

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

CITY OF OZARK, ARKANSAS, a municipal
corporation

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,
the ARKANSAS STATE HIGHWAY
& TRANSPORTATION DEPARTMENT
(an Agency of) The State of Arkansas,
TLB
AND THE ARKANSAS STATE HIGHWAY
COMMISSION

Defendants,

CIVIL ACTION NO:2:14-CV-02196-

**PLAINTIFF'S SUPPLEMENT EXHIBITS TO THE PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Comes now the Plaintiff, the City of Ozark, Arkansas, a municipal corporation by and through its undersigned counsel, Christopher D. Brockett of Sayre & Brockett, and for its Supplement Exhibits to the Plaintiff's Motion for Partial Summary Judgment filed herein on and even date herewith and does file Exhibit Q through Exhibit V as shown on the attached Table of Exhibits.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, Christopher D. Brockett, hereby certify that a copy of the foregoing Amended Complaint has this date been served by U.S. Mail on the following:

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Done at Ozark, Arkansas, this 30th day of April 2015.

/s/ Christopher D. Brockett
Christopher D. Brockett

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1 A. Do you want -- excuse me.

2 Q. Yes.

3 A. Do you want me to expand on any of these?

4 Q. Sure. Go ahead.

5 A. Well, they closed. We -- I worked there from
6 the early fifties --

7 Q. Okay.

8 A. -- to the mid sixties, and at that time they
9 closed the plant.

10 Q. Okay.

11 A. So I can't really say that it, if when they
12 closed it, I mean, when they moved the river or
13 flooded that area that it had any impact on the
14 lumber company.

15 Q. Because it was already closed?

16 A. Because it had already closed.

17 Q. Okay. So as I understand it, the crossing was
18 located east of the depot in downtown Ozark?

19 A. Yes.

20 Q. Is that right?

21 A. Yes.

22 Q. Okay. And as I understand, the road itself
23 wasn't what we would think of as a street in terms of
24 asphalt and nicely done. It was kind of an old dirt
25 road; is that right?

1 A. I don't think it was a dirt road. It was a
2 gravel road.

3 Q. Gravel road, okay.

4 A. Yeah.

5 Q. And there was some kind of asphalt that may
6 have been poured or something laid on top of the
7 railroad tracks to make the crossing. Is that -- how
8 do you remember that?

9 A. It was a regular crossing with ties, crossties.

10 Q. Okay.

11 A. And probably asphalt. I don't remember really,
12 but it was a regular, regular crossing.

13 Q. Okay. So when you would have crossed over from
14 the city side over the tracks, kind of walk me
15 through what you would have, what landmarks you would
16 have hit as you were going down the road there.

17 A. I don't quite understand.

18 Q. Okay. So if I was on the city side, and I
19 crossed over the tracks heading towards kind of the
20 river or towards the dump or towards F&S Lumber, what
21 is the first thing, after I get over the crossing,
22 what is the first thing I would do? Would I go
23 straight, or would I turn?

24 A. You would turn.

25 Q. Okay. And I would turn to the east?

1 A. To the east, yes, ma'am.

2 Q. Okay. And as I understand, there were some
3 propane tanks or something that would have been maybe
4 my first landmark that I would have come across?

5 A. Yes.

6 Q. Is that right?

7 A. Yes.

8 Q. Okay. And then after the propane tanks what
9 would be my next landmark?

10 A. F&S Lumber.

11 Q. Okay. And about how far from the propane tanks
12 would F&S Lumber have been?

13 A. Gee, probably 500 yards maybe.

14 Q. Okay. And if I continued past F&S Lumber what,
15 what would have been my next landmark?

16 A. City dump.

17 Q. City dump. And was it a little bit further
18 down or about how far down?

19 A. Well, you would go by, you would go by -- we
20 had a spur --

21 Q. Yep.

22 A. -- track --

23 Q. Uh-huh.

24 A. -- that ran into the lumber company. You would
25 cross it and turn right, which would be south, going

1 into the, into the dump.

2 Q. Okay. So, and then I guess what about -- I
3 have heard about some houses that would have been
4 down, kind of some shotgun type houses that would
5 have been down that way. Was that past the dump, or
6 would you have hit those before the dump?

7 A. Well, they weren't shotgun houses.

8 Q. Okay.

9 A. They were regular houses.

10 Q. Okay.

11 A. Real, the first one was a real nice house. You
12 would travel -- instead of turning right or east, not
13 east, but south --

14 Q. Okay.

15 A. -- to the dump. You would go east to the
16 houses --

17 Q. Okay.

18 A. -- which there was three houses located just
19 east of the lumber company.

20 Q. Okay. Do you remember who lived at those
21 houses?

22 A. Pete Oliver lived in one house.

23 Q. Okay.

24 A. And I can't remember the name of the first
25 house, the first house, but he worked for the

1 Q. Okay. Okay. Do you know if you would have any
2 records from F&S Lumber Company?

3 A. No, sir, I don't.

4 Q. Okay. Do you know if there was another
5 crossing close to the crossing at issue in this case,
6 the one right next to the east of the depot? Was
7 there ever another crossing further down, that you
8 can remember?

9 A. You mean in that locality --

10 Q. Yes.

11 A. -- or close --

12 Q. Further east, further east of the, let's call
13 it the Oliver Street crossing for just simplicity
14 purposes. Was there another crossing further down to
15 the east around the Bell Street area?

16 A. Not that I'm aware of.

17 Q. Okay.

18 A. No, sir.

19 Q. All right. So the only one that you used to
20 access your building was the Oliver Street crossing?

21 A. Oh yes.

22 MS. JONES: Object to form.

23 BY MR. BROCKETT:

24 Q. All right. Did, did you sell to the public?

25 A. Pardon me?

1 Q. Was your business open to the public?

2 A. The F&S Lumber, no.

3 Q. Okay.

4 A. M&S, yes.

5 Q. Okay. And let's just stick with F&S.

6 A. Okay.

7 Q. Okay. What did you do with your products that
8 you --

9 A. It was sold to the government.

10 Q. Okay. Was it all loaded onto train cars, or
11 did you ever ship it out on roads?

12 A. Both ways.

13 Q. Okay. So it would be produced at F&S Lumber
14 and then did you own trucks, or did you hire trucks?

15 A. We owned the trucks.

16 Q. Okay. Were those trucks -- now forgive me for
17 my age, but at that time were those trucks licensed?

18 A. Certainly.

19 Q. Okay. Through the State of Arkansas?

20 A. Yes.

21 Q. Okay. For purposes of licensing, what address
22 did you list on those titles; do you remember?

23 A. The address probably was at Fort Smith.

24 Q. Okay. Is that where your main --

25 A. Main office.

1 Q. Okay. Was in Fort Smith, okay. Is that where
2 most of the mail would have been shipped then?

3 A. Yes.

4 Q. Okay. All right. Did, did you keep a truck
5 here in Ozark?

6 A. Yes.

7 Q. Okay. And it was parked there?

8 A. Yes.

9 Q. Okay. About how often do you think a truck
10 would leave that location and cross the tracks?

11 A. Daily.

12 Q. Okay. Just once per day or --

13 A. Yes, it was long haul.

14 Q. Okay.

15 A. Long hauls, yes.

16 Q. Okay. Did -- how many employees did F&S Lumber
17 Company have?

18 A. Thirty to forty --

19 Q. Okay.

20 A. -- people.

21 Q. Wow. How big a building did you guys have?

22 A. Pardon me?

23 Q. How big a building?

24 A. Well, we had two buildings, actually. There
25 was -- I'm just estimating probably 50 by 150. It

1 it's an insert of that same map at a different
2 location that shows Oliver Street. Do you see that?

3 A. Yes.

4 Q. Okay.

5 MS. JONES: I'm not stipulating to
6 that, but.

7 BY MR. BROCKETT:

8 Q. Well, not for you, for the purposes of this
9 question. Would that -- where there is a large
10 building on there, would that be where F&S Lumber
11 Company was located?

12 A. Yes, I would say so.

13 Q. Okay. And does the road look how it was back
14 in 1962 when your building is located there?

15 A. Yes.

16 Q. Okay. And you would have traveled on that road
17 as it's identified on that map to get to your company
18 and also to the houses that were past your, your
19 company?

20 A. Yes.

21 Q. Okay. All right. Did all of your 30 to 40
22 employees utilize the Oliver Street crossing to go to
23 work?

24 A. Yes.

25 Q. Okay. All right. Did you have to ask

1 permission from anybody to use that crossing?

2 A. No.

3 Q. Did you buy land south of the river?

4 A. No.

5 Q. Okay. Did you -- who did you lease that
6 property from?

7 A. Missouri Pacific Railroad.

8 Q. Missouri Pacific Railroad Company, okay.

9 A. I believe that would be correct.

10 Q. Okay. Do you know how much land you leased
11 from them?

12 A. Probably, probably ten acres.

13 Q. Ten? Okay. Okay. Was that road already there
14 when -- well, strike that. Did F&S Lumber Company
15 build the building, or was the building already
16 there?

17 A. We built the buildings.

18 Q. Okay. Okay. And was that road already there
19 when you built the buildings?

20 A. Yes.

21 Q. Okay. Do you know if the City of Ozark ever
22 maintained the building, or the road? Did they put
23 gravel on it or grade it or anything like that?

24 A. I can't, I can't remember anyone doing the work
25 on it, but someone had to.

1 Q. Okay. It didn't just deteriorate?

2 A. Yeah, it would have deteriorated over time, but
3 I can't say for sure who done it.

4 Q. Okay. Fair enough. Did you, I guess did F&S
5 Lumber Company utilize the dump?

6 A. Not as such.

7 Q. No? Okay. And you did mention that you
8 remember a Pete Oliver living there? According to
9 Exhibit 51, Exhibit D to Exhibit 51, there was also a
10 Tom Kirkendall that lived down there.

11 A. I was trying to think of his name, yes.

12 Q. Okay. He lived in the nice house?

13 A. In the first house, yes.

14 Q. Okay. In your opinion that was a nice house?

15 A. It was a good house, yes.

16 Q. Okay. And then according to this exhibit there
17 was a vacant lot down there. Do you remember looking
18 at those houses if there was a vacant house or a
19 vacant lot?

20 A. I never was on that property, so I can't --

21 Q. Okay. You didn't drive on down in there?

22 A. No.

23 Q. Okay. There was an Alfred Oliver. Does that
24 sound familiar?

25 A. I think -- I'm sure that's the one they called

1 Pete Oliver.

2 Q. Okay. You think Alfred was Pete? Okay. And
3 then there was a gentleman named Frank Oliver?

4 A. Yes.

5 Q. Okay. Do you think he was the other colored
6 guy?

7 A. Yeah, the third house, yes.

8 Q. Okay. What about a Barry Collins?

9 A. I don't remember him living over there.

10 Q. And what about Martin Oliver, Junior?

11 A. I don't remember him.

12 Q. Okay. From the ten acres that you believe you
13 leased from Missouri Pacific, we will call it MoPac,
14 do you remember how much you paid them in lease?

15 A. No, sir.

16 Q. Okay. And I know it's been years ago.

17 A. Years ago.

18 Q. Do you know if it was an annual lease or a
19 monthly lease?

20 A. It was an evergreen lease.

21 Q. Okay. So just as long as you stayed there you
22 got the lease?

23 A. And pay the rent you had possession of it, yes.

24 Q. And did you pay your rent annually or monthly?

25 A. Annually.

1 Q. Once a year?

2 A. Once a year.

3 Q. Okay. When you vacated that property sometime
4 in the mid sixties did you have to tear down the
5 building?

6 A. No.

7 Q. Okay. You did not?

8 A. No.

9 Q. Okay. Do you know if the building was torn
10 down?

11 A. I don't know.

12 Q. Okay.

13 A. I left.

14 Q. Okay. All right. Do you have an opinion as to
15 whether or not this gravel road was a public road or
16 a private road?

17 MS. JONES: Object to form,
18 foundation.

19 A. I would have to assume it was a public road.

20 Q. Okay. And what would you base that opinion on?

21 A. No one -- you had -- you didn't have to get
22 permission to travel.

23 Q. Okay. So if someone wanted to come across they
24 could come across?

25 A. Yes.

Page 27

1 Q. Okay. Did -- do you remember if you had to
2 carry any type of insurance policy when you leased
3 this land from MoPac?

4 A. No, sir.

5 Q. Okay. And let me be very clear on what type of
6 insurance I am talking about. Did you have to carry
7 any type of insurance regarding that crossing?

8 A. No.

9 Q. So they didn't say you can use this land, but
10 you have to carry a liability policy?

11 A. No, sir.

12 Q. Okay.

13 A. Not that I remember.

14 Q. Not that you remember?

15 A. Huh-uh.

16 Q. Okay. After you vacated did you, do you
17 remember ever using that crossing again after the mid
18 sixties?

19 A. No, sir.

20 Q. Okay. Are you familiar with when the crossing
21 was removed?

22 A. No, I'm not.

23 Q. Okay.

24 A. No.

25 Q. Do you remember from, let's say 1974, do you

Exhibit Q-2

Copy of picture dated 1952

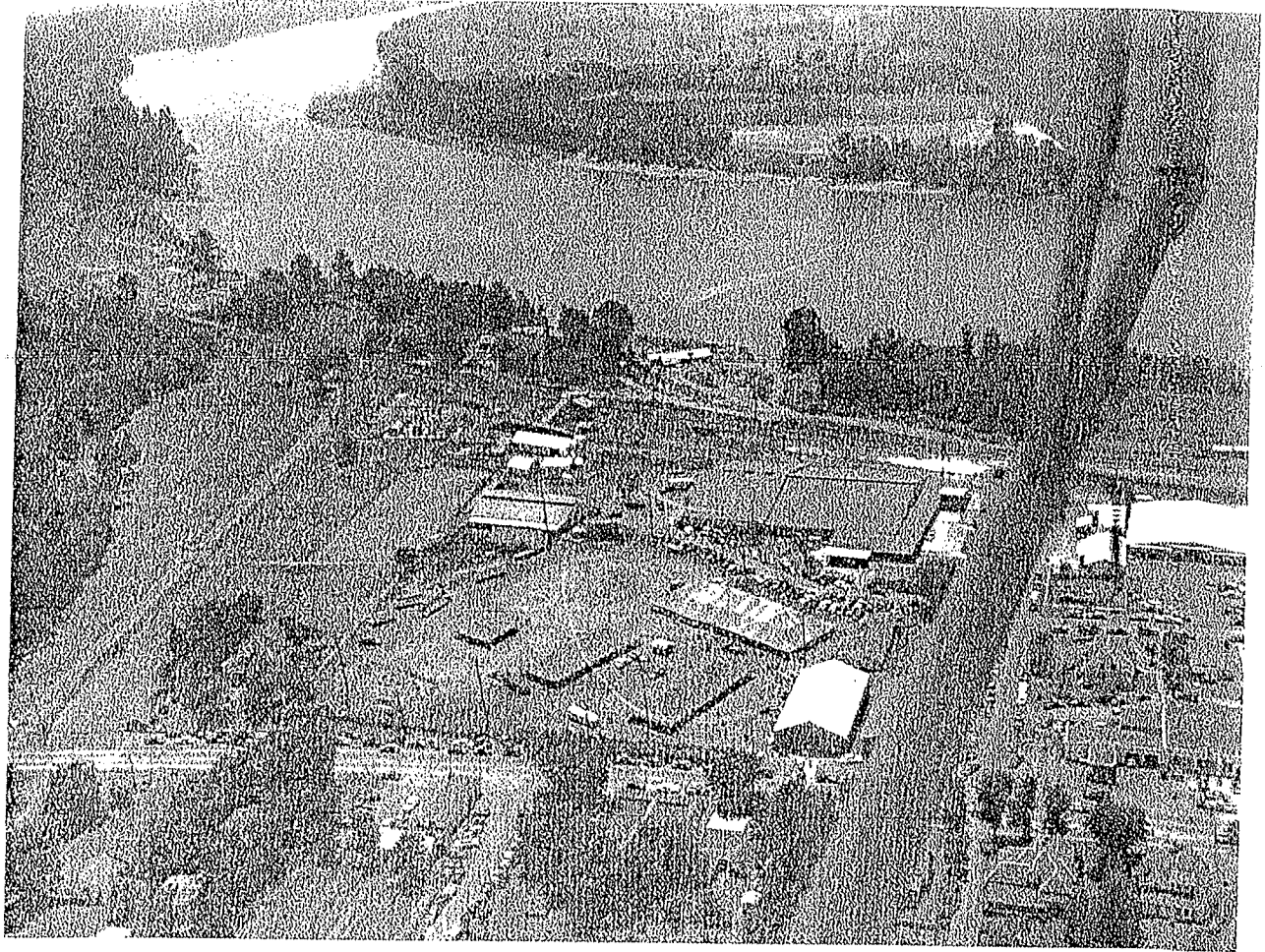


Exhibit Q-3

Zoomed in version of Copy of picture dated 1952

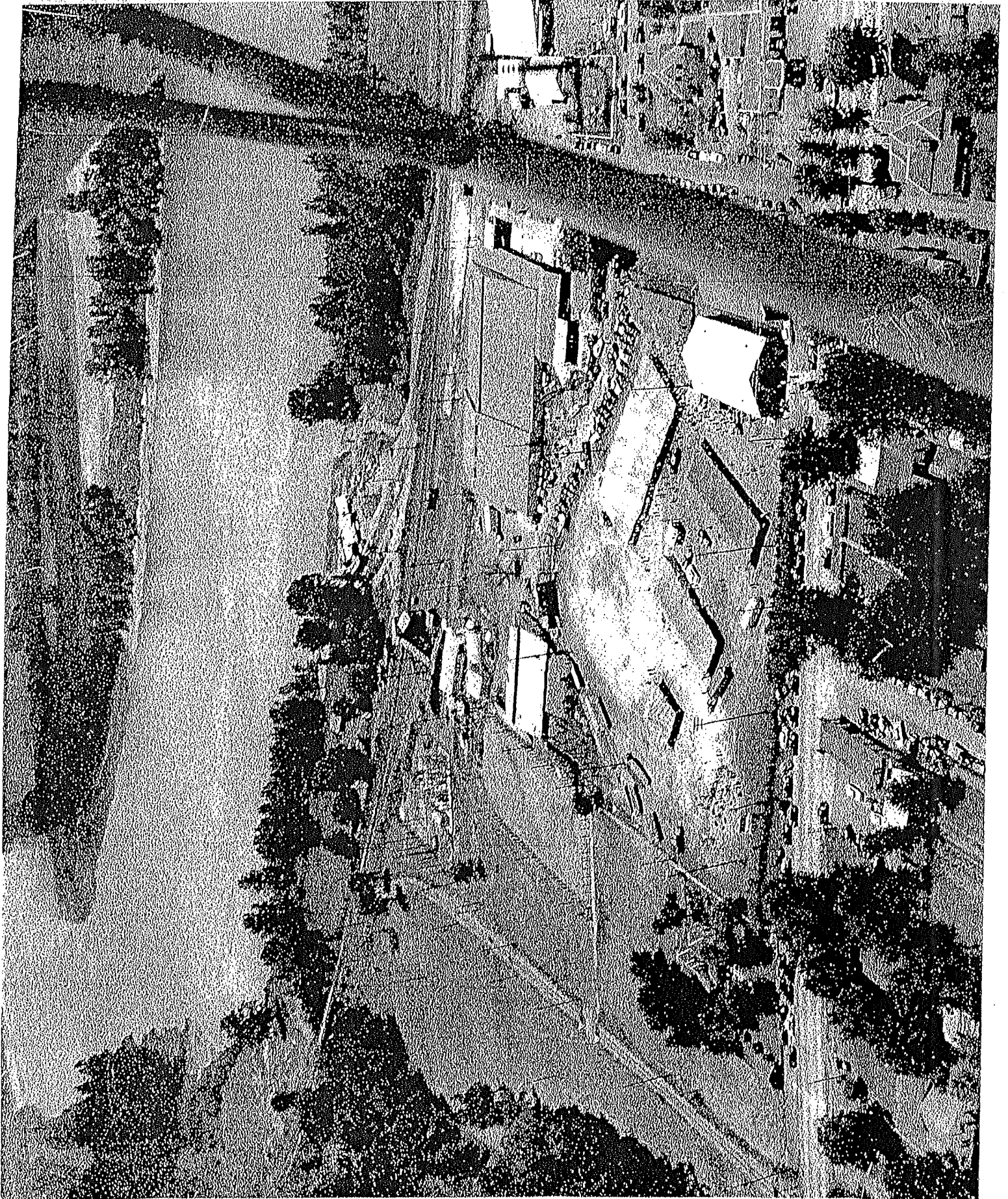


Exhibit Q-4

Copy of picture dated 1954



Exhibit Q-5

Zoomed in version showing structures on South side of railroad crossing

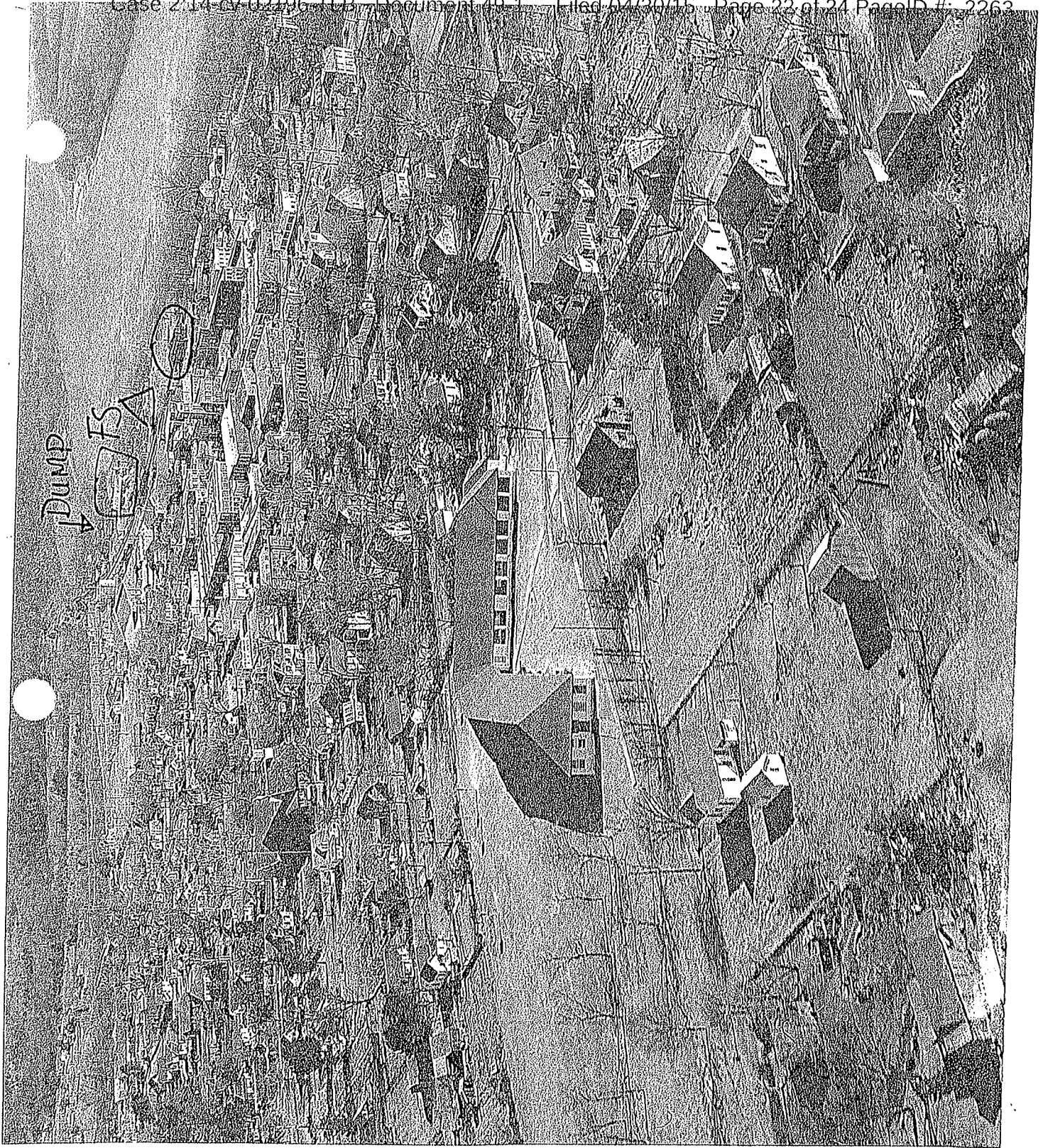


Exhibit Q-6

Substantially zoomed in version showing structures on South side of railroad crossing

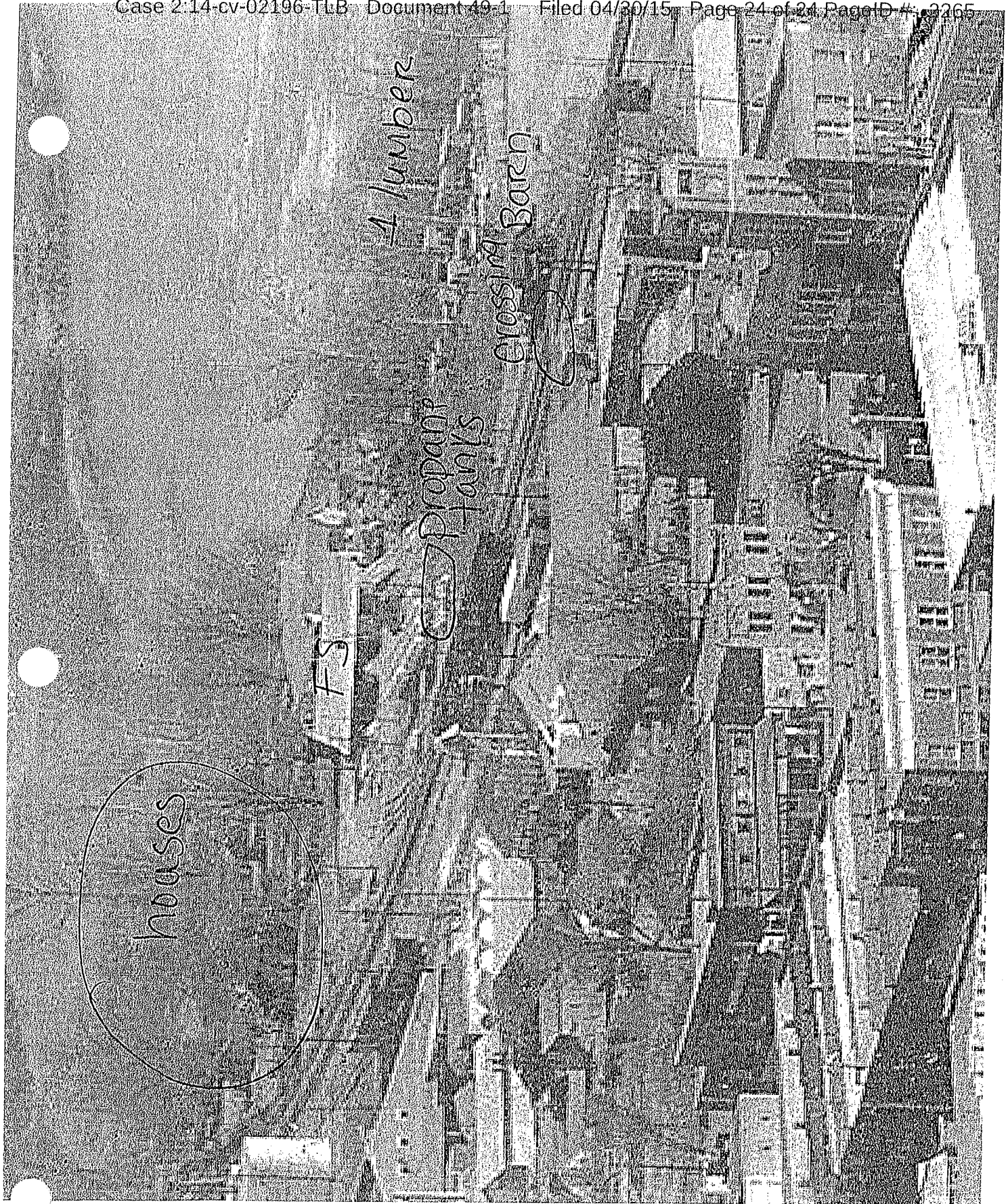


Exhibit R

Deposition of Harrison Allred Pages 12, 13, 23 and 25

1 A. No, ma'am, I don't.

2 Q. Okay. Did you just call it sort of the street
3 down by the propane tanks or street to the dump or
4 whatever?

5 A. There was just a road that went down through
6 there. I can give you the different places that used
7 that street.

8 Q. Right.

9 A. If you want me to.

10 Q. Well, as I understand it, when you crossed over
11 the railroad tracks there was the propane tanks
12 there?

13 A. When you crossed over the tracks directly in
14 front of the propane tanks there was a sheet iron
15 barn.

16 Q. Okay.

17 A. You turned left right down the tracks, and the
18 propane tanks were there. You go a little bit
19 further, and the pallet plant was there. You go a
20 little further, and there was a railroad spur that
21 went down to the pallet plant.

22 Q. Uh-huh.

23 A. You crossed the spur, made the right down to
24 the river, and that was the city dump, and right on
25 down past there there was a colored community.

1 Q. Okay. About how many houses; do you know?

2 A. I would say from three to five.

3 Q. Okay.

4 A. That's a guess.

5 Q. Do you know any of the names of the people who
6 lived down there?

7 A. I don't know the full name. I remember one of
8 them was named Al.

9 Q. Okay.

10 A. And there was one of the girls named Josie.

11 Q. Okay.

12 A. A colored girl. I don't know the last names of
13 neither one of them.

14 Q. Okay. And you are going to have to excuse me,
15 because you're not the first person I have talked
16 with today, and so I'm -- sometimes I will forget
17 what I have asked certain people.

18 Part of when we asked you to come here
19 today we asked for certain documents to be brought
20 with you. Did you look through those request one
21 through six to see if you would have had anything?

22 A. Hun, I can't read.

23 Q. Okay. Well, how about I ask you this and see
24 if you would have had anything. I'm going to take a
25 shot at guessing that you wouldn't have had any of

1 Q. Okay. Did -- just so I'm clear, did you work
2 at the one when it was north of the tracks?

3 A. Yes.

4 Q. Okay.

5 A. I worked at the one north of the tracks for a
6 while, and then they moved it south of the track down
7 next to the river by the city dump. And I worked
8 down there about, I would -- do you want me to guess
9 at it, about three years.

10 Q. For purposes --

11 A. Around three years.

12 Q. Okay.

13 A. Three to four.

14 Q. Okay. And you think they had two shifts on the
15 south side?

16 A. I know for definitely they had two shifts on
17 the south side of the river.

18 Q. Okay.

19 A. They worked a day shift and a night shift when
20 they had that big government contract.

21 Q. Okay. How did they get trees over to the
22 sawmill when they had the sawmill down there?

23 A. They hauled them across that crossing.

24 Q. Okay. So they didn't come up the river. They
25 actually hauled them across?

1 A. But I probably did help build the building
2 because we run out of lumber to build pallets up
3 there, and we -- I'm sure that all of us worked down
4 there some helping to build that.

5 Q. Okay.

6 A. Do you know this -- I went to work -- if you
7 want to know how I went to work with Flocks, do you
8 want to know the year?

9 Q. Yes, sir, if you remember?

10 A. 1951.

11 Q. Okay. And that would have been on the north
12 side?

13 A. That would have been on the north side.

14 Q. How, how soon before --

15 A. I don't know how soon it was after they moved
16 over on the south side of the river.

17 Q. Okay.

18 A. It may have been five or six months. It may
19 have been a year.

20 Q. Okay. So you think somewhere around 1952, they
21 would have been located on the south side?

22 A. On the south side.

23 Q. Okay. And they were there until mid to late
24 1960s?

25 A. They were there quite some time after I went to

Exhibit S-1

Deposition of Jimmy Bearden Page 21

1 A. I think that was long before the lumberyard
2 actually went in.

3 Q. Okay. And where did you find Exhibit 273?

4 A. It's just off of some of the documents we got
5 at the museum and books and stuff that I just thumbed
6 through. And when I see a picture I like, I take a
7 picture of it and take it home and put it on the
8 computer and save it for history.

9 Q. Okay. I think I have seen this before, but
10 274, I am thinking, is from a newspaper; is that
11 right?

12 A. Yeah. I double checked the date on it today
13 when I was over there today. There are a bunch of
14 books. I mean, they are monster size books, but they
15 have got cutouts of stuff that went on during the
16 years, like '55 and '58 and '59.

17 Q. Uh-huh.

18 A. And that's the picture in the book in 1955. I
19 thought it was 1958, but it says '55 in the book, so
20 whether that is an actual date or not, you know, I
21 can't say.

22 Q. Okay. So this shows, at least purports to show
23 that this was around the time period, was taken
24 around the time period that the butane tanks were
25 moved by the railroad tracks?

Exhibit S-2

Picture of 1955 Butane Tanks Move



Butane Tanks Moved To New Location

There have been some landscape changes made here. The four big butane gas tanks located in Oak Hill community on Highway 64, west of Ozark, have been moved by the Peach Valley Gas company to a new location east of the Missouri-Pacific depot.

1955

Exhibit T

Deposition of Harrison Allred Pages 17, 26 and 32

Page 17

1 whenever I -- I don't know who we got permission to
2 tear that down, but we tore that barn down.

3 Q. Okay.

4 A. And the sheet iron is around my barn over there
5 now.

6 Q. Oh really, okay. This time that, a few times
7 that you saw the, I guess, the city tractor paving or
8 grading the road, was that before or after the dam
9 was built; do you remember?

10 A. No, I don't.

11 Q. Okay.

12 A. No, I don't. I don't think I seen them do that
13 more than once or twice.

14 Q. Okay.

15 A. Just kind of roughly grade it down through
16 there.

17 Q. Okay.

18 A. But they brush hogged it about every year
19 around it.

20 Q. Okay.

21 A. The city did.

22 Q. The city did?

23 A. Uh-huh.

24 Q. And --

25 A. All we had to do was call them and ask them to

1 work for the gas company, because we were right there
2 next to it.

3 Q. Oh, okay.

4 A. But I don't remember when they moved it out.

5 Q. Do you remember --

6 A. It was still there when I retired, I mean, when
7 I quit. I quit the pallet plant and went looking for
8 something more permanent because we were laid off
9 quite a bit there. They couldn't keep lumber --

10 Q. Okay.

11 A. -- at steady paces, so I went to looking for
12 something else. And I found odd jobs and worked for
13 different places for a couple of years, and in 1957,
14 six or seven, now this is a guess --

15 Q. That's fine.

16 A. -- I went to work for Peach Valley Gas Company.

17 Q. Okay.

18 A. So I drove a truck across there from 19 -- I
19 went to work for the pallet plant for two or three
20 years over there, and I drove a gas truck for
21 something near 34 years across that track.

22 Q. Back about 1951 when you started at F&S on the
23 north side of the track, was that crossing there at
24 that time?

25 A. Oh yes.

Page 32

1 A. The pallet plant was built right on top of it.

2 Q. Okay.

3 A. And it would have went straight on down to that
4 colored community. They had to get their water
5 somewhere. My guess would be there is nobody living
6 that's ever crossed that railroad track more than I
7 have.

8 Q. I would probably agree with that. Thirty-four
9 years, that's a long time to be moving back and
10 forth.

11 A. That's for the gas company besides what I went
12 across it going back and forth to the pallet plant.

13 Q. That's true. So close to 40 years?

14 A. Closer, give or take a couple or three years.

15 Q. Okay. Based on the time that you were using
16 that, do you have an opinion based on your use of it
17 as far as do you believe that was a public use or
18 private use?

19 MS. JONES: Object to form.

20 A. Public.

21 Q. You can go ahead and answer.

22 A. Do what?

23 Q. You believe it was public?

24 A. Public use, yes.

25 Q. Why would you, why would you say that?

Exhibit U

Deposition of Monty Canady Pages 19 and 20

1 Q. Mules?

2 A. Yeah.

3 Q. Okay. Were those -- where were those located?

4 A. Jim had two mules that he kept down there
5 behind his house.

6 Q. Jim Kirkendall?

7 A. Yes. He hauled trash for people here around
8 Ozark. He had a wagon and a pair of mules.

9 Q. Okay. Were there any other horses -- as you
10 first crossed over the tracks to the left was there a
11 metal building there that you remember?

12 A. I don't remember that.

13 Q. Okay. Did you ever see anyone maintaining
14 Oliver Lane or Oliver Street?

15 A. A portion of it.

16 Q. Where at?

17 A. From about the propane tanks down to the dump.

18 Q. Okay. Do you know who -- I mean, do you know
19 what type of vehicle they were using to maintain?

20 A. Yes, it was an 8-M Ford tractor with a blade on
21 the back of it, and that was Bull Southerland
22 (phonetic). He was my uncle. He worked for the City
23 of Ozark.

24 Q. Okay.

25 A. He used a blade on the back of that 8-M to

1 blade the road.

2 Q. And he was doing it for the City of Ozark?

3 A. Yes.

4 Q. And what was his name again?

5 A. Bull.

6 Q. Bull?

7 A. Bull Southerland.

8 Q. B-u-l?

9 A. We called him Bull. Everybody known him as
10 Bull Southerland. He retired from the city.

11 Q. Do you know how often he would maintain that
12 road?

13 A. No. Really, I don't know how often, but I have
14 seen him blade it three or four times while I was in
15 that area.

16 Q. Okay.

17 MR. BROCKETT: Okay. I don't think I
18 have any more questions. Thank you.

19 EXAMINATION

20 BY MS. JONES:

21 Q. Just a few things to follow-up. You looked at
22 a map that Mr. Brockett showed you. You didn't have
23 anything to do with creating that map; right?

24 A. No.

25 Q. Okay. And you can't say that any of the street

Exhibit V

Deposition of Dorothy Johnson Page 17

1 just a railroad sign.

2 Q. The crossbuck?

3 A. Yes, yes.

4 Q. Okay. And the actual crossing itself, was
5 it --

6 A. I know we kind of went up a little grade and
7 over the railroad track and then kind of down.

8 Q. On the other side?

9 A. Yes.

10 Q. Okay. And you mentioned the road was made out
11 of dirt. Do you know if it had any gravel with it,
12 or was it just straight dirt, or do you remember?

13 A. I believe it had some gravel, the best I
14 remember.

15 Q. Okay.

16 A. But I don't know if the city or the county. I
17 don't know who was taking care of it.

18 Q. Okay. Did it seem like someone was taking care
19 of it?

20 A. It was traveled quite a bit. It was -- it
21 seemed to be a busy street.

22 Q. Okay. I am going to show you what's Exhibit B
23 to Exhibit 51 to the deposition, and this is
24 classified, according to the letter, as a copy of a
25 1942 city map showing a crossing reference in