Central Railroad Company of New Jersey, the train consisted of thirty-eight cars?

A. Yes, sir.

Q. And you inspected those cars?

A. Yes, sir.

Q. Now, how did you inspect them? Did you go to the head end of the train and go down one side and come up the [fol. 219] other, or tell the jury just what you did.

A. I started at the fourteenth car, as my record will show there, the first car; that was a box car. I had to get a seal record.

Q. Let's see if we can get the number of that car from this book, the fourteenth car?

A. It is this car (indicating), Erie 76315.

Q. Well now, do you mean by that that that was the fourteenth car from the head end as the train came in?

A. From the caboose.

Q. From the caboose?

A. Yes.

Q. And that was the fourteenth from the rear end of the train?

A. Yes, sir.

Q. After you started out, and as the train was standing there, you went to this fourteenth car from the rear end?

A. Yes.

Q. Then how did you proceed from the fourteenth car; did you go to the front or to the rear?

A. I went to the front of the train, took the initial and number and the seals of the car, and walked right beside the car.

Q. You went to the fourteenth car and took the initial, number and seal of that car?

A. That particular car, and then kept on taking the record.

Q. That is you went along to the front of the train?

A. Yes, sir.

Q. Then what did you do, go down the other side?

A. I went around the train.

Q. Let's see if we have your course so that the jury understand it. Thirty-eight cars standing on the track; you went to the fourteenth from the rear end?

A. Yes, sir.

Q. Then you proceeded along the side of the cars to the front end?

A. Yes, sir.

Q. Then you came around and down the other side of the cars?

A. Yes, sir.

[fol. 220] Q. Down around the rear end and back to the fourteenth car?

A. Yes, sir.

Q. So you covered the entire train?

A. Yes, sir.

Q. And both sides of the entire train?

A. In order to get the seal records from both sides.

Q. And you took the seal records on both sides?

A. Yes, sir, we do.

Q. It was about what time you did this? You said the train cleared at 4:50, as entered here?

A. That is my time that I started checking, as soon as the train stops I time them and start checking.

Q. 4:50 a. m. on July 27th. Was that daylight?

A. In July I believe it would be; yes, sir.

Q. And when you got to the fourteenth car did you write down in your book the initial and the number of the seal record on the north and the south sides of that car?

A. Yes, sir.

Q. And that is the first one that appears in this Exhibit E, is it not?

A. It is the fourteenth car, and that is what I started, on the north side, as it is indicated, and there is the south side (indicating).

Q. I see. When you got to the north side you put down the seal record of that car, Sharon 66088, did you not?

A. Yes, sir.

Q. So on the door of that car there was an intact seal, is that what it means?

A. Correctly applied, yes, sir.

Q. And when you got around, if you went around to the other side, you found an intact seal there?

A. 67233.

Q. And for every car that had seals on you made that record?

A. Yes, sir.

Q. The seals are always at the car doors, are they not?

A. Yes, sir.

Q. The second car you have here is TCX 2397?

A. That is correct.

[fol. 221] Q. That is correct, isn't it?

A. Yes, sir.

Q. What kind of a car is that?

A. That is a tank car.

Q. And did you make a note on that "T" for tank?

A. Yes, sir; that is to indicate what kind of a car it is.

Q. And where you have a T in this record against any car, that indicates that it is a tank car?

A. Yes, sir, and if it has cards on it, I make the necessary notation. If it is inflammable or acid, or whatever the case may be.

Q. And of course a tank car consisted of a tank to carry oil or gas or something of that kind and hasn't any freight car doors on it?

A. No, sir.

Q. And when you put on your record under the seal record "B," that means box car, does it not?

A. Yes, sir.

Q. Now, as you examined that train of thirty-eight cars, can you tell this jury whether or not any car of the thirty-eight, refrigerator car, box car, tank car, or any other car in that train, had any door swinging open?

A. Well, I came around the train and I am very close to the train, I can't exactly say how close, but close enough to notice them, and I did not notice anything on either side of the track.

Q. If you had noticed any such condition on any car door of any of the thirty-eight cars of that train, did you have any duty to make a note of it?

A. Oh, yes. If the cars would be open, in the case of a refrigerator door, it is my business to shut it, and we had a ruling then to seal them. Of course that has been done away with since.

Q. Now, you say you didn't see any car door open on any of these thirty-eight cars?

A. No, sir.

Q. As you examined these various cars you found some [fol. 222] that were empty, did you not, and some that were loaded?

A. Yes, sir.

Q. The empty cars, would the doors of those cars be sealed or would they be unsealed?

A. Some doors would be sealed, that is one side probably would be sealed, because when they empty a car they usually use the one door as a rule.

Q. They empty it only from one side?

A. From one side, yes, sir; and I would find cars that would be sealed cars that would have the doors open, and it was up to me to find out whether or not there was anything in the car.

Q. It was part of your job to see whether there was anything in the car which proved to be an empty car?

A. Yes, sir.

Q. Did you examine the doors, the open doors, the doors that were not sealed, of the empty cars?

A. Yes, sir.

Q. To see if the cars had any contents?

A. Yes, sir.

Q. And did you find any of the doors that were open on any of those cars in any defective condition of any kind?

A. No, sir.

Q. Well, is it the fact, then, Mr. McGrath, that these thirty-eight cars in the train, those that were loaded, all had intact seals on them?

A. Yes, sir; there was nothing to dispute the train at all, the seal records.

Q. And those that were empty you tried to open the door of each of the empty cars, leaving out the tank cars?

A. Yes, sir, to make positive that they were empty. There is times when we find cars that come on empty bills that have contents in the cars. That is what we are to do, is to find out if they are empty or loaded.

[fol. 223] Q. Now, I see in green pencil or green ink in Defendant's Exhibit A a circle around a car W. & L. E.

A. Wheeling & Lake Erie.

Q. 29124?

A. Yes.

Q. Did you put that red ink circle around it?

A. That is a blue pencil mark.



Q. Now, will you tell us what that signifies and why that is there?

A. The reason for that is that the car got billed to Ashley as a loaded car of merchandise, Ashley, Pennsylvania, but Ashley is not a transfer point. It was necessary to find out what was in the car and determine the destination of the contents, so I had to break *the* both seals on this car, and I show the seals that I took off and the various sides I have taken them off from, and I show my application of seals also.

Q. You made a record of that in your book because of the fact that you broke the seals?

A. Yes, sir.

Q. To find out where the car was routed to?

A. Where the contents were destined to.

Q. So that you could arrange for the further transportation of that car?

A. Yes, sir; expedite the movement.

Q. And you made a note in your book, Defendant's Exhibit A, reading as follows: "This car received on memo bill marked Merchandise. Opened car on arrival W. L. E. 29124, applied N 763495 north side, applied N 763490 south side."

A. Yes, sir.

Q. "Took off W. L. E. 403345 north side, took off W. L. E. 403368 south side. Destination originally Plains Junction, delivered to Ashley, Pennsylvania."

A. Yes, sir.

Q. Did you make that notation that I have just read to you in full at the time or immediately after the time of [fol. 224] your inspection of the seal records and so on of that train?

A. I made it at the time or shortly afterwards when I got up to the office. It is my duty to take a record of it and I had to make a notation to keep the record straight about the seals.

Q. I did not ask you about the letter G that appears in the seal record that is against one car. What does that mean?

A. That is a gondola, an open top car.

Q. Will you look at that list yourself, Mr. McGrath, and before you look at it, in the performance of your duty as a railroad man that you have told us about, have you heard

the expression regarding railroad cars, the expression "reefer"?

A. Refrigerator; yes, sir; reefer.

Q. Railroad men called the refrigerator cars reefers, do they not?

A. Yes, sir.

Q. Now will you see in that list of cars how many, if any, reefers there were in that train?

A. I see three here. Do you want the list of them?

Q. If you will give me the numbers of them I will appreciate it.

A. Union Tank Line—U. R. T. is the initial.

Q. Yes.

A. 26643. URT—

Q. Just a minute. 26643?

A. Yes, sir. It probably is the—

Q. I have it.

A. URT 85412.

Q. Yes?

A. And MDT 4011.

Q. Now, do you know the position in the train of URT 85412?

A. 85412?

Q. Yes.

A. About the 26th car.

Q. From which end?

A. From the rear end, the caboose end.

Q. From the caboose end?

A. Yes, sir.

Q. How many cars did you say there is?

A. Thirty-eight cars in the train.

[fol. 225] Q. Yes; and that was how many cars from the rear?

A. 25th or 26th car; is that correct?

Q. Somewhere along there.

A. Yes, sir.

Q. And where was the next refrigerator that you speak of, 26643?

A. 26643. Well, that should be close to the hind end, the rear end, about the 17th car from the rear end.

Q. About the 17th; and where was MDT 4011?

A. The 8th car from the engine, is it not?

Q. The 8th car from the engine. I don't know; I want to—

A. Well, I started at the 14th car here. I had it sort of split.

Q. So it was the 8th car from the engine. Now, starting from the engine back, do I understand that your record shows that the first car that was a reefer was the 8th car?

A. Wait a minute. I want to get that straight.

Q. Oh, yes, we want to get it absolutely straight.

A. This MDT; is that the one you are questioning?

Q. Yes.

A. That was the 8th car from the rear of the train, from the caboose.

Q. That is what I thought.

A. The 8th car from the caboose. You see I have this split up here.

Q. Now we want to get them in order. From the caboose to the first reefer there were eight cars?

A. Yes, sir.

Q. And that first reefer was 4011?

A. Yes, sir.

Q. Now, the next one going forward to the engine, can you get that one?

A. 15th car from the engine, 85412.

Q. The 15th car from the engine. You see that doesn't help us. The first one was the 8th car from the caboose?

A. Yes.

Q. Here you went from the caboose up to the engine.

A. The next car would be 26643.

[fol. 226] Q. Now, how far in front of the first reefer was this second one?

A. 17th car.

Q. The 17th car from the rear end?

A. Yes, sir.

Q. Where was the next reefer going up toward the front end, 85412?

A. Did I say the 17th?

Q. Yes. I think that is right.

A. 24th car.

Q. So you have a record on this train of three reefers, one eight cars from the caboose, one seventeen cars from the caboose and one twenty-four cars from the caboose; right?

A. Yes, sir.

Q. And in front of that first reefer that was twenty-four

cars from the caboose, there were fourteen cars, none of them being reefers?

A. No, sir.

Q. There were no other reefers in that train?

A. No, sir.

Q. Now taking the three reefers that were in the train, tell us whether or not they were sealed?

A. These three reefers that I have read were sealed with foreign railroad seals.

Q. Both sides?

A. Yes, sir.

Q. North side and south side?

A. North and south sides. My records show that they were correct, and if they were not, I would apply seals.

Q. There were unbroken seals on the doors on both sides of each of those reefers?

A. Yes, sir.

Q. Your record shows that?

A. Yes, sir.

Q. Now, will you point out these three cars to me?

A. There is the MDT.

Mr. Kiendl: May I put a circle around each one of the three reefers, so that the jury will see which ones they are, in lead pencil?

The Court: Do I understand you to say, Mr. McGrath, that the first fourteen cars from the engine not one of the fourteen cars was a reefer?

[fol. 227] The Witness: The fourteen cars from the caboose.

The Court: The fourteen from the caboose?

The Witness: You see I start from the rear end of the train to check. This is the 8th from the rear.

Mr. Kiendl: Let's make that clear if your Honor is confused about it. I will go over it again.

Q. Now, where is the second one?

A. That is URT 85412, and then 26643.

Q. Now, Mr. McGrath, the Court was confused, and probably the jury is, as to just where these three cars were on this train. On your list, the first reefer that I have marked in pencil is four cars from the top of your list?

A. Yes, sir.

Q. Does that mean it was the fourteenth car on the train?

A. No, sir; I started at the fourteenth car from the rear end. That would give me the balance of the train in front, see. This here (indicating), is the car that was next to the caboose.

Q. There, 3133?

A. Yes, sir.

Q. Well now, you start at the 14th car and listed the cars as you went to the front in the order in *in* which you inspected them?

A. Yes, sir.

Q. And not in the order in which they were in the train?

A. No, as they were standing.

Q. Well now, I think you told us that 4011, one of the three reefers, was eight cars from the caboose?

A. Yes, sir.

Q. Is that definitely right?

A. Yes, sir.

Q. Eight cars from the caboose?

A. Yes, sir.

Q. And then you told us that the next car going forward was the 17th car?

A. 26643; yes, sir.

[fol. 228] Q. And then you told us still going forward, as I understood you, that the 24th car was 85412?

A. Yes, sir.

Q. And in front of 85412 there were fourteen more cars; that is right, isn't it?

A. Yes; this is the 24th; then there is——

Q. That is the 24th, and there were 38. That would give a balance of 14. Fourteen cars in front of that?

A. Yes, sir.

Q. And none of those fourteen cars were refrigerator cars?

A. No, sir.

The Court: That is what you would call reefers?

The Witness: Yes, sir.

Mr. Kiendl: Now may I show this book to the jury, if your Honor please. This is the record we have just been talking about (handing to jury).

Juror No. 12: May I ask if a refrigerator car is the only car that has hinged doors?

The Court: Will you answer that?

The Witness: Why, I believe it is.

The Court: Did you get the question?

The Witness: Yes, sir; the only car with hinged doors; it is the cars that have a double door that open out towards you.

Juror No. 12: Yes; but it is a hinged door?

The Witness: Yes, sir. I don't know whether there is any other cars that have hinged doors. All other cars seem to slide on rollers.

The Court: Does that answer your question?

Juror No. 12: Yes.

Juror No. 4: May I ask, is there any notation here to [fol. 229] show how each car was numbered; I mean the standing behind the engine or from the caboose?

The Witness: No, there is no notation there. I say that I started checking the train at the fourteenth car from the caboose, and there is thirty-eight cars in the train.

The Court: Does that answer your question, Mr. Juror?

Juror No. 4: I think so.

Juror No. 12: How does he know that this is the fourteenth car? Is there any notation on here?

The Witness: I looked at my train list before I came down.

Mr. Hunt: Where is the train list?

The Witness: The train list is at Ashley, Pennsylvania, the copy that I get from Keller.

Juror No. 1: Is it customary to start in the middle of a train?

The Witness: I did that for my own purpose, in order that I did not have to take those extra steps where there is so many empty cars. I would try to cut in on the first loaded car and then go around and circle around that way. You see the rear end had about six or eight tank cars, I don't know just how many, so I cut in there and got a seal first on this particular car and I was down in that direction in order to walk up to the head of the train, or the rear of the train.

Q. Mr. McGrath, you talked about a train list. When the Ashley Special comes into Ashley—

A. Yes, sir.

[fol. 230] Q. Do you get a copy of the train list from the conductor?

A. Yes, sir.

Q. Is it the sort of a thing that I show you now? Is this what you mean by a train list?

A. Yes, sir; that is what we call the passing record.

Mr. Kiendl: I ask to have this train list marked for identification, and I will offer it in evidence if you will concede it is the train list, Mr. Hunt.

Mr. Hunt: May I see it?

Mr. Kiendl: Surely (handing).

Mr. Hunt: Is this the list he gets?

Mr. Kiendl: He gets a copy of this.

Mr. Hunt: From whom?

Mr. Kiendl: From the conductor.

The Witness: From the conductor.

Juror No. 12: That is not this train list?

The Witness: That is a copy of the list.

Mr. Kiendl: It happens to be, but we will have to prove it, unless Mr. Hunt will concede it.

Mr. Hunt: No objection.

(Marked Defendant's Exhibit F.)

The Court: What do you call that?

Mr. Kiendl: Conductor's train list. That is the list of the cars in this train, without objection, the thirty-eight cars, showing the car numbers, the initial, the contents, the destination, the junction point, and subject to any corrections that Mr. Hunt may desire to make, I will make the statement that the train list and the seal record book correspond with the exception that the last number on one of [fol. 231] the Erie cars, on the conductor's train list, Defendant's Exhibit F, the number of the 33rd car on that list is 14141 CNJ, whereas on the seal record it is 14145 CNJ.

Q. Now, from that train list, Exhibit F, will you tell us what car it was that you first inspected, according to that record, Erie 76315? Where does that show?

A. That is the 25th car.

Q. The 25th car from the top of the list?

A. From the engine. That is according to this list.

Q. From the engine?

A. Yes, sir.

Q. And is that the 14th car or the 13th car from the rear end?

A. The 14th.

Q. And that is the car that heads your list in your seal record book?

A. Yes, sir.

Q. By the way, Mr. McGrath, if you discovered a broken seal you make a record of it?

A. Yes, sir.

Q. And what is the purpose of that,—to fix the responsibility as between the various carriers as to where the seal—

A. (Interrupting:) Yes; one railroad is responsible to the other, and it is for the claim department.

Q. If a foreign road delivers cars to your road and you examine them—

A. Yes, sir.

Q. You try to ascertain whether or not the seals are broken before you take delivery of them; is that it?

A. Yes, sir.

Q. And if the seals are broken and the contents damaged or pilfered, you have a record to show to the delivering carrier?

A. Yes, sir.

Q. That that seal was broken?

A. Yes, sir.

Q. And that they are responsible, and not your company, for the damages?

A. Yes, sir.

[fol. 232] Q. Or pilferage?

A. We make a police report.

Mr. Kiendl: That is all.

Cross-examination.

By Mr. Hunt:

Q. That is the theory as to why you keep a record. Now, you know, don't you, from your experience as a railroad man, that one of the most common remarks between railroads is that one claims a seal was on and another one claims that it was off at a given point? You know that from your experience, don't you? I am asking you.

A. Well, I can't say.

Q. Well, don't you know in the claims that railroads have against each other that is always the question, whether a



car door was open or sealed or was not sealed at a given point?

A. Well, they try to find out where.

Q. Well, you know that is the only question that is litigated between railroads, don't you?

A. Yes, sir.

Q. And there are hundreds and hundreds of situations of that kind are going on every day where one road claims that a door was open and another claims it was closed and sealed, and you know that from your experience and from what you have heard?

A. Well, I am not in a position to say anything about it, because that is handled by the Claim Department.

Q. Yes. Now, your duties were what? What is your name, please?

A. McGrath.

Q. And your duties were what?

A. Billing clerk and car checker. Night clerk is the title of it.

Q. Night clerk. You were the night clerk at the Ashley yard, were you not?

A. Ashley station yard; yes, sir.

[fol. 233] Q. And yards—well, they are real railroad yards there?

A. I work at the office the biggest part of the night, at the station.

Q. Well, let me get briefly—the office was, I take it from what you say, some distance from the yards?

A. Yes, sir; it is about a fifteen minute walk.

Q. And when you walk from the office to the yards, towards the yards, you walk to the north or the south?

A. I am walking east and west.

Q. At that point you would be walking?

A. That is the direction I would be walking; yes.

Q. Well, at any rate, in the office, what did your office work consist of?

A. Way-billing cars.

Q. What does that mean?

A. Why, coal, way-billing coal.

Q. Is that all you way bill?

A. And taking care of inbound freight bills.

Q. Yes. What does that consist of?

A. Shipments that are billed to Ashley, Pennsylvania, different consignees.

Q. What other office work do you do?

A. Interchange with the Erie, take care of the interchange reports to and from the Erie.

Q. You take care of those; you are the clerical man in the office?

A. Yes, sir; in general.

Q. You don't do car inspection very much?

A. No. I take the seal record, I go around the train.

Q. You don't occasionally say to one of the inspectors, "Take a look at these seals for me" as you go around? You don't do that, do you?

A. I get the inspectors——

Q. Just answer me. Do you or do you not?

A. I do not tell him to get my seals for me, no, sir.

Q. I say do you occasionally ask one of the inspectors, if you are pretty busy that night with your clerical work, to [fol. 234] go around and——

A. (Interrupting:) No, sir.

Q. You don't do that?

A. No, sir.

Q. Do you ever get any help from one of the boys outside?

A. Yes; we have times when we call a man out extra.

Q. These are large yards, are they?

A. Well——

Q. How many trains?

A. There is one side has eight tracks.

Q. Yes.

A. Then there is a main track and several other tracks; there is about fifteen tracks there.

Q. Pretty good size yard?

A. Fairly good size; yes, sir.

Q. And a lot of trains in and out of there during the course of a day?

A. Well, this is what they call a branch. It is off the main line.

Q. I understand, but you have got the Erie Railroad coming in there in addition, haven't you?

A. Yes, sir.

Q. And during the course of a night you have a lot of,

I presume, yard work, and a number of trains in and out of there every night?

A. Oh, yes, sir; roustabout trains; yes, sir.

Q. And this Erie train came in?

A. Yes.

Q. What time did it get there?

A. 4:50 a. m.

Q. This train did not arrive at Ashley until 4:50?

A. That is the time I timed it when it clears the yard.

Q. What do you mean by that?

A. When his train stops on the track.

Q. Does this train pass by your office building?

A. No. When he gets his train clear of the other tracks, you see, he gets a track to come in on.

Q. Yes.

A. And when his hind end clears and his train stops, that is the time I get and I start checking.

[fol. 235] Q. Well, you have got to walk—how many—

A. I am down there waiting for him.

Q. How long, on this night, had you been waiting?

A. I was going down there about three o'clock. This train goes in service anywhere between one-thirty and two o'clock at Avoca.

Q. With all your office work to do you have been down there waiting an hour and fifty minutes?

A. Well, I have another train to prepare for him to take out.

Q. You have a train?

A. I have to go down and take these seal records.

Q. Yes.

A. To him, cars to him.

Q. Are you telling us what you did on this particular night?

A. No, I am telling you what I am doing every night.

Q. Yes. Well, is there any variation in your work at all?

A. What do you mean?

Q. Why, you would not go down there and wait an hour and fifty minutes?

A. Yes, sir; I go down as a rule around three a. m.

Q. Yes. Well, you prepare this train?

A. This train was going out to them; yes, sir.

Q. Going back on the Erie?

A. Yes, sir.

Q. And that took you how long to prepare that?

A. Well, I have a record there, if you will see over there, that shows what time I went down to the yard.

Q. Well, what time did you go down to the yard (handing book)?

Mr. Kiendl: May it be noted that the witness is examining the same book in which Defendant's Exhibit E is included?

Mr. Hunt: Yes.

[fol. 236] A. I started checking the train that he takes back at four a. m.

Q. At four o'clock?

A. Four a. m.

Q. Then you were not down there at three o'clock on this particular night?

A. Well, I don't know where I was.

Q. I just read from your own record. Something had happened this night so that you were away later than usual; is that right?

A. Yes.

Q. How big a train was that?

A. You see this train is not complete. There is twenty-one cars there that was on the track that I checked.

Q. How long did that take you?

A. I would say that would take me about fifteen or sixteen minutes.

Q. And you figure sixteen minutes—what did you say, fifteen or sixteen?

A. Yes; less than that, sometimes.

Q. What is that?

A. Less than that it would take me.

Q. Well, be as accurate as you can. What would you say, ten minutes?

A. Well, say ten minutes, yes.

Q. What do you have to do with those cars, the same thing as you do with these?

A. Take a seal record and put the bills in order for the conductor. You see, we are responsible to the other road, and we have to have things in order.

Q. So you did twenty-one cars in about ten minutes?

A. Yes.

Q. That would be pretty accurate, wouldn't it?

A. About ten; yes, sir.