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THE RECAPTURE OF EARNINGS PROVISIONS OF THE TRANSPORTATION ACT

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On the 28th of February, 1920, an act was passed by Congress called the "Transportation Act, 1920,"¹ which provided for termination of federal control of railroads, settlement of disputes between railroads and their employes, and made extensive amendments to the Interstate Commerce Act. The act evidenced an entirely new policy of Congress, a constructive policy aiming to build and keep up transportation facilities at all times adequate to the nation's needs.

An important feature of the act is a direction to the Commerce Commission to divide the country into rate groups, to make rates to yield a fair return upon the value of the railway property in each group; with a provision for the recapture and putting into a government fund, to be used as provided in the act, of some part of the excess revenues of any carrier over six per cent. per annum upon the fair value of its railway property. These provisions are shown in the parts of section 15a quoted in the margin.²

[In connection with the above article, see Artaud, *A Review of the Federal Valuation of Railroads* (1922) 32 YALE LAW JOURNAL, 37. Ed.]

¹ Act of February 28, 1920 (41 Stat. at L. 456).

² Title IV (*ibid.* 474) of the Transportation Act, 1920, is "Amendments to Interstate Commerce Act." Section 422 of the Transportation Act (41 Stat. at L. 456, 488) amends the Interstate Commerce Act "by inserting after section 15 a new section to be known as section 15a" and to read as follows:

"Sec. 15a. (1). . . .

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation:

It has been contended that the seizure of income of railway companies in excess of a fair return upon a government valuation of their properties violates the fifth amendment to the Constitution of the United States. This amendment prohibits Congress from depriving persons

Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

"(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

"(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

"(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

"(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory Act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4).

"(7) For the purpose of paying dividends or interest on its stocks, bonds or other securities, or rent for leased roads, a carrier may draw from the reserve fund established and maintained by it under the provisions of this section to the extent that its net railway operating income for any year is less than a sum equal to 6 per centum of the value of the railway property held for and used by it in

(including corporations) of their property without due process of law and from taking private property for public use without just compensation; and the contention urged is that to seize the income derived from property violates these provisions, even though the seizure be limited to income in excess of a fair return on the value of the property.

the service of transportation, determined as provided in paragraph (6); but such fund shall not be drawn upon for any other purpose.

"(8) Such reserve fund need not be accumulated and maintained by any carrier beyond a sum equal to 5 per centum of the value of its railway property determined as herein provided, and when such fund is so accumulated and maintained the portion of its excess income which the carrier is permitted to retain under paragraph (6) may be used by it for any lawful purpose.

"(9) The Commission shall prescribe rules and regulations for the determination and recovery of the excess income payable to it under this section, and may require such security and prescribe such reasonable terms and conditions in connection therewith as it may find necessary. The Commission shall make proper adjustments to provide for the computation of excess income for a portion of a year, and for a year in which a change in the percentage constituting a fair return or in the value of a carrier's railway property becomes effective.

"(10) The general railroad contingent fund so to be recoverable by and paid to the Commission and all accretions thereof shall be a revolving fund and shall be administered by the Commission. It shall be used by the Commission in furtherance of the public interest in railway transportation either by making loans to carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers, as hereinafter provided. Any moneys in the fund not so employed shall be invested in obligations of the United States or deposited in authorized depositories of the United States subject to the rules promulgated from time to time by the Secretary of the Treasury relating to Government deposits.

"(11) A carrier may at any time make application to the Commission for a loan from the general railroad contingent fund, setting forth the amount of the loan and the term for which it is desired, the purpose of the loan and the uses to which it will be applied, the present and prospective ability of the applicant to repay the loan and meet the requirements of its obligations in that regard, the character and value of the security offered, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of granting the loan applied for and the ability of the applicant to make good the obligation, as the Commission may deem pertinent to the inquiry.

"(12) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the making, in whole or in part, of the proposed loan from the general railroad contingent fund is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant and the character and value of the security offered are such as to furnish reasonable assurance of the applicant's ability to repay the loan within the time fixed therefor, and to meet its other obligations in connection with such loan, the Commission may make a loan to the applicant from such railroad contingent fund, in such amount, for such length of time, and under such terms and conditions as it may deem proper. The Commission shall also prescribe the security to be furnished, which shall be adequate to secure the loan. All such loans shall bear interest at the rate of 6 per centum per annum, payable semi-annually to the Commission. Such loans when repaid, and all interest paid thereon, shall be placed in the general railroad contingent fund.

"(13) A carrier may at any time make application to the Commission for the lease to it of transportation equipment or facilities, purchased from the general railroad contingent fund, setting forth the kind and amount of such equipment or facilities and the term for which it is desired to be leased, the uses to which it is proposed to put such equipment or facilities, the present and prospective ability of the applicant to pay the rental charges thereon and to meet the requirements of its obligations under the lease, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements

My purpose is to show the true considerations upon which this contention must turn. In doing so I shall not inquire into the principles which must or should control government valuation. Presumably the courts will see to that in due course. I shall assume for the purposes of this paper that valuation will proceed upon constitutional grounds and confine what is here said to the vice that has been alleged to inhere in the provisions for seizing a portion of the excess income of some companies.

Subdivision (5), quoted in the margin, states briefly the controlling fact which has made it impossible, and will always make it impossible, to establish rates which will adequately sustain the weaker carriers indispensable to large portions of the country, without enabling some of the stronger carriers, on whose lines traffic is dense and operation unusually cheap, an income in excess of the ordinary return on invested capital, and therefore in the judgment of Congress as stated in the act, substantially and unreasonably in excess of a fair return upon the value of their property devoted to transportation. The greater part of all traffic is competitive and in order for it to move must have the same rates on all lines. This is forced by competition of two kinds: (a) competition between carriers as to all traffic that may be carried by more than one,

showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of leasing such equipment or facilities to the applicant as the Commission may deem pertinent to the inquiry.

"(14) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the leasing to the applicant of such equipment or facilities, in whole or in part, is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant is such as to furnish reasonable assurance of the applicant's ability to pay promptly the rental charges and meet its other obligations under such lease, the Commission may lease such equipment or facilities purchased by it from the general railroad contingent fund, to the applicant for such length of time, and under such terms and conditions as it may deem proper: The rental charges provided in every such lease shall be at least sufficient to pay a return of 6 per centum per annum, plus allowance for depreciation determined as provided in paragraph (5) of section 20 of this Act, upon the value of the equipment or facilities leased thereunder. All rental charges and other payments received by the Commission in connection with such equipment and facilities, including amounts received under any sale thereof, shall be placed in the general railroad contingent fund.

"(15) The Commission may from time to time purchase, contract for the construction, repair and replacement of, and sell, equipment and facilities, and enter into and carry out contracts and other obligations in connection therewith, to the extent that moneys included in the general railroad contingent fund are available therefor, and in so far as necessary to enable it to secure and supply equipment and facilities to carriers whose applications therefore are approved under the provisions of this section, and to maintain and dispose of such equipment and facilities.

"(16) The Commission may from time to time prescribe such rules and regulations as it deems necessary to carry out the provisions of this section respecting the making of loans and the lease of equipment and facilities.

"(17) The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section."

and (b) competition of markets or sources of supply. Commodities of all kinds everywhere compete with commodities produced elsewhere and cannot be produced and shipped unless the railroad rates with other costs permit their production and shipment at a profit. Products of the soil, of the forests, of mines, and manufactured goods must be shipped and sold in competition with similar goods produced elsewhere, and therefore it has been proven that for the most part it is fruitless to give the weaker carriers higher rates than the others.

The volume of traffic not subject to competition of one class or the other is too small to be important. The decree denying an injunction of state-made rates in the case of other railroads, but allowing such injunction in favor of the Minneapolis & St. Louis Railroad Company in the *Minnesota Rate Cases*³ was not of large benefit to the Minneapolis & St. Louis Railroad Company because the vast bulk of its traffic was competitive with other railroads, and, in so far as the decree was effective, it was a hardship on shippers served exclusively by that road, whose goods had to be bought and sold in competition with similar goods on lines in the same territory which charged lower rates.

The railways have been built mostly under the authority of state governments. If they were all built and owned by a single company it would be much easier to regulate their charges so as to give a fair return upon invested capital and induce the necessary investments of new capital.

But the railways were not built and are not owned by one company. The various lines were built from time to time by numerous companies. The capital was invested in each having regard to the territory served and the hopes of future growth and development of that territory. The railways compete, and the goods produced on each must be moved to market in competition with similar goods produced on the other railways.

If rates, which for the most part must be equal, all circumstances considered, on all lines, are to be fixed with reference to lines carrying a heavy traffic, the lines with a light traffic will be bankrupt and large regions of the country must remain undeveloped for lack of railway transportation. On the other hand, rates fixed solely with a view to the lines with meager traffic and to encourage the building of other such lines would be disastrous to the country considered as a whole, would restrict its productivity, and would impose a tax for transportation which would universally be conceded to be unreasonable.

The policy of Congress expressed in the act is therefore to group all the railways in one group, or in such a number of groups as the Commission may determine, and make rates reasonable with reference to a group as a whole. Such rates will evidently be substantially higher than if made with sole reference to conditions on lines carrying the densest traffic, and substantially lower than if made with sole reference

³ (1913) 230 U. S. 352, 469-473, 33 Sup. Ct. 729, 768-769.

to the weakest lines. It is intended by Congress that the rates shall be made with reference to the average condition of all lines in a group. And if rates so made should chance to yield to any carrier more revenue than six per cent per annum on the fair value of its transportation property the excess is by the act to be divided between such carrier and a general railroad contingent fund managed by the government.

The direction of the act as to how rates shall be made is in line with what the Commerce Commission had endeavored to do before the act.

The Commission said in *In the Matter of Proposed Advances in Freight Rates*:⁴

"The question now presents itself, must we go further and examine the financial showing of other lines in determining what rate shall be applied by these lines? The transportation charge must be the same by all routes. Whatever rate is made on grain from Chicago to New York by the Vanderbilt System must determine the rate between that point and the Atlantic Seaboard by all routes. Since the fixing of a rate upon that system indirectly determines what that charge shall be upon all other roads, should we, by reason of this indirect effect, consider the condition of those roads?

"It might be manifestly unfair to select a single advantageous line and make that the standard. We have seen that grain can be transported under actual conditions by the Lake Shore and the New York Central Railroads from Chicago to New York at a cost less than that by most other routes. It would be hardly just to these other routes to compel the putting in of a rate upon that line which was reasonable with respect to it alone and which had no reference to its competitors. Upon the other hand, it would be equally unfair to the public if the most expensive line were made the standard."

This was reaffirmed in a later investigation of advances in rates where the Commission said:⁵

"We hold to the same view in this investigation. We do not mean that other lines should not be considered, but that these systems may be taken as typical. Under rates reasonable for these three systems there may be lines whose earnings will be extravagant, but that is their good fortune. There may be lines which can not make sufficient earnings, but that is their misfortune. We ought not to impose upon this territory, for the purpose of allowing these defendants additional revenues, higher rates than are adequate to these three systems considered as a whole."

Notwithstanding the effort of the Commission as shown in these quotations to fix rates as nearly as possible with reference to what may be called the average railroad, the large income of a few railroads created such a pressure of public opinion that rates were forced gradually down to such a level that the credit of all but a few of the strongest companies was greatly impaired. There was a loss of incentive to private capital to invest in the creation of new railways. The railways as a whole were not able to issue and sell new stock, or to borrow on reasonable terms the \$500,000,000 or more per annum which experts generally agreed was necessary to keep transportation facilities abreast

⁴ (1903) 9 I. C. C. 382, 425.

⁵ *In re Investigation of Advances in Rates* (1911) 20 I. C. C. 243, 274.

of the country's needs. New construction had stopped and growth of then existing railways lagged far behind.

But in the long run transportation facilities of the country must grow, and if private capital cannot be made available the alternative is government ownership. Congress, when the Transportation Act⁶ was framed and passed, was face to face with this alternative. The scheme shown in section 15a of the act appeared to Congress the best way of meeting a great public need; of laying a foundation for railroad credit which would secure in the long run the private capital needed to build new railroads, to improve the roads existing, and to keep transportation facilities abreast of the growing needs of the country.

The precise contention made against this recapture of earnings has a double aspect. It is said first that the rates which have produced excess earnings of a particular carrier have either been expressly adjudged by the Commission, or must be presumed because made with the authority of the Commission, to be just and reasonable rates for the service of that carrier, and having been thus adjudged or presumed to be reasonable rates the revenues received therefrom are the absolute property of such carrier; and therefore that to recapture such earnings or any part of them is a taking of the property of the carrier without compensation. It is said secondly that unless such rates are to be regarded as just and reasonable to shippers or passengers they cannot be charged against such shippers or passengers without taking their property without compensation, contrary to the fifth amendment; in other words, that rates cannot be exacted from shippers or passengers for the purpose of putting the proceeds thereof, or any part of the proceeds, into a government fund.

It will be necessary to examine both aspects of the contention; to consider whether the scheme is open to constitutional objection by the carrier, or to similar objection by shippers and passengers.

But before either contention can be examined it is fundamentally necessary to define terms and not to use the expression "reasonable rate" in a double sense. Where a court is called upon to determine what is a reasonable charge either for property or service the question is very different from that presented when the inquiry is whether a rate fixed by legislative authority takes property without due process. Here we have no concern with the general question of *quantum meruit*. The inquiry, it should clearly be perceived, is whether the legislation takes property without compensation.

*Cotting v. Kansas City Stockyards Co.*⁷ and *Canada Southern Ry. v. International Bridge Co.*⁸ are frequently cited to prove that the reasonable charge of a carrier involves only the value of the service it renders; and that a carrier so favorably situated as to be able to render a multitude of services and make abnormal profits is still entitled to have its profits disregarded; is entitled, in other words, to the same charge per

⁶ *Supra* note 1.

⁷ (1901) 183 U. S. 79, 95, 22 Sup. Ct. 30, 37.

⁸ (1883, P. C.) 8 A. C. 723.

service as a carrier which has few transactions; such charges not becoming unreasonable because by reason of their multitude the aggregate of profits is large. This may be good doctrine where the court is considering only the value of services on the general principles of *quantum meruit*. But put as a constitutional limitation on legislative power and applied to cases where the court is considering whether legislative rates operate to take property without compensation, it is not consistent with the authorities.

No fallacy is more dangerous than the use of a term in different senses. When it is said that a carrier is entitled to a reasonable rate for service rendered, and therefore that what one carrier receives for a given service is a conclusive measure of what every other carrier must receive, we are using the term "reasonable rate" in the sense of *Canada Southern Ry. v. International Bridge Co.*⁹ Whilst on the other hand the question here is not a determination on general principles of what are reasonable rates (for the Constitution nowhere guarantees reasonable rates in that sense), but whether rates fixed by legislative authority on the plan of the act will be held confiscatory by the courts, and whether the recapture of earnings provided by the act is the taking of private property without compensation.

One who says that Congress cannot in the same breath adjudge as just and reasonable the rates charged by a carrier and take away some part of the earnings derived from such "reasonable rates" is playing upon the meaning of a word, using "reasonable" in two senses. The plain fact is that under the act the Commission does not fix "just and reasonable" rates for any particular carrier. It is required to fix what are just and reasonable rates for a group of carriers; rates fair for the average of the group. It says what are just and reasonable rates for a group of carriers to receive and for their shippers and passengers to pay. Its determination that any scheme of rates is just and reasonable is nothing more than the tentative determination provided for by the act.

Let us consider on the authorities the constitutional right of any carrier to object in the courts to rates fixed by legislative authority.

The first important case was *Chicago etc., Ry. v. Minnesota*,¹⁰ where a strong minority of the court took the view that making of rates was purely a legislative function, the majority holding, however,¹¹ that where a carrier is deprived of the power of charging reasonable rates, "*in the absence of an investigation by judicial machinery*," it is deprived of the lawful use of its property, and thus in substance of the property itself. What this case established was the right to judicial review.

In *Reagan v. Farmers' Loan & Trust Co.*¹² after review of previous decisions it was held¹³ that property may be taken in violation of the

⁹ *Supra* note 8.

¹⁰ (1890) 134 U. S. 418, 10 Sup. Ct. 462.

¹¹ 134 U. S. at p. 458, 10 Sup. Ct. at p. 467 (italics are the author's).

¹² (1894) 154 U. S. 362, 14 Sup. Ct. 1047.

¹³ 154 U. S. at p. 399, 14 Sup. Ct. at p. 1055.

fifth amendment by legislative limitation of the rates charged for use of the property.

The exact measure of this constitutional right would seem since to have been settled as a right to receive a reasonable return on the fair value of the property used for convenience of the public.¹⁴ "What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public."¹⁵

In *Darnell v. Edwards* the court said:¹⁶ "In determining whether rates are confiscatory because not yielding a proper return, the basis of calculation is the fair value of the property used in the service of the public."

The recent case of *Galveston Electric Co. v. City of Galveston*¹⁷ shows how completely settled in our law is the principle that the only constitutional objection to legislative rates is that they prevent a fair return on the fair value of property devoted to public use.¹⁸

Legislative rates may be valid at one time and invalid at another as to a particular carrier, depending on the earnings from time to time of that carrier.¹⁹ They may be valid as to one carrier and invalid as to another.²⁰

The *Minnesota Rate Cases*²¹ are very significant. The judgment of the court there denied to the Northern Pacific and to the Great Northern an injunction against state-made rates, while as to the Minneapolis & St. Louis the injunction was granted and the rates as to it restrained. The court held this result to follow from the failure of the Northern Pacific and Great Northern to prove that the rates deprived those companies of a fair return on the reasonable value of their properties, while the Minneapolis & St. Louis was able to prove that its earnings were inadequate for a fair return.

The court held in *Interstate Commerce Commission v. Union Pacific Ry.*²² that a rate fixed by the Interstate Commerce Commission cannot be determined to be reasonable or unreasonable in the manner in which

¹⁴ *Smyth v. Ames* (1898) 169 U. S. 466, 546, 18 Sup. Ct. 418, 434.

¹⁵ *San Diego Land & Town Co. v. National City* (1899) 174 U. S. 739, 757, 19 Sup. Ct. 804, 811. To the same effect are *San Diego Land & Town Co. v. Jasper* (1903) 189 U. S. 439, 442, 23 Sup. Ct. 571, 572; *Willcox v. Consolidated Gas Co.* (1909) 212 U. S. 19, 41, 29 Sup. Ct. 192, 195; *Minnesota Rate Cases*, *supra* note 3, 230 U. S. at p. 434, 33 Sup. Ct. at p. 754.

¹⁶ (1917) 244 U. S. 564, 37 Sup. Ct. 701.

¹⁷ (1922) 42 Sup. Ct. 351.

¹⁸ *Ibid.* See the numerous recent decisions of the Supreme Court and inferior federal courts cited by Mr. Justice Brandeis.

¹⁹ *Smyth v. Ames*, *supra* note 14, 169 U. S. at p. 550, 18 Sup. Ct. at p. 435; *Minnesota Rate Cases*, *supra* note 3, 230 U. S. at p. 473, 33 Sup. Ct. at p. 769.

²⁰ *Minnesota Rate Cases*, *supra* note 3, 230 U. S. at pp. 469-473, 33 Sup. Ct. at pp. 768-769.

²¹ *Supra* note 3.

²² (1912) 222 U. S. 541, 549-551, 32 Sup. Ct. 108, 111-112.

goods are determined to be worth so much a pound or services worth so much a day, and that a lower charge may be established by the Commission on one road than on another on considerations quite other than those which would determine a reasonable charge for service rendered.

In *Covington etc., Turnpike Road Co. v. Sandford*,²³ the court held that the circumstances of each carrier determine largely the rates of toll to be properly allowed for use of its property; that the legislature may require in respect of one road rates different from those prescribed for other roads, and that rates on one road may be reasonable and just to all concerned, while the same rates would be exorbitant on another road; that all any corporation may rightfully demand at the hands of the legislature is that it receive what under all the circumstances is such compensation for the use of its property as will be just both to it and to the public. This means that the aggregate return each carrier is earning for its public service may be considered by the legislative power in fixing the charge for such service.

On this principle legislation has been common which classifies or distinguishes between railroads and fixes a less charge for those on which traffic is dense or most profitable. Such classification was held reasonable in *Chicago, Burlington & Quincy Ry. v. Iowa*.²⁴ And in *Chicago & Grand Trunk Ry. v. Wellman*²⁵ the court sustained a Michigan statute which fixed passenger fares differently on different roads according to gross earnings per mile.

If a carrier's rates may be made with reference to its prosperity lower than those of other carriers, and if no carrier can insist as an absolute legal right on receiving more than a fair return on the value of its property, it would seem that there can be no violation of the Constitution in the mere recapture of so-called earnings made after the act was on the statute books, provided that after the recapture the carrier is left with a reasonable return on the value of its property. The rates fixed as provided in the act are tentative only and if any carrier's earnings are afterwards recaptured and its property and revenue left exactly where they would have been had rates been fixed originally to yield the same amount, it can make no difference to the carrier whether this result is reached by rates directly fixed for it or by higher rates fixed tentatively for a group, subject to readjustment through recapture.

Under the law as it stood before the act, if rates were fixed applicable to six competing roads which would give to road A, the most favorably situated of the six, a reasonable return on the value of its property and yield the other five roads less, it was settled that road A could not successfully object to the rates. Its constitutional right was held confined to an objection to such rates only as deprived it of a reasonable return on the fair value of its property. This precise question was determined in the *Minnesota Rate Cases*.²⁶

²³ (1896) 164 U. S. 578, 597, 17 Sup. Ct. 198, 205.

²⁴ (1876) 94 U. S. 155. ²⁵ (1892) 143 U. S. 339, 12 Sup. Ct. 400.

²⁶ *Supra* note 3.

But suppose the Commission under the new act makes rates applicable to the same roads yielding to the most prosperous road A an excess over that fair return which it was entitled to receive before and still is entitled to receive, how can it object to that excess or some part of it being recaptured? If it could not object under the old law to rates which yielded it a certain revenue, it cannot complain against a new scheme which allows it temporarily to collect more but afterwards by recapture reduces its revenue, not below the minimum which was its right to receive as the law stood before.

If it could not have objected under the old law to rates yielding it \$10,000,000, it cannot complain if the new law leaves it \$10,000,000 but reaches that result by permitting it tentatively to collect more and recapturing part.

Whether rates fixed under the act are open to any constitutional objection on the part of shippers and passengers remains to be considered. Apparently no rights of shippers or passengers are drawn in question except such as they may derive from the fifth amendment, and to object it is necessary for them to prove that their property is taken without compensation. But what property of theirs is taken? Without going largely into what constitutes a taking of property, the proposition certainly is novel and startling that when a rate is fixed by governmental authority shippers may object to such rates in court on the ground of confiscation. How can it be maintained that a shipper's property is taken by railroad rates? The simplest answer to the contention is that the law does not force him to use the railroad. It fixes the charge he must pay if he elects such use.

The decisions of the Supreme Court already made seem to prove that whatever railroad rate is fixed by public law is binding on a shipper, and that he has no constitutional right to review it in court with respect to its reasonableness. Shippers cannot maintain a complaint in the courts on constitutional grounds or others against rates established and filed pursuant to the Commerce Act.²⁷

A shipper has no constitutional right to reparation upon the allegation that a rate is excessive which he has paid—the cases last above hold this. And it follows that even his present right to appeal to the discretion of the Commission for reparation is not a *constitutional* right and might be modified or abolished in the discretion of Congress.

My conclusion is that the courts will sustain the constitutionality of section 15a of the Transportation Act²⁸ whether the attack comes from a carrier or shipper or passenger.

²⁷ *Texas & Pacific Ry. v. Abilene Cotton Oil Co.* (1907) 204 U. S. 426, 436-443, 27 Sup. Ct. 350, 353-356; *Robinson v. Baltimore & Ohio Ry.* (1912) 222 U. S. 506, 32 Sup. Ct. 114; *Proctor & Gamble v. United States* (1912) 225 U. S. 282, 296-297, 32 Sup. Ct. 761, 766-767.

²⁸ *Supra* note 2.