Michigan Law Review

Volume 33 | Issue 8

1935

CONSTITUTIONAL LAW -THE RAILROAD RETIREMENT ACT - INTERSTATE COMMERCE - DUE PROCESS

CONSTITUTIONAL LAW — THE RAILROAD RETIREMENT ACT — INTERSTATE COMMERCE — DUE PROCESS — Serious obstacles were placed in the path of social legislation by the Supreme Court's decision

holding the Railroad Retirement Act unconstitutional.[1] To what extent the narrow view taken of the permissible field of regulation of interstate commerce will interfere with other legislation based on the commerce power remains to be seen. The majority of the Court, speaking through Mr. Justice Roberts, found the Act objectionable both as violating the due process clause of the Fifth Amendment of the Constitution and as not being a regulation of commerce under the commerce clause. Before taking up these two aspects of the case, the significant portions of the Act itself should be reviewed.

The law set up a compulsory retirement and pension system for all carriers subject to the Interstate Commerce Act, to be administered by an executive agency known as the Railroad Retirement Board.[2] Pensions were to be paid out of a fund collected by compulsory contributions of carriers and employees, the contributions being a certain percentage of the wages paid and the carrier contribution being twice that of the employees.[3] The Board was given power to change these percentages as the demands on the fund might require, but until the Board acted the carriers were to contribute 4 per cent and the employees 2 per cent.[4] Annuities paid from this fund were to be figured on the basis of a sliding scale of percentages of the average wage up to three hundred dollars received by any given employee during his career as a railroad worker, multiplied by the number of years up to thirty of service with all carriers under the Act.[5] Service before the Act went into effect was to be used in computing the annuities, and this service need not be continuous.[6] Retirement was compulsory at 65, except that by agreement between the carrier and employee the time could be postponed till 70; after thirty years' service retirement was optional with a reduced annuity.[7] For the administration of the Act all carriers were to be treated as a single employer so that all contributions were to be paid into a single fund from which all annuities were to be withdrawn. Persons eligible for benefits under the Act were all present and future employees of the carriers, all who were employees within a year prior to the effective date of the Law, and certain employees' representatives who had been employed and who paid both contributions.[8] Provision

[1] Railroad Retirement Board v. Alton R. R., (U. S. 1935) 55 Sup. Ct. 758.

[2] Railroad Retirement Act of June 27, 1934, c. 868, 48 Stat. 1283, Sec. 1 (a); U. S. C. tit. 45, secs. 201-214. The board appointed by the President was to have a representative of labor, a carrier representative, and one impartial member.

[3] Sec. 9, 48 Stat. 1287.

[4] Sec. 5, 48 Stat. 1285. If the contribution had not been increased, it was estimated that the fund would have had a deficit of $11,000,000 by 1942.

[5] Sec. 3, 48 Stat. 1284.

[6] Sec. 4, 48 Stat. 1285.

[7] Sec. 8, 48 Stat. 1286.

[8] Secs. 1 (b), 7, 48 Stat. 1283, 1286.

was made for the continuance of the numerous private pension plans if satisfactory arrangements could be made with the Board.[9] The Act concluded with penalties, criminal sanctions, and the usual separability clause.[10]

The class I railroads, together with the Express and Pullman companies, brought suit in the Supreme Court of the District of Columbia to enjoin the enforcement of the Act. A permanent injunction was granted in that court on the ground that the regulation extended to intrastate commerce and also because of due process.[11] The Railroad Retirement Board appealed to the Supreme Court from this order.

I.

The power of Congress under the commerce clause must be exercised according to the requirements of due process in the Fifth Amendment.[12] The majority of the Supreme Court found most of the provisions of the Act objectionable on that score, much of the trouble being due to careless draftsmanship and lack of sufficient study. Few attempts were made to limit benefits to those deserving them, and much reliance was apparently placed on the convenient doctrine of administrative necessity.[13] Although one may agree with the Court in its treatment of detailed provisions, certain general devices essential for future plans were condemned by the Court; these are worth some examination.

Congress chose to treat the railroads as a single employer for the purposes of the Act, and each railroad was to contribute the same percentage of its payroll to the common fund. The railroads attacked this, and the Court agreed, on the ground that grave inequalities would result from the varying proportions of older employees on the different roads and from the unequal ages at which employment commences.[14] Furthermore, the existing carriers had to make good for services performed for defunct carriers of the past, and in the future for such as might at any time cease operations. The inequalities which may result from a pooling scheme have been before the Supreme Court in cases of state legislation challenged under the Fourteenth Amendment. In *Noble State Bank v. Haskell* a statute required all state banks to con-

[9] Sec. 6, 48 Stat. 1285.

[10] Secs. 12, 13, 14, 48 Stat. 1288-1289.

[11] Alton R. R. et al. v. Railroad Retirement Board, New York Times, October 25, 1934, at p. 41; 2 U. S. LAW WEEK 141, 149 (Oct. 30, 1934).

[12] Monongahela Nav. Co. v. United States, 148 U. S. 312, 13 Sup. Ct. 622 (1893); GAVIT, THE COMMERCE CLAUSE, sec. 88 (1932), and cases cited therein.

[13] Co-ordinator Eastman's testimony at the Hearings before a sub-committee of the Committee on Interstate Commerce, 73rd Congress on S. 3231, at pp. 158-162.

[14] Fifty-six of the carriers had no men at the compulsory retirement age. The average age at which employment commenced varied from 28.4 to 34.2 years, according to figures quoted by the court.

tribute a percentage of their deposits to a fund available for the payment of depositors of closed banks.[15] This was sustained by the Supreme Court although there was prejudice to sound banks whose depositors would receive no benefits and which did not lack the confidence which the fund was designed to give in state banks as a whole. In *Mountain Timber Co. v. Washington*[16] provisions of the state Workmen's Compensation Act were approved calling for unit treatment of all employers of a given group, the classification being based on the hazard of the industry. Each employer was required to contribute to a common fund from which all benefits to employees of that class were to be paid. The pooling provision was sustained over the objection that careful employers must carry the burdens of the careless, the observation being made that injuries were to a great extent inevitable in modern industry, an observation equally applicable to the present problem. A more extreme provision in the New York Workmen's Compensation Act requiring, in cases of death without dependents, employers to pay a certain sum to be used for the benefit of persons not adequately cared for by their compensation was also upheld.[17] In the long run the inevitableness that all employees must be retired will tend to eliminate the inequalities in this method, which method cannot be called plainly unsuited for the purpose.

Support for unitary treatment of carriers is found in the theory of the country's transportation system as marked out by Congress and the Interstate Commerce Commission since the Transportation Act of 1920.[18] Recognizing that competition was no longer a solution, an attempt has been made to secure adequate transportation as a whole through the medium of strict equalizing regulation.[19] With this in view the Court sanctioned the recapture of excess returns from strong carriers and their use for the benefit of the weaker ones.[20] Less prosperous roads have been given a greater share of the revenues from joint

[15] Noble State Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. 186 (1911). The case was followed in Abie State Bank v. Bryan, 282 U. S. 765, 51 Sup. Ct. 252 (1931). Compare Hubbell Bank v. Bryan, 124 Neb. 51, 245 N. W. 20 (1932), where the amendment to the law approved in the Abie case whereby the fund was to be used only for banks *already* closed was held an unreasonable discrimination against open banks which could not benefit at all.

[16] Mountain Timber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 260 (1917).

[17] Sheehan Co. v. Shuler, 265 U. S. 371, 44 Sup. Ct. 548 (1924).

[18] 41 Stat. 488.

[19] Railroad Comm. of Wisconsin v. Chicago, B. & Q. R. R., 257 U. S. 563 at 585, 42 Sup. Ct. 232 (1922); New England Divisions Case, 261 U. S. 184 at 189, 43 Sup. Ct. 270 (1923). REYNOLDS, THE DISTRIBUTION OF POWER TO REGULATE INTERSTATE CARRIERS 225 ff. (1928).

[20] Dayton-Goose Creek Ry. v. United tates, 263 U. S. 456, 44 Sup. Ct. 169 (1924).

hauls.[21] Once we admit that the efficient operation of every carrier is essential to the system as a whole and admit that the pension plan would have a beneficial effect, we must say that Congress was justified in adopting an arrangement which would have spread the benefits equally without regard to the strength of the particular employer or the age of its employees. As a practical matter the pooling system is preferable, for it simplifies the accounts when employees shift from one carrier to another or where there is a realignment of ownership of carriers, and also eliminates administrative difficulties in general.

Periods of service before the Act was to go into effect were to be considered in determining the amount of the annuities. The Court held that this amounted to a new value to services already completely compensated for, and as such was taking property from one and giving it to another without due process.[22] This method of determining the amount of the pension to be paid is the one most generally used in industrial pension systems and has been found most useful in promoting long and faithful service.[23] To say that Congress was acting arbitrarily in adopting this measure is going beyond the judicial function. As the Chief Justice points out in his dissenting opinion, the statement that this measure results in additional compensation for past services confuses the means used to compute the amount of the annuity with the nature of a pension. Undoubtedly the feeling that a pension is a social obligation to take care of those worn out in employment has led state courts with few exceptions to sustain public service pensions calculated in this manner in the face of state constitutions forbidding the payment of additional compensation for public service already performed.[24] The pension system of the Federal Civil Service as originally set up used past services in calculating the amount of the annuity.[25] It may well be that starting the annuities immediately with full payments would have been an additional financial burden which the railroads would have been unable to bear; but that is a separate question from the reasonableness of a method of computing annuities. Again, as a practical matter a method like the one used here is necessary to prevent postponing the complete operation of the plan for a number of years.

On reading the majority opinion one feels that the large expense

[21] New England Divisions Case, 261 U. S. 184, 43 Sup. Ct. 270 (1923).

[22] (U. S. 1935) 55 Sup. Ct. 758 at 762.

[23] Testimony of Mr. Ekern, Hearings on S. 3231, page 7; 1 LATIMER, INDUSTRIAL PENSION SYSTEMS IN THE UNITED STATES AND CANADA 105 (1932).

[24] People ex rel. v. Abbot, 274 Ill. 380, 113 N. E. 696 (1916); Attorney General v. Connolly, 193 Mich. 499, 160 N. W. 581 (1916); cases are collected in 37 A. L. R. 1162 (1925). *Contra*, State ex rel. Heaven v. Ziegenhein, 144 Mo. 283, 45 S. W. 1099 (1898).

[25] U. S. C. tit. 5, sec. 691 ff.

to the railroads at this time was a controlling consideration in the minds of the Court, but that they sought to put this in terms of accepted legal objections. It must be conceded that just as it is proper for industry to bear the costs of injuries, so also it is proper for an industry to bear the costs of superannuation;[26] but the burden must not be unreasonable. There is no question but that the unlikelihood that increased rates, if granted, would have yielded greater revenue and that any of the increased labor costs could have been passed on through a reduction in wages, would have made the added expense a serious threat to the financial condition of many of the carriers. Figures for December 1934 show that 949,382 employees on Class I Steam Railroads were receiving $118,064,291 in wages.[27] Using that month as a basis the annual contribution of the carriers would have been $56,670,852. The present pension systems, which cover about 90 per cent of the employees under the Act, are costing the respective employers approximately $30,000,000 yearly, the amounts being paid out having been cut drastically in recent years.[28] Stated in terms of percentages of operating revenues, the Act would have increased the pension expenses from about 1⅓ per cent to over 2½ per cent. Although the Act only doubled this item of expense, the burden would have fallen heaviest on those weaker roads which have cut their present retirement expenses the most. The large initial cost results from payment in full to those who retire during the first few years of the Act's operation and who have consequently not paid their proportionate shares into the fund. The railroads' figures show that the total annuities attributable to services before the effective date of the Act would have been $4,415,000,000, of which two-thirds would have been paid by the carriers.[29] Because of this method of figuring, the costs would increase for ten years, at the end of which time the railroads would be paying twice the initial costs.[30] These figures put meaning into the suggestion of Co-ordinator Eastman that Congress should audit his survey's figures on actual costs.[31] They also

[26] Mountain Timber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 260 (1917).

[27] 40 MONTHLY LABOR REV. 789 (March 1935).

[28] Mr. Parmalee, Director of the Bureau of Railway Economics, in Hearings on S. 3231, p. 84 ff. There are 51 formal pension plans, 23 informal, and 10 indefinite arrangements. Of these, only six have any funded reserves, the rest paying the pensions as part of the operating expenses. Using the 1933 operating revenues as a basis of calculation, the Pension Act would have increased the operating deficit from $13,800,000 to about $43,000,000. Labor costs are about 45 per cent of operating revenue (pp. 181, 182).

[29] 98 RAILWAY AGE 388 at 425:2 (March 16, 1935). The present worth of two-thirds of this figure is $1,720,000,000.

[30] 98 RAILWAY AGE 388 at 425:2 (March 16, 1935). The annual cost would have begun around $60,000,000, which would increase until in 1945 the cost per year would have been about $137,000,000.

[31] Hearings on S. 3231, p. 154.

suggest the possible unfairness of making the railroads bear the great part of these initial annuities. Just as we have to draw the line somewhere marking the end of permissible taking under the police power and the beginning of eminent domain, so too there is probably a limit to the expense to which the railroads may validly be put as a part of the regulation of interstate commerce.[32]

In spite of these serious objections to the particular provisions of the Railroad Retirement Act as enacted, legislation could be drafted which would pass the tests of the Fifth Amendment. The large initial expense to the railroads might be met by the use of public money in starting the system off in full force. Co-ordinator Eastman's committee has delayed its full report until this decision should be announced, but will soon make recommendations based on an exhaustive study of pensions and the cost thereof. This is but a part of a complete legislative plan aimed at economic security for railroad employees including placement service, dismissal benefits, and unemployment relief.[33]

2.

The more significant part of the majority opinion deals with the power of Congress under the commerce clause to enact a compulsory retirement and pension law for interstate carriers. No matter how carefully a later bill may be drawn to avoid due process objections, it cannot be valid if the majority are to be taken at their word. Their argument is that to be a valid regulation of a carrier engaged in interstate commerce, a measure must have a direct relation to the actual business of transportation in the sense that it promotes safety, efficiency, or economy.[34] It is impossible to say from the evidence that retirement of older employees will have any such direct effect on transportation. Moreover, even if retirement alone were a valid regulation, pensions cannot be, for the economic value of a pension is a result of loyalty and gratitude to the employer, feelings which will be absent when the pension is paid through the government and under compulsion. Congress therefore had no power under the commerce clause to enact the statute, no matter how reasonable its provisions might be. This argument invites a word regarding the function of the Court in passing on the constitutionality of legislative action. Its duty is to determine

[32] Attorney General v. Williams, 174 Mass. 476, 55 N. E. 77 (1899); Fertilizing Co. v. Hyde Park, 97 U. S. 659 (1878).

[33] Hearings on S. 3231, p. 154.

[34] This is a more restricted notion of regulation than is suggested in Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1 (1824). Gavit suggests that the only requirement is that "the legislation lay down a rule which governs the conduct, legal interests or relationships of those engaged . . . in interstate commerce." GAVIT, THE COMMERCE CLAUSE 178 (1932).

whether the means chosen have a reasonable, not a necessary, relation to the ends sought.[35] The Court is not called on to give its own opinion of the effect of the particular statute on the safety or efficiency of the carrier, but rather to decide whether the necessary effect is clearly non-existent.[36] A brief review of the regulations permissible under prior decisions and of the effect of retirement and pensions on the conduct of transportation will disclose to what extent the majority followed this formula.

Congressional regulation to promote the safety of carrier employees and of the public generally has been uniformly sustained. Congress may require certain safety devices on all cars of interstate carriers under this head.[37] Conditions of employment and relations of master and servant are conceded to have a direct relationship to the safety and efficiency of the transportation system. With this in view, limitations on the hours of continuous labor have been upheld as efforts to eliminate accidents due to fatigue.[38] To encourage care, stricter liability to employees may be imposed upon the carriers by the elimination of common law defenses to actions of negligence.[39] Protection for collective bargaining has been sustained as a regulation looking to industrial peace.[40] This short list gives some idea of what the Court has permitted Congress to do in the past.

Study of industrial pension systems generally reveals that economic motives, rather than social, have led to their establishment by employers' initiative, little pressure having been exerted by employees.[41] Pension systems are believed to aid in the development of a stable personnel as an antidote to labor troubles and as a means of creating loyalty. Moreover, a comprehensive plan of caring for the aged tends to attract a better class of workers to the industry. Accidents are thought to be prevented and efficiency improved by the elimination of superannuated

[35] Radice v. New York, 264 U. S. 292, 44 Sup. Ct. 325 (1924). Holmes, J., in Adkins v. Childrens Hospital, 261 U. S. 525 at 568, 43 Sup. Ct. 394 (1923).

[36] Stafford v. Wallace, 258 U. S. 495 at 521, 42 Sup. Ct. 397 (1922).

[37] Federal Safety Appliance Act, U. S. C. tit. 45, secs. 1-51, sustained as regards penal provisions in Southern R. R. v. United States, 222 U. S. 20, 32 Sup. Ct. 2 (1911), and as to civil liability in Texas & Pacific R. R. v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 482 (1916).

[38] Baltimore & Ohio R. R. v. Interstate Commerce Commission, 221 U. S. 612, 31 Sup. Ct. 621 (1911).

[39] Federal Employers Liability Act, U. S. C. tit. 45, sec. 51, sustained in the Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169 (1912).

[40] Texas & N. O. R. R. v. Brotherhood of Ry. & Steamship Clerks, 281 U. S. 548, 50 Sup. Ct. 427 (1930), which virtually overrules Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277 (1908).

[41] 1 LATIMER, INDUSTRIAL PENSION SYSTEMS IN THE UNITED STATES AND CANADA 18 (1932).

employees, a removal which is difficult to accomplish without some form of pension.[42] The railroads particularly are said to need a pension system because the rule of seniority in re-employment leads to a greater proportion of older employees, and railroad accidents are more costly and dangerous to the public at large.[43] Evidence produced at the hearing on this bill pictured the threatened breakdown of the railroads' private pension systems,[44] the abandonment of which was thought by experts to endanger labor relations generally.[45] The majority of the Court discounted the evidence derived from private pension systems for the reason that in their opinion the benefits to industry were attributable to loyalty and gratitude, both of which would be missing under a compulsory, government-administered plan. But removing the effect of loyalty and gratitude, there still remain several ways in which it is not unreasonable to say, on the basis of the foregoing evidence, that transportation would be benefited. Increased safety, maintenance of industrial peace, efficiency through the elimination of older employees, and improvement in the morale of the younger men are all possible results of a compulsory scheme on which Congress might have been free to rely. This is clearer when the analogy between the Federal Employers Liability Act, or the admittedly possible Federal Workmen's Compensation Act and the present measure is examined. Both measures may be related to safety and efficiency through the improved morale of the employees.[46] Doubts as to the effectiveness may be

[42] 1 LATIMER, INDUSTRIAL PENSION SYSTEMS IN THE UNITED STATES AND CANADA 18 (1932).

[43] Testimony of Mr. Ekern and Mr. Eastman in Hearings on S. 3231, pp. 9, 155. The brief for the petitioner (p. 65) in the Supreme Court of the United States gives the following figures for 1930 on the percentage of employees over 65 years of age: steam railways, 3.43 per cent; coal mining, 2.26 per cent; oil wells, 1.5 per cent; iron and steel, 2.61 per cent; other transportation, 2.27 per cent. In 1932 the railway figure had increased to 4.25 per cent, due perhaps to the failure of private pension systems.

[44] Mr. Eastman testified that payments had been reduced from 10 per cent to 40 per cent. In other cases the retirement age has been postponed. Hearings on S. 3231, p. 155. The record submitted from the trial of the case contained affidavits showing the serious condition of the railroad pension systems. Practically no reserve funds have been established, and the plans are actuarily unsound. See brief for petitioners, pp. 52 ff. Private pensions are unsatisfactory also because the employee seldom has an enforceable right, benefits being revocable by the employer. Also service must be continuous up to the time of retirement. Ekern, "Railroad Pensions," 24 AM. LABOR LEGIS. REV. 124 (1934). A comment in 44 YALE L. J. 292 (1934) contains a discussion of the social factors involved in pensions.

[45] Co-ordinator Eastman, Hearings on S. 3231, p. 155.

[46] 1 BRADBURY, WORKMEN'S COMPENSATION AND STATE INSURANCE LAW, 2nd ed., 3 (1914); 1 HONNOLD, AMERICAN AND ENGLISH WORKMEN'S COMPENSATION LAWS 15 (1917).

found in each case; in fact, the very arguments and distinctions urged by the railroads here are found in the earlier cases.[47] The majority's distinction, based on a supposed difference in the employer's duty in regard to accidents and in regard to superannuation, is not convincing.[48] So, although much can be said in opposition to the theory of the law, the foregoing evidence, reasoning, and authority are believed to show that in some degree and under reasonably conceivable circumstances there is an actual relationship between pensions and the improvement of transportation.[49] The elements of relief and social reform, stated to be an additional purpose in the preamble of the statute, do not affect its character as regulation of commerce. It is a constitutional commonplace that a statute passed under one of the powers granted to Congress is not rendered invalid because of an additional purpose which could not be achieved alone.[50]

The decision in the lower court was placed primarily on the ground that the regulation extended beyond interstate commerce and fell within the authority of the *First Employers Liability Cases*.[51] Although this possible objection was strangely enough skipped by the majority and only mentioned by the minority, it is bound to be an important question if some substitute legislation is adopted. The Act purports to cover all employees of railroads engaged in interstate commerce, making no distinction as to the type of work. It thus covers the large class of those employed in services which are not a part of interstate commerce according to the self-imposed limitations of the Second Employers Liability Act.[52] Included in this group are some who are engaged in services totally disconnected from interstate commerce, the number here being small. Since the *First Employers Liability Cases*, the tendency has been to extend the scope of federal regulation by finding sufficient relationship to interstate commerce in an ever widening range of intrastate matters. The argument has been that

[47] See the arguments of counsel in the Workmen's Compensation and Employers Liability cases, summarized in Mountain Timber Co. v. Washington, 243 U. S. 219 at 223, 37 Sup. Ct. 260 (1917), and Second Employers' Liability Cases, 223 U. S. 1 at 20, 36, 37, 32 Sup. Ct. 169 (1912).

[48] (U. S. 1935) 55 Sup. Ct. 758 at 771.

[49] "It is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end." Sutherland, J., in Stephenson v. Binford, 287 U. S. 251 at 272, 53 Sup. Ct. 181 (1932), a case involving state regulation of highways.

[50] Arizona v. California, 283 U. S. 423, 51 Sup. Ct. 522 (1931); Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 41 Sup. Ct. 243 (1921).

[51] The Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141 (1908).

[52] In Illinois Central R. R. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646 (1914), the Court states that Congress might have applied the Employers' Liability Act to more workers than are covered by its terms.

Congress' power may extend to the latter whenever necessary to make regulation of the former effective. Under the Safety Appliance Act an employee injured on a car which had not been in interstate commerce for a month was given a cause of action, the test adopted being whether the act or thing controlled reflects ultimately as a burden or benefit on interstate commerce.[53] The same reasoning has sustained the Interstate Commerce Commission's intrastate rate-making under the Transportation Act of 1920.[54] Turning to the Retirement Act, this test would permit the application of benefits to all employees engaged either directly in interstate commerce or in services contributory thereto.[55] And it could be applied to an employee engaged in whole or in part in such services, for the benefits to be received from his work as a whole would be reflected in interstate commerce, and actuarial and administrative difficulties would prevent a division such as that adopted by the Second Employers Liability Act.[56] Although the decisions will not carry us beyond this point, it is possible to argue that all employees may be constitutionally covered.[57] So long as the railroads themselves find it convenient and economically sound to operate their various enterprises under a single management, there is much to be said for Congress' right to regulate them functionally as a unit. The failure to take this next step will not seriously embarrass a future regulation, for the minority estimated that less than 100,000 employees would be excluded.

This decision, with its narrow interpretation of what is regulation, takes its place along with *Hammer v. Dagenhart* [58] as an impediment

[53] Texas & Pacific R. R. v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 482 (1916).

[54] Railroad Comm. of Wisconsin v. Chicago, B. & Q. R. R., 257 U. S. 563, 42 Sup. Ct. 232 (1922). See also Colorado v. United States, 271 U. S. 153, 46 Sup. Ct. 452 (1926), upholding the Federal power to authorize abandonment of a line wholly within a state; Board of Trade v. Olsen, 262 U. S. 1, 43 Sup. Ct. 470 (1923), upholding Federal regulation of grain futures selling; Stafford v. Wallace, 258 U. S. 495, 42 Sup. Ct. 397 (1922), upholding Federal regulation of stockyards commission men; Dayton-Goose Creek R. R. v. United States, 263 U. S. 456, 44 Sup. Ct. 169 (1924), recapture of rates from intrastate commerce; Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 32 Sup. Ct. 436 (1912), requiring uniform accounting for intrastate business as well as interstate.

[55] The situation here must be distinguished from Schechter v. United States, (U. S. 1935) 55 Sup. Ct. 837; here the regulation affects one engaged in interstate commerce in a matter which directly touches that activity, not in a matter legally separate from that activity.

[56] The difficulties encountered in the administration of the Second Employers' Liability Act are a persuasive argument in favor of a wider application. See Schoene and Watson, "Workmen's Compensation on Interstate Railways," 47 HARV. L. REV. 389 (1934); GAVIT, THE COMMERCE CLAUSE, sec. 76 (1932).

[57] GAVIT, THE COMMERCE CLAUSE 176, 219-220 (1932).

[58] 247 U. S. 251, 38 Sup. Ct. 529 (1918).

to the power of Congress to enact social and economic legislation in a field where the states are admittedly without power to act. It is difficult to see how the rest of the Co-ordinator's plans for railroad employees can be sustained without either an overruling of this decision, some very agile distinguishing, or a constitutional amendment.

R. T. A.