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Railroad Retirement Act

John E. Freese

That being so, the defendant is discharged, both legally and theoretically, of liability for there has been a variation of his risk without his assent and without reservation of a right of recourse against him.

WILLIAM E. SEWARD.

RAILROAD RETIREMENT ACT.

On June 30, 1934, there was presented to the President of the United States for his signature a bill which may be the forerunner of a host of similar legislative enactments affecting the social and economic condition of the nation. President Roosevelt signified his approval by signing the bill, thereby creating an Act "to provide a retirement system for railroad employees, to provide unemployment relief, and for other purposes". Thus the Railroad Retirement Act, which the Seventy-third Congress had passed by a narrow margin and which had encountered tremendous opposition from the carrier systems of the country as well as various other moneyed interests, became law.

The purposes of the Act are, according to its own language, manifold. It is for the purpose of: (1) providing adequately for the satisfactory retirement of aged employees; (2) promoting efficiency and safety in interstate transportation; (3) making possible (a) greater employment opportunity, (b) more rapid advancement of employees in the service of carriers.

Under this Act every employee, including executives, is required to pay into the Retirement Fund a percentage of his compensation, except that all compensation exceeding $300 per month is excluded. The carrier is required to pay a contribution equal to twice that of its employees. The percentage of compensation to be thus paid is to be determined by the Railroad Retirement Board, but until otherwise determined, is declared to be 2 per cent for the employees. The carrier is directed to deduct its employees' contribution from their compensation and to pay the deducted amounts along with its own contribution into the Treasury of the United States, which will hold it in a special Retirement Fund.[1]

Retirement is compulsory under the Act upon all employees attaining the age of 65, except that such compulsory retirement does not "apply to an employee who from and after the effective date (August 1, 1934) occupies an official position". The carrier and the employee may, by written agreement filed with the Railroad Retire-

[1] Payments into the Treasury of the United States of the amount deducted and of the carriers' own contribution are directed to be made quarterly, or otherwise as the Board may order.

ment Board, extend the time for retirement for successive periods of one year each, but not beyond 70 years of age.

Such is a brief abstract of the Railroad Retirement Act.[2] The conception, birth and subsequent life of this Pension Law has been attended by conflicting opinions; vigorous arguments have been advanced in favor of and against the legality and rationality of the Act. However, all theories tend to agree on one point—this bit of legislation is of the greatest importance in determining the trend of future legislative enactments.

On August 1, 1934, the Railroad Retirement Board created by the Act came into being and the new Pension Law became effective.[3] From that date, events followed in swift succession. The Board issued the statement that the first group of pensions would be granted on February 1, 1935. The railroad interests countered by announcing, through the American Railway Association, their intention of opposing the enforcement of the Act by appropriate court action.[4] They declared that their campaign would be fought on the grounds that the new law discriminated against Class I carriers. At the same time the various railroads themselves differed on the immediate action to be taken. Some announced that deductions would be made from their employees' salaries immediately, while others determined to defer any action until the controversy had been threshed out in open court and a decision reached.

For a week affairs remained *in statu quo*. On August 13, one hundred and thirty-seven railroads, through counsel for the Association of Railway Executives, filed suit against the Railroad Retirement Board and its individual members in the Supreme Court of the District of Columbia to enjoin the said Board from enforcing the Act.[5] Petitioners alleged among other things that the first year's cost to them will approximate $60,000,000, becoming even more burdensome in subsequent years. They attacked the constitutionality of the Act on four grounds, namely: (1) Congress has transgressed its powers because the Act has no relation to the promotion of efficiency and safety of interstate transportation; (2) the provisions of said Act are unreasonable and arbitrary; (3) said Act applies to all employees, including those not engaged in any commerce, those engaged exclusively in interstate commerce, and those not engaged in interstate commerce, or work so closely related thereto as to warrant regulation to promote efficiency or safety of interstate transportation and also to certain persons not employees; (4) the Act is not a valid exercise of the power granted to Congress by the "commerce" clause for the reason that the Act is designed to provide for the satisfactory retirement of veteran employees and to create

[2] RAILROAD RETIREMENT ACT, Public, No. 385, 73d Cong. [§3231].
[3] N. Y. Times, Aug. 1, 1934, at 25:6.
[4] N. Y. Times, Aug. 2, 4, 11, 12, 1934.
[5] N. Y. Times, Aug. 14, 1934, at 1:7.

greater employment opportunities, in spite of the express declaration that one of its aims is the promotion of efficiency and safety in interstate transportation.[6]

Petitioners alleged further that the Act discloses on its face that it is experimentation at the expense of petitioners; furthermore, it authorizes the Board to require of petitioners contribution for administration and research, and without limiting the amount,[7] all in violation of the Fifth Amendment. This final (oft and much relied on) allegation assails the validity of the Act on the ground that, in violation of the Fifth Amendment to the Constitution, the railroad interests are deprived of property and liberty of contract without due process of law, and property is taken without just compensation.

On August 16 the Supreme Court of the District of Columbia denied the application of the combined railroad group for a temporary injunction on the grounds that since the Board asks only enough funds to permit the commencement of administrative work, the railroads are not in danger of great damage. In an opinion written by Judge Proctor, the court said: [8]

> "In the light of the consideration on each side and the stated plans of the Board, which do not threaten any great and immediate danger to the railroads, there is no proper showing for issuance of a restraining order. I, of course, can conceive of a situation arising which may justify the railroads in coming in with a renewal of their application at any time. I see nothing now to suggest the presence of any immediate or great damage. The petition will be refused without prejudice."

The following day the Board issued two orders.[9] The first required Class I carriers to contribute one-tenth of one per cent of their July payrolls, no road to pay more than $5,000; these contributions amounted to about $125,000, which was to be used for administrative expenses. The second order required each railroad to submit a list of the names of all employees reaching the age of seventy by February 1, 1935.

The railroad group immediately marshalled their forces in renewed attempts to have the new Act declared unconstitutional. Their efforts culminated successfully when, on October 24, the Supreme

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[6] The petition alleged that many employees, such as the clerical forces of the railroads, attorneys and doctors, as well as heads of railroad labor unions and employees of the Railroad Retirement Board itself—none of whom could be said to be engaged in interstate commerce—are affected by the Act. This, it is claimed, places an unwarranted burden on the railroads.

[7] The Board is empowered, if necessity, demands, to increase the percentage fixed in the Act, without altering the ratio between carrier and employee contributions.

[8] N. Y. Times, Aug. 16, 1934, at 27:2.

[9] N. Y. Times, Aug. 17, 1934, at 2:5; Aug. 25, 1934, at 17:7.

Court of the District of Columbia, sitting as an equity court[10] in testing the Railroad Retirement Act, found it to be unconstitutional.[11]

The decision in effect is a warning to Congress not to overreach its powers under the interstate commerce clause of the Constitution. In the instant case, the lower court (perhaps with past National Industrial Recovery Acts brewing in the back of the judicial mind and future pension and unemployment insurance bills staring into the judicial face) has decreed that the breaking point was reached by the legislature when it hurried this bill through its last session.

Substantially the same arguments were offered in the case before Chief Justice Wheat as those in the prior proceedings before Judge Proctor. The railroad group added the further somewhat fallacious argument that their own pension systems adequately care for aged or incapacitated employees in a manner which engenders loyalty and faithful cooperation on the part of the employees, thereby raising the standard of efficiency and service rendered to the public. The enforcement of the new law will, so the carriers aver, change this voluntarily sponsored pension system into a compulsory one, thereby effectively killing any feelings of gratitude and loyalty on the part of the employees toward the railroads.

The court answers this objection briefly by saying:[12]

> "These matters, however, seem to me to involve questions of wisdom and propriety rather than of power, and to be for the consideration of the Congress rather than the courts."

As regards the further objections, Chief Justice Wheat predicated his decision on the theory that the Act was too extensive and widespread both in regard to the railroads and the employees embraced thereby. In the words of the learned justice:[13]

> "When the act is examined in detail I find it contains provisions which, in my opinion, were beyond the power of Congress and which render it unconstitutional.

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[10] The case, unreported as yet, is entitled The Alton Railroad Company and others v. The Railroad Retirement Board and Murray Latimer, John Williamson and Lee Eddy, individually and as members of the Railroad Retirement Board.

[11] N. Y. Times, Oct. 25, 1934. (By agreement the hearing before Chief Justice Alfred A. Wheat was treated as a final hearing on its merits, both sides submitting evidence in the form of affidavits. An appeal from the Supreme Court of the District of Columbia to the Court of Appeals and proceedings therein would tend to delay unduly the final determination as to the constitutionality of the Act. Therefore under Section 347 of Title 28 of the United States Code, the United States Supreme Court may accept jurisdiction after the case has reached the Court of Appeals, prior to a decision in such court.

[12] *Supra* note 11.

[13] *Ibid.*

> "In the first place, the act is unconstitutional, because it extends its provisions to persons not engaged in interstate commerce.
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> "The retirement act confers its benefits upon all employees of any company to which it relates without regard to distinction between interstate commerce, intrastate commerce, or activities which do not constitute commerce at all."

Chief Justice Wheat cites from the record before him that "some 200,000, approximately one-fifth of all the employees of the plaintiffs, do not work in interstate commerce or in work so closely connected therewith as to be a part thereof".

The facts of the record bear out the contention of the railroads that the Act is quite extensive; for instance, the Long Island Railroad, whose lines are solely within the state of New York, have a large number of employees engaged only in intrastate commerce. The New York Central and the Illinois Central Railroads are somewhat similarly situated, since much of their property and many of their employees, though engaged purely in intrastate commerce, are affected by the Retirement Act.

The learned justice has struck what seem to be several telling blows at the faulty and admittedly hurried construction of the Act, in spite of the fact that he appears at times to be trying to save his face in the event of a reversal by the appellate tribunal. He invokes the doctrine of *stare decisis* by reiterating a statement of the President of the United States, that "Decision of this bill has been difficult". He retains his position beside (or behind) the Chief Executive by admitting that the bill, although much improved in its final form, is still crudely drawn and will require many changes and amendments at the next session of Congress.

From time immemorial debate has raged over the extent of the powers accorded to Congress by the United States Constitution. With the advent of varied modes of transportation and communication, the spotlight has focused on that magic phrase—the interstate commerce clause. Just what is its significance?

The controversy over a statute of this type resolves itself into two questions. 1. May Congress, in the exercise of its powers over interstate commerce, regulate the relations of common carriers and their employees while both are engaged in such commerce? 2. Has Congress exceeded its power in that regard by prescribing the regulations which are embodied in the act in question? Obviously in the light of reams upon reams of well-considered opinions the answer to the first question is in the affirmative.

It has been broadly held that the power of Congress to regulate commerce extends to all the means, appliances, facilities and in-

strumentalities of commerce.[14] *Linn Sing* v. *Washburn*[15] and other leading cases[16] are authority for the principle that such power extends to persons as well as property.

As to the second query, decision is not so easily rendered and is dependent upon a close reading of the statute itself.

The October, 1907, term of the United States Supreme Court had before it the problem of the Employers' Liability Act.[17] There too the constitutionality of an act passed by Congress under the interstate commerce clause was in issue. The nine learned jurists contemplated the act in dispute from such divers viewpoints that the decision rendered was agreed to by only five of the nine. The opinion of the court was written by Mr. Justice White, Mr. Justice Day concurring with him; Mr. Justice Peckham delivered a separate opinion, with which the chief justice and Mr. Justice Brewer concurred. Then followed three additional dissenting opinions by Mr. Justice Moody, Mr. Justice Holmes, and Mr. Justice Harlan, with the latter of whom Mr. Justice McKenna agreed. From the above, it is not to be gainsaid that the question of the extent and scope of the powers of Congress over interstate commerce is not only important and interesting, but also highly debatable.

In the *Employers' Liability* cases,[18] defences were raised similar to those in the case at hand—in brief, to what extent may Congress control by legislation the various phases of interstate commerce? In the prevailing opinion, Mr. Justice White remarks:[19]

> "The act then being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employes may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce. Without stopping to consider the numerous instances where although a common carrier is engaged in interstate commerce such carrier may in the nature of things also transact business not interstate commerce, although such

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[14] Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347 (1875); Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436 (1903); Stockton v. Baltimore & N. Y. Railway Co., 32 Fed. 9 (C. C. N. J. 1887).

[15] 20 Cal. 543.

[16] "Head Money Cases," 18 Fed. 135 (C. C. E. D. N. Y. 1883); Memphis & Little Rock Ry. Co. v. Nolan, 14 Fed. 532 (C. C. W. D. Tenn. 1882).

[17] 207 U. S. 463, 28 Sup. Ct. 141, 52 L. ed. 297 (1907), *aff'g*, 148 Fed. 986 (C. C. W. D. Ky. 1906) and 148 Fed. 997 (C. C. W. D. Tenn. 1906).

[18] *Ibid.*

[19] *Ibid.* These contentions are thus summed up in the brief filed on behalf of the Government: "It is the carrier and not its employees that the act seeks to regulate, and the carrier is subject to such regulation because it is engaged in interstate commerce. * * * By engaging in interstate commerce the carrier chooses to subject itself and its business to the control of Congress, and cannot be heard to complain of such regulations."

> local business may indirectly be related to interstate commerce. ***. As the act thus includes many subjects wholly beyond the power to regulate commerce and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution, and cannot be enforced unless there is merit in the propositions advanced to show that the statute may be saved. * * * It is yet insisted that the act is within the power of Congress, because one who engages in interstate commerce thereby comes under the power of Congress as to all his business and may not complain of any regulation which Congress may choose to adopt."

The court disposed of this argument quite readily by denying the assumption that "because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution". Naturally such a presumption would be contrary to the spirit and letter of the Constitution, and if upheld, would extend the power of Congress so as to include power of legislation over matters, now and from the beginning of the Union, under the control of the states.

In his brief the attorney general pointed out that a statute should not be construed so as to render it unconstitutional when a constitutional construction is open to the court. In his prevailing opinion Mr. Justice White remarked that although it is incumbent on the court to so construe an Act of Congress as to render it valid, if lawfully possible, an ambiguous statute will not be rewritten by the court to obtain this result, the writer goes on to say:[20]

> "Concluding, as we do, that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the Constitution and nonenforceable."

The Act was held invalid.

Four years later, the 1911 term of the United States Supreme Court decided the *Second Employers' Liability* cases.[21] The Second Employers' Liability Act, unlike the first Act, dealt merely with the liability of a railroad engaged in interstate commerce for injuries sustained by its employees while engaged in interstate commerce. The Court, Mr. Justice Van DeVanter writing the opinion, held the Second Employers' Liability Act constitutional.[22]

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[20] *Supra* note 17.

[21] 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327, 38 L. R. A. (N. s.) 44 (1911).

[22] It may be noted that Mr. Justice Van Devanter did not grace the Supreme Court bench at the time that the *First Employers' Liability Cases* were decided; he became an associate justice in 1910.

The decision was based on the ground that the effect upon interstate commerce, rather than the source of the dispute, was the important test of validity.[23] The Court distinguished the two cases by pointing out that [24]

> "* * * the present Act [25] unlike the one condemned in *Employers' Liability* cases,[26] deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employees while engaged in such commerce. And this being so, it is not a valid objection that the act embraces instances where the causal negligence is that of an employee engaged in intrastate commerce; for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein".

Mr. Justice Van Devanter cited the opinion written by himself in *Southern Railway Co.* v. *United States*,[27] wherein he said:

> "The power of Congress to regulate interstate commerce is plenary and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, *it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate* commerce." (Italics ours.)

The rule laid down in these cases was restated and confirmed in the celebrated *"Shreveport"* cases.[28] Therein the Supreme Court declared that the power granted to Congress by the Constitution should extend at all times to cope with varying exigencies that may occur in order to keep interstate commerce free from local control. The court pointed out that [29]

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[23] Here it was the negligence of an intrastate worker resulting in injury to an interstate employee.

[24] Second Employers' Liability Cases, 223 U. S. 1, at p. 51.

[25] SECOND EMPLOYERS' LIABILITY ACT.

[26] 207 U. S. 463, 28 Sup Ct. 141 (1907).

[27] 222 U. S. 20, 32 Sup. Ct. 2 (1911), where the question was presented whether the amendment to the Safety Appliance Act (March 2, 1903, c. 976, 32 STAT. 943) was within the power of Congress in view of the fact that the statute was not confined to vehicles that were used in interstate traffic but also embraced those used in intrastate traffic.

[28] Houston, East & West Texas Railway Co. v. United States, Texas and Pacific Railway Co. v. United States, 234 U. S. 342, 34 Sup. Ct. 833 (1913).

[29] In the opinion of the Court, in Houston & Texas Railway Co. v. United States, *supra* note 28: "It is unnecessary to repeat what has frequently been

> "The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the state, and not the nation, would be supreme within the national field".

In substance, the Court believed that, although Congress may not have power to regulate the internal commerce of a state, *per se,* nevertheless, pursuant to its authority to control interstate commerce, it may so affect intrastate commerce if the latter is closely interwoven with the former.

Section 1 of the Railroad Retirement Act contains a provision harshly inequitable in its possible effect. Judge Wheat pointed this out when it was shown that about 143,000 men, who had left the employ of the carrier systems during the year prior to the date of the enactment of the Act (some of whom had been dismissed for cause), would be entitled to the benefits of pension.[30] Furthermore, upon the re-employment of any person formerly in the service of a carrier, such former service may be counted as part of his total service in computing his annuity. According to this, there are today over a million persons entitled to such benefit.

A statute is prospective and not retroactive, unless "it is intended to remedy a mischief, to promote justice, to correct innocent mistakes, to cure irregularities in judicial proceedings or to give effect to acts and contracts of individuals according to the intention thereof".[31]

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said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating state legislation.' "

[30] The opinion states: "The right to annuities is not dependent upon the rendition of service subsequent to enactment and the computation of the annuities is not confined to service rendered subsequent, but includes service rendered prior thereto." *Supra* note 11.

[31] Winfree v. Northern Pacific Railway Co., 173 Fed. 65, *aff'd,* 227 U. S. 296, 33 Sup. Ct. 273, 57 L. ed. 518 (1912).

By the Railroad Retirement Act, an employee may assert pension rights on a contract of employment which was made, performed, and terminated *before* the Act was passed. This prior term of employment may be added to existing or future terms in computing what pension the applicant shall receive. Certainly the Act cannot be interpreted under any of the classifications above-mentioned. Yet is it obviously retroactive—altering contracts of employment which were made and executed *prior* to passage of the law by Congress. In 1814 the case of *Society for Propagation of the Gospel* v. *Wheeler*[32] decided that a statute creating a new obligation, imposing a new duty, or attaching a new disability in respect to past transactions, is illegally retroactive, and thus contrary to the sacred doctrine of the inviolability of contracts. Cases are legion wherein this principle was heralded as elementary in determining the validity of disputed statutory enactments.[33]

Were such power conceded to vest in Congress to alter and amend contracts by subsequent legislation, the parties to contracts would be in ridiculously precarious positions; contract law would become a farce.

That portion of the Pension Act which vests additional rights in the employee in prior terms of employment would seem to be directly violative of the Fifth Amendment to the Constitution and to all existing principles of contract law.

When the Railroad Retirement Act comes before the United States Supreme Court, several nice questions will arise. Will the Supreme Court sitting in 1934 use the decision of the same Court, invalidating the First Employers' Liability Act, as a precedent and declare this Act unconstitutional? Or will it take the view that the "New Deal" era fathered by the present administration demands a liberal interpretation of the iron-bound Constitution, and rely on the *Second Employers' Liability* cases and the *"Shreveport"* decision? Will the Court take judicial notice of the peculiar economic crisis through which the world is passing and decree that this piece of social legislation shall stand as one of the first mile-posts along the road to economic betterment of labor?

The Attorney General of the United States recognizes the importance of this cornerstone of future Congressional enactments, in declaring:

> "It is important that the Supreme Court pass on this act as soon as possible, not only for the particular purpose of pass-

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[32] Fed. Cas. No. 13,156 (2 Gall. 105).

[33] Satterlee v. Matthewson, 27 U. S. 380, 7 L. ed. 458 (1829); Albee v. May, Fed. Cas. No. 134 (2 Paine, C. C. 74) (1834); Wilder v. Lumpkin, 4 Ga. 208 (1848); State v. Squires, 26 Iowa 340 (1858); Thornton v. McGrath, 62 Ky. 349 (1864); Wilson v. Hardesty, 1 Md. Ch. 66 (1847); Baugher v. Nelson, 9 Gill 299, 52 Am. Dec. 694 (1850); Reed v. Beall, 42 Miss. 472 (1869); Bleakney v. Farmers' & Mechanics' Bank, 17 Serg. & R. 64 (1827); Burch v. Newbury, 10 N. Y. (6 Seld.) 374 (1852).

ing on the Railway Retirement Act, but also to determine the scope to which any such acts can go." [34]

On the same day that the Railroad Retirement Act was held invalid, the President's Commission on Economic Security voted to recommend old-age pension and unemployment insurance legislation, as well as sickness insurance. This shows the general tendency today toward social insurance legislation which will aid labor in its fight to safeguard the workman from unwelcome charity in the event of sickness, unemployment and old age. Will the Supreme Court, in considering its decision on the Act under discussion, take cognizance of the fact that a balk of the attempt of Congress to provide for railroad employees may deter and hinder future legislative efforts along the same lines? Or will the Supreme Court take the view that a denial of the constitutionality of the Railroad Retirement Act will be in the nature of a warning to Congress and other lesser legislatures to draw bills more carefully?

Social legislation, such as the Railroad Retirement Act exemplifies, has been sponsored by labor ever since it became a recognized force in industry. Even if this present Act is denied life by the court, it is inevitable that further proposals along the same lines in other industries will be made. That such legislation will be a burden to the various industries cannot be denied. Nevertheless such legislation is a necessary adjunct to the betterment of industrial, social and economic existence and, as such, is bound to eventuate. Such laws require, in addition to painstaking study of industrial conditions, careful drawing on the part of the legislators in order to conform with constitutional requirements. Spokesmen for the railroads and the employees alike agree that the Pension Act is, *per se*, fundamentally progressive, but likewise concur in the opinion that it is poorly drawn and open to adverse criticism.[35]

In drawing a conclusion as to the fate of the Railroad Retirement Act in its appearance before the august tribunal in Washington, the last section of the Act must be given due consideration, for perhaps thereon depends the decision. This is the separability clause which states that if any portion of the Act shall be declared invalid, the remainder shall not be affected thereby.[36]

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[34] United States Law Week, Vol. 2, No. 9, Index 156.

[35] It has been pointed out that certain railroads have cut down their employment lists since the Pension Act went into effect. Heads of various railroads defend this as a natural let-down in business, and assert that it is not a by-product of the new law. Expressing an opinion felt by most executives, Daniel Willard, President of the Baltimore & Ohio Railroad, in a statement to the press, said: "The Baltimore & Ohio Railroad is not opposed to pensions. We pay the entire cost of pensioning employees of more than fifty years. We are opposed to certain features of the Pension Law rather hurriedly passed by the last Congress and we hope that the next Congress may correct the features that clearly seem wrong." (N. Y. Times, Aug. 25, 1934, at 17:7.)

[36] RAILROAD RETIREMENT ACT, Public, No. 385, 73d Cong. [§3231] §14: "If any provision of this Act, or the application thereof to any person or

While it may be granted that the Act does not violate the interstate commerce clause or the Fifth Amendment of the Constitution, its retroactive feature does seem to attempt to alter and amend executed contracts. Will the Supreme Court deem it advisable to take advantage of the separability clause and its prerogative of "separating the chaff from the wheat", thus cutting out the retroactive portion while preserving the valid sections of the Act?

While the highest court in the land enjoys a reputation of rare conservatism, it has been known in the past to perform astonishing feats of judicial reasoning in order to sustain legislation which has met with the Court's approval.

In the light of the known status of Mr. Justice Van Devanter and Chief Justice Hughes, who, it must always be remembered, wrote the opinions in the *Second Employers' Liability* cases and the *"Shreveport"* case, the liberal bloc of Benjamin Cardozo, Louis Brandeis, Harlan F. Stone and Owen J. Roberts should be able to influence the Supreme Court in holding the Railroad Retirement Act valid, if not in full, at least in part.

JOHN E. FREESE.

POWER OF TRUSTEES TO LEASE—INSTRUCTIONS.

A TRUSTEE, AFTER SECURING THE APPROVAL OF A LONG TERM LEASE BY THE SUPREME COURT UNDER SECTIONS 106 AND 107 OF THE REAL PROPERTY LAW,[1] HAS NO AUTHORITY TO MODIFY THE TERMS OF SAID LEASE, WITHOUT A LIKE APPROVAL BY THE COURT.[2]

THE COURTS WILL NOT DECIDE QUESTIONS OF BUSINESS JUDGMENT, BUT WILL LEAVE THEM TO THE TRUSTEE.

1. *Power to lease for term of trust estate.*

It has never been doubted that a trustee who is charged with the receipt and disposal of the income of real property necessarily

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circumstances, is held invalid, the remainder of the Act or application of such provision to other persons or circumstances shall not be affected thereby."

[1] N. Y. REAL PROP. LAW §106. A trustee appointed to hold real property during the life of a beneficiary, and to pay or apply the rents, income and profits thereof to, or for, the use of such beneficiary, may execute and deliver a lease of such real property for a term not exceeding five years, without application to the court. The Supreme Court may, by order, on such terms and conditions as seem just and proper, in respect to rentals and renewals, authorize such a trustee to lease such real property for a term exceeding five years, if it appears to the satisfaction of the court that it is for the best interest of the trust estate.

§107. Provides for notice to beneficiary and other persons interested where real property affected by a trust is conveyed, mortgaged or leased, and procedure thereon.

[2] City Bank Farmers Trust Co. v. Smith, 263 N. Y. 292, 189 N. E. 222 (1934), *aff'd* on reargument, 264 N. Y. 396, 191 N. E. 720 (1934).