

OVER THE  
COUNTER

No.

---

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

---

ANNE PAYNE,

*Plaintiff-Appellee*

v.

CSX TRANSPORTATION, INC.,

*Defendant-Appellant.*

---

On appeal from the Circuit Court of Knox County, No. 2-231-07  
Court of Appeals, Eastern Division: No. E2012-02392-COA-R3-CV

---

APPENDIX OF APPELLANT (Volume 1 of 2)

---

Randall A Jordan  
Karen Jenkins Young  
Christopher R. Jordan  
THE JORDAN FIRM  
1804 Frederica Road, Suite C  
St. Simons Island, GA 31522  
(912) 638-0505

Evan M. Tager  
Carl J. Summers  
MAYER BROWN LLP  
1999 K Street, NW  
Washington, DC 20006  
(202) 263-3000

John W. Baker, Jr. (BPR #001261)  
Emily L. Herman-Thompson  
(BPR #021518)  
BAKER, O'KANE, ATKINS & THOMPSON  
2607 Kingston Pike, Suite 200  
P.O. Box 1708  
Knoxville, TN 37901  
(865) 637-5600

---

2014 MAR 21 AM 11:23  
APPELLANT  
KNOXVILLE

No.

---

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

---

ANNE PAYNE,

*Plaintiff-Appellee*

v.

CSX TRANSPORTATION, INC.,

*Defendant-Appellant.*

---

On appeal from the Circuit Court of Knox County, No. 2-231-07  
Court of Appeals, Eastern Division: No. E2012-02392-COA-R3-CV

---

**APPENDIX OF APPELLANT (Volume 1 of 2)**

---

Randall A Jordan  
Karen Jenkins Young  
Christopher R. Jordan  
THE JORDAN FIRM  
1804 Frederica Road, Suite C  
St. Simons Island, GA 31522  
(912) 638-0505

Evan M. Tager  
Carl J. Summers  
MAYER BROWN LLP  
1999 K Street, NW  
Washington, DC 20006  
(202) 263-3000

John W. Baker, Jr. (BPR #001261)  
Emily L. Herman-Thompson  
(BPR #021518)  
BAKER, O'KANE, ATKINS & THOMPSON  
2607 Kingston Pike, Suite 200  
P.O. Box 1708  
Knoxville, TN 37901  
(865) 637-5600

---

## TABLE OF CONTENTS

<u>Page</u>	<u>Description</u>	<u>Record Reference</u>
<b>Volume 1</b>		
App. 1	Excerpts, Hearing, Oct. 7, 2009	R. 43
App. 4	Excerpts, Hearing, Sept. 22, 2010	R. 45
App. 6	Requested Jury Instruction No. 16	R. 20:2861-62
App. 8	Def. Ex. 571 (for identification)	R. 94
App. 18	Excerpts, First Trial	R. 51-66
<b>Volume 2</b>		
App. 242	Excerpts, First Trial	R. 66-68
App. 278a	Excerpts, Defendant's motion for JNOV or a new trial	R.24:3481-84
App. 279	Oral ruling on motion for new trial	R. 70
App. 281	Order granting new trial	R. 25:3570-71
App. 483	Docket reflecting order of Court of Appeals denying Plaintiff's application for extraordinary review	R. 41:5765
App. 484	Order of Supreme Court of Tennessee denying Plaintiff's application for extraordinary review	not in record on appeal
App. 285	Affidavit and report of David A. Dooley in support of CSXT's motion to exclude expert testimony	R. 27:3872-3940
App. 354	Affidavit of Larry R. Liukonen in support of CSXT's motion to exclude expert testimony	R. 27:3942-62

App. 375	Excerpts, Hearing on CSXT's motion to exclude expert testimony, Oct. 5, 2012	R. 76-77
App. 413	Excerpts, Hearing on CSXT's motion to exclude expert testimony, Oct. 16, 2012	R. 78
App. 427	Order granting CSXT's motion to exclude expert testimony	R. 39:5605-08
App. 431	Order granting CSXT's motion to exclude expert testimony	R. 39:5618-20
App. 435	Order denying Plaintiff's motion for reconsideration	R. 39:5627-28
App. 437	Order denying Plaintiff's motion for reconsideration	R. 40:5681-82
App. 439	Order granting CSXT's motion for summary judgment	R. 40:5683-86
App. 443	Court of Appeals' opinion	
App. 475	Court of Appeals' order on Defendant's Petition for Rehearing	



1 THE COURT: We are back here today  
2 after meeting a week ago today and had an  
3 extended presentation of various motions,  
4 and the Court asked for some extra time to  
5 review things that were still coming in at  
6 that time and waded through all kinds of  
7 stuff that has been submitted to me which is  
8 good, I guess, and turns out that what I got  
9 to say today is mostly -- rather than a  
10 ruling on what we talked about last week, I  
11 think it's more advisory than anything else.  
12 So let's go over briefly some of the things  
13 that we talked about last week.

14 We started out with a motion by the  
15 defendant to exclude expert testimony after  
16 discovery depositions had been taken of  
17 experts proposed by the plaintiff in this  
18 case. It's difficult to exclude totally the  
19 testimony of such witnesses. For example,  
20 that Tennessee opinion involving CSX  
21 railroad that both sides talked about some  
22 last week can be understood, if nothing  
23 else, as saying that such experts are  
24 normally admitted and permitted to testify.  
25 What they will say at the trial, you know,

1 we don't really know yet as evidenced by the  
2 fact that we had this additional affidavit  
3 submitted after last week's hearing, and  
4 then this morning we had the opposition to  
5 that affidavit. I suppose it's good to  
6 bring these things out now, but in the  
7 Court's opinion I can't make any definitive  
8 ruling about any of these people at this  
9 time.

10 And one thing that bringing it out  
11 now does do is allow them to correct and add  
12 to testimony, and of course the trial is not  
13 set until March. We may have occasion to  
14 talk about this some more later on, much  
15 closer to the trial date, but right now the  
16 Court is not prepared to make any definitive  
17 ruling about these things other than to say  
18 that probably all these people will be  
19 certainly permitted to testify. You know,  
20 what exactly they say is subject to  
21 objection, I suppose, right before trial and  
22 also during trial.

23 The position advocated by the  
24 defendant that you all can just go ahead and  
25 exclude such evidence if it doesn't prove a

1 case right now is just one approach, as  
2 pointed out in some of the opinions  
3 submitted to me in connection with this, and  
4 also things we just obviously know.

5 If at the end of the plaintiff's  
6 proof or anybody's proof something is not  
7 proved, the Court can clear that up during  
8 that point of the trial. But for right now  
9 nobody is excluded as requested last week.

10 Then we had talked about  
11 depositions from other cases. Plaintiff  
12 made a motion to have these things declared  
13 admitted in this trial. Defendants made a  
14 motion to have these things excluded. I'm  
15 not ruling absolutely or definitively right  
16 now, but in an advisory sense I will tell  
17 you that it's unlikely in my opinion that  
18 such depositions would be admitted into the  
19 trial. We are here to try this case. When  
20 we start talking about other trials, other  
21 plaintiffs, other situations, whatever the  
22 admissibility of a deposition is, it's  
23 generally outweighed by problems with  
24 confusion and distracting the jury and just  
25 simply wasting time. And what has been

1 30 percent to be honest with you.

2 Page 20, Lines 5 through 25 and

3 Page 21 -- that should be 21, Lines 1

4 through 7 on the ground of hearsay, and the

5 reason we made this objection, Your Honor,

6 is because in this case initially it was

7 believed that this man had thyroid cancer

8 and thyroid cancer is something that is in

9 the literature believed to be related to

10 exposure to radiation, but as it turned out,

11 there is no evidence of -- and there will be

12 no expert testimony of thyroid cancer and

13 apparently he did not have thyroid cancer.

14 In here, the -- they are talking

15 about Dr. Manning's hearsay statements to

16 him about thyroid, his thyroid when in fact

17 it's not a part of the case. And if all of

18 a sudden the jury hears thyroid and thyroid

19 cancer in this part of the -- in this but

20 the rest of the case there's no expert

21 testimony on it, they might think that he

22 has, one, has thyroid cancer and, two, it

23 may be related to exposure to radiation

24 which is not supported by expert testimony.

25 MR. SHAPIRO: Your Honor, it's



1 appropriate because it was abnormal and it  
2 was part of his cancer treatment and it's  
3 simply a recitation of the type of care that  
4 he had. It was a necessary test because it  
5 was abnormal, they were monitoring it.

6 No one in here says he had thyroid  
7 cancer but he had an abnormality so we say  
8 it's appropriate.

9 MR. BAKER: Then he asked about  
10 Dr. Akin and Dr. Akin is not going to appear  
11 as a witness nor has he been listed as a  
12 witness by anyone. It's kind of like he had  
13 corns on his feet, something like that or  
14 epicondylitis of his elbow. Just doesn't  
15 have -- it's misleading to the jury to start  
16 talking about thyroid cancer.

17 THE COURT: Well -- that would save  
18 a whole minute in the course of the trial so  
19 we'll mark that out -- it really doesn't  
20 have anything to do with anything.

21 Next one is 29 --

22 MR. SHAPIRO: So you are upholding  
23 that one, Your Honor?

24 THE COURT: Yes, yes, leave that  
25 out.

**FORESEEABILITY**

2010 OCT 25 A 11:18

CATHERINE F. QUIST  
CIRCUIT COURT CLERK

You have been informed that the Plaintiff contends the Defendant was negligent in that it failed to exercise reasonable care to provide the Decedent a reasonably safe place in which to work, which Defendant denies. Furthermore, you have been instructed on the meaning of negligence and that to receive any verdict, the Plaintiff must show by a preponderance of the evidence that the Defendant was negligent, that such negligence was a cause, in whole or in part, of the Decedent's injury, and that the injury and damages for which the Plaintiff seeks recovery in this action resulted, in whole or in part, from the Defendant's lack of reasonable care under the circumstances.

However, in order for the Plaintiff to prove negligence under the Federal Employers' Liability Act, the Plaintiff must still prove the requirement of "reasonable foreseeability of harm." This means that the Defendant railroad, through its officers, agents or employees, using ordinary caution and prudence, should have foreseen that some injury would probably arise from their acts or omissions. In other words, the Defendant's duties are determined by what is reasonably foreseeable under the circumstances, and by what, in the light of the facts then known, should reasonably have been anticipated. The Defendant cannot be found negligent for failing to guard against a bare possibility of injury, illness or disease.

Even though there may be exceptions, one is not ordinarily considered negligent in respect to acts which conform to a common practice that has existed for years in an industry without resulting in an injury, and that has nothing about it which at the time shows a lack of due care. It is not likely that the law will find the great majority of the people who use a certain substance or product for long periods of time to have all been negligent since ordinary care at the time is all that the law requires.

In determining foreseeability, the point of view to be taken must be the view at the time of

the exposure which caused, if it did cause, Decedent's injuries. What is now known about asbestos or diesel exhaust or ionizing radiation is of no consequence in judging whether or not the defendant acted with reasonable prudence at the time Decedent worked for the railroad. Likewise, you must not consider this case with regard to what would be today's ordinarily prudent conduct. You must measure the Defendant's conduct against the actions of ordinarily prudent men during the times when the Decedent was allegedly exposed to asbestos or diesel exhaust or occupationally induced ionizing radiation.

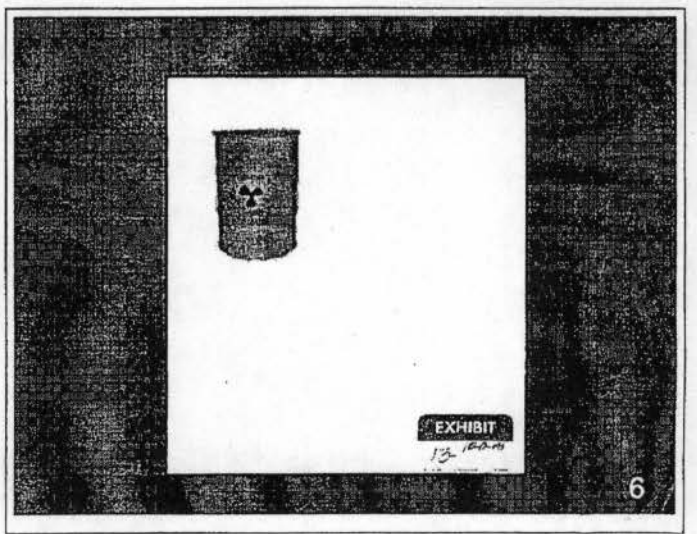
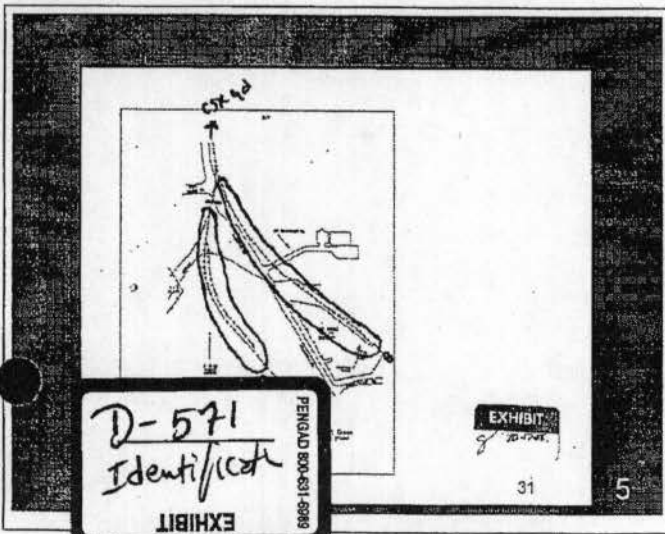
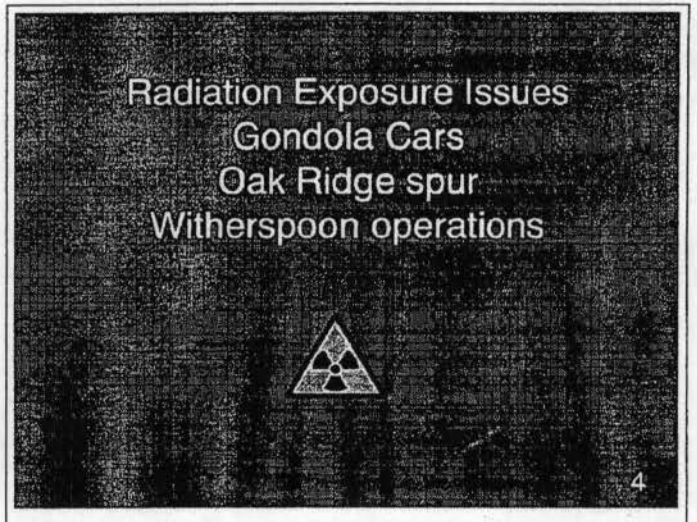
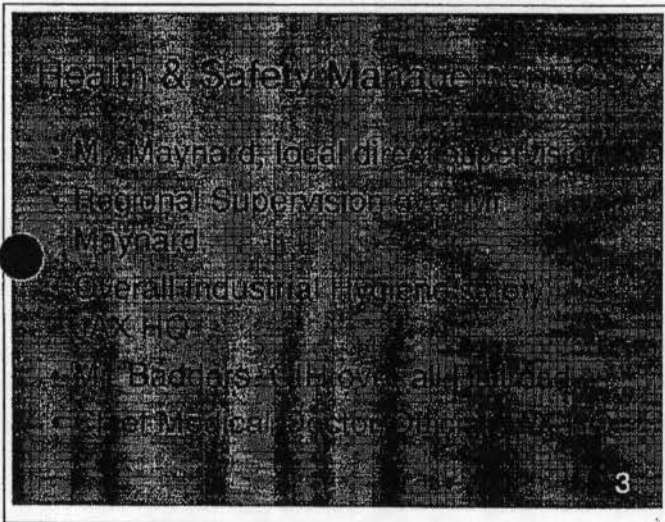
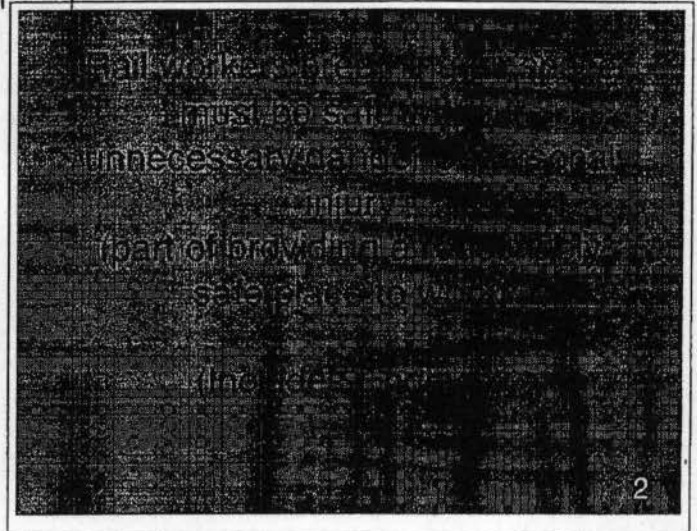
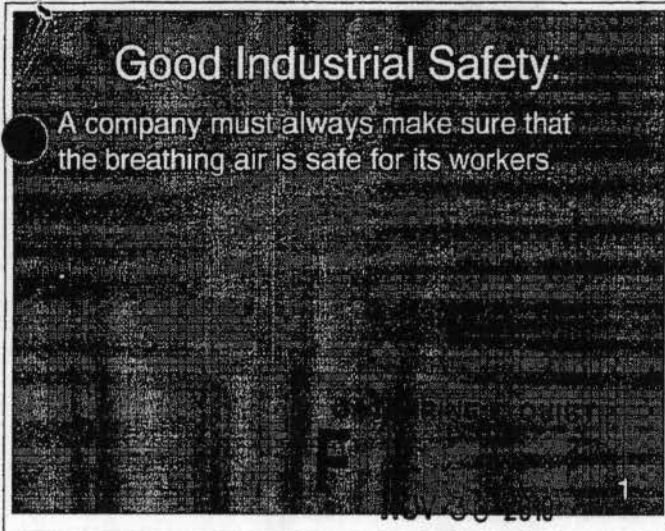
*Aparicio v. Norfolk & Western Ry. Co.*, 874 F.Supp. 154 (N.D. Ohio 1994); *Aparicio v. Norfolk & Western Railway Co.*, 84 F.3d 803, 814 (6th Cir. 1996); *Gallick v. B&O R.R. Co.*, 372 U.S. 108, 117 (1963); *Rubley v. Louisville & Nashville Road Co.*, 208 F. Supp. 798 (E.D. Tenn. 1962); *Ellis v. Louisville & Nashville Railroad Co.*, 251 S.W.2d 577, 579 (Ky. 1052); *Richardson v. Missouri Pacific Railroad*, 677 F.2d 663 (8th Cir. 1982); *Lessee v. Union Pacific R. Co.*, 690 P.2d 596 (Wash. App. 1984). 57 Am. Jur. 2d Negligence, Sec. 77, p. 428.

ACCEPTED \_\_\_\_\_  
REJECTED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
WITHDRAWN \_\_\_\_\_  
OBJECTION \_\_\_\_\_

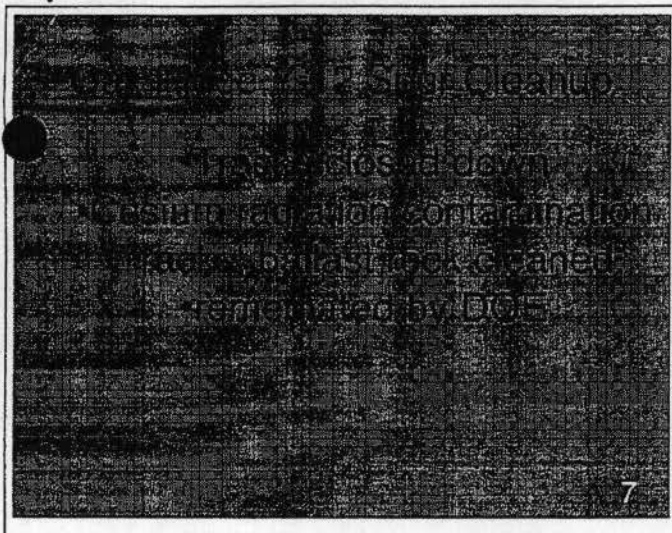
Maynard

## Good Industrial Safety:

A company must always make sure that the breathing air is safe for its workers.







7

## CSX Personal Protective Equipment 1987 Catalog

Some methods you might use include:  
Educating employees on the seriousness of potential hazards.

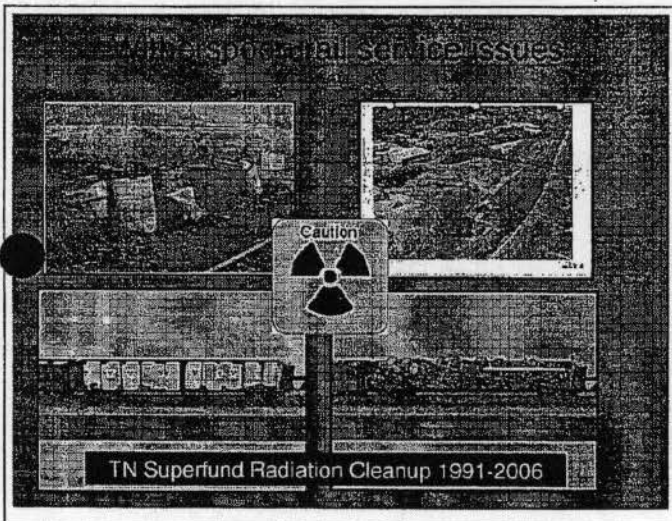
Enforcing the use of protective equipment by employees and discipline, where required, for failure to use protective equipment, depending on the operation, exposure or environment.

Enforcing the use of protective equipment by visitors or other personnel who may be in an area where use of such equipment is necessary.

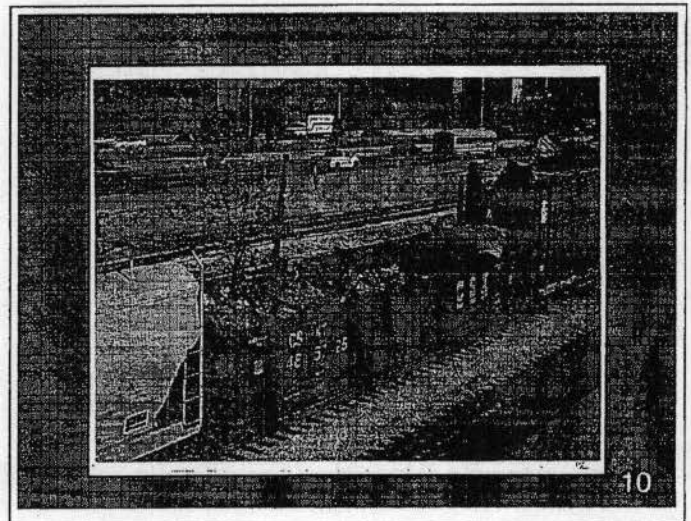
Remember, employees must be given complete instructions on the proper use and care of all personal protective equipment. Without this instruction, protection will not be fully effective. Thorough training sessions must be conducted at the time of initial issuance of equipment and periodically reinforced as the need arises.



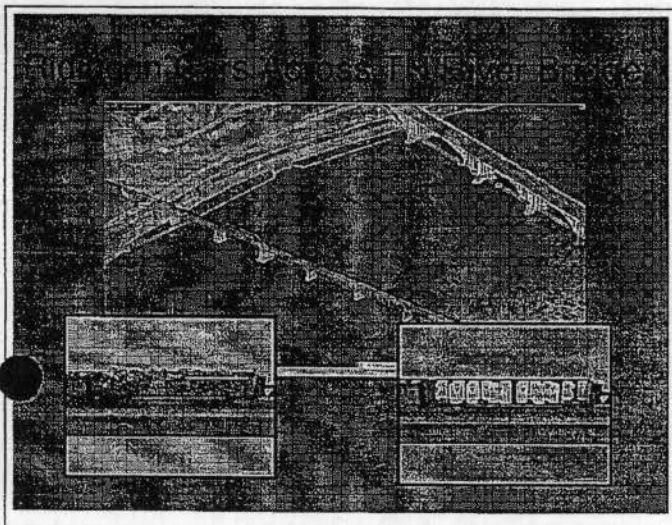
8



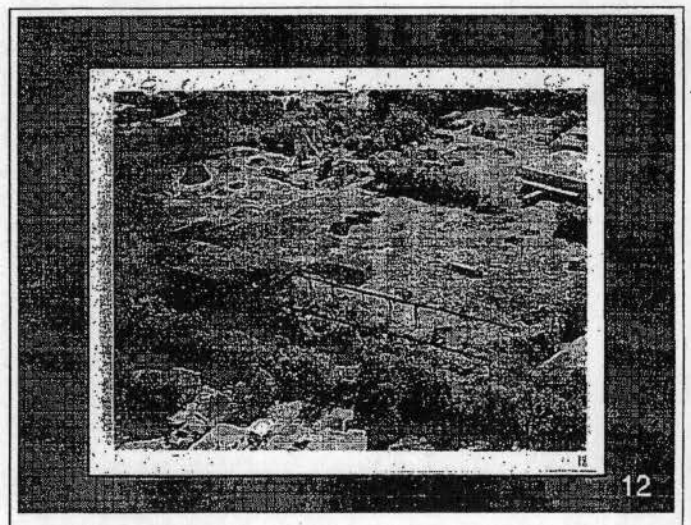
TN Superfund Radiation Cleanup 1991-2006



10



TN Superfund Radiation Cleanup 1991-2006



12

- L & N-Witherspoon Lease-1959;
- W. Payne starts employment;
- Routine business-L & N to Witherspoon
- L & N tracks into the Magnet House
- Customer Contact/Inspection Duties
- Feedback from Transportation Workers
- L & N paid for every load of cargo

13

12/70 12-107 1000 9338870 163

The records of surveys by V. C. Bailey show that surveys have been made at least weekly with fields being mowed around areas where material is being processed.

14

Date	Source	Mode	Weight Shipped (Lbs.)
3/69	<del>Stearns</del>	Rail	987,500
4/69	<del>Stearns</del>	Rail	884,700
5/69	<del>Stearns</del>	Rail	565,500
6/69	<del>Stearns</del>	Rail	1,015,300
7/69	<del>Stearns</del>	None	
8/69	<del>Stearns</del>	Truck	215,600
9/69	<del>Stearns</del>	Truck	339,630

15

[illegible]

5. In 1963 or thereabouts, a solicitation was issued and awarded to Witherspoon, numbered #717, then modified to be #719, then modified to be #749.

16

[illegible]

Supplement #7 added scrap metal from the ORNL portion of the White Wing Yard and some additional scrap from the ORGDP Scrap Yard. The ORNL scrap metal was advertised as potentially contaminated with plutonium.

The "Agent" was responsible for monitoring and then allowing release of scrap falling within the range of permissible contamination levels.

17

[illegible]

8) The total amount of advertised contaminated metal received by Witherspoon between 1963 and 1972 was in excess of 4000 gross tons.

18



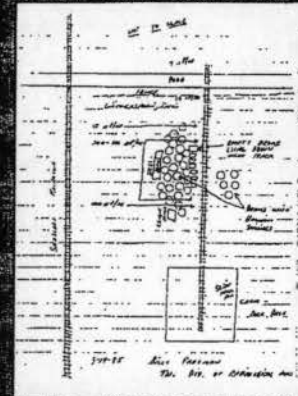
AEC-Witherspoon Memo April 21, 1969  
Contract with Witherspoon, Inc for White Wing  
Yard Scrap



2- The Purchaser should emphatically be made aware of the fact that the material is contracting to handle does contain a plutonium potential and we cannot guarantee a specific level below which all material with read.

19

Billy Freeman Sketch—1985  
Witherspoon — Railroad Track Area



20

Witherspoon — Railroad Track Area

By 1985 you learned about scrapyards worker claims that geiger counters "went off scale" and metals they sorted glowed with green tint

21

Who was in charge of Over-  
Sight work Freedom of Information  
1985 and made the choices on  
worker safety?  
Continued next slide

22

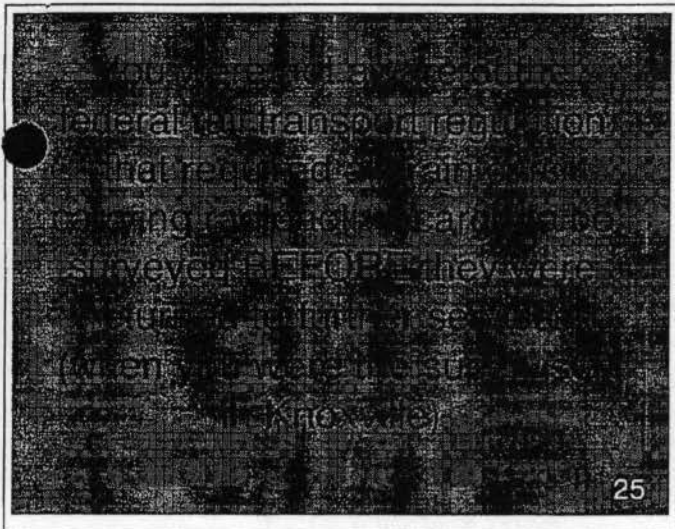
Witherspoon-85 to 91 — RR Track Area

- Changes: Mr. Badders-Jax
- No change in practices?
- Worker radiation protection program?
- Demand surveys for service?
- Workers continue in & out?
- No worker was actually tested?

23

Mr. Badders-Jax was in charge of  
the work. He was the one who  
was in charge of the work. He was  
the one who was in charge of the  
work. He was the one who was  
in charge of the work. He was the  
one who was in charge of the work.

24



## 49 CFR Part 174, Subpart K – Detailed Requirements for Radioactive Materials (October 1, 1980)

- § 174.700 Special handling requirements for radioactive materials
- (f) A person shall not remain unnecessarily in, on or near a transport vehicle containing Class 7 (radioactive) materials.

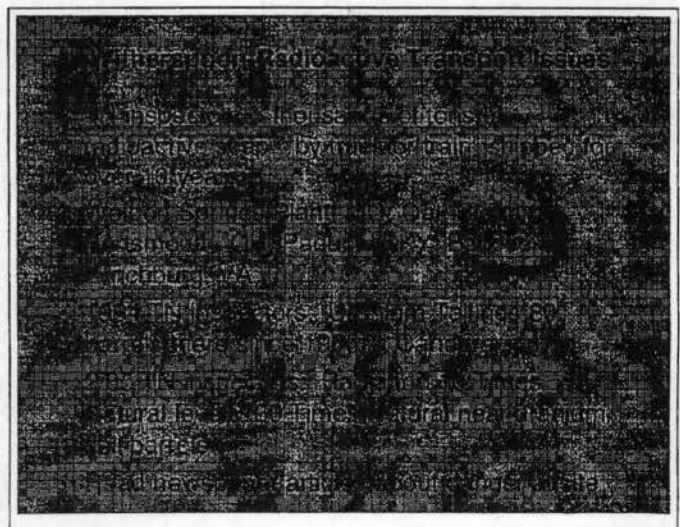
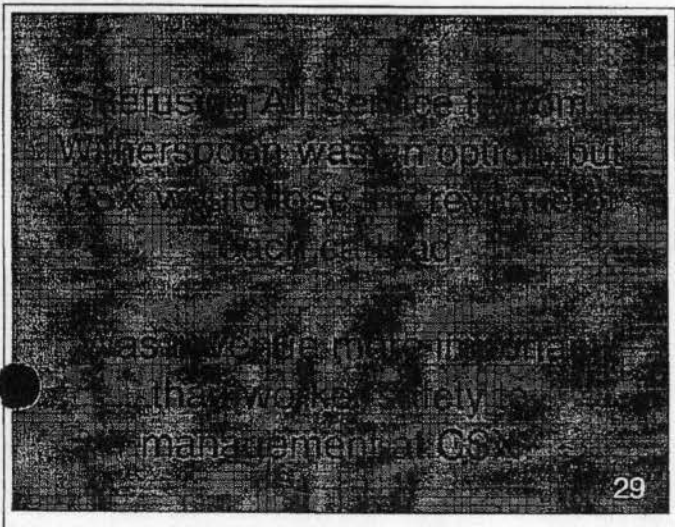
## Radiation Transport Regulations and Railroad Compliance Issues

- 49 CFR 174.715:  
Each car used for transporting low specific activity radioactive materials... in carload lots ... must be surveyed with appropriate radiation detection instruments after each use. A carrier may not return a car to service until the radiation dose rate at any accessible surface is not more than 0.5 millirem per hour and there is no significant removable radioactive surface contamination. . . .

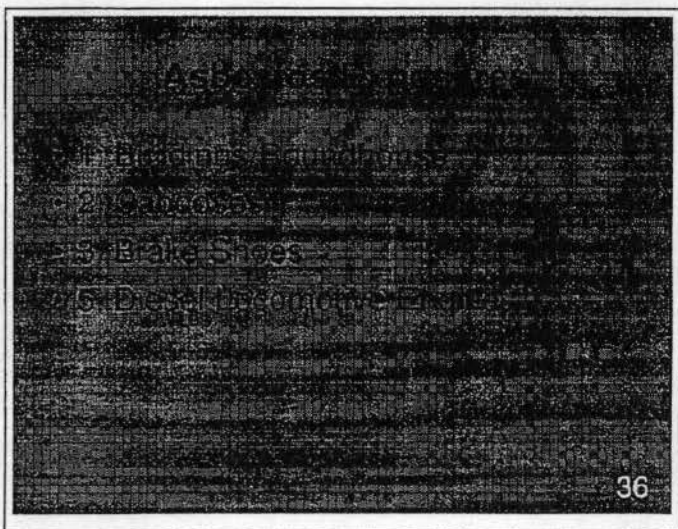
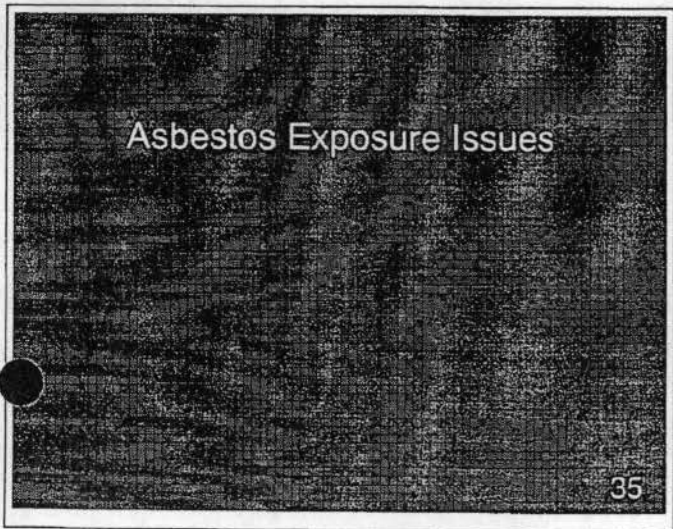
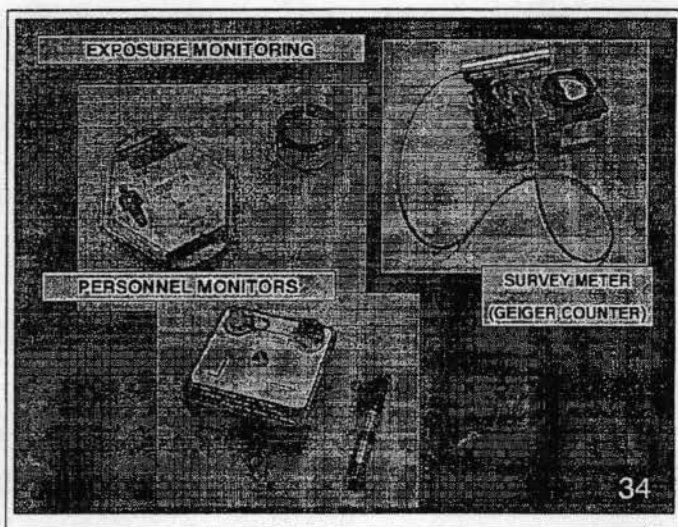
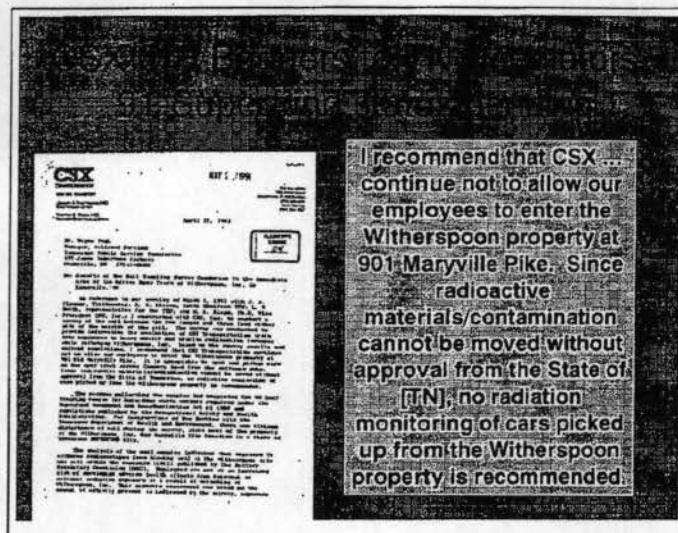
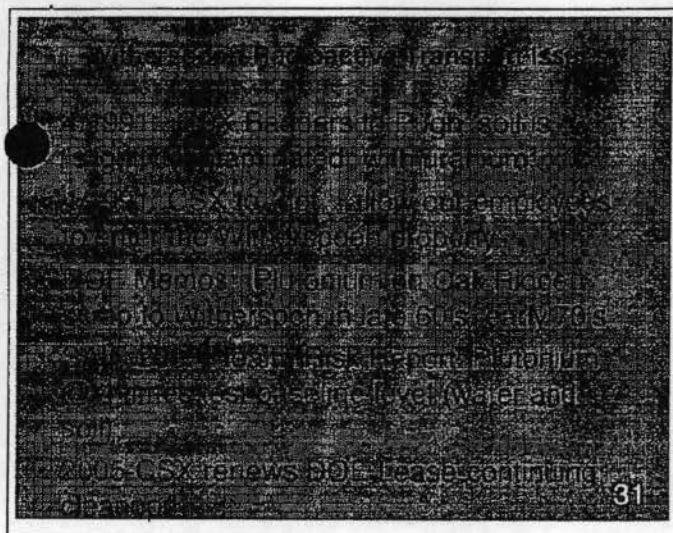
## Regulations Don't Hear Excuses

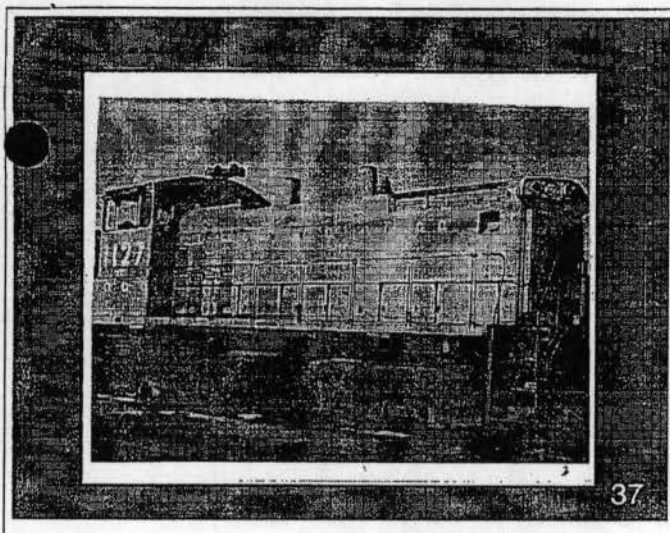
You agree that a federal railroad transport regulation required surveys of all train cars loaded with radioactive material before they are returned to service. That other CSX's customers with special permits can skip the survey.

28

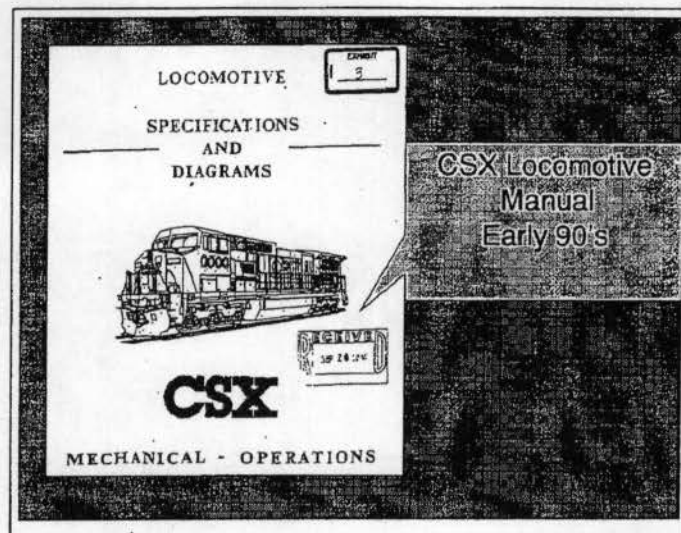








37



LOCOMOTIVE MAINTENANCE AND PROCEEDURES - BOOK 100  
SUBJECT: SPECIFICATIONS AND DIAGRAMS PAGE 8  
DATE 8-25-92

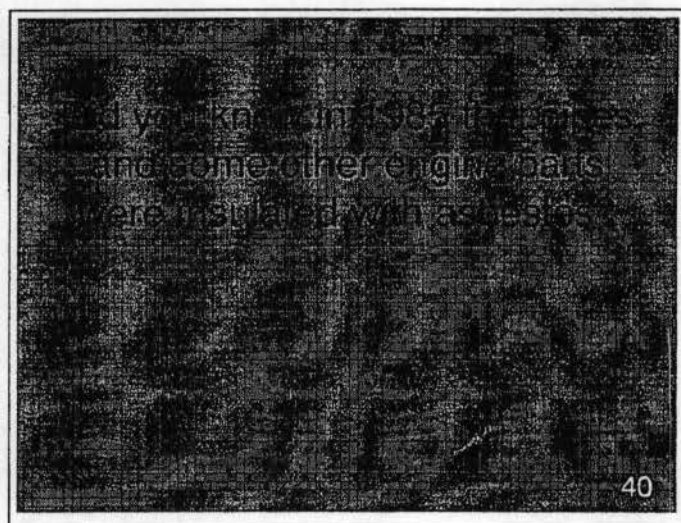
RECAPITULATION

COMPARISON BY TYPE OF SECTION

MAIN AXLE DRIVE:		FOR AXLE DRIVE:		SWITCHERS:	
UNITS	CLASS	UNITS	CLASS	UNITS	CLASS
8	8000-7	72	8000-8	2	800-1
44	8000-7	94	8000-1	10	8-12
44	8000-8	187	8000-8	10	8-12
110	8000-7	14	8000-8	20	8000-1
10	8000-8	208	8000-2	42	8000-1
3	8000-8	13	8000-2	2	8000-1
7	8000-8	141	8000-2	5	8000-1
20	8000-8	14	8000-2	17	8000-1
182	8000-8	23	8000-2	5	8000-1
5	8000-8	23	8000-2	5	8000-1
40	8000-8	23	8000-2	5	8000-1
147	8000-8	23	8000-2	5	8000-1
117	8000-8	23	8000-2	5	8000-1
26	8000-8	23	8000-2	5	8000-1
40	8000-8	23	8000-2	5	8000-1
270	8000-8	23	8000-2	5	8000-1
340	8000-8	23	8000-2	5	8000-1
140	8000-8	23	8000-2	5	8000-1
90	8000-8	23	8000-2	5	8000-1
87	8000-8	23	8000-2	5	8000-1
1400	8000-8	23	8000-2	5	8000-1

GRAND TOTAL OF UNITS: 1123

CSX Locomotive Manual  
EMD, GE



40



41



42



Dr. Kaplan, Chessie, C & O, B & O  
Medical Doctor, September 1, 1977

From a health standpoint, I am extremely concerned about the railroad's use of any product containing asbestos, since it is an established fact that the chemical is carcinogenic and does not require considerable exposure for production of malignant lesions.

It would be my recommendation that, wherever possible, your purchasing department attempt to substitute for those products containing over 2 to 3 per cent asbestos some other materials.

43

As of the last time you worked in the area, you had no idea of any asbestos in the area from the engine.

44

Diesel Fume Exposure Issues

45

46

47

48

GENERAL CLAIMS DIVISION  
ASSOCIATION  
of  
AMERICAN RAILROADS



50

Copyright © 2004 John Wiley & Sons, Ltd.

51

UNION PACIFIC RAILROAD

52

[illegible]

53

[illegible]

12. 02 19 86

[illegible][illegible]

1989). According to such hypothesis, the  $\beta$  phase is more stable in polymeric systems of higher molecular weight and is favored by higher crystallinity. In the present work, we observed no change in the  $\beta$  phase content with increasing molecular weight. This may mean that the  $\beta$  phase is not a distinct crystalline phase. It has been reported earlier that, of all the  $\beta$  phase structures, the most probable one will be of the type  $\beta_1$  (polymer chain parallel to the  $bc$  plane) (Sato et al. 1987). The  $\beta_1$  phase is the most stable one among the  $\beta$  phase structures.

When the house owner is sure that the work is finished, he should call the contractor to the house and pay him the balance of the money. The contractor should then give the owner a receipt for the money.

any further or less light on the subject, but the only thing I can say is that the subject is very important and it is very important to know the truth about it. I am sure that the people who are interested in this subject will find this information very helpful.

On 11/10/2001

[illegible][illegible]

---

54



Regulations of the Department of  
Transportation:

§ 229.43 Exhaust and battery gases.

(a) Products of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions.

55

Regulations of the Department of  
Transportation:

§ 229.7 Prohibited Acts

The Locomotive Inspection Act (45 U.S.C. §§ 22-34) makes it unlawful for any carrier to use or permit to be used on its line any locomotive unless the entire locomotive and its appurtenances

(a) Are in proper condition and safe to operate in the service to which they are put, without unnecessary peril to life or limb.

56

Anne Payne - Direct

1 Q. Okay. How many grandchildren do  
2 you have?

3 A. I have six.

4 Q. So when you got married, your  
5 husband was working for the railroad.

6 A. Yes, he was.

7 Q. Do you know what his job was?

8 A. Switchman, I think.

9 Q. Okay.

10 A. I think when he first went, though,  
11 he was some kind of an operator.

12 Q. Did you know much about his work?

13 A. No, not really, not all that much.  
14 I just knew that he, you know, switched cars and  
15 took them to different places.

16 Q. And he worked regularly, didn't he?

17 A. Yes, he did.

18 Q. And was he faithful to his job?

19 A. Yes, he was.

20 Q. He liked working for the railroad?

21 A. Yes.

22 Q. Did you know he was riding in these  
23 gondola cars?

24 A. I'm not sure if I did or not.

25 Q. Okay. You have been to the West

Truesdel & Rusk

Anne Payne - Direct

1 Knoxville Yard before.

2 A. Yes.

3 Q. Down by the university down there.

4 A. Yes.

5 Q. Have you ever been to Witherspoon  
6 junkyard?

7 A. I have driven by there. I know  
8 approximately where it is.

9 Q. Okay. Now, you heard the opening  
10 statements, and you heard a lot about smoking.

11 Your husband smoked when you first  
12 met him, didn't he?

13 A. Yes, he did.

14 Q. And he smoked up until when?

15 A. Up until 1988.

16 Q. What happened in 1988?

17 A. Our first grandson, Blake, was  
18 born, and he promised our daughter that he would  
19 quit when he was born. So November 26th is when he  
20 quit.

21 Q. He quit that day.

22 A. Yes.

23 Q. You remember that.

24 A. Yes.

25 Q. Because that's when your grandson

Truesdel & Rusk

Anne Payne - Direct

1 expenses for his treatment?

2 A. Yes, sir.

3 Q. What is the total of that?

4 A. \$587,903.38.

5 MR. GILREATH: We offer that as the  
6 next exhibit.

7 (Exhibit 70 received).

8 Q. (BY MR. GILREATH) So after his  
9 diagnosis in '05, he lived until 2010.

10 He put up a pretty good fight,  
11 didn't he?

12 A. Yes, he did.

13 Q. You were right there with him the  
14 whole time.

15 A. Yes.

16 Q. You gave him support.

17 A. Yes.

18 Q. As you always had.

19 A. Yes.

20 MR. GILREATH: You may ask.

21 MR. BAKER: Thank you, Counsel.

22 CROSS-EXAMINATION

23 BY MR. BAKER:

24 Q. Mrs. Payne, as I've expressed  
25 before, I'm so sorry for your loss.

Truesdel & Rusk



Anne Payne - Cross

1 that, based upon your observations, when he was at  
2 home he would smoke.

3 A. Yes.

4 Q. And when you all would do  
5 recreational type things, he would smoke.

6 A. Yes.

7 Q. And based upon your observations of  
8 when you were with him, he would smoke about a pack  
9 a day, give or take.

10 A. I didn't keep up with how many he  
11 smoked. I just knew he smoked.

12 Q. Okay. Do you recall telling me  
13 before that he smoked maybe a pack a day based upon  
14 your observations?

15 A. I probably did.

16 Q. And you don't know if he smoked at  
17 work or not, do you?

18 A. I wasn't ever with him at work.

19 MR. BAKER: Okay. I'm not going to  
20 ask you anymore questions.

21 THE WITNESS: Thank you.

22 MR. BAKER: Thank you so much.

23 THE COURT: Anything else?

24 MR. GILREATH: No, Your Honor.

25 THE COURT: You may have a seat

Truesdel & Rusk

Winston Payne - Direct

1 A. Yes.

2 Q. What year did you first go to work  
3 for the L&N Railroad?

4 A. 1962.

5 Q. How old were you when you started  
6 working for L&N?

7 A. Twenty.

8 Q. Did the L&N eventually become CSX?

9 A. It became SCLNN and then CSX.

10 Q. Did you retire from CSX?

11 A. I did.

12 Q. What year did you retire?

13 A. 2003.

14 Q. How many total years did you work?

15 A. Forty-one.

16 Q. What positions did you hold in  
17 those forty-one years?

18 A. I started out as an agent, operator  
19 in the non-transportation department.

20 Q. Did you keep that job about a year?

21 A. I kept it from April 20th to  
22 November 9th of the same year.

23 Q. And then what position did you get  
24 into after that?

25 A. I transferred to the transportation

Truesdel & Rusk

Winston Payne - Direct

1 department.

2 Q. What job?

3 A. Switchman.

4 Q. What types of -- do switchmen  
5 handle moving trains around?

6 A. Yes.

7 Q. Did you also work as a brakeman?

8 A. Yes, I did.

9 Q. And did you also work as a freight  
10 conductor?

11 A. A freight conductor, no.

12 Q. Okay. Tell me the different jobs  
13 you did hold in transportation. Did I cover them  
14 all?

15 A. Switchman, switch foreman, and  
16 brakeman.

17 Q. Okay. When it got to be 2002/2003  
18 and you had forty some years with the railroad, did  
19 you decide to retire voluntarily?

20 A. Yes.

21 Q. At the time you retired, were you  
22 married?

23 A. Yes.

24 Q. And what is your wife's name?

25 A. Anne, A-n-n-e.

Truesdel & Rusk



Winston Payne - Direct

1 you said you had two adult children. Do you have  
2 grandchildren?

3 A. Yes.

4 Q. How many?

5 A. Six.

6 Q. Do any of them live in the  
7 Knoxville area where you get to see them?

8 A. All but one.

9 Q. Did you start spending time with  
10 your grandchildren after you retired?

11 A. Yes.

12 Q. I want to turn your attention to  
13 the fall of 2005, so this is about a little over two  
14 years after your retirement; right?

15 A. Yes.

16 Q. Did you go to see your family  
17 doctor, Dr. Manning during October of that year?

18 A. I did.

19 Q. Were you suffering any unusual  
20 problem?

21 A. Just trouble breathing a little.

22 Q. What did Dr. Manning do after  
23 examining you in October of 2005?

24 A. He took an x-ray of my lungs and  
25 told me that there was a large mass of some kind.

Truesdel & Rusk

Winston Payne - Direct

1 Q. Did you also have any blood that  
2 you had coughed up?

3 A. No.

4 Q. What did Dr. Manning tell you about  
5 that mass, what did he tell you he wanted to do or  
6 prescribe?

7 A. He wanted to send me to a pulmonary  
8 specialist.

9 Q. A pulmonary specialist?

10 A. Yes.

11 Q. And did he do that?

12 A. Yes, he did.

13 Q. Who did you go see?

14 A. Dr. Brunson, B-r-u-n-s-o-n.

15 Q. Did Dr. Manning also have you see a  
16 Dr. Kerns soon after October 2005?

17 A. Yes.

18 Q. And what type of doctor is Dr.  
19 Kerns?

20 A. He's my oncologist.

21 Q. Did one of those doctors order  
22 what's called a bronchial brushing inside your  
23 throat?

24 A. Yes.

25 Q. Did you also in October have a lung

Truesdel & Rusk

Winston Payne - Direct

1 biopsy done; did they do a lung biopsy?

2 A. Yes.

3 Q. How is that procedure done; do you  
4 remember it?

5 A. Yes.

6 Q. What do they do?

7 A. They put you to sleep and run a  
8 tube down your throat and a camera and they take  
9 what they call brushings.

10 Q. In November of 2005 did you also  
11 have an MRI and a PET scan of the brain?

12 A. Yes.

13 Q. Did Dr. Kerns explain why they  
14 wanted a brain scan?

15 A. Just to see if there was any cancer  
16 showing up in the brain.

17 Q. Once all the testing was done, what  
18 did Dr. Kerns tell you, that's the oncologist, what  
19 did he tell you that he found?

20 A. That it was a non-small cell  
21 carcinoma.

22 Q. Did Dr. Kerns tell you what medical  
23 care he wanted to do after he found this carcinoma?

24 A. Yes. He talked with my radiology  
25 oncologist.

Truesdel & Rusk



Winston Payne - Direct

1 asbestos.

2 Q. How did you first learn that  
3 asbestos was toxic; do you remember?

4 A. It started -- the media started  
5 talking about all the asbestos, all kinds of lung  
6 diseases and everything, and they still do.

7 Q. Let me talk to you about the  
8 cabooses. There were a couple of pictures which we  
9 -- I haven't held them up for the video yet, but  
10 there's a couple of cabooses here.

11 Did you ride in cabooses during  
12 your career with L&N or CSX?

13 A. Yes.

14 Q. Was there a time after which the  
15 cabooses were not used anymore though?

16 A. Yes.

17 Q. When was that, what decade was that  
18 that they stopped using them?

19 A. That was in the '80's.

20 Q. So let me talk to you about the  
21 '60's and the '70's up until they stopped using  
22 cabooses. Were you aware whether there was ever any  
23 asbestos inside the cabooses themselves?

24 A. Yes.

25 Q. And where was asbestos?

Truesdel & Rusk

Winston Payne - Direct

1 A. It was on the water pipe and the  
2 heat shield that's in behind the stove.

3 Q. And what was there a stove in there  
4 for?

5 A. To stay warm in the wintertime.

6 Q. So was the stove running?

7 A. Yes.

8 Q. And why would a worker like  
9 yourself ride in a caboose?

10 A. That's where the flagman and the  
11 conductor rode was on the caboose.

12 Q. When you were riding in the caboose  
13 did you sometimes have duties to watch out?

14 A. Yes, protect the rear of the train.

15 Q. What was the condition like of the  
16 insulation, the asbestos insulation that you  
17 observed? Was it in good condition all the time?

18 A. The water pipe -- the water pipes  
19 that came in, they were all wrapped in tape, and I  
20 didn't see much of it being frayed. We had --  
21 because they were quite new cabooses when they first  
22 -- when we first started using the bay windows.

23 Q. Did you see ceiling insulation in  
24 the cabooses?

25 A. No, I didn't.

Truesdel & Rusk

Winston Payne - Direct

1 Q. What about back in the -- I asked  
2 you about engines. Did you ever notice whether  
3 there was any ceiling insulation in the engines?

4 A. I never noticed, no.

5 Q. What other places that you worked  
6 do you believe there was asbestos as far as  
7 buildings or things like that?

8 A. Well, the old round house had pipes  
9 running all around it, and it was asbestos insulated  
10 too.

11 Q. Okay. What year --

12 A. I would only be -- I would only be  
13 in it of the mornings when I went to get the  
14 engines, you know, just ten or fifteen minutes.

15 Q. Give me an idea what period of  
16 time, over what number --

17 MR. BAKER: I didn't quite catch  
18 that. Ten or fifteen minutes; is that what  
19 he said?

20 THE WITNESS: Yeah.

21 Q. (BY MR. SHAPIRO) Ten or fifteen  
22 minutes in the round house when you had to get your  
23 engine?

24 A. Yeah.

25 Q. And give me the time frame from --

Truesdel & Rusk



Winston Payne - Direct

1 you started in the early '60's. How long was this  
2 round house there?

3 A. Till the '80's, I think.

4 Q. Okay.

5 A. I'm not sure when they tore it  
6 down.

7 Q. In the round house, for folks that  
8 aren't working for a railroad or don't know the  
9 railroad industry, were there engines in there?

10 A. Yes.

11 Q. Were there workers repairing  
12 engines in there?

13 A. Yes.

14 Q. And there was -- did you also go to  
15 a shop area occasionally?

16 A. Yes.

17 Q. And why would you go to a railroad  
18 shop area?

19 A. The car shop. To talk to the car  
20 man to see what tracks they were going to work or  
21 what -- when they were going to work them so that I  
22 could figure my workload out.

23 Q. Was that something you did on a  
24 daily basis when you did work in that area or not?

25 A. Yes.

Truesdel & Rusk

Winston Payne - Direct

1 Q. How long would you be in those  
2 shops, just to stop and talk to folks about that --

3 A. Yes. Fifteen or twenty minutes.

4 Q. Why do you believe there was  
5 asbestos in the shop?

6 A. You could see it on the pipes.

7 Q. Did you ever see workers, you know,  
8 handling asbestos or replacing it?

9 A. Well, they were handling brake  
10 shoes, they were handling brake shoes.

11 Q. Let me switch gears back to when  
12 you were riding in cabooses. I've got a picture  
13 here of a caboose.

14 MR. BAKER: May I ask where that  
15 photograph, that caboose is located?

16 MR. SHAPIRO: I don't know where  
17 it's located, but Mr. Payne identified it.

18 MR. BAKER: It's a nice looking  
19 caboose.

20 Q. (BY MR. SHAPIRO) Mr. Payne, is this  
21 an example of a similar type of caboose to the type  
22 that you operated when you were working for L&N?

23 A. Yes, it is.

24 Q. Now, you said you had duties when  
25 you rode a caboose, and was that one of the duties

Truesdel & Rusk

Winston Payne - Direct

1 to observe?

2 A. Yes.

3 Q. Did you have to look out the window  
4 or just basically keep an eye along the window?

5 A. No, you looked out the bay window.

6 Q. Okay. Were those cabooses air  
7 conditioned?

8 A.. No.

9 Q. When you worked a caboose, would it  
10 sometimes be on a fairly long train?

11 A. Yes.

12 Q. And did you work on trains that  
13 left Knoxville and went toward, where did you say,  
14 Etowah or Corbin?

15 A. Etowah to Corbin, Knoxville to  
16 Corbin.

17 Q. Okay. Did any of those trains --  
18 well, let me ask it this way. You talked about  
19 brake shoes. What does brake shoes have to do with  
20 you riding in a caboose, anything?

21 A. Well, when we came off the  
22 mountain, the engineer had to have the brakes on  
23 probably fifty percent of the time, so the smoke and  
24 dust from the brake shoes would come right into the  
25 caboose.

Truesdel & Rusk



Winston Payne - Direct

1 Q. So from the car immediately ahead  
2 of the caboose brake shoes?

3 A. The whole train would be smoking,  
4 the wheels, yes.

5 Q. Was there enough smoke that you  
6 could see it?

7 A. Yes.

8 Q. Would the dust get inside the  
9 caboose?

10 A. Yes.

11 Q. How do you know?

12 A. Well, you could see it, especially  
13 when -- sunlight, bright sunlight.

14 Q. How do you know that smoke or dust  
15 was from brake shoes?

16 A. Because there was no other ground  
17 dust or anything unless it was the ballast, which is  
18 white.

19 Q. Would that dust land on you?

20 A. I'm sure it did.

21 Q. Did you ever observe it on your  
22 clothing?

23 A. No, I didn't.

24 Q. Could you see it in the air?

25 A. Yes, you could see it in the air.

Truesdel & Rusk

Winston Payne - Direct

1 Q. Now, I want to turn your attention  
2 to handling cars on the topic of asbestos here.

3 Did you ever work on cars that you  
4 believe -- train cars that may have had asbestos  
5 scrap in them that you transferred to any places?

6 A. Yes.

7 Q. And what type of cars or what type  
8 of cargo do you believe you transported that may  
9 have had asbestos?

10 A. Scrap metal that the local had  
11 brought in from Oak Ridge going to Witherspoon Junk  
12 Company.

13 Q. And where is the Witherspoon  
14 Scrapyard?

15 A. Over in Vestal.

16 Q. How do you know there was asbestos  
17 in the cargo?

18 A. It was up on top of the car, you  
19 could see the pipes. They just jerked out the pipes  
20 and still left them wrapped and all that. They  
21 still had the wrapping on them, and it was asbestos.

22 Q. Well, were you ever around those  
23 pipes? Where were you located in relation to these  
24 asbestos pipes?

25 A. Well, I was riding in the car with

Truesdel & Rusk

Winston Payne - Direct

1 it.

2 Q. You were actually in an open car  
3 with the asbestos pipes?

4 A. Yes.

5 Q. Why?

6 A. I had to protect the rear of the  
7 train when we shoved to Vestal.

8 Q. I'm going to -- I've got some  
9 pictures of those cars. I'm going to get those out  
10 in a moment though.

11 But before I leave this topic, did  
12 you have any other jobs that you worked besides the  
13 railroad that you believe you were exposed to  
14 asbestos at?

15 A. No.

16 Q. You were how old when you went to  
17 work for the railroad?

18 A. Twenty.

19 Q. When you worked on these engines  
20 that you described, and we had you look at them  
21 earlier, and we're talking the '60's, the '70's, the  
22 '80's, did you ever complain to CSX or to L&N that,  
23 hey, there's asbestos in these engines?

24 Did you ever complain?

25 A. No.

- Truesdel & Rusk



Winston Payne - Direct

1 A. But -- never mind.

2 Q. Okay. Let's go back to this type  
3 of engine. So were there days that you rode inside  
4 this engine?

5 A. Oh, yes.

6 Q. This type of engine?

7 A. Uh-huh (Affirmative).

8 Q. Where were the stacks that sent the  
9 diesel exhaust out on this type of engine?

10 A. Right here, these smoke stacks.

11 Q. Can you circle them, please?

12 A. Yes.

13 Q. Put a -- okay, go ahead. Yeah,  
14 that's good. On this type of engine here, were they  
15 up on the top somewhere?

16 A. Yes.

17 Q. Can you kind of circle the area?  
18 It's hard to tell where they are, but can you just  
19 circle the general vicinity where the stacks were?

20 A. It's this one right here.

21 Q. Okay. Can you tell where the stack  
22 is on this engine on the bottom here?

23 A. It should be right in here.

24 Q. Put an "X", that would be easier  
25 there, okay.

Truesdel & Rusk

Winston Payne - Direct

1 A. Yes.

2 Q. In this type of engine, was this  
3 called a switcher engine, or what do you --

4 A. Yeah, a switch engine.

5 Q. When you would be in the engine  
6 moving in this direction I'm pointing, would the  
7 fumes trail -- where would the fumes trail?

8 A. Into the cab.

9 Q. It's hard to tell in this picture,  
10 but is this the cab here?

11 A. This is the cab, yes.

12 Q. Where were the windows?

13 A. The side windows was here and over  
14 here, and this was glass, but stable glass.

15 Q. Okay. Did any of those engines at  
16 any time have air conditioning?

17 A. No, they did not.

18 Q. Did you leave the windows open when  
19 it was hot?

20 A. Yes.

21 Q. Did the fumes trail into the engine  
22 cab at any time?

23 A. Yes, they did.

24 Q. How do you know?

25 A. You could see, smell, feel, taste.

Truesdel & Rusk

Winston Payne - Direct

1 Q. Did the fumes only come in through  
2 the side windows?

3 A. No, on the other side of the engine  
4 is the door that we came in and out of when we was  
5 going to the front of the engine. And the door  
6 always -- in the summertime, we would even have the  
7 door open too.

8 Q. Just because of the heat?

9 A. Yes.

10 Q. And even when the door was closed,  
11 did you notice whether fumes would get in through  
12 the door?

13 A. Oh, yes. None of the doors fit  
14 tight.

15 Q. Could you smell the fumes?

16 A. Yes, you could smell them.

17 Q. Could you see them?

18 A. You could see the fumes, especially  
19 in the bright sunlight.

20 Q. Well, did you work on this type of  
21 engine over a course of twenty years or so?

22 A. I'd say so, around twenty.

23 Q. Did the time that you would spend  
24 inside the cab of the engine vary depending upon  
25 your job?

Truesdel & Rusk



Winston Payne - Direct

1 A. Yes.

2 Q. Did the fumes ever get in your nose  
3 or did you ever notice it?

4 A. Oh, yeah. Yeah, your nose would  
5 always -- if you blew your nose, it was always  
6 black.

7 Q. During that period of time, did you  
8 ever complain to a supervisor, I'm in an engine  
9 that's got all these fumes coming in? Did you ever  
10 do that?

11 A. One time when we walked out of the  
12 yard office to get our engine, which was setting  
13 right in front of the yard office, it was so bad --  
14 it was in the wintertime, and it was so bad that you  
15 could just see it laying over -- laying over in the  
16 engine, smoke and stuff was just laying over on the  
17 engine, and we just refused to work with it. That's  
18 the only time I ever said anything about it.

19 Q. Well, if it was like this on these  
20 engines all the time, why didn't you complain and  
21 register some sort of formal written complaint?

22 A. I didn't even know that diesel  
23 fumes was bad, that it, you know, was a hazard.

24 Q. While you worked out there for your  
25 entire forty-year career, did the railroad ever

Truesdel & Rusk

Winston Payne - Direct

1 offer you any training about diesel fumes?

2 A. No, they did not.

3 Q. Did they ever offer you a  
4 respirator or a mask to wear if you were  
5 uncomfortable about the level of diesel fumes in the  
6 cab?

7 A. Never.

8 Q. Let's talk about some of these  
9 other ones. Actually, is there something that you  
10 noticed about number four and number five of any  
11 significance?

12 A. They're the same engine number.

13 Q. So this is an L&N engine here?

14 A. Uh-huh (Affirmative).

15 Q. And then this 1147 appears to be  
16 the same engine marked with CSX?

17 A. Yes.

18 Q. About when did CSX take over L&N?

19 A. I don't remember the date, no.

20 Q. You were working for L&N for a long  
21 time, and then you said it was, what, Seaboard?

22 A. SCL&N.

23 Q. Seaboard Coastline --

24 A. Seaboard Coastline N.

25 Q. And then from there, did it go

Truesdel & Rusk

Winston Payne - Direct

1 straight to CSX or was there yet another one in  
2 between there?

3 A. No, it went straight to CSX.

4 Q. This is a different style engine.

5 Is this a type of engine you worked on that  
6 we marked number one?

7 A. Yes, we called that jeeb (sic),  
8 called it a jeeb.

9 Q. Just a nickname?

10 A. Yes.

11 Q. Now, was this type of engine -- did  
12 you notice the diesel fumes as bad in that type of  
13 engine?

14 A. Just as bad, yes.

15 Q. Do engines run like one way or the  
16 other? I mean engines reverse; right, they can be  
17 reversed?

18 A. They can be turned, yes.

19 Q. Okay. But can you run an engine  
20 like in this direction, and can an engine back in  
21 another direction?

22 A. I don't understand.

23 Q. Can this engine be run in either  
24 direction?

25 A. Sure, if it's turned, yes. Are you

Truesdel & Rusk



Winston Payne - Direct

1 talking about the way that it's headed?

2 Q. I'm just talking about the way that  
3 this particular engine is operated?

4 A. Oh, yeah, it reversed back and  
5 forth, yeah.

6 Q. So depending upon which way the  
7 engine is run, does it have an affect on the fumes  
8 and which way they go?

9 A. Sure it does.

10 Q. Here's a different L&N engine type  
11 here. Is this a general type of engine that you  
12 also ran during your career?

13 A. Yes, that's a jeeb.

14 Q. I notice there's black smoke here.  
15 Did you ever see black smoke like that coming out of  
16 an engine?

17 A. I sure have, yes.

18 Q. Were they all that bad?

19 A. Not all that bad. That's  
20 definitely a fuel line stopped up or something.

21 Q. In this picture, was the stack  
22 fumes when it ran in the normal direction, was the  
23 stack forward of where you were in the cab, this  
24 stack? In other words, was this engine -- which --  
25 point and show us which engine that --

Truesdel & Rusk

Winston Payne, Direct

1 A. At West Knoxville. This engine  
2 here was always headed this way, north.

3 Q. Is that called long hood forward?

4 A. Yes.

5 Q. Now, were there other engines that  
6 were run short hood forward normally?

7 A. Yes.

8 Q. Is that an example of one?

9 A. Right, jeebs.

10 Q. What about this one?

11 A. Yes.

12 Q. You said you ran to Corbin,  
13 Kentucky. Over how long in your career did you do  
14 that run? Was that a road job?

15 A. Probably eight years.

16 Q. About eight years?

17 A. Yes.

18 Q. Were there any tunnels on the way  
19 to Corbin or back?

20 A. Oh, yes.

21 Q. When you worked inside a tunnel  
22 taking a train, how were the fumes when you would  
23 work through a long tunnel?

24 A. Terrible. If you had -- if you  
25 stopped to have trouble, if you had any trouble.

Truesdel & Rusk

Winston Payne - Direct

1 I've even worked in the tunnel with a wrecker.

2 Q. What does that mean?

3 A. Well, that means we had had a  
4 derailment, and we had a wrecker in there  
5 straightening up, fixing the cars, and you would  
6 have to be in there in the tunnel with them.

7 Q. When that would happen, how long  
8 would you be in the tunnel?

9 A. Well, we would try to rotate in and  
10 out because of the fumes.

11 Q. So were the fumes dense enough that  
12 you could see them?

13 A. It was so dark you couldn't see  
14 them.

15 Q. Dark from what, from the fumes or  
16 from the lighting?

17 A. From no lights. No lights in the  
18 tunnel.

19 Q. Was it hard to breathe when you  
20 were working in a tunnel like that?

21 A. Sure.

22 Q. During anytime that you worked up  
23 until the end of your career, did any of the  
24 locomotives that you regularly worked on have air  
25 conditioning?

Truesdel & Rusk

Winston Payne - Direct

1 A. No, sir.

2 Q. Let me talk about the '60's when  
3 you worked on these engines.

4 A. Okay.

5 Q. Was there ever a day that you  
6 worked inside an engine that you didn't notice  
7 diesel fumes while you were inside the engine cab?

8 A. No.

9 Q. What about the '70's, the same  
10 question. When you worked inside the cab, was there  
11 ever a cab you worked in where you didn't smell  
12 diesel fumes?

13 A. No.

14 Q. The '80's?

15 A. No.

16 Q. The '90's?

17 A. No.

18 Q. Did any railroad company official  
19 ever come inside an engine that you ever worked on  
20 in your forty years and say, Mr. Payne, we're going  
21 to check the air level inside this cab for diesel  
22 fumes?

23 A. No, they did not.

24 Q. During your entire career, did you  
25 ever while you worked out there learn from another

Truesdel & Rusk



Winston Payne - Cross

1 court reporter like this young lady over here and  
2 you answered those questions truthfully, didn't you?

3 A. Yes.

4 Q. I felt you did. So I know a bit  
5 about you, don't I, at least I should?

6 A. Yes, sir.

7 Q. You told me that you enjoyed your  
8 work for L&N and for the Family Lines and for CSX?

9 A. Yes.

10 Q. And you were proud to work for  
11 these railroads?

12 A. Yes.

13 Q. And you worked for the old L&N  
14 Railroad?

15 A. Yes.

16 Q. That was back in the '60's until  
17 they merged with the Family Lines, I think they  
18 called it back then, didn't they?

19 A. Yes.

20 Q. And then CSX took over the Family  
21 Lines and you worked, I believe, according to this  
22 document that we talked about, up to September of  
23 2002?

24 A. Three.

25 Q. Let me show you a letter that we'll

Truesdel & Rusk

Winston Payne - Cross

1 make the next exhibit to your testimony, and maybe  
2 this will just refresh your memory as to when you  
3 did, in fact, retire. I want to be accurate today.

4 A. No, that would be 2002.

5 Q. Okay. Just take a look at it.

6 MR. SHAPIRO: Well, does he need to  
7 now?

8 MR. BAKER: Yes.

9 Q. Is that the letter that you  
10 received announcing your retirement?

11 A. I never received this letter.

12 Q. Okay. But do you agree that you  
13 retired in September of 2002? Does that refresh  
14 your memory?

15 A. Yes.

16 Q. And did you ever smoke cigarettes?

17 A. Yes.

18 Q. You smoked cigarettes for  
19 approximately thirty years, give or take a year or  
20 two, didn't you?

21 Did you smoke cigarettes for  
22 approximately thirty years, give or take a year or  
23 two?

24 A. Twenty-six years.

25 Q. You said you started sometime

Truesdel & Rusk

Winston Payne - Cross

1 before you started working for the railroad.

2 A. 1962.

3 Q. You started working for the  
4 railroad in 1962?

5 A. Yes.

6 Q. And you told me that you smoked  
7 cigarettes until 1988?

8 A. Yes.

9 Q. In your deposition you said 1998,  
10 but that was a mistake on your part, wasn't it?

11 A. Yes.

12 Q. Did you read your deposition that  
13 you gave under oath?

14 A. Yes.

15 Q. Go over it?

16 A. Uh-huh (Affirmative).

17 Q. You told me that you had a family  
18 doctor, Dr. Manning?

19 A. Yes.

20 Q. Dr. Manning had been your family  
21 doctor for how many years?

22 A. About thirty.

23 Q. Did Dr. Manning tell you to not  
24 smoke?

25 A. No.

Truesdel & Rusk

Winston Payne - Cross

1 A. I worked both of them.

2 Q. Well, I didn't understand that to  
3 be the case. So from 1962ish until about 1975,  
4 1976, you worked as a switchman out of the West Knox  
5 yard?

6 A. Yes.

7 Q. And then from 1975 or 1976, for the  
8 next eight years you worked on the road working on  
9 the main line going from Etowah to Corbin or from  
10 Corbin to Etowah basically riding in the cab of a  
11 locomotive or in the caboose?

12 A. Correct.

13 Q. And then you stopped doing that in  
14 about 1983 or 1984, that time period?

15 A. I don't know the dates. I worked  
16 eight years on the road, I know that.

17 Q. So if you started doing that in  
18 1975, 1976, we'd just have to count eight years  
19 forward?

20 A. Correct.

21 Q. And according to my calculations,  
22 I'm not the best in math, that would come to about  
23 1983 or 1984, that time period?

24 A. Yes.

25 Q. So we have that agreement?

Truesdel & Rusk



Winston Payne - Cross

1 A. I'm not going to agree to the exact  
2 dates, no, sir.

3 Q. All right. But generally that time  
4 period; correct?

5 A. Generally, yes.

6 Q. Right. Then when you came back  
7 from the road, being a road guy, you returned to  
8 working out of this West Knox yard?

9 A. Correct. Yes.

10 Q. And the West Knox yard back in the  
11 60's and 70's had about, what did you tell me, seven  
12 tracks?

13 A. Seven lead tracks. We had more  
14 tracks than that, but seven lead tracks.

15 Q. And then later five tracks?

16 A. Yes.

17 Q. So it was kind of an itty-bitty  
18 yard?

19 A. Itty-bittyish, yes.

20 Q. Okay. And that's located over here  
21 close to the University of Tennessee campus?

22 A. Correct, yes.

23 Q. Or kind of on the edge of it?

24 A. Yes.

25 Q. And there out of that yard is that

Truesdel & Rusk

Winston Payne - Cross

1 Q. And you had -- which shift did you  
2 mostly work?

3 A. I was on the extra board at first,  
4 so I worked all of them.

5 Q. Okay. So when you -- the railroad  
6 has a seniority system, doesn't it?

7 A. Yes.

8 Q. And the seniority system is such  
9 that the older a man is, the more time he has with  
10 the railroad, he gets the better jobs?

11 A. Yes.

12 Q. And when you start off, you're kind  
13 of like the low man on the totem pole?

14 A. Yes.

15 Q. And therefore you don't get the  
16 best jobs at the beginning?

17 A. It's considering what you think is  
18 the best jobs.

19 Q. Now, as I understand it, in the '62  
20 to '75 time period, you worked the West Knox yard  
21 job which included potentially industry work --

22 A. Yes..

23 Q. -- where you would take a train and  
24 some cars out to outlying industries and work those  
25 jobs?

Truesdel & Rusk

Winston Payne, - Cross

1 A. Yes.

2 Q. And during that period of time, an  
3 industry job was a more favored job because it was  
4 less walking?

5 A. To some men it was.

6 Q. And therefore, you being the low  
7 man on the totem pole, you worked industries  
8 infrequently?

9 A. No.

10 Q. Okay. So you say frequently?

11 A. I what?

12 Q. You say you worked them frequently?

13 A. I mean what is frequently and what  
14 is infrequently?

15 Q. Well, you tell me. What is the  
16 definition of frequently to you?

17 A. I worked all jobs, all shifts,  
18 industries, lead jobs, passenger trains, so --

19 Q. Okay. Well, let's go to your  
20 deposition again, and I'm going to ask you some  
21 questions about your deposition. Let's go to page  
22 34, starting at line 20. I asked you this question,  
23 "Now, which was the more favored job?" Answer:  
24 Industries." That's true, isn't it?

25 A. By some men, yes.

Truesdel & Rusk

Winston Payne - Cross

1 Q. But did you answer the question,  
2 now, which was the more favored job with the answer  
3 industries? Was that the way you answered the  
4 question? Let me show you --

5 MR. SHAPIRO: Well, you just read  
6 it to him. It's what's there.

7 THE WITNESS: It's what's there.

8 MR. SHAPIRO: Would you like to go  
9 forward from there? Yes, he --

10 Q. Well, my question was, when I asked  
11 you the question, and I'll read this just to make  
12 sure we're on the same page, "Which was the more  
13 favored job?" Answer, your answer was,  
14 "Industries."

15 Would you agree that that was your  
16 answer when I asked you the question on October 2nd,  
17 2008?

18 A. It was, but I would add, by some  
19 people.

20 Q. Okay. So today you add that?

21 A. Yes.

22 Q. You didn't add that back then when  
23 I asked you before?

24 A. No.

25 Q. Now, I asked you the next question,

Truesdel & Rusk



Winston Payne - Cross

1 "So is it fair to say at the beginning in the '62 to  
2 '75 period, you being the low man on the totem pole  
3 that you weren't able to work the industries as  
4 much?" And your answer was, "Correct."

5 Now, which is the truth, what you  
6 told me back on October 2nd, 2008 or what you're  
7 saying today?

8 A. You're talking about the whole time  
9 period between '62 and '75?

10 Q. That's how I asked you the  
11 question.

12 MR. BAKER: Show him the  
13 deposition.

14 MR. SHAPIRO: It's there up to  
15 there, the question and the answer.

16 THE WITNESS: First of all --

17 Q. (BY MR. BAKER) Well, first, since  
18 you've read the deposition, did I accurately state  
19 your testimony?

20 A. Yes.

21 Q. Thank you. Let me ask you the next  
22 question. After asking the question about whether  
23 it was fair to say that from '62 to '75 you being  
24 the low man on the totem pole, you weren't able to  
25 work the industries as much, I asked you at page 35,

Truesdel & Rusk

Winston Payne, Cross

1 line 3, "Did you work them at all?" And your answer  
2 was, "Yes." Then the next question was, "But  
3 infrequently?" And your answer was, "Yes." And  
4 then to make sure I said, question, "Infrequently?"  
5 And your answer was, "Yes." Did I ask you those  
6 questions and did you give me those answers?

7 A. Yes.

8 Q. At the bottom of the page, page 35,  
9 line 24, I asked you the following question, "So  
10 between 1962 and 1975, 1976 infrequently you worked  
11 these industries, the rest of the time you worked  
12 these yards, you worked in the yard?"

13 And the answer was, "Yes." Was  
14 that the question I asked you and was that the  
15 answer you gave?

16 A. Yes.

17 Q. Now, so in the '62 to '75 time  
18 period when industries were worked by whomever,  
19 multiple industries were worked, were they not?

20 A. Yes.

21 Q. You worked Bass and Company, Triple  
22 C Beverage, Dixie Cement, Florida Steel, Rohm and  
23 Haas, Southern Extract, Foreign Domestic,  
24 Institutional Jobbers --

25 A. Yes.

Truesdel & Rusk

Winston Payne - Cross

1 Q. Those were the type of industries  
2 you worked?

3 A. Yes.

4 Q. Did you work every industry  
5 everyday?

6 A. No. Can I say something?

7 Q. I've got another question to ask  
8 you right now. There's not a question on the floor.

9 MR. SHAPIRO: You should just  
10 respond to his questions.

11 THE WITNESS: Okay.

12 Q. And you told me that -- how did you  
13 know which industries to work?

14 A. The yardmaster's instructions.

15 Q. And Mr. Buckner, was he one of the  
16 yard masters back then?

17 A. Yes.

18 Q. L.T. Buckner?

19 A. Yes.

20 Q. Did you see him recently?

21 A. Yes.

22 Q. At the CSX picnic?

23 A. Yes.

24 Q. You've told this jury that you  
25 agree that Witherspoon was closed in 1993; is that

Truesdel & Rusk

Winston Payne - Cross

1 A. I don't know the date 1985, and I'm  
2 not agreeing with the date 1985.

3 Q. Now, when you would go to this  
4 Witherspoon place, you would be outside, would you  
5 not?

6 A. When I was working, yes.

7 Q. You would be outside?

8 A. On the ground, yes.

9 Q. Yes, sir. And you would be there  
10 approximately an hour, about the range of time,  
11 approximately an hour?

12 A. Sometimes.

13 Q. Well, what was it most of the time?

14 A. I never timed them myself. I don't  
15 know.

16 Q. It would seem to you like it was  
17 about an hour?

18 A. Or more.

19 Q. Well, you told me before it was an  
20 hour. Or do I need to go through the deposition  
21 again?

22 Was it an hour or not?

23 A. Whatever I told you.

24 Q. At page -- on page 59, line 17 --  
25 MR. SHAPIRO: He didn't disagree

Truesdel & Rusk



Winston Payne - Cross

1 with you.

2 MR. BAKER: Well, he said whatever  
3 I told him, whatever he told me.

4 THE WITNESS: Whatever I told you  
5 in the deposition.

6 MR. BAKER: Well, I'm going to tell  
7 you what you told me so there won't be any  
8 question about it.

9 Q. It said, "And you would be there  
10 for approximately an hour or so that you told me?"

11 Answer, "Yes."

12 A. Hour or so.

13 Q. Or so, right.

14 A. Okay. Yes. I'll agree to that.

15 Q. And you would be outside and you  
16 would be on the ground?

17 A. I would, yes.

18 Q. And typically you would take five  
19 cars in there, typically?

20 A. No.

21 Q. Typically, how many would you take?

22 A. It varied all the time.

23 Q. Well, typically.

24 A. They could spot five cars

25 underneath the shed, so that's usually what they

Truesdel & Rusk

Winston Payne - Cross

1 take a short break at the request of your  
2 lawyer.

3 THE WITNESS: Okay.

4 (OFF THE RECORD).

5 BY MR. BAKER:

6 Q. Okay. We've had a nice break. Are  
7 you ready to go again, Mr. Payne?

8 A. Yes, I am.

9 Q. Good. Now, inside -- once you get  
10 inside this gate that leads to the Witherspoon  
11 industry, you've told me that you walked.

12 A. Yes.

13 Q. And you walked outside and then you  
14 walked inside of the shed, the open-ended and the  
15 open-sided shed?

16 A. Yes.

17 Q. And was all of your walking next to  
18 the track or within a few feet of the tracks?

19 A. Yes.

20 Q. And the walking area was dirt as  
21 opposed to rocks?

22 A. Yes.

23 Q. It's easier to walk on dirt than it  
24 is rocks, isn't it?

25 A. Easier to walk, yes.

Truesdel & Rusk

Donnie Carringer - Direct

1 the railroad?

2 A. You're required to watch the rear  
3 of your train, yes.

4 Q. Okay. Have you ever been on a  
5 caboose that was -- on a train that was heading down  
6 a grade where all the brakes in the train were  
7 applied?

8 A. Yes.

9 Q. And what happens or what do you see  
10 when all the train brakes are applied on a grade?

11 A. You get dust, smoke, brake dust,  
12 you get it all.

13 Q. Does the brake dust -- how many  
14 brakes are on an individual train car, how many  
15 brake shoes, do you know?

16 A. Well, each car has got -- most of  
17 the cars has got four sets of wheels and each wheel  
18 has got two brakes on it so around 16 brakes  
19 generally on each car.

20 MR. BAKER: Your Honor, we state an  
21 objection about this gentleman testifying  
22 about the composition of any dust or the  
23 location or where it came from. That would  
24 require scientific expert testimony.

25 MR. SHAPIRO: I haven't asked any

Truesdel & Rusk

Donnie Carringer - Direct

1 question, Your Honor.

2 THE COURT: Okay, go ahead.

3 Q. (BY MR. SHAPIRO) So when you were  
4 on the caboose and a long train was heading down a  
5 grade, could you see dust from just one set of train  
6 cars or how much dust would you see?

7 A. See a lot of dust, quite a bit. It  
8 was coming -- they were asbestos brakes, you seen  
9 dust everywhere.

10 Q. Did you ever get any training  
11 during your career from the 70's into your  
12 retirement about any potential asbestos on any  
13 diesel engine?

14 A. I don't recall any, no.

15 Q. Did you ever have training about  
16 cabooses or any other possible asbestos equipment?

17 A. No, sir.

18 Q. Okay.

19 MR. SHAPIRO: Mr. Baker, I have the  
20 interior pictures.

21 MR. BAKER: No objection.

22 MR. SHAPIRO: Can you tell the jury  
23 and maybe turn it a little bit, what does  
24 that picture show?

25 A. That's the inside of an engine, the

Truesdel & Rusk



Donnie Carringer - Direct

1 it.

2 Q. Have you ever seen smoke where it  
3 was actually a black color coming out of the  
4 exhaust?

5 A. I have seen them make a black  
6 cloud, yes.

7 Q. When?

8 A. Well, certain engines just use  
9 more -- just use more diesel or burn more diesel and  
10 make a lot more smoke.

11 MR. BAKER: Can we approach, Your  
12 Honor?

13 THE COURT: Uh-huh.

14 (Bench conference out of hearing of jury.)

15 MR. BAKER: He's going to show that  
16 one that was on fire. You have to --

17 THE COURT: Leave that out for  
18 right now and we'll talk about it.

19 (End of bench conference.)

20 Q. (BY MR. SHAPIRO) Have you ever seen  
21 clouds of black looking smoke coming out of diesel  
22 engines?

23 A. I have.

24 Q. What did you do to try to avoid it?

25 A. You try to step away from it. If

Truesdel & Rusk

Donnie Lynn Carringer - Cross

1 in the same direction that you came.

2 A. Yes.

3 Q. All right.

4 MR. BAKER: May I have a second,  
5 Your Honor?

6 I think I'm through.

7 THE COURT: Yes.

8 Q. (BY MR. BAKER) Now, Mr. Carringer,  
9 you don't have a background in chemistry, do you?

10 A. No.

11 Q. And do you know what forsterite is?  
12 Forsterite?

13 A. No, sir.

14 Q. Okay. And Mr. Payne, were you  
15 friends with him?

16 A. Yes.

17 Q. And you worked with him some.

18 A. Yes.

19 Q. Not all the time.

20 A. No.

21 Q. Because he liked to work third  
22 shift and you ended up on the second shift most of  
23 the time but occasionally you would work together.

24 A. We both liked the first shift, but  
25 at times neither one of us could hold it.

Truesdel & Rusk

Arthur Frank, M.D., Ph.D. - Direct

1 and what was relevant to you?

2 A. Yes. We talked not only about his  
3 lung cancer, but we focused on other issues that we  
4 wanted to explore. For example, we had a separate  
5 cancer from his lung cancer, which was a melanoma,  
6 which was a type of skin cancer that had been on his  
7 scalp and had been successfully treated.

8 He also had a lesion in his thyroid  
9 that was at one point thought to be cancer but  
10 ultimately without any treatment or changes it was  
11 not shown to be a malignancy. I was concerned about  
12 that, because thyroid cancer does have a  
13 relationship to exposure to radioactivity, but he  
14 did not have a thyroid cancer.

15 The cancer in question that was, in  
16 my opinion, related to his work at the railroad was  
17 his lung cancer.

18 Q. Now, slightly out of order here,  
19 but can you tell the jury over how long in your  
20 career did you see patients that may have had an  
21 occupational disease for treatment yourself?

22 A. I've been seeing patients since I  
23 was a medical student in the late 1960's, but I've  
24 been working as an occupational physician roughly  
25 since 1975. I've seen hundreds, if not thousands,

Truesdel & Rusk.

Arthur Frank, M.D, Ph.D. - Direct

1 (Court resumed at 8:57 a.m. on  
2 November 17, 2010)

3 THE COURT: We'll start with that.  
4 Okay. Just stay in here a minute  
5 and do a few of these things.

6 MR. SHAPIRO: Your Honor, at the  
7 end of the day yesterday we left hanging a  
8 few exhibits that had been offered by the  
9 plaintiff and also we had put stickers on  
10 them to get the numbering right and I think  
11 starting with the oldest first we have here  
12 a series of exhibits from the Winston Payne  
13 deposition that I marked as Exhibit 110, is  
14 a group of locomotive pictures. Mr. Baker  
15 had an objection to one I can take up. I  
16 can hold that one out here.

17 THE COURT: Take that one out for  
18 right now.

19 MR. SHAPIRO: So using our original  
20 numbering, which was confusing, so we had  
21 group 110 which is a bunch of pictures and  
22 then we have 114 which is a barrel, we have  
23 115, a site layout, 116, a bunch of aerial  
24 pictures of the Witherspoon area, and then  
25 117, a summary of procedures on Mr. Payne

Truesdel & Rusk



Arthur Frank, M.D., Ph.D. - Direct

1 from that particular deposition to offer.

2 MR. BAKER: They were offered  
3 throughout the deposition. We have no  
4 objection to those.

5 THE COURT: Except --

6 MR. BAKER: Except that one.  
7 What's the number --

8 MR. SHAPIRO: It's under 110 and  
9 what we are describing as the black smoke  
10 locomotive picture.

11 THE COURT: So that hasn't been  
12 officially identified in connection with  
13 this case and the -- so we will leave that  
14 out.

15 And these, do they have numbers on  
16 them?

17 MR. SHAPIRO: Yes, sir, we have now  
18 put numbers on them.

19 THE COURT: Give those to the clerk  
20 and the reporter and we'll see.

21 Now, what's --

22 MR. SHAPIRO: Mrs. Payne --

23 MR. BAKER: I had two exhibits that  
24 I offered into evidence during the course of  
25 Mr. Payne's deposition.

Truesdel & Rusk

Arthur Frank, M.D. Ph.D. - Cross

1 exposed to cigarette smoke as a cancer causing agent  
2 than any other and have been so for decades.

3 Q. Would you agree with me that from a  
4 health standpoint there is nothing at all good about  
5 cigarette smoking?

6 A. Well, that's pretty specific. I  
7 would not want anybody to smoke. There's probably  
8 one or two minor things about smoking that some  
9 people would claim to be good, but I wouldn't want  
10 anybody to smoke. It's a bad habit. I mean, even  
11 yesterday the President got dinged at his health  
12 exam for continuing to be an occasional smoker.

13 Q. You talked a little bit about how  
14 Mr. Payne had been a cigarette smoker. Let me ask  
15 you to assume that there will be evidence in the  
16 case that Mr. Payne smoked for thirty years at a  
17 rate of about one pack of cigarettes per day.

18 A. Yes, sir.

19 Q. That would be what we call thirty  
20 pack years; is that right?

21 A. Yes, sir.

22 Q. And you've certainly had patients  
23 in your practice and in your experience with  
24 cigarette smoking at that level; have you not?

25 A. Yes, sir. Less and more, but

Truesdel & Rusk

Arthur Frank, M.D., Ph.D. - Cross

1 certainly thirty pack years is fairly average.

2 Q. Would you agree that thirty pack  
3 years is a significant cigarette smoking history?

4 A. Absolutely.

5 Q. Would you agree that thirty pack  
6 years is sufficient to cause damage to your lungs,  
7 like the disease emphysema?

8 A. It could, certainly. It doesn't  
9 mean it will, but it certainly could.

10 Q. And would you agree that thirty  
11 pack years is sufficient to cause lung cancer?

12 A. If that would have been Mr. Payne's  
13 only exposure, he, along with other people who have  
14 that amount of exposure, that could have caused his  
15 lung cancer, but those aren't the facts of the case  
16 as I understand them. But, yes, it could cause his  
17 lung cancer.

18 Q. And in isolation, thirty pack years  
19 of cigarette smoking is sufficient, without any  
20 contribution from radiation or from diesel exhaust  
21 or asbestos exposure, is sufficient to cause lung  
22 cancer; is it not?

23 A. You're right. In isolation, for  
24 another individual, if they had only been exposed to  
25 thirty pack years, I would say that smoking was the

Truesdel & Rusk

Arthur Frank, M.D, Ph.D. - Cross

1 cause of their lung cancer.

2 Q. Dr. Frank, you and I have met  
3 before many, many times; have we not?

4 A. For many years now, sir.

5 Q. You've testified for plaintiffs in  
6 many, many cases against my clients.

7 A. I have.

8 Q. And I think, although the numbers  
9 are getting a little scary, you and I have probably  
10 known each other in this setting for at least twenty  
11 years; is that right?

12 A. Oh, I think it's longer than that,  
13 but it's at least twenty years.

14 Q. Let's just keep it at twenty.

15 A. All right. Well, you're much  
16 younger than I am, so.

17 Q. I know that you said on your direct  
18 that this is the first time that you and Mr. Shapiro  
19 had worked together on a case.

20 A. Yes, sir.

21 Q. But you've worked for a wide  
22 variety of plaintiffs firms all across the country  
23 and largely in asbestos claims; have you not?

24 A. Predominantly, yes, sir.

25 Q. And it's fair to say that over the

Truesdel & Rusk



Arthur Frank, M.D., Ph.D. - Cross

1 time that you've been doing this twenty to thirty  
2 years, you've consulted in literally thousands of  
3 cases?

4 A. Yes, sir.

5 Q. And do you still review as many as  
6 three to 400 cases a year for plaintiffs' lawyers?

7 A. Yes, sir, even somewhat more than  
8 that. Unfortunately, it's gotten even busier in the  
9 last few years.

10 Q. Now, you told us on direct that you  
11 had been involved in various universities throughout  
12 your career. You were at the University of  
13 Kentucky, you were at Texas.

14 A. Mount Sinai and here.

15 Q. Mount Sinai and here. Is it fair  
16 to say that you've never been in the private  
17 practice of medicine where you treat folks?

18 A. Well, I haven't been in private  
19 practice. I have treated folks. But I've always  
20 done my medicine through the university that I was  
21 hired to work at.

22 Q. You identified four different  
23 exposures that you think were causative for  
24 Mr. Payne's lung cancer. Those being cigarette  
25 smoke, radiation diesel exhaust and asbestos. And

Truesdel & Rusk.

Arthur Frank, M.D., Ph.D. - Cross:

1 cases of lung cancer were all in people who  
2 developed asbestosis. That's how the first cases  
3 appeared.

4 But over the years, the literature  
5 has clearly shown that there is not a need to have  
6 underlying asbestosis. It's a different cell type.  
7 It's a different biological process. There are many  
8 studies that show that people without underlying  
9 evidence of asbestosis get asbestos-related lung  
10 cancers.

11 I mean, even Dr. Selikoff showed  
12 that in insulators where there was no radiologic  
13 evidence of asbestosis, and we have none here, but  
14 that these were workers who had hugely elevated  
15 levels of asbestos in their lungs and got lung  
16 cancer. And there is no agency, that I'm aware of,  
17 that regulates exposure or comments on it, like  
18 IARC, that requires that. That doesn't mean that  
19 that's not a debate. It's a very small number of  
20 people that hold out and either they're being very  
21 conservative in their opinions or they're simply  
22 trying to cut down on how many patients or  
23 individuals they have to relate to the development  
24 of lung cancer and asbestos exposure.

25 Q. As to all of these various

Truesdel & Rusk

Arthur Frank, M.D., Ph.D. - Cross

1 exposures, again, the radiation, the diesel, the  
2 asbestos or the cigarettes, there's a common thread  
3 that runs through them, and I think you gave us a  
4 little tutorial earlier about the dose response  
5 phenomenon; correct?

6 A. Yes, sir.

7 Q. And by dose response, in my  
8 language at least, are we saying that the more  
9 exposure you have to something the greater your  
10 chances of being injured by that exposure?

11 A. Absolutely.

12 Q. And to flip that around a little  
13 bit, is it also true the less exposure you have to  
14 something, the less likely it is that you'll been  
15 injured by that exposure?

16 A. That would be equally correct.

17 Q. Okay. Getting sunburned is an  
18 example of a dose response; isn't it?

19 A. Yes. The more sunburn, the more  
20 likely you are to get burned and the more likely you  
21 are to get skin cancer.

22 Q. Right. So, if this weather ever  
23 gets better and if you and I are ever able to go  
24 outside, you and I could stand out in the sun for  
25 ten or fifteen minutes and it's unprotected, then

Truesdel & Rusk

Arthur Frank, M.D, Ph.D. - Redirect

1 Mr. Jordan asked you about.

2 A. Yes, sir.

3 Q. Does the literature state whether  
4 lung cancers from radiation, asbestos, diesel and  
5 cigarette smoke can be non-small cell carcinoma, the  
6 type here?

7 A. Absolutely. That can follow from  
8 any one of those exposures.

9 Q. Okay. I have nothing further.  
10 Thank you.

11 MR. JORDAN: Dr. Frank, thanks for  
12 being with us.

13 THE WITNESS: You're more than  
14 welcome.

15 THE COURT: We will take a 15  
16 minute break now and then we'll come back.  
17 (Jury dismissed from courtroom at 10:25 a.m.)

18 MR. JORDAN: For the record, Your  
19 Honor, may we assume that the objections we  
20 made to various parts of Dr. Frank's  
21 testimony have been overruled by the Court?

22 THE COURT: You want me to make a  
23 comment to the jury about those?

24 MR. JORDAN: I would just like to  
25 know whether they are overruled --

Truesdel & Rusk



1 THE COURT: Yes, they were  
2 overruled. Would you prefer me to make a  
3 comment to the jury about it?

4 MR. JORDAN: I guess it depends on  
5 what it would be.

6 THE COURT: To the extent that, you  
7 know, objections to make to opinions  
8 expressed by that witness and it's for the  
9 jury to determine the validity.

10 MR. JORDAN: That would be fine.

11 THE COURT: We'll do that when we  
12 come back.

13 (Off the record at 10:38 a.m.)

14 (On the record at 10:43 a.m.)

15 THE COURT: Okay... So what do we  
16 need to do before the witness testifies?

17 MR. JORDAN: Your Honor, you may  
18 remember we had filed a pretrial motion to  
19 exclude any reference to federal OSHA or  
20 Tennessee OSHA and it would have to do with  
21 the testimony of the gentleman who is about  
22 to take the stand, Dr. Leonard Vance, who is  
23 going to give opinions that CSX violated  
24 federal OSHA. It was our argument that  
25 federal OSHA doesn't apply because

Robert Vance - Direct

1 records that I reviewed, that didn't hold it back  
2 any.

3 But the point is that the Tennessee  
4 Department of Radiological Health periodically went  
5 out and investigated the site, did some sampling to  
6 see what was going on there.

7 Q. And did you talk to Mr. Payne also  
8 whether he worked at the Oak Ridge spur, the CSX  
9 tracks called the Oak Ridge spur?

10 A. I did. He told me that --

11 MR. JORDAN: Your Honor, may we  
12 approach, please?

13 MS. YOUNG: Your Honor, may we  
14 approach?

15 THE COURT: Uh-huh.

16 (Bench conference out of hearing of jurors.)

17 MS. YOUNG: We believe that they  
18 are -- they have -- we believe that they are  
19 going to get into testimony about cesium.  
20 However, this witness has never offered any  
21 opinion whatsoever about cesium. We sent  
22 out discovery requests, we have taken his  
23 deposition and there's been not one word  
24 mentioned about cesium. However --

25 MR. SHAPIRO: I won't ask him about

Truesdel & Rusk

Robert Vance - Direct

1 cesium, I'll just move on.

2 MS. YOUNG: Then there's no point  
3 in --

4 MR. SHAPIRO: He worked over there  
5 so it ties in with another witness. I'm  
6 just not going to ask him about cesium.

7 MS. YOUNG: If he -- Your Honor, if  
8 the questioning at all goes to any alleged  
9 radiation exposure at the Y-12 tracks, he  
10 has no expert testimony about any radiation  
11 exposure whether it's cesium or anything  
12 else and that should be excluded altogether  
13 from Mr. Vance's testimony.

14 MR. SHAPIRO: I'm not going to  
15 offer it.

16 THE COURT: Okay.

17 (End of bench conference.)

18 BY MR. SHAPIRO:

19 Q. You mentioned Mr. Payne worked over  
20 at the Oak Ridge Y12 area. Was that about a year?

21 A. That's correct.

22 Q. And then did he work a longer  
23 period of time over at the Witherspoon Scrapyard?

24 A. He did. He worked --

25 Q. I want you to focus on the

Truesdel & Rusk

Robert Vance, Cross

1. A. Yes, sir.

2. Q. And I think I was asking you about  
3. those drums. I think I asked you the question that  
4. there wasn't any evidence that there was any  
5. plutonium in those drums.

6. Do you remember that?

7. A. I recall that.

8. Q. Okay. Now, you don't have any  
9. evidence that plutonium was ever hauled into the  
10. Witherspoon facility by CSX, do you?

11. A. No. I've seen evidence that it's  
12. there but not that CSX hauled it in.

13. Q. Do you know where on the  
14. Witherspoon site there was any plutonium?

15. A. Well, I know that after the cleanup  
16. was done that it showed up in a water sampling.  
17. Prior to that time, I don't because the evidence  
18. that I saw prior to that related to its presence as  
19. a contaminant on metal, and then it showed up in a  
20. soil sample prior to the cleanup back, as I recall,  
21. in 1987. Then 20 years later it showed up in the  
22. water.

23. Q. Where was it physically located in  
24. the soil?

25. A. I don't recall.

Truesdel & Rusk



Robert Vance - Cross

1 Q. You say it was found in the water.  
2 Are you talking about groundwater?

3 A. Yes.

4 Q. Mr. Payne wouldn't have had  
5 anything to do with the groundwater out there, would  
6 he?

7 A. That's correct.

8 Q. And if we don't know where it was  
9 found in the soil, we don't know if he had anything  
10 to do with the plutonium that's in the soil, do we?

11 A. That's a true statement.

12 Q. So at the end of the day, we don't  
13 have any evidence that says that Mr. Payne was  
14 exposed to plutonium at Witherspoon, do we?

15 A. No. What we have is evidence that  
16 it was there.

17 Q. Now, in all the materials that the  
18 attorney sent you, did you find that the Tennessee  
19 Department of Radiological Health had been out to  
20 Witherspoon a bunch?

21 A. Yes.

22 Q. And they had a long and pretty  
23 intense relationship with the Witherspoon operation,  
24 didn't they?

25 A. They did.

Truesdel & Rusk

Robert Vance - Cross

1 any locomotive that Mr. Payne was on? Do you have  
2 any written --

3 A. I don't have any evidence that  
4 there are FRA levels. I don't believe that the  
5 there are FRA levels for diesel exhaust.

6 Q. Okay.

7 A. And I don't believe that the FRA  
8 has promulgated a regulation incorporating the OSHA  
9 permissible exposure limits into the FRA  
10 regulations.

11 Q. Okay.

12 A. What I have seen is just memoranda  
13 talking about that issue.

14 Q. FRA has never mandated a zero  
15 emission level in locomotive gas, has it?

16 A. No.

17 Q. Now, Mr. Payne said to you that he  
18 would smell diesel fumes in the cab.

19 Is it your belief, Dr. Vance, that  
20 anytime a crew member smells diesel exhaust that  
21 that means something is wrong and that means that  
22 regulation has been violated?

23 A. No.

24 Q. Wouldn't you agree that, as a  
25 practical matter, the way railroads are run, that

Truesdel & Rusk

Robert Vance Cross

1 A. I haven't seen such evidence.

2 Q. So any exposure to asbestos  
3 products he might have had would have been what you  
4 might call a bystander type of exposure. He was  
5 just around something.

6 A. He was in a workplace where it was  
7 physically present.

8 Q. Okay. Now, if there is a pipe that  
9 has some wrapping on it and there's -- let's say  
10 I've got a pipe on this desk right here that's got  
11 some wrapping on it.

12 From where you are sitting in the  
13 witness stand, can you tell whether or not that  
14 wrapping is asbestos or not?

15 A. No.

16 Q. If I got the pipe and I brought it  
17 up here and put it on Mr. Rusk's desk, could you, by  
18 looking at it, tell whether it had asbestos on it or  
19 not?

20 A. I could probably make a reasonable  
21 estimate based upon experience if I had a clear cut  
22 view of it, but I wouldn't be able to say  
23 definitively.

24 Q. Okay. And you have a Ph.D.

25 A. Well, that's true, but I don't have

Truesdel & Rusk

Robert Vance - Cross

1 microscope eyes.

2 Q. Well, you kind of need microscope  
3 eyes to tell if something is asbestos or not, don't  
4 you?

5 A. You do, and it's a combination of  
6 experience and a close, physical examination under a  
7 microscope.

8 Q. You said that one of the things  
9 that you relied on for evidence that Mr. Payne had  
10 had asbestos exposure was the testimony of a  
11 gentleman by the name of Mr. Terry Rhodes.

12 Do you remember reading that  
13 deposition?

14 A. Yes, sir.

15 Q. Do you know Mr. Rhodes?

16 A. I haven't met him. I've watched  
17 the CD of his testimony, but I haven't ever actually  
18 physically met him or talked to him.

19 Q. Now, Mr. Payne, of course, worked  
20 for CSX and Mr. Payne's predecessor company, didn't  
21 he?

22 A. Yes.

23 Q. Mr. Rhodes work for Conrail, didn't  
24 he?

25 A. Yes, and then its successor

Truesdel & Rusk



Robert Vance Cross

1 corporation, Norfolk Southern.

2 The reason why I mention it, in  
3 part, is that Mr. Rhodes talked about the kind of  
4 locomotives that he worked on. One of the documents  
5 that I looked at was the kind of locomotives that  
6 CSX had, and they overlapped.

7 Q. And Mr. Payne was a trainman, a  
8 switchman, a trainman.

9 A. That's true.

10 Q. And Mr. Rhodes was a pipefitter,  
11 wasn't he?

12 A. That's correct.

13 Q. He didn't ride on trains. He  
14 didn't deliver freight. He was in maintenance,  
15 maintained the trains.

16 A. That's true.

17 Q. So they didn't do the same things,  
18 did they?

19 A. That's true.

20 Q. Now, did Mr. Rhodes have microscope  
21 eyes?

22 A. No.

23 Q. Let's go back to that pipe thing.

24 Let's say that this is a pipe. It's sitting right  
25 there, and let's say that this time it's got

Truesdel & Rusk

Robert Vance - Cross

1 asbestos insulation on it.

2 A. Okay.

3 Q. It's just sitting there.

4 Is Dr. Vance getting asbestos  
5 exposure sitting in the witness stand from this pipe  
6 sitting right here with asbestos on it?

7 A. Not unless the asbestos is friable,  
8 frayed, damaged in some way, and there's an air  
9 current that's coming toward me.

10 In order for asbestos to injure a  
11 person, the person has to breathe the fibers into  
12 the lung.

13 Q. Well, they've got to be released  
14 from the pipe first, don't they?

15 A. Yes.

16 Q. Okay. So when you say friable,  
17 that's a scientific word that basically means that  
18 you can grab it in your hands and crush it and some  
19 of the --

20 A. It's capable of crumbling to a  
21 powder in your hands by crushing it. That's the  
22 definition of it.

23 Q. But generally speaking, if you  
24 don't mess with it, it's not going to give of any  
25 powder, is it?

Truesdel & Rusk

Ross Kerns, M.D. - Cross

1 things, true?

2 A. He completes this form.

3 Q. These are his --

4 A. Or his wife or family, yes.

5 Q. Okay. And it says past medical  
6 illnesses, and under pulmonary -- obviously, that  
7 would be something that you would be concerned  
8 about.

9 A. Correct.

10 Q. What did he check there?

11 A. He checked pneumonia and emphysema.

12 Q. So he said to you that he had, in  
13 the past, pneumonia, true?

14 A. Yes.

15 Q. And he told you that he had  
16 emphysema, correct?

17 A. Yes.

18 Q. And then since he was there for  
19 cancer and we've heard again and again and again how  
20 bad smoking is for you, for any form of cancer  
21 apparently, you asked him questions about smoke, did  
22 you not, smoking?

23 A. Correct, yes.

24 Q. And he put down pack per day, one.

25 A. Yes, he did, for 30 years.

Truesdel & Rusk

Ross Kerns, M.D. - Cross

1 Q. For 30 years.

2 MR. BAKER: I would like to make  
3 this the next exhibit to the deposition --  
4 to this trial as Defendant 502.

5 (Exhibit 502 received).

6 MR. BAKER: May I have that passed  
7 to the jury?

8 THE COURT: Sure.

9 MR. BAKER: Well, maybe the quick  
10 thing to do would be to put it up on the  
11 screen so the jury will not be distracted.

12 Q. (BY MR. BAKER) Up on the top it  
13 says pneumonia, emphysema, and if you can just pull  
14 it up a little bit, pack per day, one, years, 30.

15 A. Yes.

16 Q. Thank you. You may take that down  
17 now.

18 Doctor, you've had extensive  
19 experience with lung cancer in your practice.

20 A. I think that's appropriate, yes.

21 Q. Is it a major part of your  
22 practice?

23 A. Yes, unfortunately it is, yes.

24 Q. We've heard all of these  
25 statistics.

Truesdel & Rusk



Ross Kerns, M.D. - Cross

1                   Would you not agree that cigarette  
2 smoking is the number one cause of lung cancer in  
3 this country?

4                   A.       I think that's without question.

5                   Q.       It's been so for a long time,  
6 hasn't it?

7                   A.       Yes.

8                   Q.       Would you agree that, from a health  
9 standpoint, there's nothing at all good about  
10 cigarette smoking?

11                  A.       I would agree with that.

12                  Q.       And you were talking about -- when  
13 I took your deposition before, you said greater than  
14 90 percent of lung cancer would be directly related  
15 to cigarette smoke abuse.

16                   You did some more research and  
17 found that number is like 88 percent.

18                  A.       I think that's very close. No  
19 question. It's a lot.

20                  Q.       I've got a document from the  
21 National Cancer Institute that says 90 percent, but  
22 maybe they round it off.

23                  A.       This was this year.

24                  Q.       This year, okay.

25                  A.       Projections.

Truesdel & Rus

Ross Kerns, M.D. - Cross

1 Q. Okay. We've talked about pack  
2 years of smoking, and 30 years of smoking means 30  
3 pack years of smoking.

4 A. Correct.

5 Q. All right. And that's a  
6 significant history of cigarette smoking, isn't it?

7 A. Yes.

8 Q. Sufficient to cause lung damage  
9 like emphysema?

10 A. I think so.

11 Q. Sufficient to cause lung cancer?

12 A. Certainly an increased risk of lung  
13 cancer. No question.

14 Q. And it's sufficient to cause lung  
15 cancer without any contribution from radiation or  
16 diesel or asbestos exposure, correct?

17 A. Yes.

18 Q. There's no question about that.

19 Now, you knew that he had a long  
20 history of emphysema, of lung disease, correct?

21 A. Yes.

22 Q. And emphysema involves the absolute  
23 destruction and eating up of the air sacs that are  
24 used to exchange gas and oxygen, true?

25 A. Yes, that's true.

Truesdel & Rusk

Ross Kerns, M.D. - Cross

1 Q. It's irreversible once it happens.

2 A. Yes, that's the key word, I think.

3 Q. It's progressive once it starts,  
4 correct?

5 A. Yes.

6 Q. And you have seen all these CT  
7 scans, which are kind of x-ray type of devices, that  
8 show that he had extensive emphysema.

9 A. He had prominent blebs, some have  
10 more than others, where you can see the swollen air  
11 sacs and damage, yes.

12 Q. Okay. And within a reasonable  
13 degree of -- well, strike that.

14 The number one cause of emphysema  
15 in this country is cigarette smoke.

16 A. Yes.

17 Q. And within a reasonable degree of  
18 medical certainty, his 30 years of cigarette smoking  
19 at one pack a day most likely caused his emphysema;  
20 would you not agree with that?

21 A. I think that's true, yes.

22 Q. On Page 2 of your November 1st,  
23 2005, report, you say -- you give him the diagnosis  
24 also of COPD.

25 A. Right, which emphysema would be a

Truesdel & Rusk

Ross Kerns, M.D. - Cross

1 part of that, yes.

2 Q. Chronic obstructive pulmonary  
3 disease.

4 A. Right.

5 Q. Chronic means every year. I mean,  
6 it's there. That's what chronic means.

7 A. Correct. It's ongoing. It's not  
8 going away, yes.

9 Q. All right. You knew that he had  
10 also suffered from chronic bronchitis, true?

11 A. Which is another component of COPD.

12 Q. So you've got emphysema and you've  
13 got chronic bronchitis.

14 Tell the jury what chronic  
15 bronchitis is.

16 A. Well, that's a purulent cough,  
17 irritation from the bronchial tubes, that results in  
18 a chronic cough, shortness of breath, generally  
19 productive type sputum, thick.

20 Q. Bronchial tubes -- let's do a  
21 little anatomy here.

22 You have your trachea, and that  
23 leads down to the bronchial tubes where the air goes  
24 and goes down and feeds these little air sacs, and  
25 then the gas is expelled through the lungs

Truesdel & Rusk



Ross Kerns, M.D. - Cross

1 basically.

2 A. I think that's -- yes.

3 Q. And this chronic bronchitis affects  
4 those bronchial tubes, especially the large ones,  
5 true?

6 A. Yes, small and large.

7 Q. Small and large, but the large ones  
8 as well, true?

9 A. Yes.

10 Q. Exactly where this cancer was  
11 located, correct?

12 A. I guess that's true, yes, in the  
13 bronchus.

14 Q. I just used your terminology, the  
15 main bronchial tubes.

16 A. Yes.

17 Q. And within a reasonable degree of  
18 medical certainty, his smoking caused his chronic  
19 bronchitis; would you not agree?

20 A. Yes.

21 Q. And the fact of the matter is that  
22 when you saw him in November of 2005, he continued  
23 to suffer from emphysema and he continued to suffer  
24 from chronic bronchitis up to the time that his lung  
25 cancer was diagnosed, true?

Truesdel & Rusk

Ross Kerns, M.D. - Cross

1 A. Yes..

2 Q. And that would suggest to you that  
3 the ongoing destruction of his lungs, more likely  
4 than not, was due to cigarette smoke.

5 A. I think that's true.

6 Q. All right.

7 A. Yes. You know, we have medicine to  
8 try to treat symptoms, and patient's function. He  
9 wasn't in a wheelchair and carrying an oxygen tank.

10 Q. Of course he was not.

11 A. He was walking and functional with  
12 his lung disease.

13 Q. But he had these forms of lung  
14 disease --

15 A. Correct.

16 Q. -- when he walked into your office  
17 on November the 1st, 2005.

18 A. Correct, yes, sir.

19 Q. Now, there are different types of  
20 cells, true?

21 A. Yes.

22 Q. Different types of what we call  
23 histology, trying to figure out what type of cell  
24 types are involved in the lung cancer.

25 A. Correct.

Truesdel & Rusk

Ross Kerns, M.D. - Cross

1 Q. Give the jury just a little biology  
2 lecture on cells.

3 What do you mean by cells?

4 A. Well, we have different cell types  
5 that compose the bronchus. The lining cells are  
6 more of an epithelial cell.

7 I don't know if I should get into  
8 too much.

9 Q. Don't get too --

10 A. But that's a squamous cell. That  
11 is a flat cell. It's distinguishable by the  
12 pathologist. I'm not acting like I'm a pathologist,  
13 by the way. I'm just trying to make you see it the  
14 way the medical oncologist sees it.

15 We have another cell called an  
16 adenocarcinoma in the lung. That, again, is a cell  
17 unique to many glands in the body, the pancreas,  
18 even the colon. It makes up organs, part of the  
19 bronchus and the lung.

20 Q. And there are several other types.

21 A. Yes.

22 Q. It's important for you, in making a  
23 judgment about performing chemotherapy, to have some  
24 idea about the type of cell, right?

25 A. Correct, and we actually make it

Truesdel & Rusk

Ross Kerns, M.D. - Cross

1 simpler than that, the pathologists and medical  
2 oncologists through the years, because clinically  
3 what's important is how do we treat these folks,  
4 what is their best option.

5 We basically make it very simple.  
6 You either have a small cell type, which used to be  
7 called oat cells just by the appearance, and that's  
8 about 20 percent of lung cancers now. It's notable  
9 in that it is not a surgical treatment. Those cells  
10 tend to move very rapidly throughout the body.  
11 Chemotherapy and radiation are generally the course  
12 of treatment, except for extraordinary cases where  
13 we are extremely fortunate and find a nodule, and  
14 that's why we do it.

15 The other big group that I  
16 mentioned is just the non-small cell cancer, and  
17 those are the types that we have to stage and  
18 evaluate as to whether surgery is an option for cure  
19 versus what we call systemic therapy, which is  
20 treating the body with chemotherapy and/or  
21 radiation.

22 It's just a tool that the  
23 pathologist and the pulmonology doctor give to the  
24 medical doctors and the surgeons to help guide their  
25 care.

Truesdel & Rusk



Ross Kerns, M.D. - Cross

1 All lung cancer is bad. People try  
2 to distinguish fast types and slow types. There are  
3 slower type cancers that are more well behaved,  
4 there's no question, but they are all malignant and  
5 potentially fatal.

6 Q. The type of cell type involved in  
7 this case was a squamous cell.

8 A. That was the pathologist's  
9 determination, and they will make that call when  
10 they are certain, based on the histologic  
11 appearance, meaning how it looks under the  
12 microscope, and we go beyond that now.

13 Q. Subtypes.

14 A. There's special stains in our  
15 ability to type that tissue, but the pathologist  
16 called it a squamous cancer, yes.

17 Q. And that's, s-q-u-a-m-o-u-s,  
18 squamous cell.

19 Squamous cell type of lung cancer  
20 is the most related to cigarette smoke when compared  
21 to all other types of lung cancer, correct? That's  
22 what you told me last time.

23 A. Well, I think that's true, but all  
24 lung cancer is related to smoking.

25 Q. But in terms of squamous cell, it's

Truesdel & Rusk

Ross Kerns, M.D. - Cross

1 regarded as a fact that it is the most related to  
2 cigarette smoke.

3 That's what you told me, before,  
4 correct?

5 A. Correct.

6 Q. And you'll agree with that today?

7 A. I'll agree with that, yes.

8 Q. And 98 percent of squamous cell  
9 lung cancer is associated with smoking, and it's  
10 also known as smoker's cancer.

11 A. Well, again, as I stated, all lung  
12 cancer is, you know, associated with smoking. The  
13 squamous cell type by a few percentage -- and these  
14 breakdowns change. You know, ten years ago we had  
15 more small cell cancers than we do now. We  
16 originally had more squamous cancers than we do now,  
17 but yes. We are getting into a few percentage  
18 points here.

19 Q. 98 percent --

20 A. But a high percentage, yes.

21 Q. Well, 98 percent is a pretty high,  
22 isn't it?

23 A. That's high, and I think that  
24 number may be a little high, but I won't debate that  
25 with you.

Truesdel & Rusk

Ross Kerns, M.D. - Cross

1 been done by the railroad through the years?

2 He didn't give you any of that  
3 either, did he?

4 A. No.

5 Q. Now, can we agree that this  
6 gentleman was never diagnosed as suffering from the  
7 disease of asbestosis.

8 A. Yes.

9 Q. That's true, isn't it?

10 A. That's true.

11 Q. He did not have asbestosis, did he?

12 A. He did not have evidence of  
13 asbestosis, no, sir.

14 Q. And asbestosis is something that is  
15 caused by inhaling asbestos fiber into the lungs, is  
16 it not?

17 A. Yes.

18 Q. And that has an adverse effect on  
19 the tissue of the lungs.

20 A. It causes an inflammatory response,  
21 yes.

22 Q. He didn't have that.

23 A. He didn't have evidence of it on  
24 his x-rays.

25 Q. All right. And he didn't have

Truesdel & Rusk

Ross Kerns, M.D. - Cross

1 anything they call pleural plaques, did he?

2 A. No, sir.

3 Q. And that's a marker for exposure to  
4 asbestos, pleural plaque.

5 A. Yes.

6 Q. And it's a marker suggesting  
7 exposure to low amounts of asbestos, true?

8 A. I think so, yes.

9 Q. And he did not even have any  
10 pleural plaques, did he?

11 A. He didn't have evidence of that.

12 Q. Therefore, if he was exposed, he  
13 was not exposed enough to develop the disease of  
14 asbestosis or even to develop these pleural plaques,  
15 true?

16 A. True.

17 Q. You were asked about -- you were  
18 asked about something dealing with if you're exposed  
19 to asbestos and you smoke, that's a bad thing.

20 Do you remember being asked that  
21 question?

22 A. Yes.

23 Q. What happened was that this  
24 gentleman gave you an article by a fellow by the  
25 name of Hammond, did he not?

Truesdel & Rusk



Ross Kerns, M.D. - Cross

1 A. Correct, I read that article.

2 Q. Back in the "1960's, true? Do you  
3 remember that?

4 A. Yes.

5 Q. And that's the basis of that  
6 testimony of yours, that article of Hammond,  
7 basically?

8 A. I don't think that's the sole  
9 basis. I think the --

10 Q. Okay. Well, let's talk about it.  
11 The Hammond article had to do with  
12 insulators. They were studying insulators, true?

13 A. Correct, the best I recall, yes.

14 Q. And insulators are asbestos  
15 workers, are they not?

16 A. Correct.

17 Q. And asbestos workers, insulators,  
18 are people who work with asbestos, true, on a day-in  
19 and day-out basis?

20 A. Yes.

21 Q. They are the ones that mix the  
22 asbestos up. They are the ones that actually apply  
23 the asbestos, or at least back in the old days  
24 applied the asbestos to the pipes and to the boilers  
25 and to all of that sort of stuff, right?

Truesdel & Rusk

Ross Kerns, M.D. - Cross

1 A. Okay. Yes.

2 Q. And they would be exposed to  
3 asbestos on a day-in and day-out basis, would they  
4 not?

5 A. Yes.

6 Q. And that Hammond study studied  
7 those people, people belonging to the union up in  
8 New York, right?

9 A. I believe that's true.

10 Q. Mr. Payne was not an insulator, was  
11 he?

12 A. Not that I'm aware of, no.

13 Q. He was not an asbestos worker.

14 MR. BAKER: Let's put this up.

15 Q. (BY MR. BAKER) He was not an  
16 insulator. He was not an asbestos worker. He did  
17 not work with asbestos, did he, Mr. Payne?

18 A. Not that I'm aware of, no, sir.

19 Q. Right.

20 And in that study, the people who  
21 were studied had asbestosis, true?

22 A. Virtually all of them, as I recall.

23 Q. All right. And that's the disease  
24 of the lung that we've been talking about,  
25 asbestosis.

Truesdel & Rusk

Ross Kerns, M.D. - Cross

1 A. Yes.

2 Q. Mr. Payne did not have asbestosis,  
3 did he? He did not have --

4 A. No.

5 Q. -- asbestosis.

6 He did not even have pleural  
7 plaques, did he?

8 A. No.

9 Q. We've agreed about that.

10 You used the word -- I don't know  
11 if you used the word or not, synergy.

12 Is that the word you used?

13 A. That's a word, yes, that's been  
14 used with asbestos and smokers.

15 Q. So can we agree that this Hammond  
16 study, in reality, was a study of asbestosis and  
17 cigarette smoking, true?

18 A. That sounds true, yes.

19 Q. It was not a study of asbestos  
20 exposure and cigarette smoking, true?

21 A. Yes.

22 MR. BAKER: You can take that down.

23 Q. (BY MR. BAKER) Now, you were  
24 questioned about radiation.

25 We've agreed that you were not able

Truesdel & Rusk

Ross Kerns, M.D. - Cross

1 to quantify the amount of exposure he had to  
2 radiation, true?

3 A. True.

4 Q. Right?

5 Just that he was.

6 A. Yes.

7 Q. All right. And have you ever heard  
8 of the Tennessee Department of Radiological Health?

9 A. I think from you, as a matter of  
10 fact.

11 Q. It's nice to be of assistance.

12 A. Yes.

13 Q. Did I tell you, and did you do any  
14 research on your own, about those folks, the people  
15 who belong to the Tennessee Department of  
16 Radiological Health?

17 A. I think you told me during the  
18 deposition.

19 Q. Their job is to protect the  
20 citizens of this state, right? That's their job.

21 A. Yes.

22 Q. And would you agree that all people  
23 are exposed to radiation in East Tennessee?

24 A. I think everywhere, yes.

25 Q. It's a natural and normal part of

Truesdel & Rusk



Ross Kerns, M.D. - Cross

1 everyday life, is it not?

2 A. Yes.

3 Q. For radiation on the job to have  
4 injured Mr. Payne, for it to have contributed to his  
5 lung cancer, he would have had to have a significant  
6 exposure to radiation, would he not? That's kind of  
7 obvious.

8 A. Yes.

9 Q. True?

10 And if he did not have that  
11 exposure to radiation, you could not suggest to this  
12 jury that it did potentially contribute to his lung  
13 cancer if he didn't have that exposure, obviously,  
14 true?

15 A. Yes.

16 Q. It's simple. No exposure equals no  
17 causation. Common sense.

18 A. Yes, I think so, the way you  
19 presented that, yes.

20 Q. Now, health physicists, those are  
21 people who study radiation, are they not?

22 A. Correct.

23 Q. And presumably those people are  
24 people who study radiation and are -- they have a  
25 society.

Truesdel & Rusk

Ross Kerns, M.D. - Cross

1           The people who belong to that  
2           society would kind of know what they are talking  
3           about; wouldn't you agree?

4           MR. SHAPIRO: Object to the form of  
5           that question. I don't understand it.

6           Q.           (BY MR. BAKER) Let me ask it again  
7           since he objected.

8           People who belong to the -- people  
9           who are health physicists, they have a society, a  
10          collection of people who get together who are health  
11          physicists.

12          They obviously have some expertise  
13          in the area of radiation; wouldn't you agree?

14          A.           Yes.

15          Q.           All right. Have you ever heard of  
16          the Health Physics Society?

17          A.           Again, I think you've mentioned it.

18          Q.           But you haven't yourself?

19          A.           Not particularly, no.

20          Q.           Okay. We were talking about  
21          squamous cell versus -- we were talking about  
22          squamous cell, and you mentioned something called  
23          small cell.

24          A.           Yes.

25          Q.           Small cell is another type of lung

Truesdel & Rusk

Ross Kerns, M.D. - Cross

1 cancer.

2 A. Correct.

3 Q. And have you read the literature  
4 that says that radiation-induced cancers appear more  
5 likely to be of the small cell subtype?

6 A. I think there's been some articles  
7 to support that.

8 Q. And he did not have the small cell  
9 subtype, did he?

10 A. He did not.

11 Q. He had the squamous cell subtype,  
12 didn't he?

13 A. Correct.

14 Q. 98 percent of which are related to  
15 cigarette smoke, true?

16 A. True.

17 Q. Also known as smoker's cancer,  
18 true?

19 A. You know, you've said that. I'm  
20 sure it's in the literature somewhere that that's  
21 true, yes.

22 MR. BAKER: Thank you, Doctor. Get  
23 back to work.

24 THE WITNESS: I appreciate that.

25 THE COURT: Well, not quite. We

Truesdel & Rusk

William Bullock - Direct

1 Q. And one of the reasons it became a  
2 Superfund site, among others, was radioactive  
3 contamination on the property?

4 A. Well, there were -- there were  
5 different sites that had different sources of  
6 contamination, and I'm not sure if -- if the spur  
7 was brought under that Superfund umbrella because it  
8 had the barrels of waste soil or contaminated soil  
9 from another Witherspoon site located there or if it  
10 was something on that, as you mentioned, the Candora  
11 triangle area, itself.

12 Q. Well, the Candora triangle, so the  
13 jury understands, that's the area where the railroad  
14 tracks came in the corner of the scrapyard; right?

15 A. Yes, sir.

16 Q. And you're -- you're just not  
17 positive who owns that triangle?

18 A. I -- I thought Witherspoon owned  
19 it.

20 Q. Well, in any case, let me move you  
21 forward from here. Okay?

22 A. Okay.

23 Q. I want to show you -- actually  
24 you've already pointed it out. We put aside Exhibit  
25 51, right there. Is that it, or have I got the

Truesdel & Rusk



William Bullock - Direct

1 says, "Beginning in the '63 time frame, the  
2 contractor Witherspoon and AEC initiated a series of  
3 contracts and contract extensions for prospective  
4 companies to come into the site," that's the Oak  
5 Ridge site, "and take ownership of the scrap metal."  
6 That was outlined there; right?

7 A. Yes, sir.

8 Q. "In '63 or thereabout a  
9 solicitation was issued and awarded to Witherspoon.  
10 It's numbered 717, then modified to 719, then  
11 modified to 749."

12 A. Right.

13 Q. And it says, "Supplemented --  
14 Supplement No. 7 added scrap metal from a portion of  
15 the White Wing Yard and some additional scrap from a  
16 different scrapyard. The scrap metal was advertised  
17 as potentially contaminated with plutonium.

18 MS. YOUNG: Your Honor, I have an  
19 objection on the grounds previously stated.

20 THE COURT: All right.

21 Q. (BY MR. SHAPIRO) The agent was  
22 responsible for monitoring and allowing release of  
23 the scrap falling within the range of permissible  
24 contamination levels." Is that what that said?

25 A. Yes, sir.

Truesdel & Rusk

William Bullock - Direct

1 Q. Are you familiar at all with the  
2 physical agent or the substance known as plutonium?

3 A. Yes, I know it's a naturally  
4 occurring min -- mineral.

5 Q. And have you been familiar with  
6 there's at least one book calling it the world's  
7 most dangerous element?

8 A. No, sir, I'm not familiar with that  
9 book.

10 Q. Okay. It says also in the memo  
11 that, "The contract 749 was extended on several  
12 occasions through September of 1970 and then  
13 Witherspoon received a contract from us including a  
14 sale in June 1972, numbered 2100." Do you see that?

15 A. Yes, sir.

16 Q. So, there were sales up until at  
17 least '72 it indicates here; right?

18 A. Yes, sir.

19 Q. Okay. I've got to figure a way to  
20 do this. Okay. The total amount of advertised  
21 contaminated metal received by Witherspoon between  
22 '63 and '72 was in excess of 4,000 gross tons;  
23 correct?

24 A. Yes.

25 Q. And it said that they -- they

Truesdel & Rusk

William Bullock - Direct

1 attached a memo that said the purchaser, and I'm  
2 assuming this would be any purchaser of their scrap,  
3 including Witherspoon, should emphatically be made  
4 aware of the fact that the material he is  
5 contracting to handle does contain a plutonium  
6 potential and we cannot guarantee a specific level  
7 below which all the material will read. Is that  
8 true?

9 MS. YOUNG: Same objection as  
10 previously made.

11 THE COURT: All right.

12 A. Is that on this same letter or an  
13 attached letter?

14 Q. (BY MR. SHAPIRO) I think it's on an  
15 attachment dated 1969.

16 A. (Perusing documents.)

17 Q. I'm sorry, I might not have had  
18 that attachment. We -- okay. It was produced but  
19 -- okay, sorry.

20 I want to ask you some questions,  
21 here. Well, I jumped the gun. I've got to show you  
22 something else. Hold on one second.

23 I want to ask you about a few other  
24 reports here. Okay. And I showed you these  
25 earlier. And can you look at Exhibits 14 and 15?

Truesdel & Rusk

Stephen Mantooth - Direct

1 Q. Is plutonium a naturally occurring  
2 radionuclide that would normally be found in the  
3 ground?

4 A. No, sir.

5 Q. Why not?

6 A. Plutonium is made through the  
7 process of a nuclear reaction, and that's the only  
8 way you can obtain plutonium with the exception --  
9 it can also be made in an accelerator, but it is not  
10 found naturally, through natural causes.

11 Q. Is plutonium a highly dangerous  
12 radioisotope?

13 A. When taken in the body, yes, sir.

14 Q. Is inhalation one of the known  
15 health hazards that plutonium can cause?

16 A. Yes, among others. It's the  
17 primary hazard from plutonium, actually.

18 Q. As a health physicist do we know  
19 exactly how much plutonium needs to be inhaled  
20 before a person can have injury or death or develop  
21 cancer?

22 A. As far as I know, there's been no  
23 safe level for plutonium intake.

24 Q. What about enriched uranium, is  
25 enriched uranium a dangerous radioisotope?

Truesdel & Rusk



Stephen Mantooth - Direct

1 through the 70's, the 1980's, and this period from  
2 like '91 or '90, '91 through 2007.

3 Now, in '90 or '91 was there  
4 something that took place at the Witherspoon  
5 Scrapyard that was significant as far as regulation?

6 A. Well, yes, it came part of the  
7 Superfund.

8 Q. Okay. And did you review a number  
9 of reports and documents in that time frame once it  
10 was under scrutiny to become regulated?

11 A. From '91 forward.

12 Q. Tell the jury what if anything in  
13 these records of surveys and inspections that you  
14 found was relevant as far as whether there was  
15 radiation contamination at that site?

16 A. There was actually three reports.  
17 The key one was done by the SAIC company. It was  
18 done in 2007, and this is long after the metal has  
19 been taken out, there's been remediation of the soil  
20 and everything else, but still they found detectable  
21 levels of uranium and plutonium on the site. It was  
22 a health hazard study, I believe.

23 In the late 90's there were two  
24 reports --

25 Q. Slow down a second.

Truesdel & Rusk

Stephen Mantooth - Direct

1                   What did the SAIC report find as to  
2 plutonium?

3           A.       They found -- well, plutonium they  
4 basically in the surface soil, they found they had  
5 established what they called a level that above that  
6 level it was a contaminant of concern, which means  
7 they were going to analyze that for health impacts.  
8 And there were several samples in soil -- and memory  
9 fails, maybe even some of the groundwater that had  
10 levels of plutonium above that contaminant of  
11 concern threshold.

12          Q.       You told us earlier, would that be  
13 found naturally there?

14       A.       No, absolutely not.

15          Q.       What about enriched uranium, what  
16 did the SAIC report in 2007 report find about  
17 enriched uranium?

18       A.       They found levels of uranium  
19 isotopes which includes 238, 234, 235 all above what  
20 you would call background levels.

21          Q.       Now, when they detected those  
22 levels in the soil or water, was this during the  
23 cleanup or was this after the cleanup had started in  
24 1991?

25       A.       It's my understanding that it was

Truesdel & Rusk

Stephen Mantooth - Direct

1 well after the cleanup.

2 Q. Is there anything as a health  
3 physicist that you can derive from finding plutonium  
4 in the soil on that ten acre site?

5 A. Well, it didn't -- as we've already  
6 discussed, it didn't get there naturally so it had  
7 to have been brought there.

8 The only people that I know of that  
9 deal with plutonium on a regular basis is the DOE or  
10 its predecessor, the AEC, so it had to have been  
11 brought there from one of those sites.

12 Q. What about enriched uranium?

13 A. I would make the same statement  
14 about enriched uranium.

15 Q. Okay. Was there anything else in  
16 that time frame, in that cleanup time frame that you  
17 want to tell the jury about?

18 A. Well, there were two other reports.  
19 They were called remedial investigation feasibility  
20 study reports where essentially they look at all the  
21 data that's been taken and offer the feasibility of  
22 remediating a site and look at different  
23 alternatives.

24 The thing that I was particularly  
25 interested in was their tables of analytical

Truesdel & Rusk

Stephen Mantooth - Direct

1 results, and they also recorded detectable measures  
2 of plutonium and uranium on the site.

3 Q. What years were those done?

4 A. There were two. There was one in  
5 1996 and then another in 1999.

6 Q. Okay.

7 A. I think it was two different  
8 subcontractors.

9 Q. All right. Does that cover that  
10 time frame, that last time frame now?

11 A. Yeah, I think so.

12 Q. All right. What about -- what was  
13 in the Tennessee regulator records from any time in  
14 the 60's through the 1970's that you felt was  
15 relevant to tell this jury about?

16 A. Well, again, the thing that  
17 impressed me was the sheer mass of contaminated  
18 metal that was shipped. I did a quick calculation  
19 just from Oak Ridge. There was like nearly 3,000  
20 gross tons of contaminated metal.

21 Q. Let me stop you. How did you know  
22 it was contaminated?

23 A. Because it said at the top of the  
24 page, contaminated metal. I mean, on the records  
25 that I reviewed it was an inventory metal shipped

Truesdel & Rusk



Stephen Mantooth - Direct

1 and it said contaminated metal shipped to  
2 Witherspoon.

3 Q. Okay. Go ahead.

4 A. All right. Records from the  
5 contracting officer relating to David Witherspoon's  
6 contract clearly state this is -- the vendor  
7 should -- or the buyer, the purchaser should  
8 understand that this is not being -- I'm  
9 paraphrasing here, that the metal is being sold as  
10 not uncontaminated or contamination-free and it  
11 should not be assumed that it can be free released  
12 to the public. So David Witherspoon held an AEC and  
13 later a Tennessee license for radioactive material,  
14 so this was not a problem, they knew it was  
15 contaminated, he was licensed to received it and so  
16 they sent it.

17 The other thing was is that, also  
18 from the contracting organization was a note  
19 regarding material specifically in the right wing  
20 yard that came from ORNL that the material is -- I  
21 forget whether they said likely or possibly  
22 contaminated with plutonium and that they could not  
23 guarantee the levels of plutonium that was on the  
24 metal, that it was going to meet any type of level.

25 Q. Is that -- what is surface

Truesdel & Rusk

Stephen Mantooth - Direct

1 contamination?

2 A. Well, it's pretty self-explanatory.  
3 Surface contamination is contamination that is fixed  
4 to the surface of a piece of equipment, a piece of  
5 metal, something like that. It can be rubbed off.  
6 It's not integral to the metal -- it's not -- you  
7 know, short story is that surface contamination can  
8 be released into the air, it can be transferred to  
9 your hands and then to your mouth if you don't have  
10 the proper controls.

11 Q. Okay. Anything else in the -- what  
12 about any specific Tennessee regulator tests out  
13 there in the 60's or 70's, were there any that you  
14 noted in your records?

15 A. Yes, there were several that I  
16 noted.

17 There was an inspection -- the  
18 Tennessee regulators got wind that there was some  
19 stuff coming from a plant up in Lynchburg, Virginia,  
20 so they went out. They found readings as high as 25  
21 millirem per hour, which I don't know if you guys  
22 have been educated on that, but basically  
23 background -- background levels for exposure, for  
24 gamma, the natural background is something like a  
25 thousand times less than that, okay? So just to

Truesdel & Rusk

Stephen Mantooth - Cross

1 A. Well, maybe two, but --

2 Q. Well, would you agree with me that  
3 there's a dose response relationship between  
4 radiation exposure and harm that could result from  
5 radiation exposure?

6 A. I believe so.

7 Q. And the jury is probably tired of  
8 hearing this but that basically means the more  
9 radiation exposure you have, the more likely you are  
10 to be harmed by it?

11 A. That's a good way to put it.

12 Q. And is it also true that the less  
13 radiation exposure you have, the less likely you are  
14 to be harmed by it?

15 A. Less likely.

16 Q. So the amount of radiation exposure  
17 a person gets is important in determining whether  
18 that person is likely to be harmed by it. Right?

19 A. It's important, yes, it's  
20 important.

21 Q. Okay. Have you been exposed to  
22 radiation today?

23 A. Yes, sir, we all have.

24 Q. We're all exposed every day, aren't  
25 we?

Truesdel & Rusk

Stephen Mantooth - Cross

1 A. Uh-huh.

2 Q. Can't get away from it, can you?

3 A. That's right.

4 Q. Sunlight?

5 A. Sunlight is a form of radiation.

6 Q. It's a big one.

7 A. Yeah.

8 Q. Things we use at home, microwave  
9 ovens?

10 A. I hope they are a little bit more  
11 shielded than that but it could be, could be.

12 Q. I won't go through the list.

13 But if you are out in the sunshine  
14 or you're using a microwave oven or you are getting  
15 x-rays of your teeth at the dentist's office, that  
16 doesn't compare to the cancer risk from those doses,  
17 that doesn't compare to the cancer risk to somebody  
18 if they smoked cigarettes for 30 years, does it?

19 A. I really don't know the answer to  
20 that question. I'm not an expert in that  
21 relationship with cigarettes.

22 Could I maybe clarify something?

23 You've used sunlight and medical  
24 dental x-rays kind of interchangeably as a form of  
25 radiation and they're not really one and one.

Truesdel & Rusk



Stephen Mantooth - Cross

1 A. I'm not sure I would put the  
2 adjective in "significantly" but I think -- I think  
3 that certainly you would have to prove that it's  
4 greater than background, what you would get in  
5 background radiation.

6 Q. So if you had an individual that  
7 had radiation exposure that didn't exceed  
8 background, that really wouldn't worry you, would  
9 it?

10 A. I guess -- no, not really. I  
11 mean -- no, you wouldn't point at radiation if they  
12 got sick, you really wouldn't point at radiation as  
13 being a cause.

14 Which I think we talked in our last  
15 discussion about background levels of radiation  
16 and --

17 Q. I think we did.

18 A. Yeah.

19 Q. We are still on the same page.

20 A. Yeah, I'm still on the same page.

21 Q. And in terms of causing a disease  
22 like lung cancer, which is what Mr. Payne  
23 unfortunately had, it's important to consider his  
24 dose, isn't it?

25 A. I think dose is, if you're looking

Truesdel & Rusk

Stephen Mantooth - Cross

1 at -- I think it's important to consider his dose.

2 Q. Okay. Regarding Mr. Payne's  
3 personal dose of radiation, have you done any  
4 measurements or taken any testing or done any lab  
5 work in an effort to tell us what his dose of  
6 radiation was?

7 A. I have not.

8 Q. Have you reviewed any test results  
9 or sampling concerning Mr. Payne's radiation  
10 exposures?

11 A. As in his personal sampling  
12 results? No, as I testified previously, I don't  
13 think they -- I haven't seen any that exist.

14 Q. And would it be fair to say then,  
15 Mr. Mantooth, that you are unable to quantify  
16 Mr. Payne's dose of radiation?

17 A. Yes, that would be more than fair,  
18 my point exactly.

19 Q. Well, then, I thought I heard you  
20 say, maybe I took it down incorrectly which I do  
21 from time to time but I thought I heard you say that  
22 you thought his radiation exposures exceeded  
23 background.

24 A. I think the question that  
25 Mr. Shapiro asked was what could I infer from the

Truesdel & Rusk

Stephen Mantooth - Cross

1 data and I said that I think -- I could infer that  
2 based on all the information we have on the  
3 contamination levels at Witherspoon, contamination  
4 levels on the scrap while it was being hauled that I  
5 could infer that he likely received radiation  
6 exposure above background if he had not been  
7 involved in those activities.

8 Q. So that is your inference from what  
9 you've reviewed.

10 That is not your professional  
11 opinion stated to a reasonable degree of scientific  
12 certainty that he did have radiation exposure  
13 exceeding background, is it? Do you understand the  
14 difference?

15 A. I do understand the difference and  
16 if you are asking me the question in a different  
17 way, I'll answer it in a different way.

18 Based on what I've reviewed in all  
19 of the materials given to me, it is my professional  
20 opinion that he likely was exposed, that he received  
21 radiation exposure above background levels.

22 Q. That's not only an inference, it's  
23 an opinion?

24 A. That's my opinion.

25 Q. Well, help me here. How can you

Truesdel & Rusk

Stephen Mantooth - Cross

1 say that he had exposure above background and we all  
2 have background, we all have background exposure.

3 A. Right.

4 Q. How can you say he had exposure  
5 above background when you say I don't have a clue  
6 what his dose was?

7 A. Well, I said you couldn't quantify  
8 his dose because we have no data, but it's -- I  
9 mean, the fact that these materials were  
10 contaminated is without question. The fact that the  
11 DWI site was contaminated was without question. The  
12 fact that Mr. Payne was there is without question,  
13 so it's not hard for me to assume that he received  
14 some measure, some level of dose that he would not  
15 have received if he had not been involved in those  
16 activities.

17 Q. This is --

18 I don't know how to use it.

19 A. That's nonionizing radiation by the  
20 way.

21 Q. Well, should I drop it and run?

22 A. No.

23 Q. All right. Let's say that it's a  
24 source of radiation that makes a Geiger counter do  
25 that and it's sitting right there.

Truesdel & Rusk



Stephen Mantooth - Cross

1 A. Okay.

2 Q. And it's not going anywhere, it's  
3 just going to sit there.

4 Now I'm going to walk over here  
5 next to you and I want you to tell me, am I in any  
6 danger right now because of that thing?

7 A. What is the radiation level? You  
8 could be. What is the radiation level of your  
9 source and I'll tell you.

10 Q. I don't know, what does it look  
11 like, can you tell what it is?

12 A. What?

13 Q. Can you tell what the radiation of  
14 that is just by looking at it?

15 A. No, you would have to measure it.

16 Q. I agree.

17 And can you tell if it is even  
18 emitting radiation by just looking at it?

19 A. No.

20 Q. If you had a piece of scrap metal,  
21 could you tell if it had radiation on it?

22 A. Not without measuring it.

23 Q. If you had a piece of scrap metal,  
24 could you tell if it was emitting harmful radiation?  
25 Not without measuring it. Right?

Truesdel & Rusk