

Q. Before lunch, and if I am in error, you correct me, before lunch you said there was one kind of a door you had not seen swinging for about seven or eight years.

A. Yes; that was a box car.

Q. And there was another kind of a door that you said [fol. 354] it had been five or six years; do you remember that testimony you gave?

A. Yes, sir.

Q. Now then, seven or eight years ago, you saw a door of a box car off the runner, did you?

A. Yes, I have seen them off the runner.

Q. You saw them off the runners all right up until about seven or eight years ago?

A. I don't know whether it was seven or eight years. I said seven or eight, and it is that long since I saw one.

Q. I say up until seven or eight years ago you saw——

A. No, I haven't saw them.

Q. What is that?

A. I haven't saw them off.

Q. For the last seven or eight years?

A. Yes.

Q. Up to that time you frequently or occasionally had seen them off the runner?

A. Yes, occasionally.

Q. And up until five or six years ago you had occasionally seen reefer doors open as you passed by, but you haven't seen any for the last five or six years?

A. No, sir.

Q. Does that fairly put your testimony here?

A. That is true.

Q. Now, they are using the same kind of box cars on the Erie on this branch of the Erie that they used 20 years ago, are they not?

A. Yes, they are built the same; they are larger than they were 20 years ago.

Q. Well now, let's see. You have got your wooden box cars running right there today that you know, if you will speak up, that of your own knowledge had been in use, they have actually been in use for over 20 years; don't you know that?

A. No, I could not say that.

Q. Well, you have been with the road over 30 years?

A. Yes. They are rebuilt. They are built larger.

- Q. Oh, you mean they are heavier?
- A. They are built larger.
- [fol. 355] Q. I am not talking about your new cars. Just leave those out. You see railroad trains pass you every day, do you not?
- A. Yes, sir.
- Q. And you know that we gentlemen do too, these counsel see trains go by; you realize that?
- A. Yes.
- Q. All right. Now tell us—you told us they become damaged, old box cars—how old are they?
- A. I don't know.
- Q. Well, give us some idea.
- A. I could not; I don't know how old they are.
- Q. Are they ten years old?
- A. Probably.
- Q. Are they twenty?
- A. I could not say.
- Q. Well, are they fifteen?
- A. I don't know.
- Q. Now the majority of your box cars on that division are the old cars, are they not?
- A. No, sir.
- Q. Well, 50 per cent of them?
- A. No, sir.
- Q. What do you call a new car—built how recently?
- A. Our new steel cars, all these steel cars and the like of that.
- Q. I am not talking about steel cars.
- A. Well, steel box cars.
- Q. Can you tell me from this list how many of the old wooden cars there are on this list?
- A. On that list?
- Q. Yes.
- A. I don't know that I can tell all of them or not. I can tell some of the wooden cars.
- Q. All right, how many old wooden cars are there on that list?
- A. I won't say how old they are, whether old or new, but there are wooden cars.
- Q. Well, all right.
- A. Why, I see six box cars that is wood.
- Q. You see six wooden box cars?
- A. Yes.

Q. And you haven't any idea of their age?

A. No, I have no idea of their age, no.

Q. Well now, coming back to the seven or eight years ago when you say you occasionally saw the box car doors [fol. 356] off the rail, having jumped the rail—I am not talking about new steel cars now, but old wooden box cars—nowadays your rail and the door and the door construction is exactly the same as it was seven or eight years ago, isn't it?

A. Yes.

Q. Probably they may very well be the same cars, so far as you know, that you saw seven or eight years ago?

A. They may be.

Q. And going back seven or eight years ago, when you found a door had jumped the rail, that would oftentimes happen while the train was in transit, that is going from one place to the other, when it got into where you were to take the train over?

A. Yes.

Q. You would find that the door had jumped the rail in transit?

A. Yes.

The Court: Is there anything in the testimony here regarding a box car jumping the rail as well, the car itself, or is it just the door?

Mr. Hunt: Just the door, your Honor. When I speak of rail, you see the door runs on a little rail—what do you call that, a rail?

The Witness: I don't know the name of it. The car inspectors would have to give the name of that.

Mr. Hunt: What do you call it, a rail?

Mr. Kiendl: Call it a rail for our purposes, or a track.

Mr. Hunt: It is a little steel guide, and possibly I should not use the word rail. That may be a little confusing.

Q. You find that in transit this door—how many wheels are there on the bottom of that door, two?

A. There may be.

[fol. 357] Q. One on either end?

A. There may be one in the center. I never took particular notice.

Q. And that runs on a little steel flange along at the bottom, that is correct, is it not?

A. Something like that.

Q. And that flange is screwed into the wood of these box cars?

A. It is bolted in there in some way.

Q. Screwed in, isn't it?

A. I don't know whether it is screwed in or bolted.

Q. And this wood into which these screws are screwed, that wood is out in all kinds of weather year in and year out, is it not? You don't have any sheds to put your box cars in?

A. No.

Q. They just stand out in the elements the year round? Do you understand me?

A. I do.

Q. Well, speak up, please. We are trying to get through as early as we can this afternoon. Now, sir, let's see if I understand this part correctly. Now, you say when you found, seven or eight years ago, that your door, in transit, had jumped the rail, the simple process of getting that back on the rail would be to slide it back, open it up as far as you could, and then if you push up on it, push up on the door at the bottom, the first wheel will jump over a little projection there, and you push it along until you come to the second wheel and then you push up on your door again and you have got it back on the rail. Am I correct in that, sir?

A. I don't know.

Q. Well, I am trying to take you back seven or eight years ago. You certainly——

A. If that door was not wide open, the door would not swing.

Q. I am asking you, sir, if you will just follow me—do you understand my question?

A. Yes, I understand.

Q. Well now, please! You found, where a train came in [fol. 358] that you had to take out, it came to your attention occasionally, seven or eight years ago, that on these wooden box cars the door has jumped off the rail. Now I am asking you, I want to direct your attention to how you get it back on the rail. Isn't it a fact that you would move the whole door back as far as you could and then there is a certain play, there is a certain play up at the top, and the simple process, you lift that door and push it up and you could get your first wheel back on the rail and then you push

it along until you get the second wheel back on the rail, isn't that the procedure to get it back on the rail?

A. (No answer.)

Q. How do you get it back on the rail, if you don't understand my question?

A. I did not have it in my train. I said I saw one.

Q. Yes.

A. That didn't happen in my train.

Q. And you never put one back on the rail?

A. No.

Q. You never put a door back on the rail?

A. No.

Q. You saw them occasionally?

A. I saw them, I said, I said I saw them, but I did not say that was in my train.

Q. You said you saw them occasionally up until seven or eight years ago?

A. Yes.

Q. Then did you tell me, sir, following that, that on trains that came in that you were to take out—do you remember me asking you that question?

A. No, sir.

Q. You don't remember that?

A. Not about doors being off of the rails.

Q. I did not ask you that, if you had made that observation on trains that came in which you were about to take out, you made the observation that some door in transit, while coming in, in motion had jumped the rail? You don't [fol. 359] remember me asking you that?

A. No, sir, there was nothing asked me about that.

Q. All right, sir.

A. I don't think so.

Q. Now, can you tell me from your experience as a railroad man, Mr. Keller, knowing what you do, you are generally familiar with the construction of a car?

A. Construction?

Q. Yes.

A. No, I don't pay no attention to that.

Q. Don't pay any attention to that?

A. No, I am not a builder, no.

Q. And the reefer doors, occasionally, four or five years ago you occasionally found reefer doors ajar, or you found them closed with the clamp out of position. You said you

have seen them occasionally up to five or six years ago, is that correct?

A. I haven't handled them myself. I have saw them, yes. I have saw them where they were open.

Q. Would you do anything about it if you had nothing to do with that train, or just going away?

A. No, sir, I would close it.

Q. You would close it?

A. Positively.

Q. But you would not seal it?

A. No; I have no seals to seal with.

Q. And the answer is you would close them and not seal them?

A. I would close them and fasten them.

Q. With respect to these doors, the thing you fasten them with is about how high above the ground?

A. Oh, I don't know the distance; probably a little higher than my head. Oh, I would say that high (standing and illustrating).

Q. Just a little higher. Now, just stand back a little so I can see that distance. How tall are you?

A. About five feet ten.

Q. And the latch is about——

A. The latch would be up about that high (indicating).

[fol. 360] Mr. Kiendl: About six feet.

Mr. Hunt: About six feet.

Q. And the latch on a box car door, is that the same distance or higher?

A. No, I believe they are lower than that.

Q. A box car?

A. Yes, they are lower than a reefer. I know I can reach a box car latch easier than I can a reefer.

Q. You can just about reach the reefer door, can you, the latch?

A. No, I have a better reach than reaching the reefer door, but a box car door I don't think it is as high.

Q. You have quite a reach, do I understand, for a reefer door?

A. I tell you about that high when I stand there the way I am standing on this platform here.

Q. Assuming the ground is level?

A. Yes, if the ground is level or near level.

Q. You can tell us, you know about the claims of the different railroads against each other about when a car is sealed and when it is not sealed at a given point, don't you?

A. Yes, I have heard of claims.

Q. And the question always is as to whether, at a given point, a car was sealed properly, do you understand?

A. Yes.

Q. Now, you know that little wire that goes around in there some way?

A. Yes, I know the seal.

Q. How do you fix that on a reefer door? Where do you put that wire on a reefer door?

A. Where you latch it, and it would go on a box car between the doors.

Q. On the reefer door it is just a little piece of steel that slips down into a groove, isn't it, looking at these pictures?

A. No.

[fol. 361] Q. It is not?

A. No.

Q. Is there any hole in the latch there?

A. Yes.

Q. And you put a piece of wire through?

A. Yes, put the steel down through it.

Q. I want to get at what this seal is. This seal, is a piece of wire or—it is a little thin piece of tin, is it not?

A. It is a good hard piece of tin that they put down through it.

Q. They don't use wire?

A. About the only wire one I ever see now, a wire seal, comes, I don't know, in some western or some Government seal.

Q. Do you know anything about this practice, or have you ever seen it, this practice, that doors are left open or doors have been open and the seal is left off there at the latch, hanging over at the latch, to give the inspector the impression that it is sealed when actually it is not? Do you know anything about that?

A. Where seals have been broken?

Q. In other words where seals have been broken, the wire and the little piece of steel or tin is left right hanging?

A. That may occur.

Q. Well, you know it. Now, what I am getting at, you know all about that?

A. I have seen it.

Q. Yes, you have seen that many times, haven't you?

A. Not so many times, but I have seen it, yes.

Q. That is done purposely, the remains of that seal is left up there, because you know the inspector doesn't get up and fool around the steel to see whether it is sealed or not?

Mr. Kiendl: I object to that, if your Honor please. How can this witness possibly know that?

Q. Well, you know the inspector doesn't get up and pull [fol. 362] on each piece of wire to see that it is where it belongs; you know that he doesn't do any such thing as that?

A. Not the car inspector.

Q. You know that?

Mr. Kiendl: Let him finish the answer.

The Witness: I say a car inspector don't, no.

Q. You have been a railroad man for 30 years and more, haven't you, and don't know that?

A. Don't know what?

Q. Whether an inspector gets up and pulls on a wire to see whether it is in proper place or not.

A. No, a car inspector don't; they know.

Q. And the contents of the fourth car on this list made up when you arrived at Ashley was what?

Mr. Kiendl: There is no list when he arrived at Ashley, as you know, Mr. Hunt.

Mr. Hunt: I didn't say when he arrived. I say the list you had.

The Witness: I don't know that I can tell. That is not on the——

Q. All right. This is your train list, is it not?

A. Yes.

Q. The number of the fourth car on this list is what?

A. I don't know.

Mr. Kiendl: Well, which list are you referring to, Mr. Hunt? May we have that definite for the purpose of this record?

Mr. Hunt: I say the list made up at Ashley.

Mr. Kiendl: By whom?

[fol. 363] Mr. Hunt: I mean the seal record.

Mr. Kiendl: Oh, that is the one.

Q. And that number is what?

A. 26643.

Q. And what is that, do you know what those initials stand for?

A. Yes, sir, URC.

Q. What does that mean?

A. Union Refrigerator.

Q. Union Refrigerator Company 26643?

A. Yes, sir.

Q. That is an Erie car, is it not?

Mr. Kiendl: It is a Union Refrigerator car.

Q. What is this car here?

A. That is an Erie seal.

Q. The word "Erie" here right after the number.

A. That is the seal.

Mr. Hunt: You see the reason I said that, Mr. Kiendl, the word "Erie" is spelled right after it.

Mr. Kiendl: Yes, showing an Erie seal was on that car.

Q. And that number is 26643?

A. Yes.

Q. Now, find that and see if you can find it very quickly.

A. Here it is.

Q. That is the same car, is it?

A. Yes, sir.

Q. And that car was loaded with what?

A. Grape juice.

Q. And that grape juice came from where, do you know, sir.

A. I don't know where it came from, no.

Q. The Erie Railroad would know, wouldn't it?

A. Yes, they could find out where it came from. I don't [fol. 364] know where that came from. All I have is the destination where they go.

Mr. Hunt: Thank you, sir.

Redirect examination.

By Mr. Kiendl:

Q. Mr. Hunt asked you, Mr. Keller, whether or not the car inspectors tested the seals on the car doors where they were sealed.

A. No, they don't.

Q. Whose job is it to do that?

A. The clerk that checks his train when we arrive in Ashley, he goes around and takes the numbers of the cars, the loaded and empties, and the seal records of every car in the train that is sealed.

Q. And that is what I would call the seal inspector, the clerk that inspects and takes a record of the seals.

A. Yes.

Mr. Kiendl: That is all.

Recross-examination.

By Mr. Hunt:

Q. And you have seen him do his work, have you?

A. Yes, I have seen him do his work.

Q. And what does he do?

A. Who?

Q. This man that Mr. Kiendl referred to.

A. The clerk?

Q. Yes; which end of the train does he usually start at?

A. What is that?

Q. Which end of the train have you usually seen him start at?

A. Oh, he starts wherever it is convenient to him.

Q. Well, what do you mean by convenient?

A. Well, he may be down at the rear end of the train, [fol. 365] maybe 14 or 15 cars, anywhere he is located, and when we come in he will come right across to the train and start around it.

Q. Does he start—

A. He does not have any particular place to start.

Q. And does he start at either end of the train?

A. He can start either end.

Q. He can start at either end?

A. And he can start at the middle of it, or any place.

Q. The middle of it?

A. Any place he wants to start.

Q. You can start anywhere you want to, can't you?

A. Oh, no.

Q. Can't you?

A. No.

Q. Why not?

A. Because I start—well, I start where it is convenient, but that is either the head end or the rear end.

Q. I see, but you could start anywhere you wanted to?

A. No.

Q. Why not?

A. I could not and check a train.

Q. Well, tell us why you could not?

Mr. Kiendl: He said he could not check the train.

A. I would be doing a lot of unnecessary work and unnecessary delay, and doing a lot of unnecessary work for myself.

Q. You know you are doing substantially the same thing he is, going down the list and taking a list of the cars?

A. No, I check my train to keep the bills straight so that when we get the train checked the bills is straight from the engine to the caboose.

Q. Now let me ask you this: You have seen this clerk do his work, have you?

A. I have seen him.

[fol. 366] Q. At night time?

A. Sometime.

Q. Sometimes—well, I mean occasionally you have seen him?

A. I have seen him checking trains, yes, certainly, and I have seen him doing other work.

Q. Just try to get one occasion in mind, if you can, so it will be clear, in which you on one occasion at least have seen him going along checking the train.

A. Yes.

Q. You may have been going in one direction and he going in the other, you might have passed each other or something like that?

A. Yes, sir.

Q. Now then, what did you see him do?

A. What is that?

Q. What did you see him do?

A. I saw him take the numbers of the cars and the seal records.

Q. What do you mean seal records?

A. I mean the number of the seal on the book.

Q. Where did he get the seal record from?

A. Off the seal.

Q. And take the number of it?

- A. Take the number on the seal.
- Q. And would he have a lantern with him?
- A. Certainly.
- Q. And the number is where on the seal? Did you ever see the number on a seal?
- A. Yes, right along—it is on the seal, it is generally flat seals that the number runs along the seals.
- Q. It is a flat seal and then the number is stamped right into it?
- A. Yes.
- Q. On a tag or is it just stamped right into the—
- A. No, it is stamped in there with a regular stamp.
- Q. And he has a flashlight, does he, or something of that kind?
- A. He has a kerosene lantern.
- Q. And you have seen him hold it up by the seals?
- A. Always.
- [fol. 367] Q. To get the number?
- A. He has to hold it up to see them.
- Q. He holds it up by the seal to get the number, and in his other hand he has got his book, has he? Is that correct?
- A. Yes.
- Q. And then after he gets the number on the seal he comes down, I assume, and changes and marks, writes it down?
- A. Puts it in the book.
- Q. That is what you have seen him do, correct?
- A. Yes, sir.

Redirect examination.

By Mr. Kiendl:

- Q. Mr. Keller, see if we can get some idea of the size of the seals on the car doors. Are they about as big as a half dollar or a quarter or as big as a nickel or are they as big as a silver dollar?
- A. No, they are, 90 per cent of the seals or more, are a piece of flat tin probably that length (indicating), and then there is like a bell on one end, and these seals, all of them have numbers on and like the road initial and number and even a letter.
- Q. You say like a piece of tin with a bell on the end, and where are the numbers pressed, on the piece of tin or on the end?

A. No, on the piece of tin lengthwise.

Q. On the piece of tin?

A. Lengthwise.

Q. And in order to take the numbers from that piece of tin you have got to be right close to it and look at it in order to write it down, isn't that so?

A. Oh, yes.

Q. You can't walk alongside the freight cars and look at seals and write numbers down in a book like I am doing now, can you?

A. No.

Q. It would be absolutely impossible to do at night?

A. No. Lots of times he would get hold of them and pull [fol. 368] them around so that he can get the number of them.

Q. And you have to get right close to them to write down these numbers like "B909563" etc. etc.?

A. No.

Q. It is physically impossible to read seals without getting up to them?

Mr. Hunt: I will have to object to the leading examination.

Mr. Kiendl: Of course it is leading.

The Court: Overruled.

A. Yes.

Q. How can you read a seal without getting close to it? Is it possible?

A. You cannot.

Mr. Kiendl: That is all.

JAMES A. DOONER, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kiendl:

Q. Mr. Dooner, how long have you worked for the Railroad Company?

A. 19 years, sir.

Q. And were you on this train on the night of the accident?

A. Yes, sir.

- Q. With the other members of the train crew?
A. Yes, sir.
- Q. And were you a brakeman or flagman on that train on that night?
A. Flagman, sir.
- Q. Flagman?
A. Yes, sir.
- [fol. 369] Q. You have been over that road between Avoca and Ashley many times?
A. Yes, sir.
- Q. By day and by night?
A. Yes, sir.
- Q. And where did you get on the train, at Avoca or where?
A. Avoca, sir.
- Q. You reported there for duty?
A. Yes, sir.
- Q. About what time in the morning?
A. I reported there around 12:40, sir.
- Q. What are the duties of a flagman? Just generally describe them.
A. The duties of a flagman?
Q. Yes.
A. Are to protect the rear end of the train if the train should happen to stop, go back a sufficient distance to protect the rear end of this train; assist the conductor with his clerical work; and when going through switches to see that the switches are properly set for the main track, see that the switches are properly set. That is the duties of a flagman.
- Q. And does the flagman have anything to do with keeping the records such as train lists and things of that kind?
A. Yes, sir.
- Q. This train list in evidence here, Defendant's Exhibit F, is that in your handwriting?
A. Yes, sir.
- Q. You had something to do with preparing this train list, did you?
A. Yes, sir.
- Q. Did you do that regularly, make up a train list for your conductor?
A. Yes, sir.
- Q. And you can identify the handwriting on that, and all the handwriting on it, as being yours, Mr. Dooner?

A. Yes, sir.

Q. Can you tell the Court and jury how you prepared the train list and what you did about it?

A. Southbound Ashley train pulled into the yard, the Avoca yard, the back leader of Avoca yard about 1:40, sir.

[fol. 370] Q. Let's get this straight. The train pulled into the Avoca yard from where? Did it come from Susquehanna?

A. From Susquehanna, sir.

Q. And that is the train that comprised the major part of the train that you took on to Ashley?

A. Yes, sir.

Q. Did you add any cars to that train at Avoca?

A. Three cars, rear end, sir.

Q. And how many cars came in from Susquehanna on the other train?

A. 35, sir.

Q. Now, that train from Susquehanna came in about 1:40?

A. Yes, sir.

Q. When did you leave Avoca with the 35 cars and the 3 extra cars that you added at Avoca?

A. 2:10, sir.

Q. Will you tell us when that train got into Avoca from Susquehanna with the 35 cars, what you did in connection with the preparation of the train list that is in evidence as Defendant's Exhibit F?

A. I took the train check.

Q. Yes.

A. Conductor Keller and I walked up over the train from the rear end to the head end, I took the initials and numbers and kind of cars, Mr. Keller hollered contents and the destination, and I took the contents and destination down as he hollered while Mr. O'Boyle and Mr. McCarthy were putting the caboose and three cars on the rear end. After we done that I closed my book and Mr. Keller put all the bills together and I went to the rear end and got in the caboose, I took my slip and made my slip out, and the train started while I was making this slip out. After I made that slip out there is what you call a wheel report to make out. I separated my slips. You make an original and two carbon slips.

Q. Of the train list?

A. Yes, sir.

[fol. 371] Q. Yes.

A. I separated my slips, put one slip with the bills.

Q. And the other two?

A. The original slip goes to the yardmaster in Ashley yard to classify this train, the slip with this original slip; the other slip goes back to Avoca yard to be used as a record slip.

Q. Now, can you tell us, in this train slip you have got 38 cars listed by numbers 1, 2, 3, 4 all the way down to 38, can you tell us which was the head end of the train and which was the rear end?

A. No. 1 on the slip was the head car.

Q. By head car do you mean, as I understand you, the car next to the engine?

A. Yes, sir.

Q. And then are they numbered numerically all the way down to the rear end of the train?

A. Yes, sir.

Q. The last one being 3113?

A. The car next to the caboose.

Q. Next to the caboose?

A. Yes, sir.

Q. When the train left Avoca. By the way, you have down here on this train list "arrival Ashley 3:50 a.," for "a. m.," I assume?

A. Yes, sir.

Q. When did you put that notation on there?

A. Leaving Avoca, sir.

Q. You put that heading on the train slip when you left Avoca?

A. Yes, sir.

Q. Will you explain to the Court and jury why you put down here 3:50 as arriving time at Ashley?

A. Well we don't take the particular time on arrival at Ashley for this slip, we only take the conductor's, and I figured an hour and a half from Avoca to Ashley, and in order to get through with this slip I estimate the time.

Q. That is just an estimate of yours?

A. That is an estimate, sir.

Q. Do you know actually what time you arrived at Ashley [fol. 372] that morning, of your own personal knowledge?

A. Yes, sir.

Q. What time was it when you arrived there?

A. 4:40, sir.

Q. How do you know it was exactly 4:40?

A. I asked the conductor.

Q. Oh, you asked the conductor?

A. Yes, sir. I myself asked him.

Q. And after you had done this work, did the train at some time start?

A. The train was going while I was doing that work, sir.

Q. Now, when you and the conductor went up alongside the train did you notice anything defective or out of order at any part of the train the side of which you went along?

A. No, sir.

Q. Do you know whether or not they had car inspectors at Avoca?

A. Yes, sir, I know there is.

Q. Were they working that night?

A. Yes, sir.

Q. You saw the two on the stand, Mr. Howell and Mr. Cook?

A. I saw Mr. Howell and Mr. Cook, and I conferred with Mr. Cook at the head end of the train if the other side was all right, and he told me O. K.

Q. You conferred with Mr. Cook about it?

A. Yes, sir, about the other side of the train.

Q. When you started out on the way to Ashley did you know of the occurrence of any accident on that trip?

A. No, sir.

Q. When did you first learn about that occurrence?

A. On my arrival at Avoca Mr. Keller told me.

Q. You had gone to Ashley and made a return trip to Avoca?

A. Yes, sir.

Q. And then Mr. Keller told you someone had been injured?

A. He told me Mr. Tompkins had had his arm off at Pittston Summit.

[fol. 373] Q. And did you remember when Mr. Keller told you, that you were a member of the train crew on that train?

A. Let me get that right.

Q. When Mr. Keller told you that this man had this accident somewhere near Pittston Summit, you, of course, remembered then that you had been one of the crew of that train, the flagman?

A. Yes, sir.

Q. Do you remember how fast that train was going from the time it left Avoca until it passed Rock Street crossing?

A. No, sir.

Q. Was it going 30 or 35 miles an hour?

A. Oh, no.

Q. At any part of it?

A. No, sir, that train couldn't go that rate of speed.

Q. The train could not go that rate of speed?

A. No, sir.

Q. Why not, Mr. Dooner?

A. The pull was too great for the size engine we had. That engine couldn't make over eight to ten miles an hour with the train.

Q. In that part of it, along that track?

A. In that vicinity of that territory.

Q. Well, tell us what you know about the territory. Is it up-hill or down-hill or level?

A. It is up-hill from Avoca until you hit the other side of Rock Street crossing.

Q. And you say that this engine, 2499 of the J2 class with 38 cars and a caboose and a coal car, could not go over that territory faster than how many miles?

A. Eight to ten miles an hour, sir.

Q. And that is your best recollection of the speed of the train over that part of that line?

A. Yes, sir.

Q. It did not make any stops during that run of any kind?

A. William Street was our first stop.

Q. And that is beyond Rock Street crossing nearer Ashley, isn't it?

A. Yes, sir.

[fol. 374] Q. Do you remember whether or not any signal was given by the whistle of this train as it approached the Rock Street crossing?

A. Yes, sir, I heard the whistle blowing for Rock Street crossing, I heard it blowing for Center Street crossing before it made the Rock Street crossing.

Q. You heard it blow for the Center Street crossing?

A. And Rock Street crossing.

Q. Were you in the caboose at that time?

A. Yes, sir.

Q. 38 cars behind the engine?

A. Yes, sir.

Q. Did you hear the engine bell ringing?

A. No, sir.

Q. You don't know anything about the headlight on the locomotive at that particular time when the train was going over Rock Street, as to whether it was lit or whether the engine was running blind, you don't know?

A. I don't know, sir.

Mr. Kiendl: You may examine.

Cross-examination.

By Mr. Hunt:

Q. You say, sir, that the time that train arrives and leaves is comparatively unimportant?

A. Not on that slip, sir.

Q. And so when it comes to that part of your report you just fill that out and put in an estimate or something?

A. Always estimate it.

Q. And you remember that you did get in at 4. what?

A. 40.

Q. What time did you get into Ashley?

A. 4:40, sir.

Q. And then Mr. Kiendl says how do you remember that and you said that you remembered it because you always asked the conductor.

[fol. 375] Mr. Kiendl: No, he didn't say that.

The Witness: Always asked the conductor what arrival we made.

The Court: He says because the conductor told him.

Q. Didn't you say right afterwards you always ask the conductor?

A. I would ask the conductor, yes, sir.

Q. You always ask the conductor?

A. When I am flagging for him, yes, sir, because I have a wheel report.

Q. And you remember now the reason you got in at 4:40 is because on this night you asked the conductor what time it was and he said 4:40?

A. Yes, sir.

Q. That is right, now?

A. Yes, sir.

Q. And nothing else, nothing you have heard here in court or anything of that kind?

A. No, sir.

Q. You are not telling anything that you heard some other witness say or anything of that kind?

A. No, sir.

Q. You remember that on this night, the night that Mr. Tompkins lost his arm, that you asked the conductor what time it was when you got to Ashley and he said 4:40?

A. Yes, sir.

Q. That is a fact, sir?

A. Yes, sir.

Q. At that time, of course, you did not know there was any accident to Mr. Tompkins at all; in fact you did not know that until the next day? That is true, is it?

A. That morning when we arrived at Avoca, sir.

Q. And when did you—what time did you get into Ashley the night before Mr. Tompkins lost his arm?

A. I can't recall, sir.

Q. Well, you asked the conductor, didn't you?

A. Well, that slipped my mind, sir.

[fol. 376] Q. That slipped your mind?

A. Yes, sir.

Q. And the night that Mr. Tompkins had the—the next night, the night of the 27th, what time did you get into Ashley?

A. 4:40, sir.

Q. Well, the following night what time did you get in?

A. I don't know, sir.

Q. Well, you asked the conductor, didn't you?

A. Yes, sir, but I can't recall.

Q. You can't recall that?

A. No, sir.

Q. This is the only night you can recall?

A. Yes, sir.

Q. You say this is the only night that you can recall?

A. How is that? The only night I can recall?

Q. Yes.

A. Because I asked Mr. Keller.

Q. That is the only reason you have?

A. Yes, sir.

Q. No other reason?

A. No other reason, sir.

Q. Simply you asked Mr. Keller?

A. Yes, sir.

Q. The accident had nothing to do with it at all, because you did not know about the accident, did you?

A. Didn't know anything about the accident until the following morning, sir.

Q. And then you found out. When did you come down to New York, sir?

A. Friday, sir.

Q. Last Friday?

A. Or Saturday, sir.

Q. Saturday?

A. Yes, sir.

Q. And since you came to New York you have been staying with the other witnesses, somewhere, of course?

A. Yes, sir.

Q. And what man from the railroad is concerned or had you gentlemen in charge? Who has been looking after you?

A. Mr. Cannon, sir.

Q. What is his job?

A. Lieutenant, sir.

Q. Lieutenant?

A. Yes, sir.

Q. Lieutenant of what?

A. Police.

Q. He is one of the railroad detectives, you mean?

[fol. 377] Mr. Kiendl: I object to that, if your Honor please, as wholly immaterial to any issue in this case as to who Mr. Cannon is or what he is doing or why.

The Court: I don't see the purpose of it.

Mr. Hunt: I will come right to it, if Mr. Kiendl doesn't see it.

Q. And has he been talking with you about what your testimony was going to be when you got on the stand?

A. No, sir.

Q. What?

A. He has not, no, sir.

Q. He has not?

A. No, sir.

Q. Hasn't he talked with you about this case?

A. No, sir.

Q. Hasn't talked with you and hasn't said a word about the case at all to you?

A. Only that the case was down here in New York, that is all.

Q. Has he been with you since you came here to New York?

A. Yes, sir.

Q. Every day?

A. Yes, sir.

Q. Every evening?

A. Yes, sir.

Q. And he has never talked to you about this case at all?

A. No, sir.

Q. And you haven't heard him talk to any of the other witnesses?

A. No, sir.

Q. This railroad detective.

A. No, sir.

Q. Now sir, have you talked—who from the railroad have you been talking with, you and the other witnesses?

A. We conferred with Mr. Kiendl.

Q. Now, before you ever talked to Mr. Kiendl, who did you talk to before you ever talked to Mr. Kiendl about this case?

A. The claim agent.

Q. The claim agent? What is his name?

A. I don't know his name.

Q. Well, have you,—did he come down with you?

A. No, I met him down here.

[fol. 378] Q. You met him down here?

A. I talked with that man sitting with Mr. Early over there.

Q. And has he been talking with you about this case?

A. Mr. Early?

Q. Yes.

A. Just got my statement about it.

Q. Has he been talking with you since you came to New York?

A. No, sir.

Q. Did he ask you anything about what time the train got in there?

A. No, sir.

Q. Nobody asked you what time the train got in there before you went on the stand?

A. No, sir.

Q. Mr. Kiendl did not ask you what time the train came in there before you went on the stand?

A. No, sir, Mr. Kiendl did not.

Q. Now, how many years has it been, sir, since you saw—take one of your own wooden cars—since you have seen one of the doors off the flange of the rail, how many years has it been since you have seen that?

A. Why, my 19 years' experience on the road I haven't seen one, sir.

Q. You haven't seen one at all?

A. No, sir.

Q. You have never heard of a——

Mr. Kiendl: If your Honor please, for the purpose of the record I make the same objection and want the same exception as to this line of cross-examination that I made with the last witness, that it concerns matters on which this witness was not examined in chief, and for those purposes we must insist that the plaintiff is making the witness his own witness.

The Court: Overruled. Proper cross-examination.

Mr. Kiendl: Exception.

[fol. 379] Q. After how many years has it been, if at all, since you have seen a reefer door open when it is either in the yard or out on the tracks?

A. You mean a moving train?

Q. Yes, either a moving train or a standing one, how many years has it been?

A. I haven't seen any reefers open on moving trains.

Mr. Kiendl: What is that answer?

The Witness: I haven't seen any reefers open on moving trains.

Q. How about a standing car?

A. Why, I have seen them open where they were unloading them.

Q. Outside of where they were unloading them, how many years since you have seen a reefer door open, if at all?

A. I have seen them open when they are unloading those cars, that is all.

Q. You have told me that. I don't mean when men are around there working, of course. I don't mean at that time, but I mean when there is nobody around there working at all and you see a car standing on the siding or in a yard

or anywhere, how many years has it been since you saw a reefer door open?

A. I have seen none open, sir.

Q. Never in your whole nineteen years, you have never seen one?

A. No, sir.

Q. Don't know anything about that at all?

A. No, sir.

Q. And nobody has talked with you about that since you went on the witness stand or before you went on the witness stand?

A. No, sir.

Redirect examination.

By Mr. Kiendl:

Q. Now, Mr. Dooner, irrespective of who may have talked to you from the time of the day of this accident [fol. 380] down to this minute, are you telling this Court and jury what you know to be the truth?

Mr. Hunt: Allowing the witness to characterize his own testimony.

Mr. Kiendl: In the light of the cross-examination.

The Court: Overruled.

Mr. Hunt: Exception.

Q. Listen to that question again, Mr. Dooner, so you have it in mind, and look at these men and tell them——

Mr. Hunt: I object to this, may it please the Court.

The Court: Objection sustained.

Mr. Kiendl: I submit, your Honor, I want to undo the harm he did by suggesting that somebody had told him what and what not to testify to, and I submit I have an absolute right to bring it out.

The Court: Objection overruled.

(Discussion off the record.)

Mr. Kiendl: Now we will go back to it.

Q. No matter who has talked to you about this case at any time,—lieutenant of police, claim agents, Mr. Kiendl, anybody else, is the testimony that you have given here on this witness stand the truth?

A. Yes, sir.

Mr. Hunt: Objected to.

The Court: Overruled.

Q. And your answer is yes, sir?

A. Yes, sir.

Q. Now, you have been asked how you happen to remember [fol. 381] ber about this time of 4.40, the arrival of this train at Ashley. Did you tell Mr. Hunt that you made a notation of it in something that you called a wheel book?

A. Yes, sir.

Q. And is this the wheel book that I hold in my hand?

A. Yes, sir.

Q. And have you seen that wheel book since?

A. Yes, sir.

Q. And has it a notation in your own handwriting as to when that train arrived at Ashley (handing)?

A. Yes, sir.

Q. And what is the time there in your own handwriting?

A. 4.40, sir.

Q. That is all.

A. The night previous to that I was not flagging that job.

Q. And from your train book, if you look at the entry, you can see the time any train you were on that went to Ashley arrived at Ashley when you were flagging?

A. Yes, sir.

Recross-examination.

By Mr. Hunt:

Q. And when I asked you about that matter you did not tell me anything about the wheel book as being the—

Mr. Kiendl: He did tell you about the wheel book.

Mr. Hunt: Now your Honor—

Mr. Kiendl: That question is unfair.

The Court: Gentlemen, both of you gentlemen are excellent lawyers, and it doesn't pay to get into an argument.

Mr. Hunt: But when I asked him—

Q. When I asked you about it, I asked you how it was you remember that this train got in at 4.40, do you remember that?

A. Yes, sir.

[fol. 382] Q. And you said it was because you had asked the conductor.

A. I asked the conductor.

Q. All right; and at the same time, when I asked you my next question, if there was any other reason—do you remember my asking you that?

A. When I am flagging that job I always—

Q. No, I want to show I was fair to you in my question. Now, do you remember I asked you whether there was any other reason that you remembered on this particular night, and you said no, that was all? You remember that answer?

A. Yes.

Q. Now, if you had told me about the wheel book we could have referred to some book, couldn't we?

A. Yes.

Q. Now, you made a mistake before, you didn't think about the wheel book while I was questioning you, is that it?

A. That is right, sir.

Mr. Hunt: I would like to see the paper from which the witness refreshed his recollection, which now, really, I am entitled to see.

Mr. Kiendl: Certainly. Do you want the witness?

Mr. Hunt: No.

Mr. Kiendl: Are you through with the witness?

Mr. Hunt: I am through with the witness.

WILLIAM H. HENNING, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kiendl:

Mr. Hunt: Will your Honor indulge me just a minute, [fol. 383] please? I will offer this page in evidence.

Mr. Kiendl: No objection.

(Marked Plaintiff's Exhibit No. 7.)

Mr. Hunt: I ask that the jury read this page.

The Court: What do you designate that?

Mr. Hunt: It is known as the wheel book, I find out; is that right, Mr. Kiendl?

Mr. Kiendl: The wheel book or conductors' train book.

(Book shown to jury.)

Mr. Kiendl: Is that the part you are offering?

Mr. Hunt: I am offering the whole page, but I am calling the jury's attention to the part that the witness used.

Q. Mr. Henning, you were the engineer on this train?

A. Yes, sir.

Q. And you have been an engine man all your working life, haven't you?

A. Yes, sir.

Q. Would you mind telling us how many years?

A. From January 7, 1905, 32 years, next January.

Q. And during part of that time did you fire before you became an engineer?

A. About five years and six months.

Q. Then you became an engineer and have been an engineer ever since?

A. Yes, sir.

Q. And worked with this railroad that entire time?

A. Yes, sir.

Q. And have you worked on this part of the Wyoming Division that we are talking about in this case, between [fol. 384] Avoca and Ashley?

A. Yes, sir; the first man that ran down that territory, that is to Ashley.

Q. And you know that territory pretty well?

A. Yes, sir.

Q. You have operated freight trains down there in the day and in the night?

A. Yes, sir.

The Court: Did you enter the service of the Erie Railroad Company in 1904?

The Witness: I entered the service of the railroad, Wyoming Valley, in 1898, September 27th, and was promoted from wiping engines and coaling to fireman, in September, 1898, and promoted to an engineer on January 7, 1905, I ran my first day.

Q. This Ashley Special carried freight cars down to the Central Railroad at Ashley, didn't it?

A. Yes, sir.

Q. From Avoca?

A. Yes, sir.

Q. Now, you had a fireman, of course, in your locomotive?

A. Yes, sir.

Q. And his name was——

A. Charles Edwards.

Q. And he is here in court?

A. Yes, sir.

Q. And the number of your engine—I am reading some car report—is 2499. Is that a J2 engine?

A. Yes, sir.

Q. And had you driven these J2 engines many times in your extended experience as an engineer?

A. Well, in the last ten years that I have been on the run we have had all J2 engines. Before that we did not have them.

Q. Now, do you remember the run at all on the night when this accident happened, the run from Avoca to Ashley?

A. Yes, sir, I do.

[fol. 385] Q. Do you remember the track from Avoca to Rock Street?

A. Yes, sir, I do.

Q. What sort of a track is it? You tell the jury what you know about it.

A. Why, it is a good piece of track on the Wyoming Division until we get down on the Central Railroad, and then it isn't so bad.

Q. You like the Erie track better than the Central Railroad track, is that the idea?

A. Yes, sir; but that is a good piece of track from Avoca to Plains Junction.

Q. And what is the level or grade of the track from Avoca to Rock Street?

A. There is a heavy grade from Avoca, from the back leader to just as you are pitching over Rock Street, and from Rock Street south it begins to get kind of level, and about 40 car lengths or 43 car lengths you pitch over the grade and in a space of 43 car lengths we have got to stop to flag William Street. On this track from Avoca to Pittston Summit we call it, Rock Street is right there, there is an S curve in that and it is impossible for the J2 engines

with 38 cars or more to make any speed over 10 miles an hour in that territory.

Q. You testify to that as a result of your experience as an engineer on this particular division?

A. Yes, sir.

Q. How fast was the train going over that territory that night from Avoca up to Rock Street?

A. Well, I don't think we were traveling over 10 miles an hour. At Rock Street, now, I speak of.

Q. Well, from Avoca all the way up to Rock Street, is that about—

A. Well, I would not say ten miles an hour there because I have got to slow up for the back leader, which is 28 car lengths, and will have the engine on an S curve.

Q. Yes.

A. And the grade is pretty heavy around this S curve [fol. 386] until you get the rear end over—well, I don't know, we call it No. 8, I don't know the name of the street there.

Q. Well, where is it with respect to Rock Street, to the north?

A. That is north of Rock Street.

Q. Then you get over your S curve and you are going toward Rock Street from Avoca, and you say there is a heavy grade all the way up to Rock Street?

A. Heavy grade all the way up to Rock Street.

Q. What speed were you making on that section of track until you got up to Rock Street?

A. I would say about ten miles an hour there.

Q. About ten miles?

A. There, yes.

Q. And at any point from the time you left Avoca until you had passed Rock Street, had your train on that night gone anything like 30 or 35 miles an hour?

A. No, sir, no, sir.

Q. Was there anything unusual about the operation of this train on that particular night over that track, or was it the same as usual except you may have had more or less cars on?

A. Well, I just did not get that question right.

Q. Well, did you operate your engine and your train over that track on the night when this accident happened the same way you have always operated it?

A. No, I would say no, for this reason. If I had less cars than 38 cars, then I would not work the engine full stroke, but with 38 cars we have to work that engine full stroke and a wide-open throttle.

Q. That is just what I want to get at. A wide-open throttle would mean you are giving to the engine all the steam that she can possibly take?

A. Yes, sir.

Q. Were you doing that on the night in question?

A. Yes, sir, with these 38 cars or any other 38 cars.

Q. Your engine throttle was wide open?

A. Yes, sir.

[fol. 387] Q. And the steam going into the cylinders was all the steam that you could get into those cylinders?

A. Yes, sir.

Q. And with those 38 cars, some loaded and some empty?

A. Yes, sir.

Q. On that track, your throttle wide open, at no time were you going over 10 miles an hour, in your opinion?

A. No, sir, not over 10 miles an hour.

Q. And you say you could not go faster than that?

A. I could not if I wanted to.

Q. When your engine has the throttle wide open, does it make some noise, the noise of escaping steam?

A. Yes, sir, it does, plenty of noise.

Q. And 38 cars going uphill, being pulled under those conditions, can you hear the rolling of the cars on the tracks?

A. Not very handy.

Q. Not very handy. Well now, your locomotive had a headlight on, did it?

A. Yes, sir.

Q. And what did the headlight consist of?

A. It consists of a reflector, electric globe. It is an electric headlight globe.

Q. And what did you have in the engine to turn that on and off?

A. We have a switch just overhead.

Q. Was that electric headlight on at all times while you were operating that engine that night?

A. Yes, sir.

Q. Have you ever driven an engine blind without a headlight on in your life?

A. Not in my 32 years.

Q. That headlight, did it cast a ray or a gleam out somewhere in front of your train?

A. Why, it is similar to an automobile light, only stronger. It casts a ray out.

Q. And does it cast the ray out right directly in front of your engine or out in front along the road?

A. I would not say so, I would say that there is a kind of a shadow there—well, I don't know, I guess I will have to [fol. 388] guess at it, because I never made any measurement—I would say—I want this to be only truthful—between 15 and 25 feet.

Q. And that shadow where the ray does not show on the tracks, is that the shadow you are talking about when you are running on a straight track or running on a curve or what?

A. Well, that would be most any place.

Q. As you approach Rock Street, you knew there was a curve on the track as you came up from Avoca towards Hughes and Rock Street?

A. Yes, sir, there is a curve there.

Q. And in operating that train the curve would be taking you around to the left, wouldn't it?

A. Yes, sir.

Q. Would that have any effect on your headlight insofar as it would show on the tracks?

A. Yes, sir, that headlight—

Q. Well now, try to explain to the Court and jury just how that would work.

A. Your headlight is set directly in the center of the smoke-box there, and when you are running a left hand curve it is focused toward the right hand side of the track, and when you are going in the opposite curve, on a right hand curve, it is focused to the left hand side.

Q. And it depends on the size of the curve as to how far off to the right or the left the ray shows?

A. Yes, sir.

Q. It is possible in going around a curve that the headlight threw itself on the track all the time as distinguished from one side or the other?

A. No, just as I said.

Q. Well now, in addition to that headlight, did you have a bell on your locomotive?

A. Yes, sir.

Q. Is that what I call an automatic bell?

A. Yes, sir, it is.

[fol. 389] Q. How did it operate?

A. It is operated by air; there is a valve in the cab that sets right in front of the engineer in these J2 engines—well, mostly all of them, but these J2's, because a J2 engine is an engine I have all the time, and there is two sanders, front and back, and the bell ringer that is operated by compressed air.

Q. Did you ring that bell at any time as you approached this section, Rock Street crossing?

A. Yes, sir, all crossings.

Q. Now, do you remember whether you had the locomotive bell ringing that night as you went up to and over the Rock Street crossing?

A. Yes, sir, I had the bell ringing at all crossings, and that crossing.

Q. How about your whistle? You have a locomotive whistle?

A. Yes, sir.

Q. Did you blow that for the Rock Street crossing as you approached it?

A. Yes, sir.

Q. Now, did you see the plaintiff that night at any time as you operated your train on that track and over Rock Street?

A. No, sir, I didn't see anybody.

Q. Did you know that there had been an accident at any time before you got to Ashley?

A. No. The first I knew about the accident—now, I am not so sure on this whether the officer got on at Pittston Summit and showed me in the paper, or whether it was at Avoca, a fellow named Jack Evans, an officer, and he told me that there was a fellow got his arm off at—

Mr. Hunt: Wait a minute.

Q. I don't want you tell what some officer down there told you, but you did hear some time the next day, was it?

[fol. 390] A. Oh, he showed it to me in the paper that morning on the way back.

Q. But you didn't know about any accident on your way down to Ashley?

A. No, sir.

Q. It was after you left Ashley before your return trip before you ever heard of an accident?

A. It was after I got back to Pittston Summit or Avoca, I don't know which.

Q. How wide is your engine, in your opinion, I mean this J2?

A. Well, I should judge, and I think I will be telling the truth to tell you that it is about 10 feet from the outside of one cylinder to the outside of the other.

Q. And that is the widest part of your engine, is it?

A. Yes, sir. The breast beam is only about 8 feet.

Q. Have you seen people walking along the track there at Rock Street from time to time?

A. Yes, sir.

Q. And when your train comes along, if you give them warning, what do they do?

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

The Court: Objection overruled.

Mr. Hunt: Exception.

A. They step out of the way of the train, if they are walking along the track, step to one side.

Mr. Kiendl: You may inquire.

Cross-examination.

By Mr. Hunt:

Q. Mr. Henning, I think this picture will probably show as well. Your headlight is up on your engine approxi-[fol. 391] mately how many feet above the ground, can you tell me?

A. Well, I would say three feet above the pilot.

Q. Well, that doesn't help us, I don't know how high the pilot is. Figure that out. About how high?

A. You have got a 56-inch wheel, and you have a pencil there so you can figure that out, 56 inches in that.

Q. And how high above the wheel?

A. I would say 3 feet above the pilot.

Q. Well then, would it be all right to say somewhere between 7 and 8 feet above the ground?

A. Why, I would say—

Q. Or higher than that?

A. I would say about 6 feet.

Q. The headlight on an engine is only the height of a man standing on the ground, a man a little taller than you, Mr. Henning? Is that a fact?

A. Yes. It may be 8 feet or so.

Q. If a man of Mr. Kiendl's proportion stands and looks at that headlight, he is looking up decidedly, isn't he?

A. Yes. But now, you just get this right. This headlight is not set on top of the smoke-box; it is set in the center of the smoke-box.

Q. Oh, I know. With your years of experience, I am asking you to help us to this extent: Can you tell us whether, if a six-foot man were standing in front of that engine, how far above his head would this headlight be?

A. Well, I would say maybe it is 8 feet.

Q. Now, that light is not projected out exactly straight, it is tilted down somewhat toward the ground; am I correct?

A. I would not say so.

Q. Well, I don't know.

A. It shows 800 feet ahead, according to law.

Q. Do you know whether the headlight, assuming that [fol. 392] is a headlight, now, is that headlight on the engine projected, is that headlight projected straight out, or do they——

A. I would say straight out.

Q. Straight out. All right, sir. And then being projected straight out, that accounts for this dark space that you said was immediately in front of the engine?

A. I would say so.

Q. Wait until I finish. To the extent of 25 or 50 feet?

Mr. Kiendl: He said 15 to 25, I think.

Q. Did you say 15 to 25 feet?

A. I think I did.

Q. Did you?

A. Yes, I think I did.

Q. All right, I am sorry, sir. Now then, can you take this picture and look at it. Have you ever seen it before?

A. I don't think I have seen it before.

Q. I have only three or four questions to ask you if you will try to help me.

A. I haven't seen these pictures.

Q. Now, you say that road-bed is at least four to five feet above the houses, is it—I mean the ground on which the houses are resting; is that not a fair statement?

A. How is that?

Q. Your road-bed, the thing on which the engine runs.

A. I see.

Q. Is four or five feet higher in elevation than the land on which the houses are setting?

A. Yes, I guess that is right.

Q. And so your headlight would be 13 feet higher in elevation than the land on which the houses are setting?

A. That would be about right.

Q. Now, as you come around that curve your headlight shows straight across on about the top of the houses, doesn't it? That is what you would say?

A. Well now, that is further back there.

[fol. 393] Q. As you come——

A. You are coming around here now, around the curve, direct straight line—let me get this thing right.

Q. I am not trying to confuse you at all.

Mr. Kiendl: Let him explain to you, Mr. Hunt.

Q. As you go along, your headlight would first hit the house I am pointing at now, wouldn't it?

A. That is correct.

Q. And gradually it would swing over until it hit this next house?

A. Yes.

Q. And it would hit about the tops of the houses, wouldn't it?

A. Well, I don't know.

Q. Well, your headlight is about 13 feet above the land on which the——

A. About in here.

Q. You are indicating about what, the middle of the house?

A. About the middle of the house.

Q. Hit about the middle of the house from the top to the bottom?

A. Yes, from the middle to the top.

Q. Now, as you continued around your light would keep projecting as I am indicating this way (indicating)?

A. It would keep going this way (indicating) to keep going around the curve.

Q. The next thing it would hit after hitting the house would be the curve and the corner of Rock Street and the railroad, wouldn't it?

A. Yes.

Q. Then it would hit Rock Street just opposite that little house; in other words, it would not hit Rock Street curve until you completed that curve, would it?

A. Until I had completed this curve.

Q. Until you had completed that curve?

A. The rear end would be here (indicating).

Q. And walking along here, is that the action of your light, with respect to anyone walking along—there would [fol. 394] be some place, that is it starts over here, and as your train swings it will swing right across the back of a person just as I am indicating with my pencil, is that right?

A. Well, you mean a person—

Q. At night time, going around that curve and coming to Rock Street, is your light directly in front of you here? You are dark here (indicating), your light is going across the fields and hitting the houses instead of the track in front of you, isn't it?

A. Well, I don't quite get your question.

Mr. Hunt: That is all, sir.

(Short recess.)

CHARLES EDWARDS, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kiendl:

Mr. Kiendl: If your Honor please, by stipulation, referring to the sheet in the so-called conductor's train book that has been offered in evidence by the plaintiff as Plaintiff's Exhibit 7, under the heading "Where taken," the head of the page, appears W168, that is the station number at the Avoca yard where the train started. Under the heading "Where left" are the letters "AH," which means Ashley,

and under the heading "Time Taken" is "2.10 a.," which means 2.10 a. m., and at various places on the page there are dashes in pencil. Those mean ditto marks.

[fol. 395] Q. You are Mr. Edwards, the fireman?

A. Yes, sir.

Q. And you were the fireman on this engine 2499, the night of this accident?

A. Yes, sir.

Q. And the engineer is the man who was on the stand before you?

A. Yes, sir.

Q. Was there anybody else in the cab of the locomotive that night?

A. Mr. O'Boyle.

Q. He was the head brakeman?

A. Yes, sir.

Q. And the engineer is on the right hand side of the engine?

A. Yes, sir.

Q. And the fireman, when he is not actually shoveling coal, is on the left side?

A. Yes, sir.

Q. And where is the head brakeman's position? Does he sit behind you or behind the engineer or where?

A. In front of me.

Q. On the night of the accident, what in your opinion was the speed of this train as it went from Avoca on up over this Rock Street crossing?

A. From 8 to 10 miles an hour.

Q. And is that about the speed that—was the engine bell ringing when the train went over the Rock Street crossing?

A. Yes, sir, he always rings the bell at every crossing.

Q. And how about the whistle, was the whistle blowing that night?

A. He does the same thing with the whistle.

Q. Was the headlight lit?

A. Yes, sir.

Q. Did you see the plaintiff at any time on or near the tracks?

A. No, sir.

Q. Did you know that an accident happened until later?

A. Not until we were coming back to Avoca.

Q. When you came back to Avoca you learned of the occurrence of an accident?

A. Yes, sir.

Q. And your job as fireman is to keep the fire going to keep up steam?

A. Yes, sir.

[fol. 396] Q. And you were performing your job that night?

A. Yes, sir.

Q. And where were you when this train approached this crossing, Rock Street crossing?

A. I was on the left of the engine.

Q. On the left of the engine?

A. On the left of the engine on my seat.

Q. Were you looking out ahead?

A. Yes, sir.

Mr. Kiendl: Your witness.

Mr. Hunt: No cross-examination.

JOHN FRANCIS O'BOYLE, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Kiendl:

Q. You were the head end brakeman of this train, Mr. O'Boyle?

A. Yes, sir.

Q. And you were up in the locomotive cab as the train approached this Hughes and Rock Street section that we have been talking about?

A. Yes, sir.

Q. How fast was the train going when it got up near there?

A. I should judge about 10 miles an hour.

Q. And was the headlight lit?

A. Yes, sir.

Q. And how about the whistle and bell; do you know whether they were operated?

A. The whistle blew and the bell rang.

Q. And you heard about the accident when?

A. On our arrival at Avoca.

Q. What were you doing in the locomotive as you went over this territory across Rock Street?

A. I was sitting in the front forward seat.

[fol. 397] Q. Were you looking ahead?

A. I was looking straight ahead, the door was open and it was kind of a warm night, and the windows was open and I was looking straight ahead for automobiles on the crossing or something like that, because we were approaching that town.

Q. Did you see the plaintiff at any time yourself?

A. No, sir.

Q. You didn't know he was hurt until you got back to Avoca the next day?

A. No, sir.

Q. You had nothing to do with the inspection of any of the cars on this train, did you?

A. No, sir.

Q. You did not keep the train book or the train list or any of those things?

A. No, sir.

Q. Your job was to do what work a brakeman would have to do at the front part of a train in switching and taking out a flag to protect the crossing and things of that kind?

A. Cut the engine on and couple up the air and cut in the air, meaning to open up the air and let the air pass through the entire train.

Mr. Kiendl: You may examine.

Cross-examination.

By Mr. Hunt:

Q. How many years have you been in the railroad business?

A. 29 years.

Q. Just a question or two. How many years has it been since you have seen, taking the—referring to a box car first, how many years since you have seen the door of a box car sprung off the run or rail that it runs on?

Mr. Kiendl: To be consistent, may I have the same objection and exception to this line of questioning?

[fol. 398] The Court: Same ruling.

Mr. Kiendl: So it won't be assumed to have been waived in any sense.

Q. How many years?

A. None that I can remember.

Q. None. And there hasn't anybody by chance spoken to you about that since yesterday afternoon when it developed here, has there?

A. About this case?

Q. No, has anybody spoken to you since yesterday afternoon to the effect that in case I asked you about the doors springing off the rails that you have no recollection of any such thing?

A. No, sir.

Q. Has anybody asked you about that at all?

A. No, sir.

Q. And you haven't talked with anybody about that?

A. No, sir.

Q. And you as a railroad man never have seen the side doors of the car off the rail, is that exactly it?

A. No, not in transit or anywheres like that.

Q. Nowhere?

A. I have never seen any of them off those rails.

Q. What did you say about traffic?

Mr. Kiendl: He never had seen any of them off the rails.

Q. Did you say anything about traffic?

A. Not in transit.

Q. Well, that means the same thing, in transit; you mean by that, in motion?

A. Yes.

Q. Now take in the yards, have you ever seen that?

A. No, sir.

Q. Then you have never seen them at any time?

A. No, sir.

Q. Any place?

A. No, sir.

[fol. 399] Q. And the reefer doors in the yards, you have never seen a reefer door open?

A. I did once in Port Jervis.

Q. Once in Port Jervis?

A. Yes, sir.

Q. And did you go over and close it?

A. No, sir; there were people taking those slats out of the car.

Q. Oh, you mean people were working on that car?

A. No, they were people from the town there was getting those slats out of the car that come as crating.

Q. Well, people in the town had gone there?

A. Yes, sir.

Q. Did you do anything about it?

A. No, sir; I was going on my way up the road.

Q. And that is the only reefer door you ever saw open?

A. That is all that I can remember.

DANIEL F. McCARTHY, called as a witness on behalf of the defendant, being duly sworn, testified as follows :

Direct examination.

By Mr. Kiendl :

Q. Mr. McCarthy, you were the rear end brakeman or flagman on this train?

A. Middle brakeman.

Q. Middle brakeman?

A. Yes, sir.

Q. The flagman and the conductor and the head brakeman have already been on the stand. You were what was called the middle brakeman?

A. Yes, sir.

Q. That is the extra brakeman?

A. I was extra brakeman; full crew man law.

Q. And where were you when the train left Avoca?

A. At the head end.

[fol. 400] Q. And did you ride the head end or did you ride the middle or the rear end of the train?

A. Stayed there until the train pulled out.

Q. And then where did you go on the train?

A. I was on the last end, on the caboose.

Q. And then did you ride in the caboose from that point on down to Ashley?

A. Yes, sir, down to Miners Mills.

Q. Down to Miners Mills?

A. Yes, sir.

Q. Do you know this territory of Rock Street and Hughes Street in Hughestown that we are talking about?

A. Yes, sir.

Q. What do you say the speed of the train was as it went over that territory there?

A. Anywheres from 10 to 12 miles an hour.

Q. That is your best estimate?

A. Yes, sir.

Q. At any time did it go anything like 30 or 35 miles an hour?

A. Not to my knowledge. We could not do it.

Q. What was that, it could not do it, you say?

A. Yes, sir.

Q. Do you know anything about any signals by locomotive whistle or bell or anything of that kind given at that point? Did you hear the whistle?

A. That night?

Q. Yes.

A. Yes, sir.

Q. Did you hear the bell?

A. No, sir.

Q. Did you see the headlight?

A. At the Avoca yards, sir.

Q. At Avoca yard?

A. Yes.

Q. You did not see it thereafter?

A. No, sir.

Q. You didn't know anything about the occurrence of an accident until you got back to Avoca, did you?

A. No, sir.

Mr. Kiendl: That is all.

Mr. Hunt: No cross.

[fol. 401] Mr. Kiendl: Defendant rests.

Mr. Hunt: Plaintiff rests.

MOTION TO DISMISS

Mr. Kiendl: If your Honor please, the defendant renews its motion made at the close of the plaintiff's case, on the same grounds, because the plaintiff has not established any actionable negligence whatsoever on the part of the Railroad Company and on the further ground that on the whole

case it has been affirmatively established, as a matter of law, that the plaintiff was guilty of contributory negligence and cannot recover in this action.

The Court: Motion denied.

Mr. Kiendl: Exception.

The Court: How much time will each of you gentlemen require for summation?

(Discussion off the record.)

The Court: Under the circumstances, that is two hours, and my charge will take anywhere from 20 minutes to half an hour. That is two and one-half hours, and it is four o'clock now. Do the jury want to stay here?

Juror No. 7: I made an appointment for five o'clock.

The Court: How do the other jurors feel about it?

Juror No. 5: I think Tuesday would be much better.

Juror No. 8: Not tonight.

The Court: Is that the way all of you gentlemen feel?

Juror No. 5: I think that would be much better.

The Court: How do you feel about it?

[fol. 402] Juror No. 6: The same as the rest of them.

Mr. Kiendl: I heard the last juror suggest Tuesday.

The Court: Well, have the attorneys any objection to this matter going over until Tuesday?

Mr. Hunt: I have none, sir.

Mr. Kiendl: I have none, sir.

The Court: Very well, gentlemen. Do not discuss this case among yourselves or with anyone else until you finally get it for determination from the Court and from counsel on both sides.

Will you gentlemen see to it that you have your requests to charge on Tuesday, as is the rule of the court?

Mr. Kiendl: Oh yes indeed, before we start our summation.

Mr. Hunt: Yes, your Honor.

The Court: Very well, 10.30 Tuesday, October 13th.

(Adjourned to October 13th, 1936, 10.30 a. m.)

New York, October 13, 1936,

10:30 o'clock a. m.

Trial resumed.

(Mr. Kiendl summed up to the jury on behalf of the defendant.)

(Mr. Hunt summed up to the jury on behalf of the plaintiff.)

[fol. 403] PLAINTIFF'S REQUESTS TO CHARGE

1. If they believe there was a door swinging on the side of the train in question or any other unusual projection sticking out from the side of said train, then there is a presumption that the Erie Railroad was negligent and failed to use reasonable care. Refused. Exception.

2. It is undisputed that these paths were used openly and notoriously for a long period of time. Refused. Covered. Exception.

3. If the jury believe the plaintiff was on the junction of the path at the time of the accident and the paths were openly and notoriously used by the public for many years without objection by the Erie Railroad, then the Erie Railroad owed a duty of reasonable care in the operation of its railroad to the plaintiff at that time. Refused. Covered. Exception.

4. If they believe there was no proper inspection made or that defendant's employees were careless and negligent in their inspection of the train in question on the night of the accident and under such circumstances permitted said train to operate with a swinging door or unusual projection, then in that event it is for the jury to decide if the defendant failed to exercise reasonable care and was negligent. Refused. Covered. Exception.

5. The test of contributory negligence is whether in the opinion of the jury the plaintiff acted as a reasonably prudent man would have acted under all the circumstances, at the time of the accident, taking into consideration that [fol. 404] the plaintiff was a young man, twenty-nine years of age; that he testified he was long familiar with the pathway and had frequently used it in the past. Refused. Covered. Exception.

6. That if they believe the defendant had negligently permitted a swinging door or other unusual projection to protrude from the side of its train and that the plaintiff had a right to be on the junction of the paths and that he was on such junction at the time of the accident and that the

plaintiff was not guilty of contributory negligence, then they must award to the plaintiff as a verdict the reasonable damages suffered by him as a result of the accident in question. Refused. Exception.

7. That in arriving at the amount of reasonable damages they must award the plaintiff, the plaintiff is entitled to:

(a) The reasonable amount of the loss of earnings he has suffered, is suffering and will suffer in the future throughout his life as a result of the loss of his right arm;

(b) For the pain and suffering he has, is and will suffer;

(c) For the mental anguish he has, is and will suffer throughout his life as a result of the loss of his right arm;

(d) \$439.00, the amount of the hospital bills, doctor bills, and medicines, which latter sum has been agreed upon. Refused. Covered. Exception.

[fol. 405] DEFENDANT'S REQUESTS TO CHARGE

1. The plaintiff has not pleaded or proven that the defendant was guilty of any wilful or wanton negligence and consequently you are not permitted to give any verdict on any such ground. Refused. Exception.

2. The plaintiff must sustain the burden of proving the defendant's negligence and unless you are satisfied by a fair preponderance of the evidence which you believe, that the defendant did not exercise reasonable care, your verdict must be for the defendant. Refused. Exception.

3. If the evidence on the issue of negligence is evenly balanced in your minds, the plaintiff cannot recover. So charged.

4. If you should decide either that the plaintiff was not struck by the door of a freight car or that the defendant did not know and in the exercise of reasonable care should not have known that the door of one of the freight cars was open, your verdict must be for the defendant. So charged.

5. If you find that the plaintiff was negligent in any respect whatsoever, he cannot succeed in this action. Refused. Exception.

6. If you find that the plaintiff knew or should have known that it was dangerous to walk alongside this moving train in the darkness at the time and in the place here involved, he was negligent and cannot recover. Refused. Covered. Exception.

[fol. 406] 7. If you find that the plaintiff's version of the occurrence and cause of this accident at any time was substantially different from the one he testified to, you should take that into consideration in determining which, if any, version was correct. So charged.

8. A railroad track is a place of danger and anyone walking alongside it in the darkness and aware of the approach of a train must use reasonable care to keep at a safe distance from such train. So charged.

9. If you find that the so-called footpath ran substantially along the edge of the ties and was about two feet wide, I charge you as a matter of law that the overhang of the engine and the widest freight cars on this train were such that no one could walk out on that path alongside of this moving train with safety. Refused. Exception.

10. If you find that the so-called footpath ran substantially along the edge of the ties and was about two feet wide, I charge you as a matter of law that the plaintiff was in a dangerous position when the engine and cars passed him and if he knew or should have known that situation he was duty-bound to get out of the way. Refused. Exception.

11. The defendant was only bound to use reasonable care in the inspection of its trains and is not liable for any defects that may have existed which could not have been discovered in the exercise of such reasonable care. So charged.

[fol. 407]

New York, October 13, 1936, 10.30 a. m.

CHARGE OF THE COURT

(MANDELBAUM, D. J.):

The Court: Gentlemen, you have heard the evidence in the case and the arguments of counsel, and the case now ap-

proaches the stage where I am to charge you and then you will deliberate as to your verdict.

This action is brought by the plaintiff to recover damages from the defendant for personal injuries which he asserts he sustained in an accident on the 27th day of July, 1934, at about two-thirty a. m. while he was lawfully on a footpath about two feet wide extending between the Rock Street grade crossing and Hughes Street, in Hughestown, Pennsylvania, which footpath runs parallel with the defendant's railroad track, separated only by the ends of the railroad ties which extend out about two feet from the rail. Plaintiff testified that he was walking northerly from Rock Street on this footpath towards Hughes Street, where he lived. The plaintiff further claims that this footpath has been used for a long period of time by the public and that the defendant negligently, carelessly and recklessly operated its train so that some dark object about two feet wide and about five or six feet in length, which he believes to have been a swinging door from a reefer or refrigerator car protruding from one of the defendant's cars as the locomotive and several cars passed him, striking him on the right side of the face, causing him to be thrown down and under the wheels of the train, suffering thereby an amputation of his right arm together with other injuries of which he complained.

The defendant, on the other hand, contends that not only [fol. 408] were the cars inspected at Avoca, from whence they started, but were again inspected and tested at Ashley, the point of destination, and that the cars were found to be in good condition, the seals on the reefers or refrigerator cars intact and unbroken and no projection protruding from any of the 38 cars making up this so-called Ashley Special. It also contends that the plaintiff, by his own negligence in not stepping away from the train when he saw the train approaching and *and* in not using traversable territory west of the track so as to avoid being struck by the overhanging of cars of any other possible accident, was the direct cause of this accident and that therefore the defendant should not be held liable or responsive in damages.

Under the law in this case the burden of proof is upon the plaintiff to establish by a fair preponderance of the credible evidence that the proximate cause of the accident was the negligence of the defendant in the operation of its train on the occasion of the accident by permitting or causing a door

of a reefer or refrigerator car to remain open and swinging so as to strike the plaintiff, as alleged.

If he fails to show this by a fair preponderance of the evidence, the defendant is entitled to a verdict at your hands.

I charge you that when I mention some of the facts I merely call them to your attention to refresh your recollection. You are to find the facts from the evidence given by the witnesses and by the exhibits in the case, according to your recollection of it. You are, however, to accept my rulings on the law in this case as I believe it to be.

The plaintiff testifies that on the night in question while on the footpath he heard the whistle and sound of the bell of the train and saw the headlight of the locomotive. You [fol. 409] must therefore eliminate from your consideration any question of proper signals or warnings of the train's approach to the Rock Street crossing. Plaintiff claims that the train was going between 30 and 35 miles per hour. The defendant's witnesses dispute this claim, contending that the train could not have made more than 10 miles per hour. I charge on this phase of the case that it is for you to determine from the credible evidence in this case the probable speed that this train was making at the time of the accident.

The plaintiff offered testimony by several witnesses relative to this footpath to the effect that it had become a lawful, well-beaten path used by people in the vicinity over a long period of time as a pathway between Rock and Hughes Streets and which joined another pathway going west from Hughes Street; that this footpath was used to the exclusion of the section of ground extending about 25 feet or more from the edge of the pathway to the picket fence for the reason that this section was composed of rough and sloping ground and was therefore not used by anyone.

I charge you that permission or a license to pass over the beaten path owned by the defendant over which the plaintiff claims to have walked may be expressly or impliedly created by constant use over a long period of time where there has been no objection to the use of the same on the part of the owner. It is for you to determine from the credible evidence and all the surrounding circumstances whether, in this case, such permission or license has been expressly or impliedly given to the inhabitants of that vicinity and to this plaintiff to so use this footpath. If you find from all the evidence and exhibits that a right-of-way over the footpath was created, [fol. 410] then it was incumbent upon the defendant to use

reasonable care and take such precaution in the maintenance and operation of its trains so as to avoid injuring the plaintiff.

The defendant, in support of its contention that no reefer or refrigerator car door was left open and swinging from the so-called Ashley Special has submitted testimony by several employees of the Jersey Central Railroad who received the so-called Ashley Special at Ashley, who testified in what manner the cars were sealed, checked and examined for defects, as well as the condition of the 38 cars when they arrived in Ashley. It also submitted testimony by its own employees who similarly explained what precautions were taken; how the cars were examined and the condition of the cars at the time that they left Avoca.

It is from this testimony and all the surrounding circumstances and exhibits in evidence that you are to determine whether or not the defendant's contention that no reefer or refrigerator car doors were left open or swinging from the Ashley Special is to be accepted by you.

If the plaintiff has satisfied you by a fair preponderance of the evidence as to the defendant's negligence, the defendant in order to avoid liability must establish by a fair preponderance of the credible evidence that the plaintiff, Tompkins, was himself guilty of some negligence which either caused or contributed to this accident. If you so find, the defendant is entitled to a verdict regardless of whether the defendant itself was guilty of any negligence.

The defendant in seeking to avoid liability apparently proceeds on two theories; the first, that the plaintiff was a [fol. 411] trespasser and, second, that even if not, the plaintiff himself was negligent in some manner and in some manner contributed to the accident.

The defendant attempted to elicit both from the plaintiff and his witnesses as well as from its own witnesses that the so-called pathway had not assumed the characteristics of a right-of-way. It contended, that is, the railroad company, the defendant,—contended that the territory from the pathway to the picket fence was used by people in the vicinity; that it was not in a dangerous condition, and that if the plaintiff had used such ground the accident could not have happened. It further claims that the plaintiff, while on the pathway, should have stepped aside at the approach of the train so as to avoid any accident, and by failing to do so the plaintiff alone must assume the responsibility of the acci-

dent. I have previously charged you with respect to this pathway that a right-of-way may be created by long usage, and that if you so find the defendant owed the plaintiff the duty of exercising reasonable care in the maintenance and operation of its trains so as to prevent injuring the plaintiff.

It is, however, incumbent upon me to charge in this regard that if you find from all the evidence and surrounding circumstances that such a right-of-way of a footpath was not created, then the plaintiff was merely a trespasser and the defendant did not owe him the duty of exercising reasonable care except that the defendant is charged with not wilfully or wantonly injuring him.

So that if you find by a fair preponderance of the evidence that the plaintiff was a trespasser and that the defendant did not wilfully and wantonly injure him, you must find [fol. 412] for the defendant. If you decide upon all the evidence in the case that the plaintiff has established his right to use the footpath and that the defendant failed to exercise reasonable care in connection with the operation of its trains, you must then further consider the question of whether or not the plaintiff in anywise contributed to the accident.

He, the plaintiff, claims through his own testimony and that of his other witnesses that the ground between the picket fence and the pathway was rough, sloping and unlevel and contained a ditch or drain, making it dangerous to traverse that ground and that no one in that vicinity ever used it. It is for you to determine from all the evidence and exhibits in this case whether this condition of which the plaintiff complains existed at the time of the accident.

In determining whether the plaintiff was negligent or, in other words, whether he in some manner contributed to the accident, you must determine whether the plaintiff, under the circumstances in which he found himself, exercised the care of a reasonably prudent person. This you must determine from all the surrounding circumstances and evidence in the case.

During the course of my instructions to you I have repeatedly used the expression "fair preponderance of evidence." What do those words mean? By a fair preponderance of the evidence you are not to understand that it necessarily means the number of witnesses who go upon the stand to testify. It has reference to the quality rather than to the quantity. This requirement, however, is a substantial one,

and the word "preponderance" indicates its meaning and that there must be more evidence in favor of the plaintiff's [fol. 413] contention that you credit and believe than you find opposed thereto before you can declare a preponderance in his favor.

The same rule applies to the defendant on the issue of the plaintiff's contributory negligence, which the defendant must prove by a fair preponderance of the evidence.

If at the end of your deliberations you are satisfied that the defendant was negligent and that the plaintiff was free from negligence contributing to the accident, then you must pass to the question of damages. On that subject you will find a verdict, if you reach that point, for this plaintiff, that will fully and fairly and reasonably compensate for his pecuniary loss, the loss of time, for the pain and suffering which he endured as the result of this accident, for his expenses incurred in curing himself of his injuries and any expenses that he may incur in the future for curing himself of the injuries as a result of this accident.

You will recall the injuries he received, the operations he underwent, the loss of his arm, the injuries to his face, the time spent in the hospital and all other things in connection with the case which were necessarily and directly the result of this accident. You may consider in fixing the damages the effect on his ability to work on account of the loss of his arm which, of course, is a permanent injury. If the defendant is responsible for his injuries, it should respond in such a sum as will fully compensate him. His medical and hospital bills were, as I recall the testimony, in the sum of about \$439.

Mr. Hunt: That is correct, your Honor.

The Court: Plaintiff testified that he had an earning capacity between 1929 and until two months prior to the accident of the average of about \$25 per week. You will find from all the facts what he is reasonably entitled to recover for his injuries if he is entitled to recover, and give him such sum as will fully and fairly compensate him for his injuries.

Let me repeat again that you twelve men are the sole and exclusive judges of the facts. It is your recollection of the evidence as you heard it from the lips of the witnesses that is controlling. As to who is telling the truth, you alone must determine from all the evidence in the case and from the exhibits allowed in evidence. You may take into consideration the manner in which the various witnesses testified; were

they truthful, were they frank or were they evasive and untruthful. You are to take into consideration the interest that any witness may have in the result of the trial. If you find that any witness has wilfully sworn falsely to any material fact, you may disregard that part of his testimony or you may disregard the entire testimony of that particular witness.

In short, it is your duty to examine the testimony of each sworn witness and give it the weight and credit you find it is entitled to after reasoning with each other on all the evidence in the case.

The denial of the motion at the close of the plaintiff's case and the denial of the motion at the close of the entire case are simply decisions on propositions of law which must be passed upon by the court. Such rulings must not be regarded as any indication that either the plaintiff or the defendant is entitled to prevail on the issues of fact. Neither must you be influenced by summations of counsel, no matter how eloquent or positive they may be, because in the last analysis the questions of fact must be determined by the [fol. 415] sworn testimony of the witnesses as you saw them take the stand.

In other words, gentlemen of the jury, both plaintiff and defendant are entitled to a fair and impartial examination of their evidence at your hands, in order that a true and just verdict be arrived at.

REQUESTS TO CHARGE—EXCEPTIONS

Now, gentlemen, the plaintiff and the defendant have submitted certain requests to charge. I will take up the defendant's proposed requests to charge first.

Defendant's first request declined, as I have covered same in my main charge.

Mr. Kiendl: If your Honor please, may I note an exception to those you deny so that I won't have to take them up later on?

The Court: Defendant has an exception. Defendant's second request.

Mr. Kiendl: That is withdrawn, your Honor, as covered by what has already been said.

The Court: Defendant's third request, I so charge, "If the evidence on the issue of negligence is evenly balanced in your minds, the plaintiff cannot recover."

Defendant's fourth request I so charge; that is to say: "If you should decide either that the plaintiff was not struck by the door of a freight car or that the defendant did not know and in the exercise of reasonable care should not have known that the door of one of the freight cars was open, your verdict must be for the defendant."

Mr. Kiendl: The fifth we withdraw, your Honor, as charged already in the main charge.

The Court: Defendant's sixth request declined. I have covered it in my main charge.

Mr. Kiendl: May we have an exception?

[fol. 416] The Court: Yes. Defendant's seventh request I so charge: "If you find that the plaintiff's version of the occurrence and cause of this accident at any time was substantially different from the one he testified to, you should take that into consideration in determining which, if any, version was correct."

Defendant's eighth request, I so charge; that is: "A railroad track is a place of danger and anyone walking alongside it in the darkness and aware of the approach of a train must use reasonable care to keep at a safe distance from such train."

Defendant's ninth request refused.

Mr. Kiendl: Exception.

The Court: The defendant may have an exception. Defendant's tenth request refused. Defendant may have an exception.

Defendant's eleventh request, I so charge; that is to say: "The defendant was only bound to use reasonable care in the inspection of its trains and is not liable for any defects that may have existed which could not have been discovered in the exercise of such reasonable care."

In so far as the plaintiff's requests to charge the jury, plaintiff's request one refused, plaintiff may have an exception; plaintiff's second request refused. I have charged that anyway in my main charge.

Plaintiff's third request refused. Plaintiff may have an exception to each of these refusals.

Plaintiff's fourth request refused.

Plaintiff's fifth request refused as I have covered most of it in my main charge.

Plaintiff's sixth request refused.

Plaintiff's seventh request refused because I think I have covered all these requests in my main charge.

[fol. 417] Now, gentlemen, the case is now in your hands. As to the form of your verdict, if you find for the plaintiff, then you find for the plaintiff in the sum of so much money as you see fit. If you find for the defendant you merely say "Verdict for the defendant."

Mr. Kiendl: If your Honor please, may the defendant have one exception to your main charge?

The Court: Yes.

Mr. Kiendl: To preserve our legal point, we except to that portion of your Honor's main charge wherein you leave to the jury as a question of fact the question of whether or not there was a permissive right on the longitudinal so-called footpath running along a railroad right-of-way in the State of Pennsylvania. That is all I have to say, your Honor.

The Court: You may have an exception.

Mr. Hunt: I have no further request, your Honor.

Mr. Kiendl: May the jury have the exhibits if they want them?

The Court: Yes, surely, if they want them.

(At 12:40 o'clock the jury retired.)

Mr. Kiendl: May I request that if the jury so decide, that they be entitled to see the complaint and the file complaint for discovery and inspection in this case.

Mr. Hunt: And the answer.

Mr. Kiendl: And the answer and the bill of particulars.

The Court: Yes.

Mr. Kiendl: We will send them in.

[fol. 418] Mr. Hunt: Yes.

The Court: Yes.

(At 4:45 o'clock p. m. the jury returned to the court room.)

VERDICT

The Clerk: Gentlemen, have you agreed upon a verdict?

The Foreman: Yes, sir, we have.

The Clerk: How say you?

The Foreman: We find for the plaintiff.

The Clerk: In what amount?

The Foreman: Thirty thousand dollars.

The Clerk: Gentlemen, listen to your verdict as it stands recorded in this issue joined between Harry J. Tompkins against Erie Railroad Company. You say you find a verdict for the plaintiff in the sum of Thirty thousand dollars, and so say you all?

The Foreman: Yes, sir.

MOTION TO SET ASIDE VERDICT

Mr. Kiendl: If your Honor please, the defendant moves to set aside the verdict and for a new trial on the ground the verdict is against the evidence and the weight of evidence and on the exceptions that we have noted throughout the trial, and we call your Honor's attention particularly to the fact that the only court that can review the weight of evidence in our federal jurisdiction is your Honor's court, and it seems to me we have established beyond any doubt that the plaintiff is not entitled to recover anything in this case whatsoever.

The Court: I will reserve decision on that motion.

Mr. Kiendl: Would your Honor desire a brief on the subject?

[fol. 419] The Court: Yes.

Mr. Kiendl: Within, perhaps, a week?

The Court: Well, within ten days, anyhow. A week would be better.

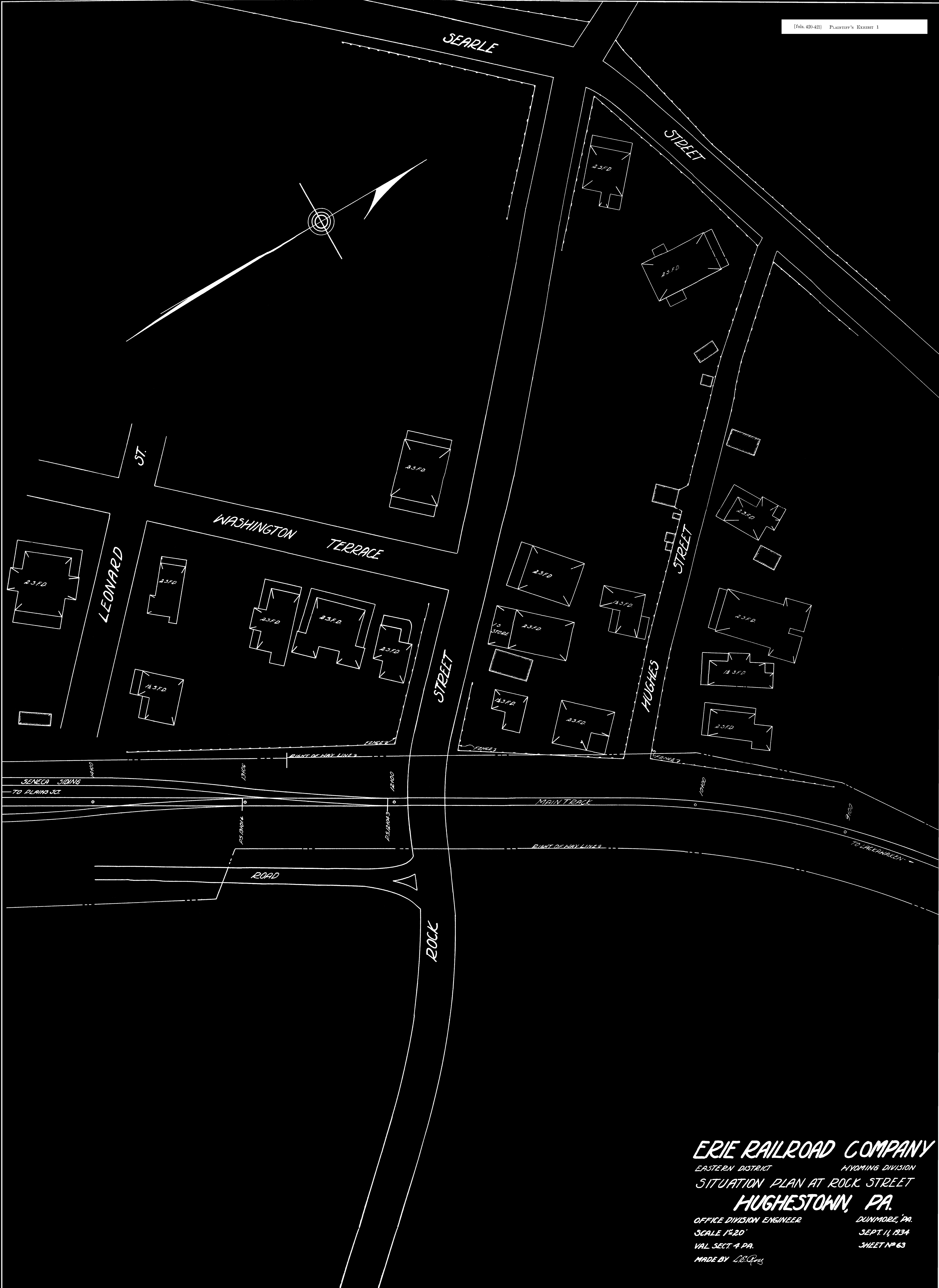
Mr. Kiendl: A week will be all right?

The Court: Yes. If you want to have more time, I think I will oblige you.

Mr. Hunt: May we have an opportunity to answer the brief?

The Court: Yes.

The Clerk: The jury is excused for the term with the thanks of the court.



ERIE RAILROAD COMPANY
 EASTERN DISTRICT PENNSYLVANIA DIVISION
 SITUATION PLAN AT ROCK STREET
HUGHESTOWN, PA.
 OFFICE DIVISION ENGINEER DUNMORE, PA.
 SCALE 1"=20' SEPT. 11, 1934
 VAL. SECT. 4 PA. SHEET NO. 63
 MADE BY L.B. QUINN

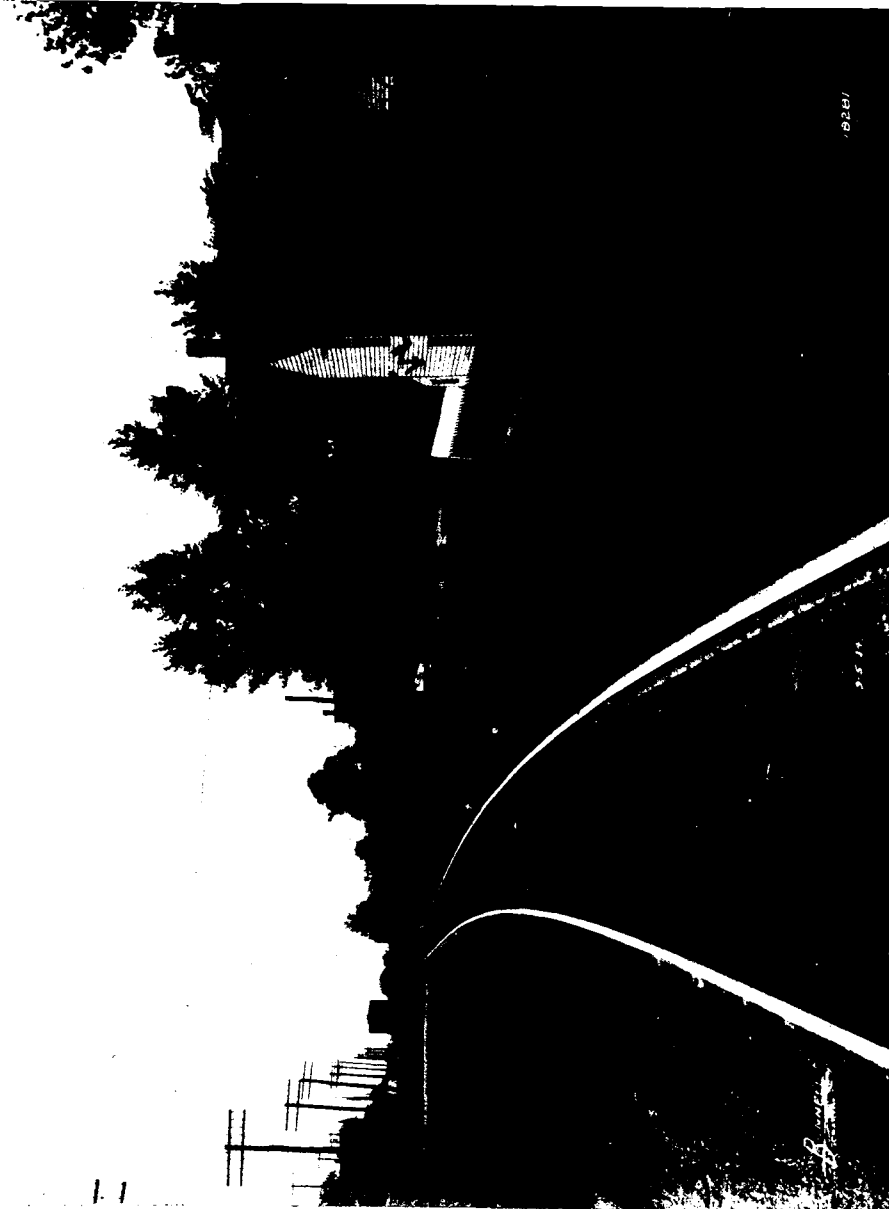
[fols. 422-423] PLAINTIFF'S EXHIBIT 2

Photograph taken with camera 50 feet west of crossing
and 150 feet from point of accident, looking east.



[fols. 424-425] PLAINTIFF'S EXHIBIT 3

Photograph taken with camera 100 feet east from point of accident. looking west.



[fols. 426-427] PLAINTIFF'S EXHIBIT 4



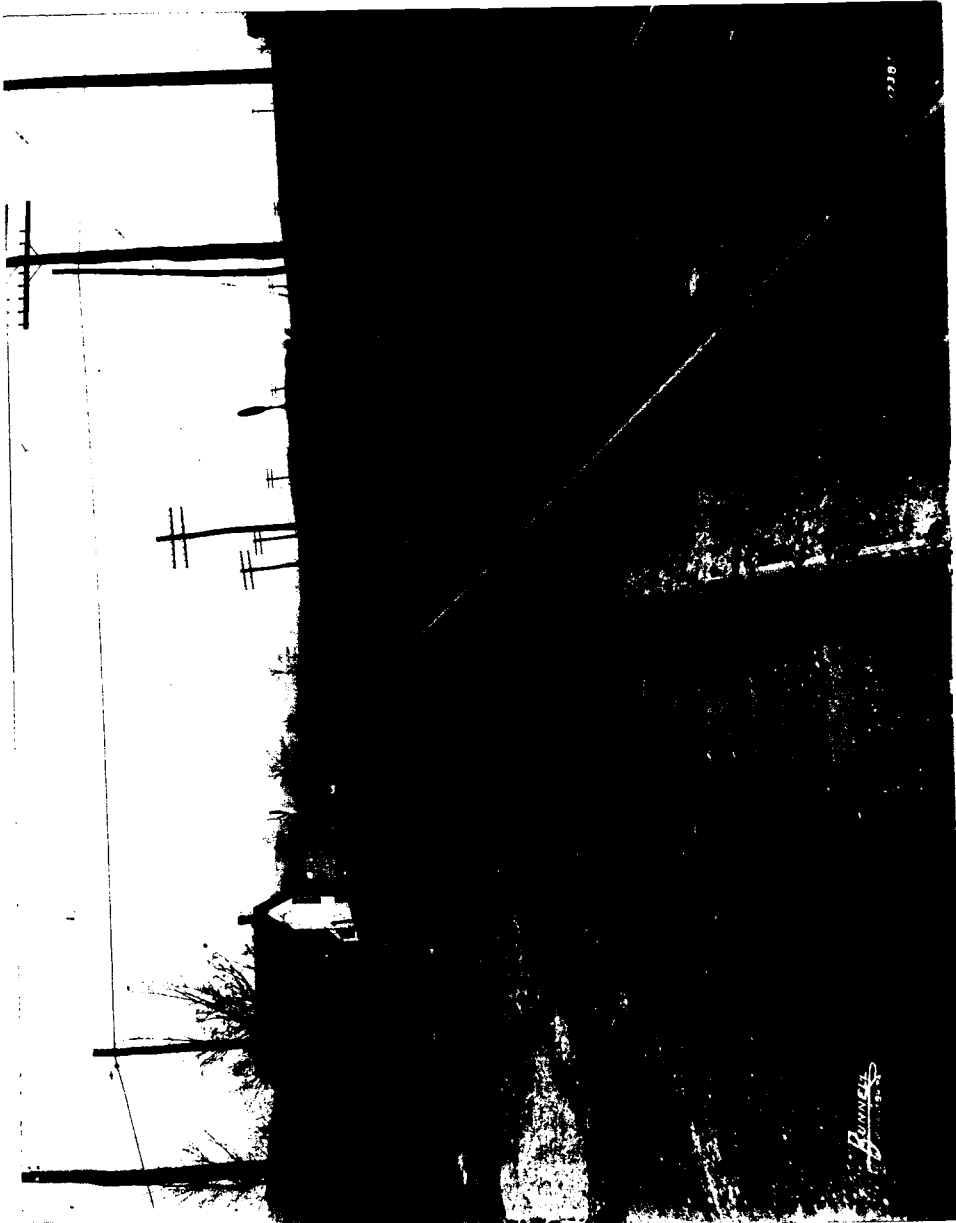
[fols. 428-429] PLAINTIFF'S EXHIBIT 5



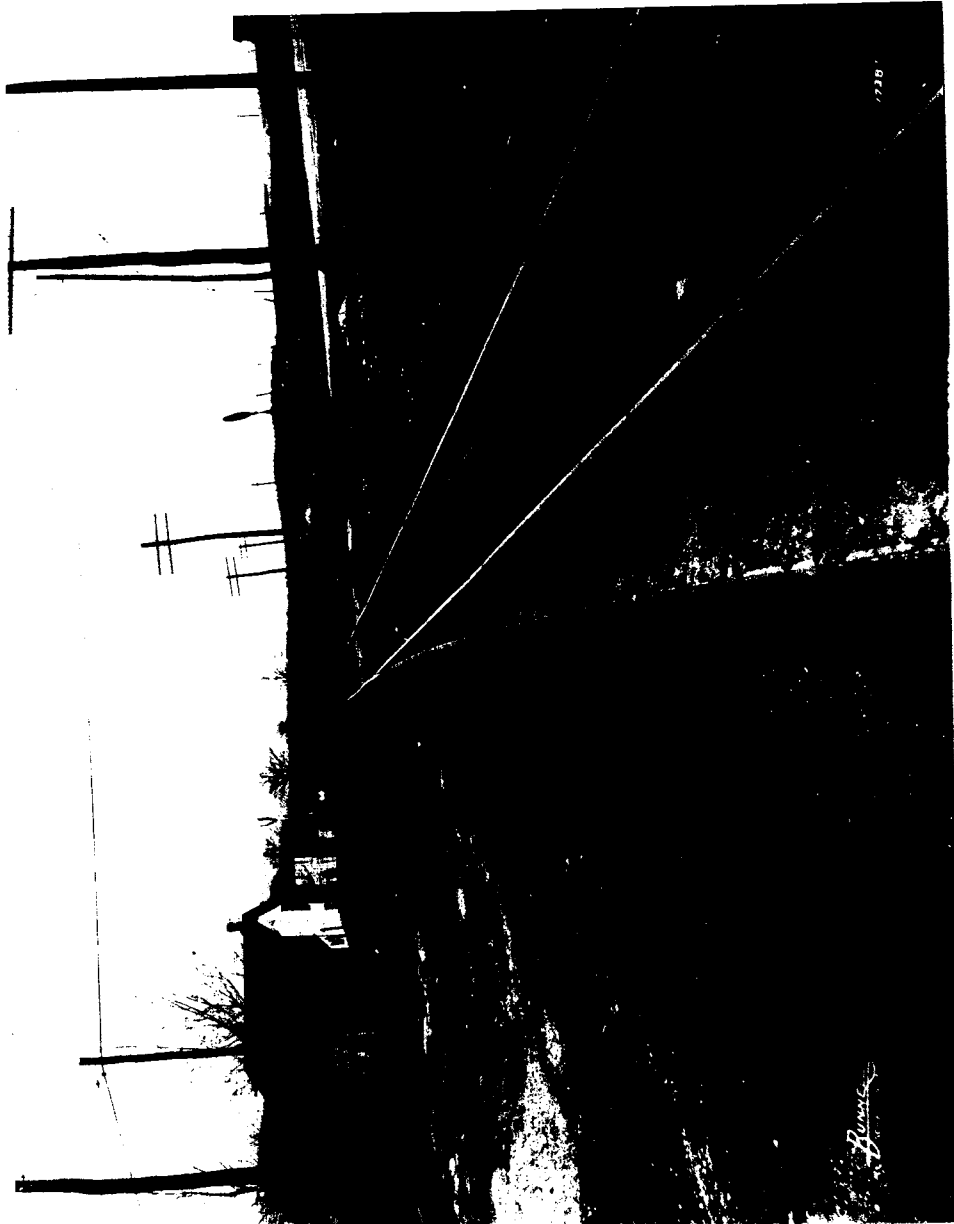
[fols. 430-431] PLAINTIFF'S EXHIBIT 6



[fol. 434-435] DEFENDANT'S EXHIBIT A

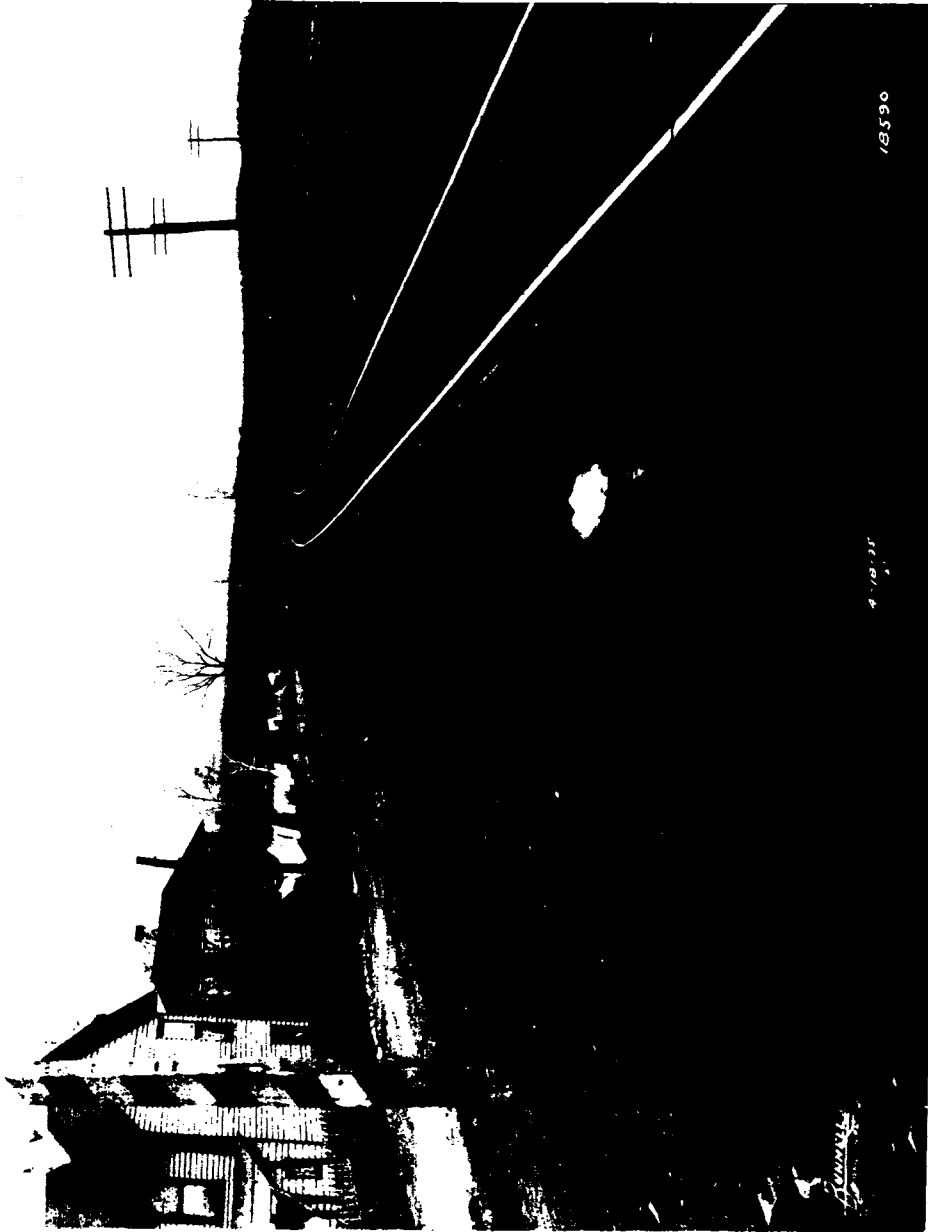


[fols. 436-437] DEFENDANT'S EXHIBIT. B



[fols. 438-439] DEFENDANT'S EXHIBIT C

Photograph taken with camera over center of Rock Street, 5 feet north from near rail, looking east.



[fols. 440-441] Defendant's Exhibit C—Continued

Photograph taken with camera over center of Rock Street, 15 feet north from near rail, looking east.



[fols. 442-443] Defendant's Exhibit C—Continued

Photograph taken with camera over center of Rock Street, 25 feet north from near rail, looking east.



[fols. 444-445] Defendant's Exhibit C—Continued

Photograph taken with camera over center of Rock Street, 35 feet north from near rail looking east.



[fols. 446-447] Defendant's Exhibit C—Continued

Photograph taken with camera over center of Rock Street, 50 feet north from near rail, looking east.



[fols. 448-449] Defendant's **Exhibit C**—Continued

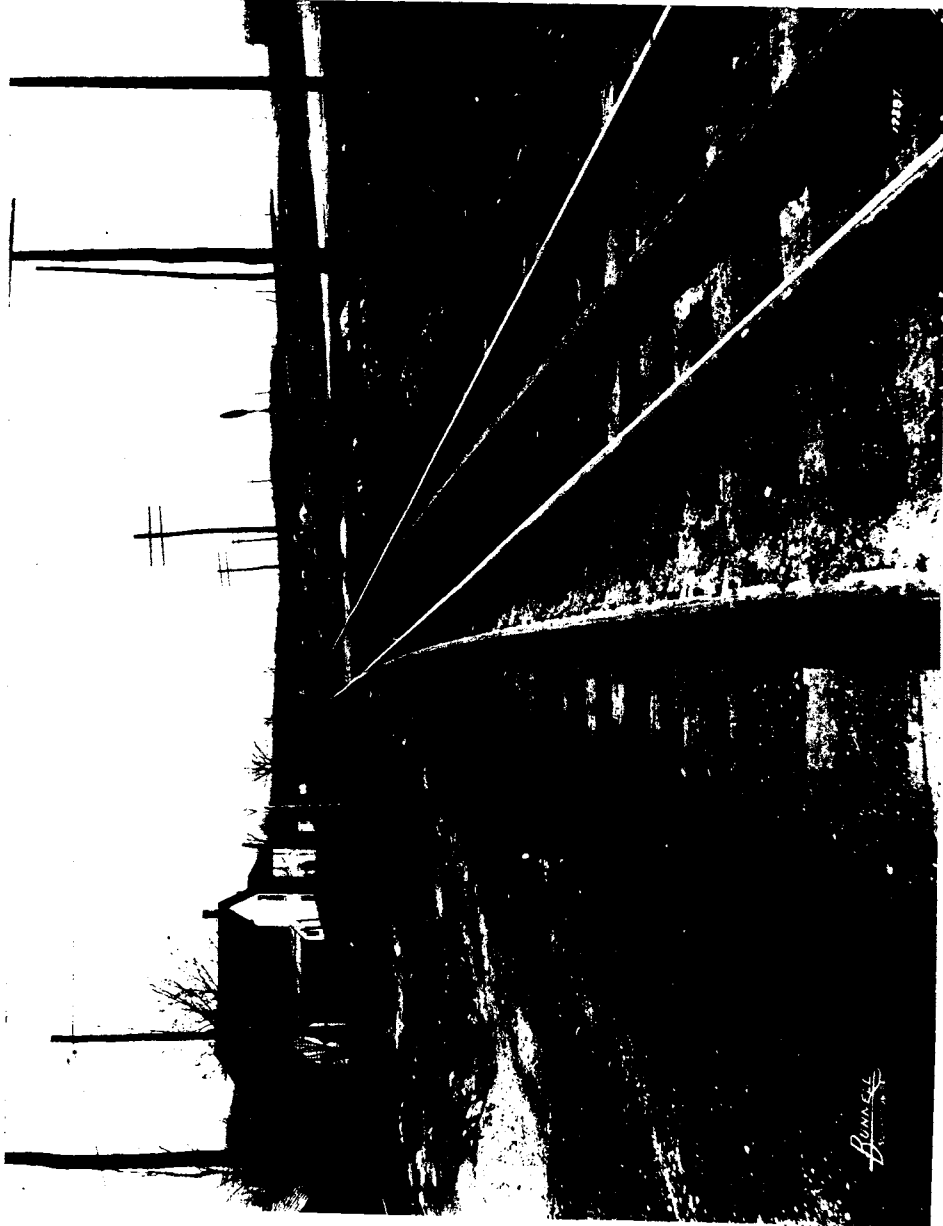
Photograph taken with camera 20 feet north from near rail and about 75 feet east from center of Rock Street; looking west.



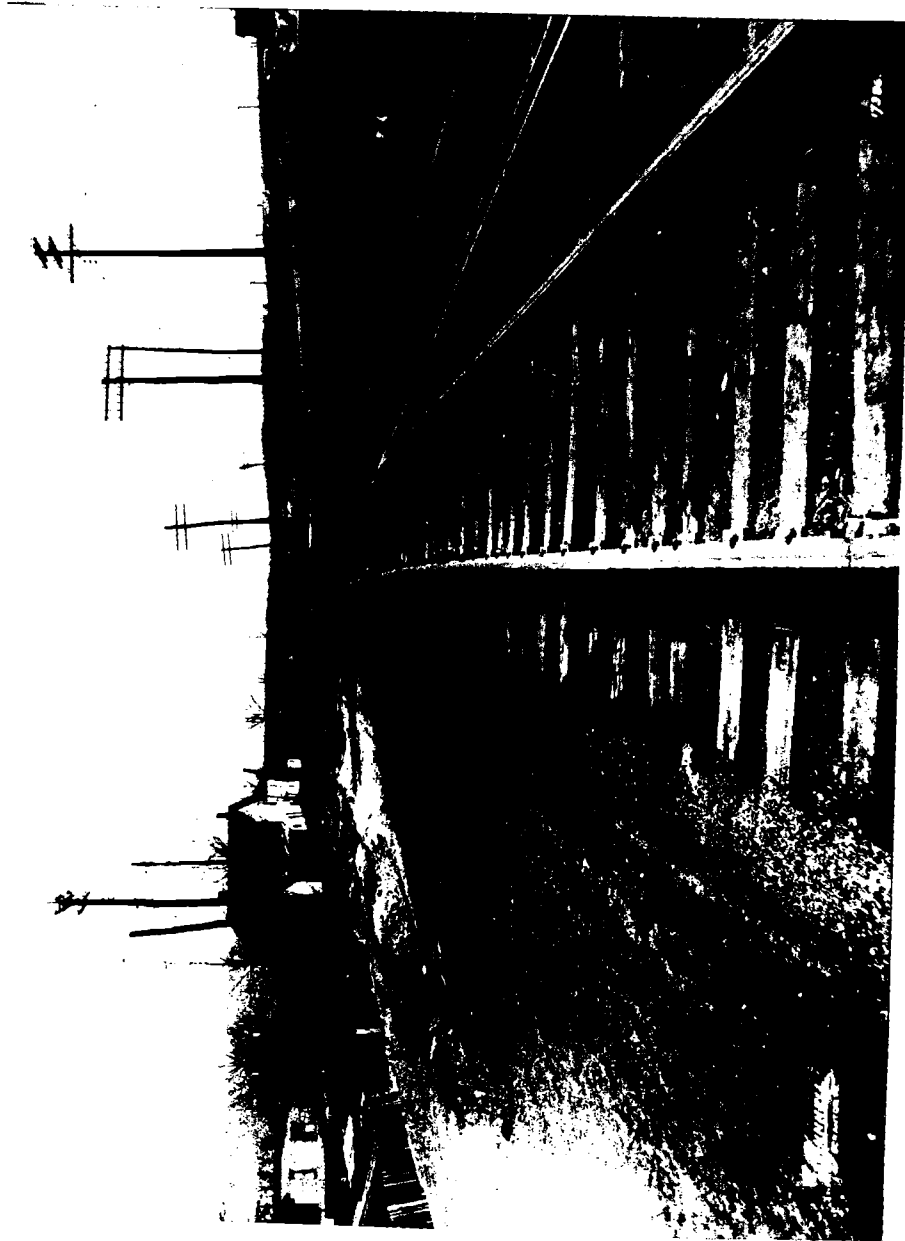
[fols. 450-451] DEFENDANT'S EXHIBIT D



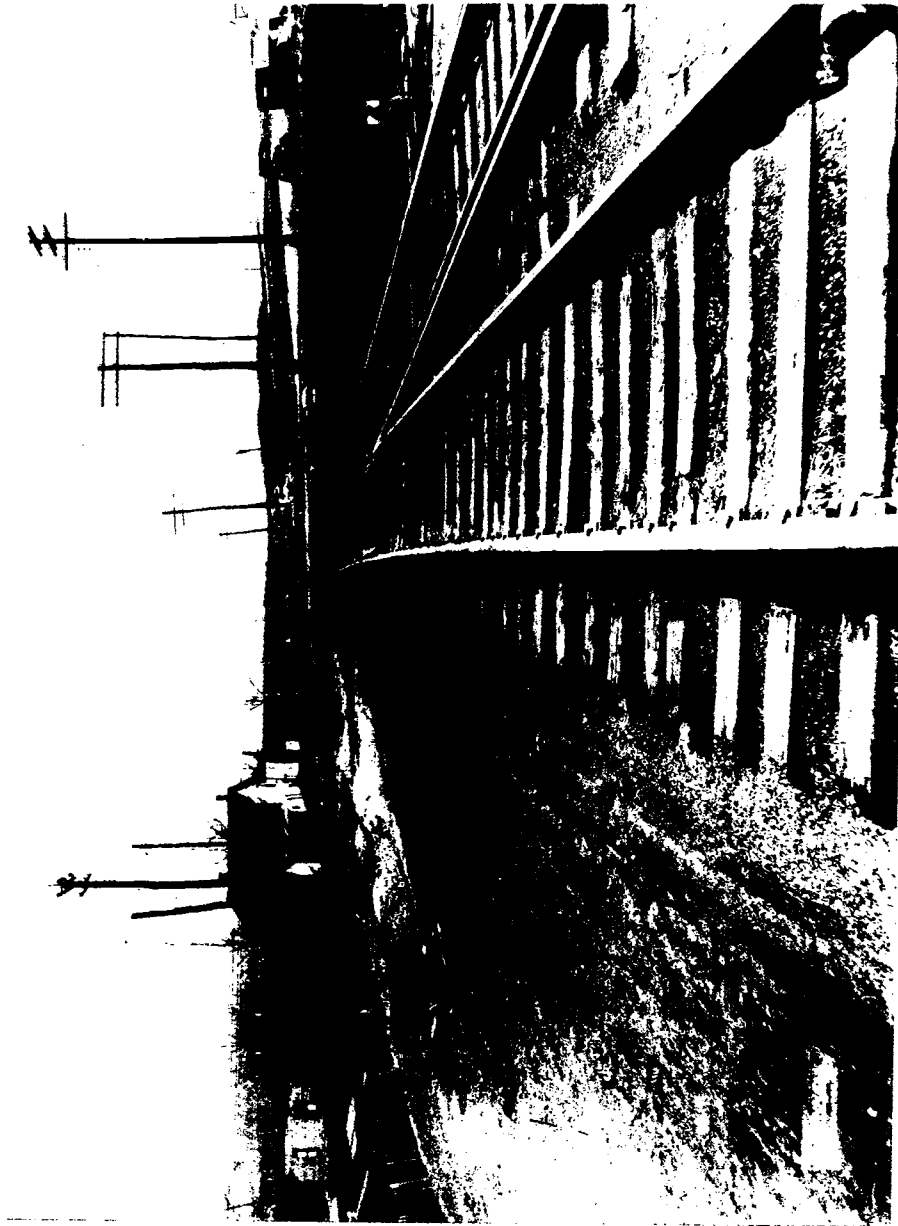
[fols. 452-453] Defendant's Exhibit D—Continued
Photograph taken looking east



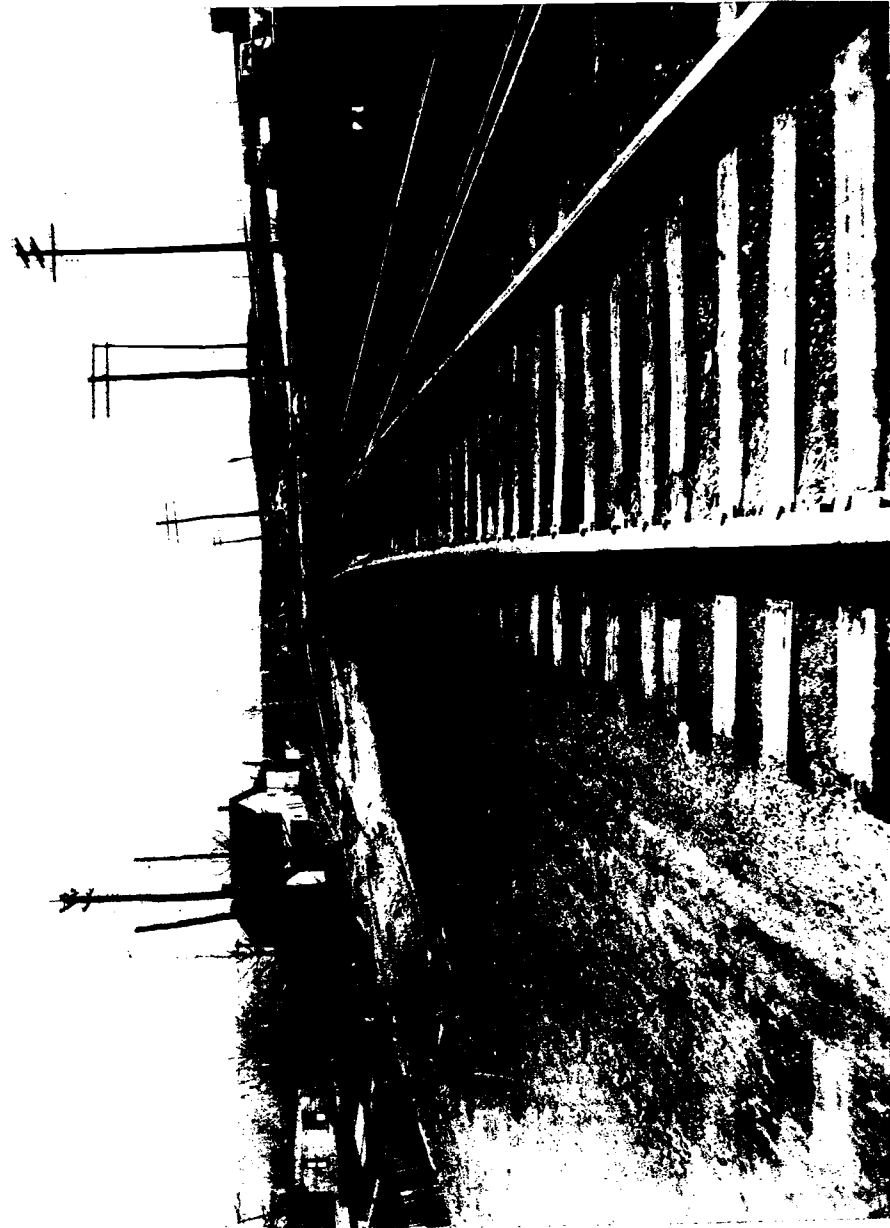
[fols. 454-455] Defendant's Exhibit D—Continued



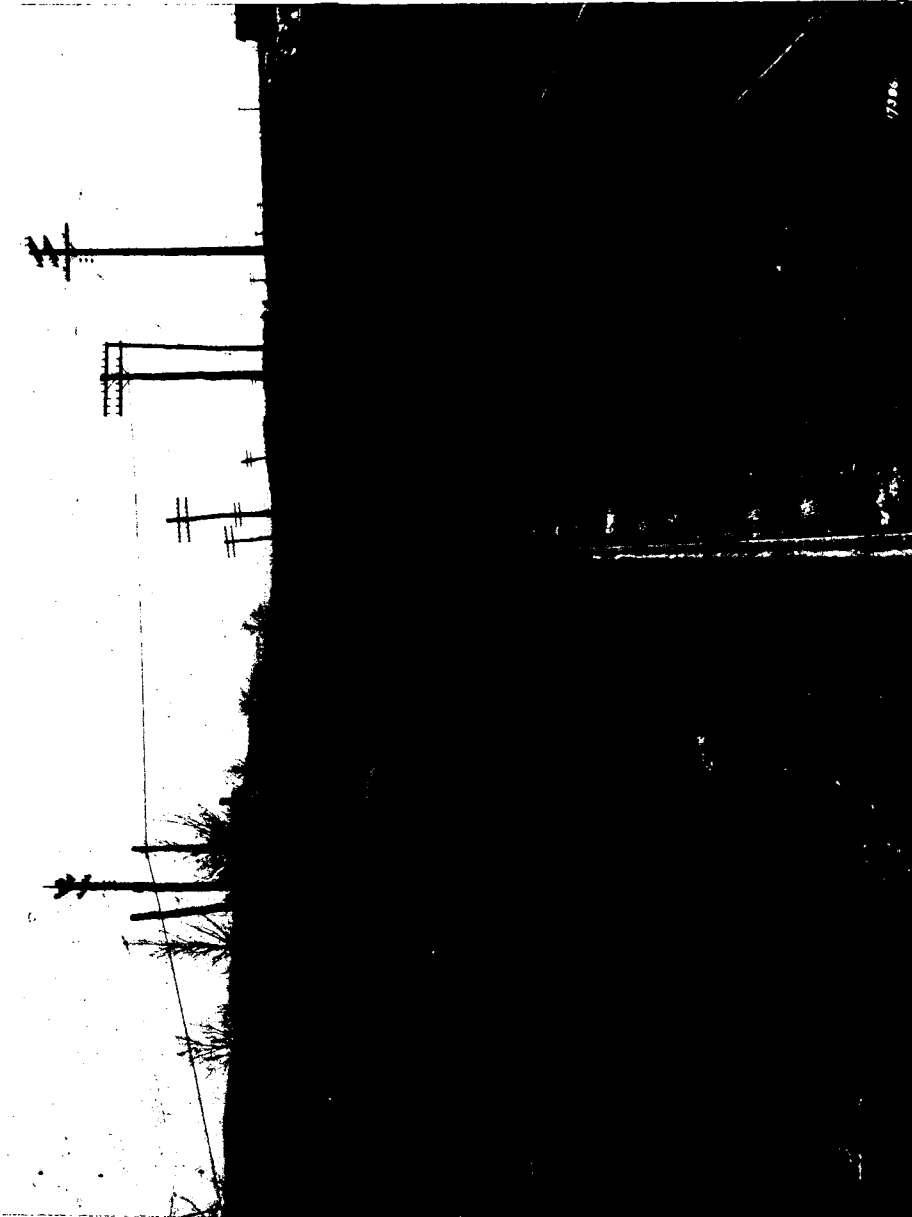
[fols. 456-457] Defendant's Exhibit D—Continued



[fols. 458-459] Defendant's Exhibit D—Continued



[fols. 460-461] Defendant's Exhibit D—Continued



[fols. 462-463] DEFENDANT'S EXHIBIT E
Seal Records

Form 0872-A THE CENTRAL RAILROAD CO. OF NEW JERSEY YARD RECORD CARS REQUIRING SEAL PROTECTION				Form 0872-A THE CENTRAL RAILROAD CO. OF NEW JERSEY YARD RECORD CARS REQUIRING SEAL PROTECTION			
DATE	TIME	TRAIN	TRACK	DATE	TIME	TRAIN	TRACK
INITIAL	NUMBER	SEAL RECORD #	CHECKER	INITIAL	NUMBER	SEAL RECORD #	CHECKER
EMC	76315	7411	W. G. G.	EMC	21225	74000	W. G. G.
TCX	2397	66085-67233	J. S.	EMC	21616	1174-72	J. S.
EMC	17021	B		EMC	21338	13601387-68	
EMC	26643	EMC 690935-36		EMC	LEO 17	EMC XA 7-88/89	
EMC	1802	T		EMC	35642	EMC X352712-12	
EMC	1602	T		EMC	14145	B	
EMC	478	T		EMC	21573	B	
EMC	4172	T		EMC	21618	B	
EMC	21634	B		EMC	27608	IS	
EMC	17354	T		EMC	21788	IS	
EMC	25953	EMC 87578-89		EMC	3113	T	
EMC	25212	T					
EMC	4422	T					
EMC	52979	EMC 1335-38					
EMC	29244	EMC 40315-68					
EMC	49292	EMC 2525-4504					
EMC	6037	T					
EMC	243	T					
EMC	19543	EMC 1165-66					
EMC	84036	EMC 1159-69					
EMC	10032	EMC 2625-07					
EMC	11170	EMC 2622-08					
EMC	92607	EMC Retest - 80					
EMC	71231	T					
EMC	109564	EMC 26832-60					
EMC	81706	EMC 26832-53					
EMC	14784	T					
EMC	30897	T					

This covered remaining ball
marked index of first car in train
1178
took off 1178 403345 to out
403368 20 out
check rough on seal
check
EMC
U.S. DIST. COURT
S.D.N.Y.

[fols. 464-465] DEFENDANT'S EXHIBIT F

Train List



ERIE RAILROAD COMPANY

C. & E. R. R. THEN J. & N. Y. R. R. N. Y. & S. W. R. R.

TRAIN LIST

DEPARTURE *1:00* TIME *2:09* DATE *7-27-34*
 ARRIVAL *Asheley* TIME *3:59*
 TRAIN *5* ENG *2494* CONDUCTOR *J. J. Kallal*

CAR No.	INITIALS	CONTENTS	YEP	DESTINATION OR JUNCTION POINT
1	706	Land	43	West Point
2	9569	Whee	51	Asheley
3	723	UTEX	70	Asheley
4	92607	Walt	54	Asheley
5	11170	Whee	23	Asheley
6	10072	-	26	Asheley
7	84636	Walt	46	Asheley
8	79543	-	44	Asheley
9	243	Walt	48	Asheley
10	6037	-	41	Asheley
11	44292	C.R.R. Throat	42	Asheley
12	29124	W.F.E. Wagon	36	Asheley
13	52479	C.R.R. Wheel	43	Asheley
14	9922	Walt	-	Asheley
15	85412	H.R.T. Milk	-	Baltimore Md
16	75983	Walt	-	Asheley
17	17354	C.N.R. Wagon	-	Asheley
18	21639	-	-	Asheley
19	4172	W.A.T.K.	-	Asheley
20	428	B.A.K.	-	Asheley
21	8642	W.F.E.	-	Asheley
22	26643	H.R.T. Wagon	-	Baltimore Md
23	17524	W.F.E. Wagon	-	Asheley
24	2397	W.F.E.	-	Asheley
25	76315	W.F.E. Wagon	-	Asheley
26	14489	W.F.E. Wagon	-	Asheley
27	76847	W.F.E.	-	Asheley
28	21223	W.F.E.	-	Asheley
29	86163	Carbon	-	Asheley
30	51252	W.F.E. Wagon	-	Asheley
31	4011	W.F.E. Wagon	-	Asheley
32	35292	W.F.E. Wagon	-	Asheley
33	10141	W.F.E. Wagon	-	Asheley
34	84573	-	-	Asheley
35	21618	-	-	Asheley
36	27608	UTEX	-	Asheley
37	21780	W.F.E.	-	Asheley
38	3113	W.F.E.	-	Asheley
39				
40				
41				
42				
43				
44				
45				
46				
47				
48				
49				
50				

EX
 U. S. Dist. Court
 S. D. of N. Y.
 OCT 10 1934

ab 7/27

[fol. 466]

DEFENDANT'S EXHIBIT G

Inspector's Records

(2 pages covering Ashley Special 7/27/34)

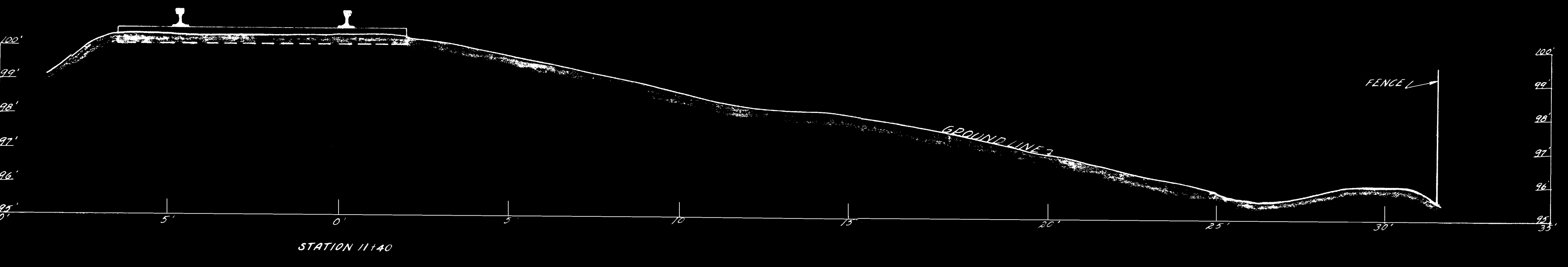
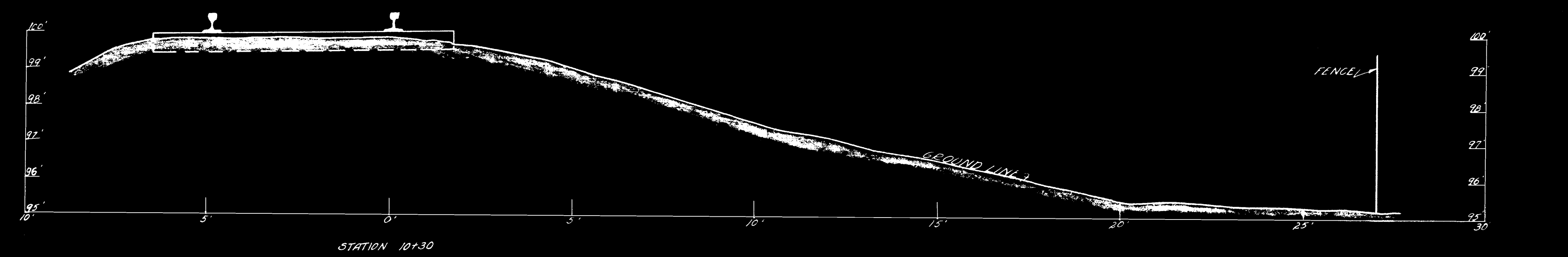
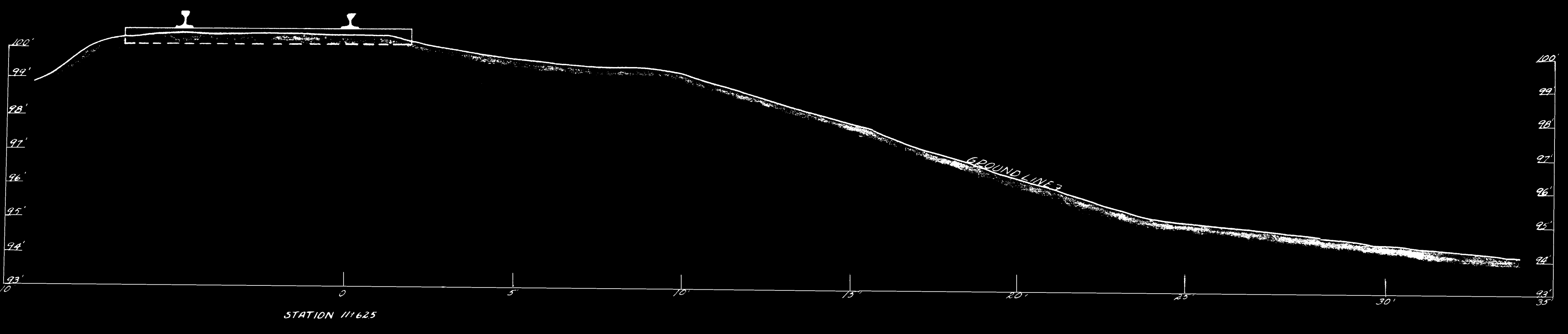
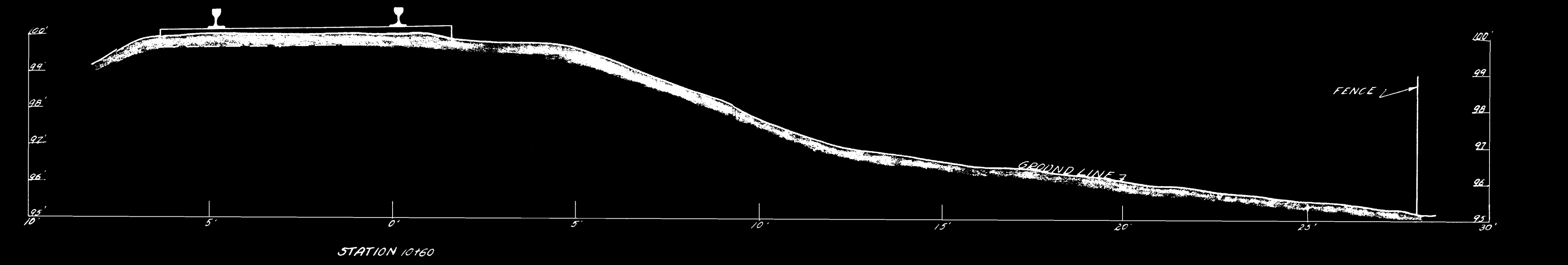
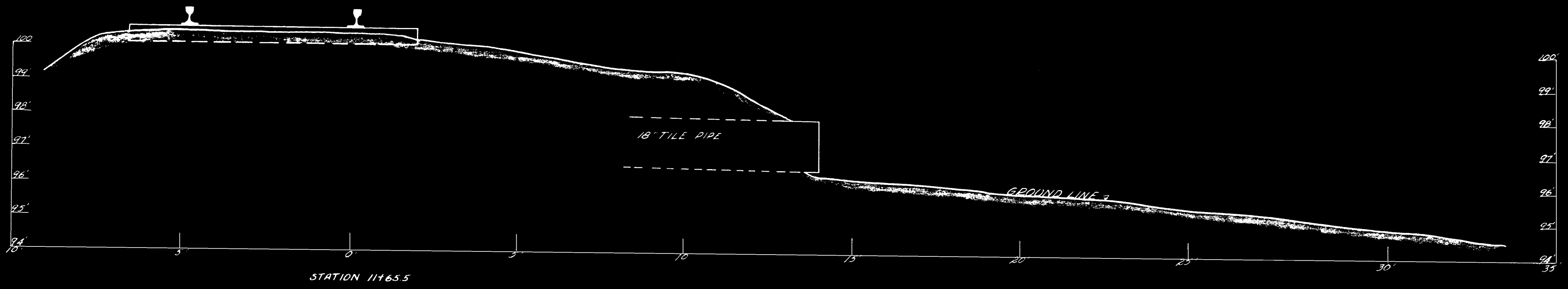
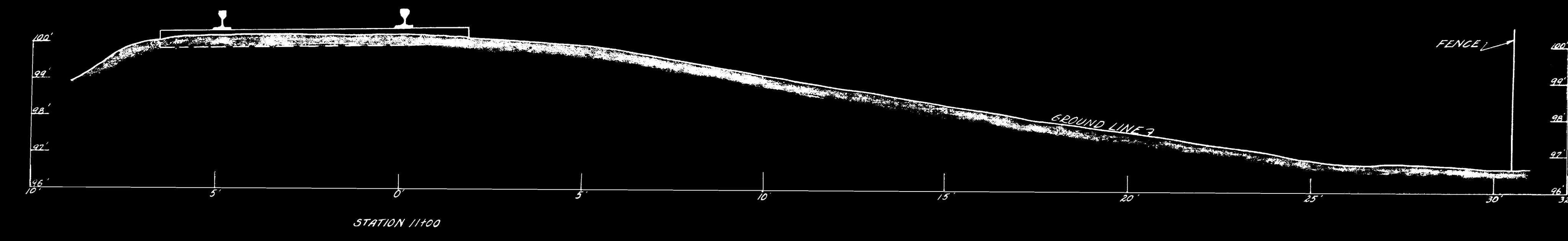
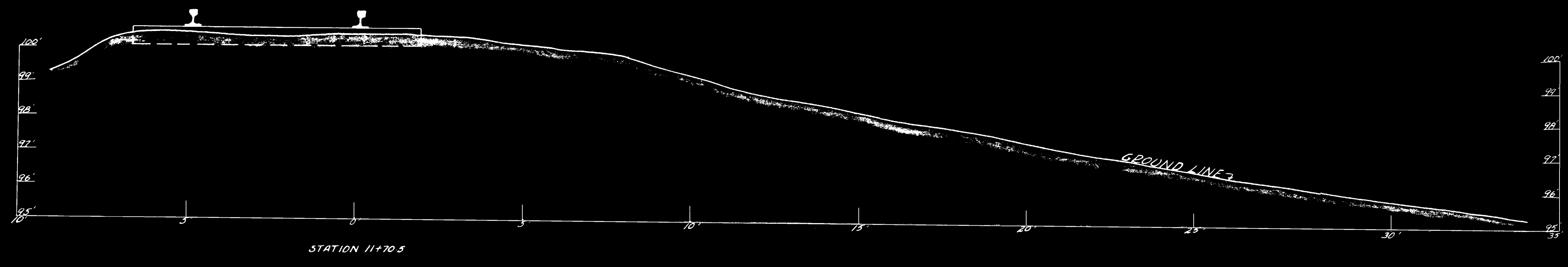
Form 27
THE CENTRAL RAILROAD CO. OF NEW JERSEY
Date 7-27-34 Place Ashe

Form 27
THE CENTRAL RAILROAD CO. OF NEW JERSEY
Date 7-27-34 Place Ashe

NUMBER	INITIALS	CONDITION	NUMBER	INITIALS	CONDITION
23113	M.B.R.	7 c. O.C. Deck	26443	M.B.R.	Deck
23122	C	6 c.	26442	J.C.	T. CO. DECK
23128	T.C.	T. DECK	26441	M.C.	T. CO. DECK
23161	C	6 c.	26440	M.C.	T. CO. DECK
23173	C	6 c.	26439	C	6 c.
23175	B.E.P.	Deck	26438	S.P.	Deck
23192	C	6 c.	26437	C	6 c.
23211	M.B.R.	Deck	26436	M.B.R.	Deck
23236	C	6 c.	26435	M.B.R.	Deck
23243	M	Deck	26434	M	Deck
23254	T.C.	Deck	26433	T.C.	Deck
23277	J.C.	Deck	26432	J.C.	Deck
23279	C	6 c.	26431	C	6 c.
23275	C	6 c.	26430	C	6 c.
23273	C	6 c.	26429	C	6 c.
23272	C	6 c.	26428	C	6 c.

[fols. 468-469] DEFENDANT'S EXHIBIT H
 Inspector's Records
 (Howell) (page covering Ashley Special)

ERIE RAIL CAR INSPECTOR'S				ROAD CO. ORIGINAL RECORD	
CAR INITIAL	CAR NUMBER	CLASS	LOAD OR EMPTY	DIRTY OR SHOD	CONDITION DEFECTS REMARKS
JV	29425	W	E		OK Out of Ashy Wike sum bet of 2 Jan 27 see 2 door - fine coal
L	22572	M	E		
	97190				
	80424				
	8736				
	105630				
	22953				
	67051				
	80422				
	86705				
102646-7-26-27					
Place: <u>LE 53-57</u> Date: <u>7-26-27</u>					
C 605650					
Ashy special					
Defects 12 10 see					
38 Cars and 38 Wks					
Train 14					
Concl. Review Aug 7, 99					
Howell					
<small>Be Note: When damage is due to Derailment, Curving, Sliding, or other Handling Line Responsibility Conditions.</small> <small>Form 1370-B 48-1-34</small>					
				Train No. <u>1</u> Arrived <u>11:14</u> From <u></u>	
				Track No. <u>1</u> No. Cars <u></u>	
Car Inspector <u>Howell</u> I certify that the above Record made by me is correct.					



ERIE RAILROAD COMPANY
 GROSS SECTIONS NORTH SIDE OF TRACK
 BETWEEN HUGHES AND ROCK STREETS
HUGHES TOWN, PA.
 SCALE 1/2" = 12'
 MADE BY L. E. P.

[Fols. 470-471] DEFENDANT'S EXHIBIT I
 Blueprint showing land surfaces

379

[fols. 472-473] DEFENDANT'S EXHIBIT J
Keller's Detention Report

ERIE RAILROAD COMPANY

Avoca, Pa. July 27 1937

Engine 2110 Engineer Hanning Condr Keller

Departed Avoca 8:10 a.m.

Arrived Plains Jct. 2:25 a.m.

Departed " " 2:30 a.m. ✓

Arrived Ashley 10:40 a.m.

20 Loads 17 Empties 1710 Tons

Departed Ashley 5:15 a.m.

Arrived Plains Jct. 6:45 a.m. ✓

Departed " " 6:45 a.m.

Arrived Avoca 6:45 a.m.

20 Loads 17 Empties 1700 Tons

Pusher

Delays to 10:30 hrs. on track by W. W. Whitehead
to 11:15 hrs. on track by W. W. Whitehead
on track by W. W. Whitehead

Departed Ashley 5:15 a.m.

Arrived KV 5:30 a.m.

Departed KV 5:45 a.m.

Arrived Plains Jct. 6:45 a.m.

20 Loads 17 Empties 1700 Tons

Ex. Court
U. S. Dist. Court
S. D. of N. Y.
OCT 27 1936

[fol. 474] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO EXHIBITS

It is hereby stipulated by and between the attorneys for the parties hereto that for the purpose of the case on appeal in the above entitled action the printing of certain book records indicated as Plaintiff's Exhibit 7 and Defendant's Exhibits E, G and H, will be dispensed with except those certain pages contained in the book records which specifically refer to the train or cars involved in the case at bar; it is further stipulated that the original books or the parts thereof which have been introduced in evidence, may be referred to by either party in preparation of the briefs or upon argument of the appeal.

Dated, New York, N. Y., December 18, 1936.

Bernard G. Nemeroff, Attorney for Plaintiff. Davis,
Polk, Wardwell, Gardiner & Reed, Attorneys for
Defendant.

[fol. 475] IN UNITED STATES DISTRICT COURT

[Title omitted]

EXTRACT OF THE CLERK'S MINUTES—October 5, 1936

Now comes the Plaintiff By Bernard C. Nemeroff (Everett G. Hunt, Counsel), and moves the trial of this cause, likewise comes the Defendant by Davis, Polk, Wardwell, Gardiner & Reed (Theodore Kiendl, Counsel). Thereupon a Jury is duly impaneled and sworn, and the cause proceeds to trial. Opening statements made by Counsel.

On Oct. 6, 1936, at 10:30 A. M. trial continued. Plaintiff rests—Defendant's motion to dismiss, etc.: Denied—Exception.

[fol. 476] On Oct. 7, 1936, at 10:30 A. M. trial continued—Defendant rests—Both sides rest—Defendant renews motion to dismiss, etc.: Denied—Exception.

On Oct. 13th, 1936, at 10:30 A. M. trial continued.

Summations made by Counsel—Jury charged—Deputy Marshal sworn and Jury retired—at 4:15 P. M. the Jury

returned a verdict for the Plaintiff for \$30,000—Defendant's motion to set verdict aside etc: Decision reserved—Briefs to be submitted within 10 days.

On November 9, 1936, the Court rendered its decision denying the motion to set aside the verdict.

Charles Weiser, Clerk.

[fol. 477] IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

L58—389

HARRY J. TOMPKINS, Complainant,

against

ERIE RAILROAD Co. (a New York Corporation), Defendant

Defendant's address: 50 Church Street, New York City.

Plaintiff's address: 1125 Wyoming Avenue, Exeter, Pa.

JUDGMENT

The issues in the above entitled action having been brought on regularly for trial before the Hon. Samuel Mandelbaum and a Jury at a Jury Part of this Court held in the Federal Court House in the City, County and State of New York, on the 5th, 6th, 7th and 13th days of October, 1936, respectively, and both parties having appeared by counsel, and the issues having been duly tried, and the Jury having duly rendered a verdict in favor of the plaintiff and against the defendant, in the sum of \$30,000.00 on the 13th day of October, 1936, and at the close of said trial and the rendition of said verdict by the Jury counsel for the defendant having made a motion to set aside the said verdict as being against the weight of the evidence and the law, and, after due deliberation, Hon. Samuel Mandelbaum having denied said motion, and interest on the sum of \$30,000.00 from October 13, 1936 to the date of the entry of the within judgment, amounting to the sum of \$165.00 having accrued, and the costs of said plaintiff having been duly taxed at \$95.00

[fol. 478] Now, on motion of Bernard G. Nemeroff, attorney for the plaintiff, it is

Adjudged that the plaintiff Harry J. Tompkins recover of the defendant Erie Railroad Co., a New York Corporation the sum of \$30,000.00, found by the Jury, together with the sum of \$165.00 interest on said sum from October 13, 1936 to the date hereof and together with the sum of \$95.00 costs as taxed, making in all the sum of \$30,260.00 and that the plaintiff have execution therefor.

Judgment signed and entered this 16th day of November, 1936.

Charles Weiser, Clerk.

[fol. 479] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

L. Ray Glass being duly sworn deposes and says that he is an attorney and counsellor at law associated with the firm of Davis, Polk, Wardwell, Gardiner & Reed, attorneys for the defendant herein.

That he is familiar with the above entitled action and assisted in the trial of the same on October 5, 6, 7 and 13, 1936, before Hon. Samuel Mandelbaum and jury, at a Stated Term of the United States District Court for the Southern District of New York.

That upon information and belief no opinion was handed down by Hon. Samuel Mandelbaum in this case.

L. Ray Glass.

Sworn to before me this 17th day of December, 1936.
Wm. H. Bruder, Notary Public, Bronx County No. 122. Certificate filed in New York County No. 611. Bronx County Register's No. 126B37. New York County Register's No. 7B347. Commission expires March 30, 1937. (Seal.)

[fol. 480] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

To the Honorable The Judges of the United States District Court for the Southern District of New York:

Now comes the Erie Railroad Company, defendant above named, and says that on or about the 16th day of November, 1936, this Court entered a judgment herein in favor of the plaintiff and against the defendant which judgment ordered and adjudged that the plaintiff recover from the defendant the sum of \$30,000, besides the costs of this action taxed at \$95.00, and interest from the date of the rendition of the verdict to the entry of the judgment in the sum of \$165.00, and have execution therefor; and that in said judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear in the assignment of errors which is filed with this petition.

[fol. 481] Wherefore this defendant prays that an order may issue in its behalf allowing defendant to appeal to the United States Circuit Court of Appeals for the Second Circuit for correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the aforesaid Circuit Court of Appeals.

Your petitioner submits herein good and sufficient bond for the aforesaid appeal and further prays for an order approving the said bond.

Dated, New York, N. Y., December 15th, 1936.

Davis, Polk, Wardwell, Gardiner & Reed, Attorneys
for Defendant, Office & Post Office Address, 15
Board Street, Borough of Manhattan, City of New
York.

[fol. 482] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—December 15, 1936

Defendant above named having prayed for the allowance of an appeal to the United States Circuit Court of Appeals

for the Second Circuit from the judgment made and entered in the above entitled cause by the United States District Court for the Southern District of New York on the 16th day of November, 1936, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the rules of said Circuit Court of Appeals for the Second Circuit in such case made and provided; it is [fol. 483] Now hereby ordered and the same hereby is allowed to this cause to the United States Circuit Court of Appeals for the Second Circuit from said District Court to the manner and to the extent prayed and as provided by law; and it is

Further ordered that the Clerk of said District Court shall prepare and certify a transcript of the record, proceedings and judgment in this cause, and transmit the same under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit, so that he shall have the same in the said Court within thirty days of this date; and it is

Further ordered that the bond for the aforesaid appeal submitted herein by the defendant be and the same hereby is approved.

Jno C. Knox, U. S. D. J.

[fol. 484] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes Erie Railroad Company, defendant above named, and in connection with its petition for allowance of an appeal herein, files the following assignment of errors upon which the defendant will rely in prosecution of the said appeal from a judgment of this Court entered on the 16th day of November, 1936:

First. The Court erred in submitting the issues to the jury as questions of fact.

Second. The Court erred in denying defendant's motion to dismiss the complaint made at the end of the plaintiff's case (Transcript of Record pp. 213-214).

Third. The Court erred in denying the defendant's motion to dismiss the complaint at the conclusion of the entire case (Transcript of Record p. 401).

Fourth. The Court erred in denying the defendant's motion to set aside the verdict and for a new trial made after [fol. 485] the rendition of the verdict by the jury (Transcript of Record p. 418).

Fifth. The Court erred in admitting evidence over the objection of the defendant with respect to a pathway which crossed the tracks and which was in no wise involved in the accident out of which this action arises (see Transcript of Record pp. 41-42, as follows):

“The Court: Suppose you reframe the question.

Q. What kind of a path was this after it crossed the railroad track, where did it lead to and what kind of a path was it?

Mr. Kiendl: I object to that as wholly immaterial. The path across the railroad track has nothing to do with the issues in this case.

The Court: Overruled.

Mr. Kiendl: May I have an exception?”

Sixth. The Court erred in allowing plaintiff's counsel to ask a question in improper form and calling for a conclusion (See Transcript of Record p. 89, as follows):

“Q. So to get at the truth of this matter, you don't know of any occasion why you should ever be reading the complaint and you have no recollection of it?

Mr. Kiendl: I object to the form of that question, if your Honor please—‘so as to get to the truth of this matter.’

The Court: Overruled.

Mr. Kiendl: Exception.”

Seventh. The Court committed error in admitting evidence with respect to conversations had by the plaintiff with attending physicians (see Transcript of Record pp. 89-90, as follows):

“Q. By the way, before you ever knew Mr. Nemeroff had you told the doctors there in the hospital, later on, how your accident happened?

A. Yes, sir.

Q. Had you told them the same as you told his Honor and these gentlemen?

Mr. Kiendl: I object to that, to what he told the doctors in the hospital being the same as he has testified to here.

The Court: Overruled.

Mr. Kiendl: Exception.

Q. Had you, Mr. Tompkins?

A. Yes, sir.

Q. As a matter of fact, if anyone asked you about your accident you told them substantially the same as you have told us here?

A. Yes, sir.

Mr. Kiendl: I object to that as improper redirect, as calling for a conclusion, and as irrelevant, incompetent and immaterial.

The Court: Overruled.

Mr. Kiendl: Exception.”

Eighth. The Court erred in allowing plaintiff to testify over the objection of the defendant, with respect to conversations alleged to have been had by plaintiff with attending physicians (see Transcript of Record pp. 101-102, as follows):

“By Mr. Hunt:

Q. Just one question: These gentlemen you spoke of, the surgeons who took care of you, you had told them about [fol. 487] your accident before you ever had a lawyer or ever started any case at all, hadn't you?

A. Yes, sir.

Mr. Kiendl: I make the same objection to protect the situation that I did before.

The Court: Both of you gentlemen opened the door pretty wide and I think it is pertinent. It is all right.

Q. Did you tell them before or after you ever had a lawyer?

Mr. Kiendl: May I have the same objection and an exception to this line, without constantly objecting?

The Court: The same ruling.

A. I told them right after it happened, as soon as I was—I didn't have no lawyers or anything then.

Q. Did you tell those gentlemen substantially as you have told us today under oath?

A. Yes, sir.

Q. Those men are living right out there, are they not?

A. Yes, sir.

Q. They are active practicing surgeons and in that hospital?

A. Yes, sir."

Ninth. The Court erred in not holding as a matter of law at the conclusion of the plaintiff's case that upon the plaintiff's own case he was guilty of contributory negligence barring recovery (Transcript of Record pp. 213-214).

Tenth. The Court erred in failing to hold at the conclusion of the plaintiff's case that the permissive pathway doctrine did not apply to longitudinal pathways such as herein involved, under the laws of the State of Pennsylvania and the decisions of this Court (Transcript of Record p. 214).

[fol. 488] Eleventh. The Court erred in admitting in evidence observations of witnesses with respect to condition of car doors on other occasions (Transcript of Record pp. 283, 284, 285 and particularly p. 285, as follows):

"Q. And as a matter of fact, you have done that many times, I mean as a man——

Mr. Kiendl: Oh, I object to that line of inquiry, if your Honor please. It is not what happened in other cases; we are interested in what happened here. It is not proper cross-examination.

Mr. Hunt: What I am leading up to is that——

The Court: Cross-examination. I will allow it."

Twelfth. The Court erred in admitting evidence as to the observations of witnesses with respect to condition of old cars in no wise involved in the case at bar (see Transcript of Record pp. 315-316, as follows):

"Q. All right. Now, one of your difficulties with your old cars is that after they have been running over the roads for thousands of miles and around the curves and all that,

one of your difficulties is, you know as a railroad man that—I am referring to a box car—your lower part of that door jumps that track on which it rides; that is one of the common complaints, is it not?

A. No, sir.

Mr. Kiendl: If your Honor please, I have no objection to this line of cross-examination if it is done with the understanding that Mr. Hunt is making the witness his own witness for this purpose. It involves matters concern-[fol. 489] ing which the witness was not examined on direct examination at all.

The Court: I don't say that they were, Mr. Kiendl, but I will overrule your objection.

Mr. Kiendl: May I have an exception, just to reserve that point, that contention?

The Court: Yes."

Thirteenth. The Court erred in admitting in evidence observations made by the witness on years previous as to condition of old cars in no wise involved in the case at bar (see Transcript of Record p. 378, as follows):

"Q. Now, how many years has it been, sir, since you saw—take one of your own wooden cars—since you have seen one of the doors off the flange of the rail, how many years has it been since you have seen that?

A. Why, my 19 years' experience on the road I haven't seen one, sir.

Q. You haven't seen one at all?

A. No, sir.

Q. You have never heard of a—

Mr. Kiendl: If your Honor please, for the purpose of the record I make the same objection and want the same exception as to this line of cross-examination that I made with the last witness, that it concerns matters on which this witness was not examined in chief, and for those purposes we must insist that the plaintiff is making the witness his own witness.

The Court: Overruled. Proper cross-examination.

Mr. Kiendl: Exception."

Fourteenth. The Court erred in admitting in evidence the observation of a witness as to condition of cars and car

[fol. 490] doors on previous years, the said cars being in no wise connected in the case at bar (Transcript of Record pp. 397-398, as follows):

“Q. Just a question or two. How many years has it been since you have seen, taking the—referring to a box car first, how many years since you have seen the door of a box car sprung off the run or rail that it runs on?

Mr. Kiendl: To be consistent, may I have the same objection and exception to this line of questioning?

The Court: Same ruling.

Mr. Kiendl: So it won't be assumed to have been waived in any sense.”

Fifteenth. The Court erred (Transcript of Record, p. 415), in refusing the defendant's first request to charge in the form requested (see Transcript of Record, p. 405, as follows):

“1. The plaintiff has not pleaded or proven that the defendant was guilty of any wilful or wanton negligence and consequently you are not permitted to give any verdict on any such ground. Refused. Exception.”

Sixteenth. The Court erred (Transcript of Record, p. 415), in refusing the defendant's sixth request to charge in the form requested (see Transcript of Record, p. 405, as follows):

“6. If you find that the plaintiff knew or should have known that it was dangerous to walk alongside this moving train in the darkness at the time and in the place here involved, he was negligent and cannot recover. Refused Covered. Exception.”

[fol. 491] Seventeenth. The Court erred (Transcript of Record, p. 416), in refusing the defendant's ninth request to charge in the form requested (see Transcript of Record, p. 406, as follows):

“9. If you find that the so-called footpath ran substantially along the edge of the ties and was about two feet wide, I charge you as a matter of law that the overhang of the engine and the widest freight cars on this train were such that no one could walk out on that path alongside of this moving train with safety. Refused. Exception.”

Eighteenth. The Court erred (Transcript of Record, p. 416), in refusing the defendant's tenth request to charge in the form requested (see Transcript of Record, p. 406, as follows):

“10. If you find that the so-called footpath ran substantially along the edge of the ties and was about two feet wide, I charge you as a matter of law that the plaintiff was in a dangerous position when the engine and cars passed him and if he knew or should have known that situation he was duty-bound to get out of the way. Refused. Exception.”

Wherefore defendant prays that the said judgment of the United States Court for the Southern District of New York in the said cause be reversed, and judgment be rendered in favor of the defendant, with costs.

Davis Polk Wardwell Gardiner & Reed, Attorneys
for Defendant, Office & Post Office Address, 15
Broad Street, Borough of Manhattan, City of New
York.

[fols. 492-493] Citation, in usual form, omitted in printing.

[fol. 494] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above cause as agreed upon by the parties.

Dated, New York, January 14, 1937.

Bernard G. Nemeroff, Attorney for Plaintiff. Davis
Polk Wardwell Gardiner & Reed, Attorneys for
Defendant.

[fol. 495] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 496] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, OCTOBER TERM, 1936

Argued March 12, 1937. Decided June 7, 1937

No. 307

HARRY J. TOMPKINS, Plaintiff-Appellee,

v.

ERIE RAILROAD Co. (a New York Corporation), Defendant-
Appellant

Appeal from the District Court of the United States for the
Southern District of New York

Before Manton, L. Hand, and Swan, Circuit Judges

From a judgment for the plaintiff in a personal injury
action tried to a jury, the defendant appeals. Affirmed.

Davis, Polk, Wardwell, Gardiner & Reed, of New York
City (Theodore Kiendl, Harold W. Bissell, and L. Ray
Glass, all of New York City, of counsel), for appellant.

Bernard G. Nemaroff, of New York City (G. Everett Hunt
and William G. Walsh, both of New York City, of counsel),
for appellee.

SWAN, Circuit Judge:

This action was brought to recover damages for personal
injuries sustained by the plaintiff when hit by a moving
freight train as he was walking along the defendant's right
of way. At the conclusion of the evidence the defendant
moved to dismiss for failure of proof of actionable negli-
gence on the part of the defendant and for affirmative proof
of contributory negligence on the part of the plaintiff. A
denial of this motion is the error chiefly relied upon for re-
versal of the plaintiff's judgment.

The accident happened about 2:30 a. m. on July 27, 1934,
as the plaintiff was proceeding to his home on Hughes
street, in Hughestown, Pa. Hughes street is a stub-end
street ending at the westerly side of the railroad right of
way. The next street to the south is Rock street which
crosses the single line track at grade. The plaintiff alighted

from a friend's automobile at the Rock street crossing and walked along a beaten pathway that runs in a northerly direction adjacent and parallel to the railroad track for about 115 feet, where it intersects a diagonal path leading out of Hughes street and across the track. The defendant's freight train approached from the direction in which the plaintiff was walking. He heard it whistle for the Rock street crossing, saw its headlight as it rounded the curve ahead, and continued to walk toward it. He says it was traveling 30 or 35 miles an hour. The train crew testified to a speed of 8 or 10 miles an hour. The pathway upon which the plaintiff walked is approximately 2 feet wide and runs along about 2 feet from the ends of the ties, although in some places it is less. The locomotive extended more than a foot beyond the ends of the ties and the widest car overhung them one foot and five inches. Tompkins himself testified that the distance between his body and the moving train was between one and two feet. The night was dark and there was no artificial light. When he had almost reached the intersection of the two paths the engine passed him, and just as he got to the intersection "a black object that looked like a door" loomed up in front. Before he could even raise his hands, he was struck on the head and thrown to the ground in such a way that his right arm came under the wheels of the train. He believes the black object to have been a swinging door on a refrigerator car and [fol. 497] says it projected from the side of the train two or two and a half feet. There was no witness to the accident other than the plaintiff, but much testimony was introduced with respect to the exact location of the paths, the long period of years during which the residents of Hughestown had been accustomed to use them, and the character of the ground lying between the longitudinal path and the fence marking the west boundary of the railroad right of way.

The defendant contends, citing *Falchetti v. Pennsylvania R. Co.*, 307 Pa. 203, 160 A. 859; *Koontz v. Baltimore & O. R. Co.*, 309 Pa. 122, 163 A. 212, that the only duty owed to the plaintiff was to refrain from willful or wanton injury because the courts of Pennsylvania have so ruled with respect to persons using a customary longitudinal path, as distinguished from a path crossing the track. The plaintiff denies that such is the local law, but we need not go into this matter since the defendant concedes that the great weight

of authority in other states is to the contrary. This concession is fatal to its contention, for upon questions of general law the federal courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law. *Baltimore & O. Railroad Co. v. Baugh*, 149 U. S. 368, 13 S. Ct. 914, 37 L. Ed. 772; *Cole v. Pennsylvania R. Co.*, 43 F. (2d) 953, 71 A. L. R. 1096 (C. C. A. 2), and cases cited therein; *Redfield v. New York Cent. R. Co.*, 83 F. (2d) 62, 65 (C. C. A. 8). Where the public has made open and notorious use of a railroad right of way for a long period of time and without objection, the company owes to persons on such permissive pathway a duty of care in the operation of its trains. *Southern Ry. Co. v. Cochran*, 29 F. (2d) 206 (C. C. A. 5); *New York, N. H. & H. R. Co. v. Kmetz*, 193 F. 603 (C. C. A. 2); *Erie R. Co. v. Burke*, 214 F. 247 (C. C. A. 2); *Robbins v. Pennsylvania Co.*, 245 F. 435, 441 (C. C. A. 6); *Pennsylvania R. Co. v. Lackner*, 246 F. 931 (C. C. A. 3); American Law Institute, *Torts*, § 334. It is likewise generally recognized law that a jury may find that negligence exists toward a pedestrian using a permissive path on the railroad right of way if he is hit by some object projecting from the side of the train. *Southern Ry. Co. v. Cochran*, 29 F. (2d) 206 (C. C. A. 5); *Schultz v. Erie R. Co.*, 46 F. (2d) 285 (C. C. A. 3); *St. Louis, S. W. Ry. Co. v. Wilcox*, 57 Tex. Civ. App. 3, 121 S. W. 588; *Missouri, K. & T. Ry. Co. v. Scarborough*, 29 Tex. Civ. App. 194, 68 S. W. 196; *St. Louis, S. W. Ry. Co. v. Balthrop* (Tex. Civ. App.) 167 S. W. 246; *Chesapeake & O. Ry. Co. v. Davis*, 58 S. W. 698, 22 Ky. Law Rep. 748; *Pruitt v. Southern Ry. Co.*, 167 N. C. 246, 83 S. E. 350; *Scott v. Davis*, 216 Mo. App. 530, 270 S. W. 433; cf. *Louisville & N. R. Co. v. Marlow*, 169 Ky. 140, 183 S. W. 470. Plaintiff's testimony that the black object which struck him looked like a swinging door was sufficient to take to the jury the question whether he was injured in the manner alleged and whether the defendant was negligent in allowing a door to swing, despite the defendant's testimony that an inspection at Ashley showed all car doors to be closed and sealed.

The main contention of the appellant is that the plaintiff's conduct in walking so close to a moving train in the dark constituted contributory negligence as a matter of law. Much testimony was directed to the character of the ground