

TAXATION OF INTERSTATE CARRIERS AND EMPLOYEES

HEARINGS

BEFORE THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

SEVENTY-FOURTH CONGRESS

FIRST SESSION

ON

S. 3150

A BILL TO LEVY AN EXCISE TAX UPON CARRIERS AND
AN INCOME TAX UPON THEIR EMPLOYEES
AND FOR OTHER PURPOSES

[REVISED PRINT]

AUGUST 22 AND 23, 1935

Printed for the use of the Committee on Finance



UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1935

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TAXATION OF INTERSTATE CARRIERS AND EMPLOYEES

THURSDAY, AUGUST 22, 1935

UNITED STATES SENATE,
COMMITTEE ON FINANCE,
Washington, D. C.

The committee met, pursuant to call, at 10:30 a. m., in the committee room, Hon. Pat Harrison presiding.

Present: Senators Harrison (chairman), George, Walsh, Barkley, Connally, Gore, Costigan, Bailey, Byrd, Lonergan, Gerry, La Follette, Metcalf, Capper.

The committee had before it for consideration S. 3150, which is as follows:

[S. 3150, 74th Cong., 1st sess.]

A BILL To levy an excise tax upon carriers and an income tax upon their employees, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DEFINITIONS

SECTION 1. That is used in this Act—

(a) The term "carrier" includes any express company, sleeping-car company, freight-forwarding company, private-car line, or carrier by railroad, subject to the Interstate Commerce Act, and any company which may be directly or indirectly owned or controlled by or under common control with any such carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service), in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of and operating the business of any such "carrier."

(b) The term "employee" means (1) each person who at or after the enactment hereof is in the service of a carrier, and (2) each officer or other official representative of an "employee organization" (herein called "representative"), who before or after the effective date has performed service for a carrier, who is duly designated and authorized to represent employees under and in accordance with the Railway Labor Act, and who, during or immediately following employment by a carrier, was or is engaged in such representative service in behalf of such employees.

(c) A person shall be deemed to be in the service of a carrier whenever he may be subject to its continuing authority to supervise and direct the manner of rendition of his service, for which service he receives compensation.

(d) The term "compensation" means any form of money remuneration for active service, received by an employee from a carrier, including salaries and commissions, but shall not include free transportation nor any payment received on account of sickness, disability, or other form of personal relief.

(e) The term "effective date" means the 1st day of the second calendar month after the enactment of this Act.

(f) The term "enactment" means the date on which this Act may be approved by the President or be finally passed.

INCOME TAX ON EMPLOYEES

Sec. 2. In addition to other taxes, there shall be levied, collected, and paid upon the income of every employee 2 per centum of the compensation of such employee (except a representative), not in excess of \$300 per month, received by him after the effective date.

DEDUCTION OF TAX FROM WAGES

Sec. 3. (a) The tax imposed by section 2 of this Act shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the compensation of the employee as and when paid. Every employer required so to deduct the tax is hereby made liable for the payment of such tax and is hereby indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

(b) If more or less than the correct amount of tax imposed by section 2 is paid with respect to any compensation payment, then, under regulations made under this Act by the Commissioner of Internal Revenue, proper adjustments, with respect both to the tax and the amount to be deducted, shall be made, without interest, in connection with subsequent wage payments to the same employee by the same employer.

EXCISE TAX ON CARRIERS

Sec. 4. In addition to other taxes, every carrier shall pay an excise tax of 4 per centum of the compensation not in excess of \$300 per month paid by it to its employees after the effective date.

ADJUSTMENT OF TAX

Sec. 5. If more or less than the correct amount of the tax imposed by section 4 is paid, with respect to any compensation payment, then, under regulations made by the Commissioner of Internal Revenue, proper adjustments with respect to the tax shall be made in connection with subsequent excise tax payments made by the same employer.

REFUNDS AND DEFICIENCIES

Sec. 6. If more or less than the correct amount of the tax imposed by sections 2 or 4 of this Act is paid or deducted with respect to any compensation payment and the overpayment or underpayment of the tax cannot be adjusted under sections 3 or 5, the amount of the overpayment shall be refunded, or the amount of the underpayment shall be collected in such manner and at such times (subject to the statute of limitations properly applicable thereto) as may be prescribed by regulations under this Act as made by the Commissioner of Internal Revenue.

INCOME TAX ON EMPLOYEES' REPRESENTATIVE

Sec. 7. In addition to other taxes, there shall be levied, collected, and paid upon the compensation of each employees' representative received by such representative, an income tax of 6 per centum annually upon that portion of the compensation of such employees' representative not in excess of \$300 per month. The compensation of a representative for the purpose of ascertaining the tax thereon shall be determined according to such rules and regulations as the Commissioner of Internal Revenue shall deem just and reasonable and as near as may be shall be the same compensation as if the representative were still in the employ of the last former carrier.

COLLECTION AND PAYMENT OF TAXES

Sec. 8. (a) The taxes imposed by this Act shall be collected by the Commissioner of Internal Revenue and shall be paid into the Treasury of the United States as internal revenue receipts. If the taxes are not paid when due, there shall be added as part of the tax (except in the case of adjustments made in accord with the provisions of this Act) interest at the rate of 1 per centum per month, or for any part of a month, from the date the tax became due until paid.

(b) Such taxes shall be collected and paid quarterly in such manner and under such conditions not inconsistent with this Act as may be prescribed by the Commissioner of Internal Revenue, the first payment to become due on the 1st day of October 1935.

(c) All provisions of law, including penalties, applicable with respect to any tax imposed by section 600 or section 800 of the Revenue Act of 1926, and the provisions of section 607 of the Revenue Act of 1934, insofar as applicable and not inconsistent with the provisions of this Act, shall be applicable with respect to the taxes imposed by this Act.

(d) In the payment of any tax under this Act a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to 1 cent.

COURT JURISDICTION

SEC. 9. The several District Courts of the United States and the Supreme Court of the District of Columbia, respectively, shall have jurisdiction to entertain an application and to grant appropriate relief in the following cases which may arise under the provisions of this Act:

(a) An application by the Commissioner of Internal Revenue to compel an employee or other person residing within the jurisdiction of said court or a carrier subject to service of process within said jurisdiction to comply with any obligations imposed on said employee, other person, or carrier under the provisions of this Act.

(b) The jurisdiction herein specifically conferred upon the said Federal courts shall not be held exclusive of any jurisdiction otherwise possessed by said courts to entertain actions at law or suits in equity in aid of the enforcement of rights or obligations arising under the provisions of this Act.

PENALTIES

SEC. 10. Any person or any carrier which shall willfully fail or refuse to make any report in accordance with this Act required by the Commissioner of Internal Revenue in the administration of this Act, or which shall knowingly make any false or fraudulent statement or report in response to any report or statement required by this Act, shall be punished on conviction by a fine of not less than \$100 nor more than \$10,000.

SEPARABILITY

SEC. 11. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances shall not be affected thereby.

The CHAIRMAN. The committee will be in order. Is Altmeyer, Mr. Latimer, or Mr. Eddy present?

Mr. EDDY. This is Mr. Eddy. I did not know that I was to testify.

The CHAIRMAN. The committee would like to find out something about this legislation and get the views of those gentlemen who have been working on this legislation. Would you prefer to wait for Mr. Altmeyer?

Mr. EDDY. Probably Mr. Latimer would testify the same thing I would.

The CHAIRMAN. You would prefer to wait for Mr. Latimer?

Mr. EDDY. Yes.

The CHAIRMAN. Who is there here who desires to make a statement?

Mr. SHEA. I would like to make a short statement, Mr. Chairman.

The CHAIRMAN. Give the reporter your full name and your position.

STATEMENT OF TIMOTHY SHEA OF CLEVELAND, OHIO, CHAIRMAN OF THE LEGISLATIVE COMMITTEE RAILWAY LABOR EXECUTIVES ASSOCIATION

Mr. SHEA. Mr. Chairman, and members of the committee, the Railway Executives Association comprises 21 standard railroad labor organizations, representing approximately 1,000,000 railroad workers,

have unanimously approved the bill before you, S. 3150, and the employees of the railroads of the United States represented by these organizations are willing to pay the taxes imposed upon them under this bill.

We have with us today Judge Krauthoff, who drafted this bill before it was introduced in the Senate and the House of Representatives, and I would like to call on Judge Krauthoff to make a statement of the matters involved in this bill.

The CHAIRMAN. All right, Judge, we will hear you.

STATEMENT OF EDWIN A. KRAUTHOFF, COUNSEL FOR THE RAILWAY LABOR EXECUTIVES ASSOCIATION

Mr. KRAUTHOFF. May it please the committee, in the year 1934 the Senate of the United States by unanimous vote established a railroad retirement system under which employees were to be paid annuities, the maximum being \$120 per month, and under which the railroads of the country were to be taxed 4 percent on their wage schedules and the employees were to be taxed 2 percent on their wages, no wages to be computed in excess of \$300 per month.

The CHAIRMAN. Why was the 4 and the 2 percent arrived at?

Mr. KRAUTHOFF. It was estimated by the experts that the 4 and the 2 percent would pay the annuities that would be payable under the bill.

The CHAIRMAN. Why was 4 percent put on the railroads and 2 percent on the employees, instead of 3 percent and 3 percent? I want to try to get all of the facts.

Mr. KRAUTHOFF. The theory of the imposition, I suppose, was that it was to the interests of the carriers to promote most of the older groups and take them off the pay roll, so that they could stimulate promotion of the younger men who were thought to be more efficient and thought to be able to render a greater degree of service for the salary they would receive.

I was not connected with the legislation and am only speaking from hearsay.

The CHAIRMAN. The reason I asked you is that we have just passed the social security bill in which we put it equally on the employer and employee.

Mr. KRAUTHOFF. According to my understanding from those who are acquainted with the situation, it was thought that it was of greater interest to the carrier to stimulate promotion for this reason: The railroad industry is peculiarly organized, there is a fixed rule of seniority, and by taking off the older men and putting them on the annuity list it promoted everybody along the line and gave the railroads the younger class of employees, who were thought to be more efficient and thought to be able to render a better degree of service for the salary they were receiving. In other words, a railroad employee 40 years old is supposed to be more profitable to the carrier than one 50 years old. That was the theory as I understand it, upon which the tax rate under the act of 1934 started at the flat rate of 4 percent on the carriers and 2 percent on the employees. The Retirement Board created by that act was authorized to increase the tax if such increase was found necessary.

The bill of 1 year ago was passed under the interstate commerce clause of the Constitution, and the United States Supreme Court, in a case in which the constitutionality of the act was attacked, by a vote of 5 to 4, ruled that the power of Congress to regulate interstate commerce did not include the power to pay an annuity to a man after he was retired from interstate commerce and levy a tax for the direct purpose of paying that annuity.

There was a great deal of discussion in the opinion about the fifth amendment to the Constitution and questions of reasonableness but that is not vital now.

The Supreme Court came to the ultimate point and said Congress did not have the power, under the power to regulate commerce, to establish an annuity system for retired employees. So, then, being confronted with that situation the Railway Labor Executives Association, following the pattern set out in the Social Security Act, and in the processing tax, and the Guffey coal bill, and other illustrative precedents, are presenting to this committee a bill that is essentially different from any of these taxing bills that have been the subject of so much controversy.

In the first place, under S. 3150 no question of delegated power arises.

There is no provision in the bill which makes taxation based upon the discretion or finding of facts by any executive officer.

It is a flat rate of 4 percent on the carrier and 2 percent on the employee, fixed by Congress. It cannot be changed except by an act of Congress.

Congress has the power next week, if it passes this bill, to change the tax rate.

There are two bills pending, and it is impossible to speak of one of these bills without speaking of the other. Our theory is that they are not connected in the sense that they are inseparable and a part of each other. One bill may be passed and operate, and the other bill may be passed and operate, without regard to whether or not the other bill has passed.

But as a practical proposition when you are confronted as you were on Monday, I believe it was, with the question of establishing the annuity system, you were necessarily faced with the like proposition, where is the money to come from.

The annuity system was established on the theory: Employees who had reached 65 years were entitled to a certain annuity; men who had served 30 years but had not attained the age of 65 years, were entitled to retire and draw an annuity when they became 65 years of age or sooner if they were willing to reduce the amount of the annuity. Employees who had served for 30 years but who were retired on account of injury or disease, were also entitled to an annuity.

Then comes the taxing bill. The taxing bill has started with a tax of 4 percent on the wages paid by all interstate carriers, and a tax of 2 percent on the wages of every employee of an interstate carrier, without regard to the fact whether the employee is himself engaged in interstate commerce, the carrier to collect the taxes and pay it to the Government quarterly, and no tax to be charged on that part of a salary over \$300 a month.

In that way we hope, through the exercise of the taxing power, to raise enough money to pay more than the annuities that are to be paid. This matter has now been heard three times, twice in the House and once by a Senate committee, and the experts all agree that the tax of 6 percent will protect the Government against any loss for at least 10 years to come.

The CHAIRMAN. How about after 10 years?

Mr. KRAUTHOFF. At the end of 10 years the experts estimate that in order to keep the Government on a level basis the rate would then have to be raised to 10 percent, and from there on the rate may go up to 15 percent, and the argument we have been having before the House committee, and likely the question that will attract the most attention here, is the question whether you should now undertake to set up a flat rate of taxation which will carry this enterprise for all time to come or whether you will say for the next 10 years you will go along at this 6 percent, then 10 years from now meet the problems in the light as they may present themselves.

The conclusion that arises from this is that some of those who discussed the situation think the Government is going into the insurance business, and the Government is making some sort of contract by which the Government is agreeing to pay them this annuity for all time to come, and in the same way the Government making that contract ought to make its word good.

But, fundamentally, we have to question that, and we have an entirely different conception of this. I wrote the two bills, so I am privileged to tell of the legal theory on which I hope to sustain them in the Supreme Court of the United States.

You noticed I said "hoped to sustain." I am not one of those sufficiently bold these days as to intimate what the Supreme Court may or may not do.

The CHAIRMAN. Have you any reasonable doubt as to the constitutionality of the law?

Mr. KRAUTHOFF. Individually, no.

Senator CONNALLY. Well, officially or otherwise, have you?

Mr. KRAUTHOFF. Individually, I think it is constitutional, but if you are going to ask me what the Supreme Court of the United States will say, I do not want to give my opinion on that.

Senator CONNALLY. Nobody is asking you that. The reason I asked you the question was, in answer to Senator Harrison you said, individually you did not think there was any question, so I wondered in what other capacity you wanted to give your opinion.

Mr. KRAUTHOFF. I said individually I thought it was constitutional.

Senator CONNALLY. How other could you consider it except individually? I thought you were making a distinction between your individual view and your other views.

Mr. KRAUTHOFF. I understand when a member of the bar states professionally that a law is constitutional, he is putting himself on record as saying the court will so declare, and I do not want to be so presumptuous.

Senator BARKLEY. I have forgotten exactly whether any of the other provisions include only the employees engaged in interstate commerce.

Mr. KRAUTHOFF. It includes every employee of an interstate commercial carrier, without regard to whether or not that particular employee is engaged in interstate commerce or not.

The theory in doing that is that when Congress comes to spending money it can spend the money of the country for any purpose and could give it to anybody it sees fit.

Senator BARKLEY. I do not like that expression "give it to them." It may be accurate, but it is not a question of gift altogether.

Mr. KRAUTHOFF. It is a gratuity. I am speaking in legal language now, if the Senator will excuse me. It is not something you brag about.

Senator BARKLEY. I suppose it is based on some merit as to service in the employ of a company.

Mr. KRAUTHOFF. Yes, and I suppose when you give a pension to a person engaged in the great World War, after all it is a gratuity, but it is based on a consideration.

We have not had at any time any question that the Government could not establish this retirement system, and could not appropriate all of the money it saw fit in paying the annuities. As a matter of fact, it was held in the case of *Massachusetts v. Mellon*, that there is no such thing as a taxpayer complaining of an expenditure by Congress. Congress holds the purse strings of the Nation, and can spend the money of the Nation, without any judicial intervention.

When it comes to this tax, in legal language, the annuity is a gratuity, and as a gratuity Congress may repeal it at any time. It is not a contractual obligation. Congress does not say to the railroad employee: in consideration of your paying a certain amount of taxes you will get a certain annuity. It simply grants an annuity.

Out of considerations of public policy, which have their basis in the proclamation of the President that we are seeking to establish a better social order; that we are seeking to take millions of dollars of money lying idle in the banks, and in some way putting them into circulation; we are saying to the men who have borne the heat of the day in the service of the railroad organization, that we are giving you an opportunity to retire from service in order to take a million men who are out of service and get them back into service, and promote everybody along the line, and increase wages in that way and perhaps restore a sense of activity in this country until the leaders of creation who control the capital of the country will wake up and conclude it is again safe to resume business.

Senator GEORGE. Let me ask this. Of course, it is a gratuity, and Congress can repeal the act; there is no doubt about that; but if you are going to impose a tax on the employer and the employee, and make them pay 3 or 4 or 5 years, and they get no benefit from it unless they happen to reach the retirement age within that time and, of course, a large number of them will not, would not that create a very definite moral obligation on the Members of Congress to continue the act?

Mr. KRAUTHOFF. Perhaps I did not make it entirely clear. Every man who begins to pay under this act has an immediate benefit.

Senator GEORGE. What does he get?

Mr. KRAUTHOFF. He gets a promotion in the service.

Senator GEORGE. Suppose he does not get a promotion in the service.

Mr. KRAUTHOFF. He gets it. The railway organizations are so organized that instantly on the promotion of the top engineer on the list, the second moves up, and the third man moves up, and so on.

Senator GEORGE. He gets that anyway, if there is a shifting in personnel, whether there is any gratuity paid or not.

Mr. KRAUTHOFF. Certainly he does.

Senator GEORGE. Your theory is that the payment of the gratuity hastens it.

Mr. KRAUTHOFF. Yes, it hastens it, and the railway labor organizations understand this thoroughly.

Senator GEORGE. Do you think the railway employees of this country would be willing to subject themselves to even a 2 percent tax if they thought within 3 or 4 years this act would be repealed? Do you not know you place upon the Government a definite, direct, inescapable obligation to continue it?

Mr. KRAUTHOFF. This is what I say, knowing them as I do, that if 4 years from now the Government finds that the 6 percent does not take care of the annuity being paid out, that the railway labor executives of this country are willing to do one of two things, either repeal the law and let bygones be bygones or have the tax increased.

Senator GEORGE. You said just now the tax would have to be increased to a total of 10 percent at the end of a 10-year period.

Mr. KRAUTHOFF. So the experts say.

Senator GEORGE. And at 25 years it would have to be increased to 15 percent.

Mr. KRAUTHOFF. It might be 15 percent.

I want to say that the next witness is ready to take the stand now if it is agreeable.

The CHAIRMAN. I want to say that we are going to adjourn at 12 o'clock, and the time must be equally divided on this proposition. We started at 10:30.

Senator BARKLEY. I would like to ask the judge a question, as he is the legal adviser.

I do not think the Supreme Court has ever rendered a decision that made perfectly clear, possibly, what the Constitution means, when it says all taxes shall be uniform. My interpretation of that has been that it means uniform among the classes taxed. Of course, all taxes cannot be uniform, and are not uniform in the sense that everybody pays the same tax.

But have you given any thought to the question whether this tax levied upon the railroads and upon the employees in any way infringes upon that requirement of the Constitution?

Mr. KRAUTHOFF. Certainly, we had to think of that, and very seriously. The word "uniform" has been considered by the Supreme Court of the United States to be uniform geographically, and a tax is uniform if it applies equally to all members of the same class.

As to the power of Congress to classify occupation, there is a wealth of decisions that Congress has inherent power to classify occupations for the purpose of levying a tax, but the Supreme Court reserves unto itself the right of deciding whether or not that classification is unreasonable or arbitrary.

The only place I can find, to the present time, where they used the power to strike down a tax was in the Kentucky State sales tax, where they decided it was unreasonable to classify a department store on the ground its gross sales were found to be more than that of its competitors, without proof that its profits were also greater.

Senator BARKLEY. That Kentucky tax was not levied under the provisions of the Constitution of the United States.

Mr. KRAUTHOFF. No; but the power of the Supreme Court of the United States to pass upon the reasonableness of a classification under the fourteenth amendment is identical with the power of the Supreme Court to pass on a classification under the fifth amendment.

Senator GEORGE. Let me ask this question. Do you really think there would have been any occasion to confer any special powers upon Congress if you can by the exercise of two simple powers; one, appropriating money, and the other, levying a tax, accomplish any purpose you want to accomplish?

Mr. KRAUTHOFF. Well, you have asked a question I suppose you can write a book on.

Senator GEORGE. I am asking you as man to man.

Mr. KRAUTHOFF. The men who framed the Constitution of the United States used words. Those words were a revelation of intelligence that came to them from an infinite source. They used them without then understanding of what they might mean a hundred and fifty years from then.

Senator GEORGE. You are not answering my question at all. I am asking you as man to man why is it necessary to say—

Mr. KRAUTHOFF. If it were necessary for the nation to have an army, a navy or postoffices, inasmuch as the Constitution does not prohibit such action on the part of Congress, Congress might exercise the power to establish such agencies, but in the absence of such grant of power in the Constitution, a State might establish like agencies. For example, the Constitution does not contain the word agriculture, yet Congress makes extensive provision to promote that activity.

Senator GORE. I infer from your answer to Senator George's question you think Congress has the power to raise money and the power to spend it as it pleases.

Mr. KRAUTHOFF. That is true. The Congress of the United States can spend money as it sees fit; but when the Congress goes further to prevent a State from doing anything, then the Congress has to point to some provision in the Constitution which gives Congress power to do that thing and to prevent a State from doing it.

SENATOR CONNOLLY. The Mellon case is *Prothingham v. Mellon*?

Mr. KRAUTHOFF. It is reported as *Mellon v. Massachusetts*.

Senator CONNALLY. You are using that as a basis for your statement that the Supreme Court decided Congress could spend money for anything they wanted?

Mr. KRAUTHOFF. Yes.

Senator CONNALLY. The truth of the matter is, that case did not uphold that affirmatively; what it did was to say there was no way by which a taxpayer could raise that question.

Mr. KRAUTHOFF. That is right.

Senator CONNALLY. That is the decision in which it was held the taxpayer had no power to raise the question, but it did not say Congress had the moral right, and it simply said if Congress exercised the power there was not anybody who could question it.

Mr. KRAUTHOFF. I did not assume when I said Congress had power to do anything, that I meant Congress was immoral.

Senator CONNALLY. What is that?

Mr. KRAUTHOFF. I do not want you to understand when I said Congress had the power to do anything, I meant that Congress was immoral.

Senator CONNALLY. What I mean is, you used that decision as a basis for the statement that Congress had the right at its will to appropriate money, and what the Court held was that nobody could question that power.

Mr. KRAUTHOFF. Yes, that is right; nobody could question that power.

Senator CONNALLY. It did not affirmatively hold we had the right to do that, appropriate money as we might see fit.

Mr. KRAUTHOFF. I do not know of anything the Constitution says you cannot appropriate money for.

Senator CONNALLY. No; there is no such prohibition, but it assumes Congress ought to appropriate money only in carrying out those powers we possess.

Mr. KRAUTHOFF. What you possess is the power to preserve the Nation.

Senator GORE. The powers of Congress are enumerated in the Constitution.

Mr. KRAUTHOFF. You are getting me into a subject I cannot discuss adequately in the time given me. You cannot find a bank named in the Constitution of the United States, but the Chief Justice of the United States, Justice Marshall, said you did have the power to create a bank.

You cannot find the Reconstruction Finance Corporation named in the Constitution, but you have created such a corporation.

I am a nationalist and I contend the Congress of the United States has power to do anything that is necessary to preserve the United States of America, except as it is absolutely forbidden by the Constitution of the United States. If that means spending money, that is spending money.

Senator GORE. You do not agree to the determination that when Congress exercised a given power, warrant of the exercise of that power must be found within the bounds of the Constitution.

Mr. KRAUTHOFF. Yes; or fairly incident thereto.

Senator GORE. Express or implied; and that the Constitution of the United States is a grant of power.

Mr. KRAUTHOFF. That is true.

Senator GORE. And the constitutions of the States are limitations of power, and the States have all of the powers under their constitution that are not forbidden, and Congress has only the powers which are granted, and no others.

Mr. KRAUTHOFF. Or fairly incident thereto.

Senator GORE. That is correct, if it fairly incidentally follows or falls within the grant.

Mr. KRAUTHOFF. I would be glad to spend some time with you, Senator, and debate that for a week. I think unless you are within the enumerated powers; or that is, unless you are within the realm of the Constitution except as you are limited by it, most of the things you are doing are absolutely indefensible.

The CHAIRMAN. Judge Krauthoff, we have given you 30 minutes, and we will give the other side 30 minutes; then we will divide what time is left remaining. We will hear Judge Fletcher, and he will have until 11:30.

STATEMENT OF R. V. FLETCHER, VICE PRESIDENT AND GENERAL COUNSEL, ASSOCIATION OF AMERICAN RAILROADS

Mr. FLETCHER. Mr. Chairman, I have what I had to say written out here. I am conscious of the limitation of time on me, and am anxious to conserve the time of the committee as much as possible. I am appreciative of your giving us an opportunity to present our views on this question.

As stated by my friend Judge Krauthoff, you have before you S. 3150, which is a bill imposing an income tax of 2 percent on the wages of employees, and 4 percent to be paid by the employer, based upon the pay roll. There is included in this now, you will observe, not only the railroad, but also the express companies and sleeping car companies.

I call special attention to the fact it does not include common carriers other than railroads and concerns affiliated with railroads.

The CHAIRMAN. What have you in mind?

Mr. FLETCHER. I have in mind the fact that the railroads are at this time under the most bitter competition, the most keen competition with transportation on the highways and with transportation on the waterways. I realize the highway carriers are now made subject to the Interstate Commerce Commission by an act of Congress, and they are just as much entitled to be put under the pension act at this time as the railroads are.

This legislation will place an added burden of \$72,000,000 on the rail carriers, and not a cent is put on their highway competitors who are handling over 17 percent of the tonnage of the country.

That goes not only to the constitutionality of the act, but to what is more important from my point of view, to the moral aspect of the act.

I call attention to the fact that while this is in form a taxing act, or a revenue act, as a matter of fact it lacks some of the incidents of a revenue act, in that it provides there shall be no income in excess of \$300 per month taxed.

If you would conceive of a law drawn which puts the burden on the small incomes and relieves the larger incomes, I think you would agree with me the thing does not look like a revenue bill, but does look like a bill without any the ordinary incidents of a revenue bill.

I know of no bill passed by Congress, the purpose of which is to raise revenue, which would have this extraordinary feature in it of saying a man's income up to \$300 a month must bear a tax, but all incomes in excess of that must be exempt of any taxation.

The CHAIRMAN. Are any of these employees getting more than \$300 a month?

Mr. FLETCHER. Many of them.

The CHAIRMAN. What is the reason of putting the limit on, then?

Mr. FLETCHER. Because this bill is framed to connect up with the bill passed by Congress this week on the retirement allowance. Under that act, the retirement allowance is based upon the application of a certain percentage of the wages of the employee, not counting any amount above \$300.

Senator BARKLEY. In other words, those who draw more than \$300 do not share in the annuity under the other bill?

Mr. FLETCHER. They share in the annuity but in computing the amount of their annuity their compensation in excess of \$300 per month is disregarded. I am not criticizing this bill, except to show how closely it is tied in with the other bill.

Senator GORE. With the Social Security bill?

Mr. FLETCHER. No; the bill which Congress passed providing for the railway pensions.

Senator GORE. Let me ask this; that pension bill passed the other day undertakes to provide compensation for employees and then undertakes to raise the money for the pension, and the pension bill we passed still leaves the railroads and employees subject to the provisions of the Social Security Act.

Mr. FLETCHER. Only to this extent; by the amendment adopted on the floor of the Senate, which corresponds to the House Act, they are taken out of section 2 of the act but they are still subject to the taxes under section 8.

Senator GORE. That looks fair.

Mr. FLETCHER. I think it was intended by the sponsors of this bill, if it passed, that there will be an amendment that will take the railroads, as well as the employees, out of the taxing provisions of the Social Security Act. I am not consulted about those things, but I assume something like that will be done.

The CHAIRMAN. Let us get that point straight. Is that right, Judge Krauthoff?

Mr. KRAUTHOFF. Yes; that is right.

Mr. FLETCHER. Now, there is a bill precisely identical to this now pending before the Ways and Means Committee of the House. I have not been advised what action has been taken by that committee, up to this time.

The CHAIRMAN. Of course, we are having this hearing because we are anxious to adjourn, and we take no action, of course, here, unless the bill passes through the House. If it does, then the committee would take further action.

Mr. FLETCHER. I understand that is in accordance with the principle announced under the Constitution that revenue bills must originate in the House.

I do not know what kind of a bill they will report, but I assume the gentlemen responsible for this legislation, and sponsoring it, will see that an amendment of the kind mentioned will be made.

The pension bill, you understand, is not effective until March 1936 and it provides for the appointment of a committee of 9 men, 3 Senators, 3 Representatives, and 3 persons named by the President, who will make a study of this situation, and make a report by the first of January.

I therefore assume those sponsoring this bill will make the effective date of the tax bill March 1, 1936. It is effective now, under the present provisions, October 1, 1935. I assume that is what will be done, as I take it for granted there will be no disposition on the part of Congress to put a railroad retirement bill in effect by March 1, 1936, providing for retirement 3 months thereafter, and let the railroads commence paying the tax on the 1st of October.

The CHAIRMAN. Let us try to get as many of these questions answered as possible. Judge Krauthoff, is there any controversy about that proposition?

Mr. KRAUTHOFF. There 's no controversy about that, as I know of, at all.

The CHAIRMAN. In other words, it is to be effective the same as the other.

Mr. KRAUTHOFF. That is our intention.

The CHAIRMAN. Then that question is removed.

Mr. FLETCHER. I submit this bill cannot be considered intelligently without taking into consideration the bill passed in the House, which for brevity I will refer to as the pension bill, and I will refer to this bill as the tax bill.

As has been stated by Judge Krauthoff, Congress a year ago passed a bill precisely similar in effect, although not in form, with the two bills that we have before us. They passed a bill providing for retirement as provided in the bill which Congress has just passed, and in that same bill there was a provision substantially similar to what is here now provided, that is, a 4 percent tax on employers and a 2 percent tax on employees, to get money to meet those expenses.

That bill went before the Supreme Court of the United States, and it was held to be unconstitutional, and I would like to take a minute of your time, not that I am going to argue the thing at length, but just to explain the basis upon which that decision was made.

The fundamental basis which directed the Court in that case is stated in the opinion, and here is what was said, and I am reading a line in the majority opinion on the question of whether Congress had power under the commerce clause to enact this legislation. Mr. Justice Roberts said:

It is an attempt for social ends to impose by sheer fiat noncontractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the States, but as a means of assuring a particular class of employees against old age dependency. This is neither a necessary nor an appropriate rule of regulation affecting the due fulfillment of the railroads' duty to serve the public in interstate transportation.

It is sometimes useful, as all of you who are lawyers know, in order to properly construe what is said in the majority opinion, to look to the minority opinion to see whether the majority agrees with the minority as to the effect of the decision, and here is what is said by the Chief Justice in his dissenting opinion in that case:

But after discussing these matters, the majority finally raised a barrier against all legislative action of this nature, by declaring that the subject matter itself lies beyond the reach of the Congressional authority to regulate interstate commerce. In that view, no matter how suitably limited a pension act for railroad employees might be with respect to the persons to be benefited, or how appropriate the measure of retirement allowances, or how sound actuarially the plan, or how well adjusted the burden, still, under this decision, Congress would not be at liberty to enact such a measure.

I submit that the language of the majority and minority opinions take this in effect beyond simply the commerce clause of the Constitution, and make it clear that this is one of the matters which has not been delegated to the Congress, about which it may legislate at all.

Now the theory here, and of course I do not use the word in any offensive sense, is to circumvent the decision of the Supreme Court of the United States, and undertake to accomplish this same thing through the medium of the taxing power.

It will be understood by the committee, by consideration of this and the companion measure, the commerce clause disappears entirely in this situation. You have got one bill here to appropriate money of the United States, then you have got another act absolutely tied into it, as somebody has said, as closely bound together as one Siamese twin to another.

Now, I submit that regardless of the lawyer's point of view, regardless of whether these tactics will or will not win in the Court, and I do not think they will, that it is a much more important matter to this committee to know whether legislation of this kind is in accord with the spirit of the Constitution; further, after the Court has declared that this is a matter which has been reserved to the States or to the people under the tenth amendment, they will now resort to a method of this sort, even if they have been ingenious enough to devise some system which will stand the test of the courts.

Is it not a larger question than that? Is it not a question whether the Congress will, as they in effect will admit, defeat the spirit of the Constitution, and undertake to inject the Federal Government into a matter of this kind, as has been admitted before the committee.

If they can do this in the case of railroads, they can do it in the case of the steel workers, in the case of mine workers, and in the field, with the men engaged in agriculture; and they can obviously do it in the case of men operating any other transportation agency, and there is positively no end to what can be done, and to the demands which will be made upon this Congress to do all sorts of things which may be desirable socially, but certainly which was not in the minds of the makers of the Constitution.

Senator BARKLEY. Assuming there is no pension bill acted on or contemplated, just forget about that, then do you doubt the power of Congress to levy an excise tax upon the gross receipts of railroads or any other business, for revenue purposes?

Mr. FLETCHER. I would not be prepared to say it might not be done.

Senator BARKLEY. Could they do that on the wages?

Mr. FLETCHER. I have my serious doubts about that, and for reasons I will state. In reply to your question in the abstract, it was suggested by Judge Krauthoff with his usual frankness that there was a limitation upon the power of Congress in the matter of taxing property. You cannot arbitrarily or capriciously select certain individuals and subject them to taxes. There is not a man on the committee who would think that you can lay a tax on the blue-eyed man and exempt the brown-eyed man, because there would be no sense in the distinction.

Senator BARKLEY. We have done that in practically all taxes, because everybody who sells furs, and everybody who sells automobiles, are taxed. We could do that as to any one of them and not touch all of the rest.

Mr. FLETCHER. There are special reasons why that could be done, but there are none why they distinguish a railroad employee from a motor truck employee, if they engage in the same work, if they are in competition one with the other, both subject to the same perils, with all of the other circumstances which I could go on for a long time indicating, showing how they are the same.

I defy the gentleman who advocates this bill to show me any reason, and I have not heard it yet, this being the fourth hearing we

have had on it, to show any good reason why we should select this particular class of transportation and subject it to this crushing tax, and not do it with our competitors.

I must hurry on, however, with the other phases I want to discuss.

Senator BARKLEY. Of course we have assumed the regulation of the competitors within the last week.

Mr. FLETCHER. Yes; you have assumed it.

Mr. BARKLEY. We do not know how it is going to work yet.

Mr. FLETCHER. I think it will work.

Mr. BARKLEY. I hope so.

Mr. FLETCHER. The Interstate Commerce Commission has gone very vigorously and intelligently to work on it.

In addition to this fundamental finding of the Court that this was a question lying outside of the field of Federal activity, there was a holding which I will mention, that this law violated the fifth amendment in two important respects, one that it took into consideration providing annuities for past services which were past and gone, and paid for, and the contractual relationship ended. I cannot stop to elaborate on that. Second and more important, that it pooled all of the services of the railroad so that the men got compensation for services not for one railroad on his retirement, but for all of the railroads in the past, and they held that would be taking property without due process of law. This bill has the same infirmity.

I do not need to spend time talking about experiments. Congress made one once in child labor. Congress, impressed with the iniquity of child labor, particularly in the cotton mills, passed a law which prohibited the transportation in interstate commerce of any manufactured product upon which there had been used child labor within 30 days before it was tendered to the railroad for transportation. The court held, 5 to 4, that that was beyond the power of Congress in the regulation of interstate commerce. They held, however desirable socially the thing might be, it was not a regulation of commerce in the sense that it contributed to the efficiency and safety of interstate commerce.

And that was the fundamental holding in the pension case.

Senator GORE. When Chief Justice Hughes in the dissenting opinion stated that if the majority opinion was the law, that it precluded any compensation whatever, does not that look a little like he was intimating to Congress that there was not any use of Congress to pass another law about like this law here?

Mr. FLETCHER. I think so, Senator.

Senator GORE. That tells Congress that it might take that hint, that this thing cannot be done.

Senator BARKLEY. Is that the proper function of a judge who is at least in the minority, to try to tell Congress what it cannot do in the future?

Mr. FLETCHER. I suppose technically it is not the duty of the Court ever to tell Congress what it cannot do in the future, although I think it would be helpful sometimes to get a suggestion.

Senator BARKLEY. If there is anybody in this country, lawyer, Congressman, Senator, or judge, who can draw a straight line between any two points of the decision of the Supreme Court and say all on

one side is constitutional and on the other side is unconstitutional, I would like to see such a man.

Mr. FLETCHER. There are some things that are so far over the line there is not much dispute.

Senator BARKLEY. Yes, but there is bound to be always a reasonable doubt in the minds of sincere men as to whether the court will sustain the constitutionality of an act, and the question that confronts us is whether to give doubt in favor of the constitutionality, or to resolve it against the constitutionality, where there is any doubt at all.

Mr. FLETCHER. I would not attempt to say about that, but my personal view is that the Court must resolve every reasonable doubt in favor of the constitutionality. I did not think that is the function of the legislator, but I have assumed he should look at it the other way, and if there seems doubt to him, he should not pass it.

Now, proceeding, after that Congress passed, in the interest of preventing child labor, a bill undertaking to accomplish the same thing they had tried before, through the taxing power, and the Court held it could not be done.

I mention that because it seems to me significant. In the first place, when the commerce power was involved the two great liberals of the Court at that time, Justice Brandeis and Justice Holmes, thought the majority was wrong, that they could exercise this power under the commerce clause; but when it came to the taxing power, it seemed to be so clear there was an abuse of the taxing power that Justice Holmes and Justice Brandeis went with the majority of the court, and that opinion was by an 8 to 1 decision, Mr. Justice Clark alone being in dissent.

In the few minutes left to me, I would like to mention the inadequacy of the amount in this bill to take care of this pension.

The CHAIRMAN. The adequacy of the 2 percent and the 4 percent?

Mr. FLETCHER. Yes. Of course we have never been able to see any reason for the heavier burden being placed on us than on the men. I do not think that is sound, or is supported by the best authorities on that subject.

Upon the question of adequacy, here is the situation. I think it has been developed, if I do not violate any propriety, very carefully by the Ways and Means Committee that this 6 percent which this bill calls for will not take care of the expenses of the pension law which you passed earlier in the week. It may take care of it for the first few years and I think my friend, Judge Krauthoff, is mistaken when he stated it will be 10 years before there is a deficit. I think it is 6 years, but Mr. Latimer's figures are before Congress. I think it is clear that by 6 years this fund will be depleted, and will be insufficient, and the taxes will have to be increased, or it will have to be paid out of the Treasury.

In 20 years this is stated to be 15 percent. We have figures which we think are entitled to consideration, showing that is too conservative, and that in less than 25 years it will be 18 percent in order to pay these pensions.

Senator BARKLEY. Here is a table somebody has handed around, and according to that table at the end of 20 years it would be 14.3 percent.

Mr. FLETCHER. When I said 15 percent I meant round figures. Yes, those are the figures.

Senator GORE. If this got to be more than the earnings of the railroad, don't you think it should be provided that the R. F. C. should loan them some money?

Mr. FLETCHER. That does not do any good to lend any money, because unfortunately it has to be paid back, and our experience is that the R. F. C. makes pretty sure you are going to pay it back, by requiring very sound collateral, indeed.

If you pass this bill you are going to be confronted with the problem—you are just postponing the evil day—with the problem whether you will reduce these benefits, assuming it stands the test in court, or will increase the amount of the burden laid upon the railroad and their employees, or will have a deficit to be paid out of the Federal Treasury.

This bill then further affects the pay roll in one vital respect. The social-security bill applies to all employees and employers. It treats the railroads no worse than other industries. It is true efforts have been made to make it sound actuarially. Some efforts have been made to create a fund out of the taxes provided under section 8 which will take care of the expenses of that scheme, but nothing has been done here in this present bill, no accumulation of reserve. It is simply taken out of the revenues of the men and the company without regard to whether it is sound or not sound, and I submit without any careful study. This is not a sound system, when viewed from the viewpoint of the actuary.

As I have said, this will cost the railroads \$71,000,000 the first year. It will cost all of the carriers and employees \$108,000,000, \$72,000,000 on the carriers and \$36,000,000 on the employees. That figure is going to run up to a cost of \$269,000,000 annually in the course of time, as shown by Mr. Latimer's figures here. You are setting up a system that will cost \$269,000,000 a year, and providing \$108,000,000 for revenue.

Senator GORE. We passed a bill day before yesterday to make it easier for the railroads to go through bankruptcy.

Mr. FLETCHER. It may be easier, or harder, I am not so sure, yet it will facilitate the reorganization.

Senator GORE. Do you not think this is supporting that legislation?

Mr. FLETCHER. Yes; this is tied into it in this way, you have made it easier to go through bankruptcy procedurally, and now you are putting a bill in here which will give the background, and give much more material to grind on.

The CHAIRMAN. You think this will make it easier to go through bankruptcy?

Mr. FLETCHER. No; it will make it easier for them to get to the door, and the other bill takes it up there and makes it easier to go through bankruptcy.

Mr. KRAUTHOFF. Will they need any help in that direction?

Mr. FLETCHER. No; I think the interests you represent will help us in that direction.

Senator BARKLEY. What is the total of the railroad retirement pay rolls now?

Mr. FLETCHER. About \$36,000,000. That is one of the things I am concerned about. This bill makes no provision for those people who are already retired. It is assumed, and I hope, the railroad will

take care of them, the men who have worked all their lives and have nothing to live on. This bill does not take care of them, but it is hoped that the railroads will be able to go on with the humanitarian policy of taking care of the men who have retired.

Senator CONNALLY. You say this bill does not take care of them?

Mr. FLETCHER. No.

Senator CONNALLY. The Supreme Court decision made it impossible to take care of them, did it not?

Mr. FLETCHER. I think it did, that is, on the theory the Court decided it upon. If this theory which they have presented to you here prevails, you could do anything, you could get the money out of the Treasury for anybody, every Tom, Dick, and Harry, then tax the people for it.

Senator CONNALLY. When the case was decided, the Court held you could not charge the railroads with payment of pensions to the men already out of the service.

Mr. FLETCHER. Not under the commerce clause, but you could get it otherwise.

Senator CONNALLY. I am talking about the case decided, they held you could not do it as provided in that bill.

Mr. FLETCHER. Yes.

Senator CONNALLY. Your suggestion about this new plan, of course, may be correct.

Mr. FLETCHER. Yes; and under the theory they have suggested here, it could be paid to the men on the street.

Senator BARKLEY. Does that \$36,000,000 increase in the proportion provided in the bill?

Mr. FLETCHER. I think it increases some, but I do not know the proportion.

Senator GORE. Do you want to be understood that the Congress could tax the people and give the money to anybody on the street?

Mr. FLETCHER. I say under this theory which has been presented to you by those who favor the bill that could be done. Under this theory you could pass a bill to give everybody in the State of Oklahoma a pension of \$1,000 a month, payable out of the Treasury.

Senator GORE. You do not go as strong as the Townsend bill.

Mr. FLETCHER. You can go as strong as you like.

Senator GORE. We are doing that, under the relief.

Mr. FLETCHER. Yes, you can go as far as you like under relief.

Senator CONNALLY. Of course that has not been passed in the House; has it?

Mr. FLETCHER. It may be one of those things higher than the Congress, higher than the law, that you cannot let the people starve in the street.

Now, in conclusion I want to say this, and I have just a very short time left.

Senator BAILEY. I am in favor of extending the time; this is a very important matter, and I suggest that we extend the time.

The CHAIRMAN. I realize that it is an important matter, and I do not know when the committee will meet again, and we wanted to hear Mr. Latimer this morning, who is an expert on this matter. All that was requested of us was 30 minutes to each side.

Mr. FLETCHER. I will get through. I just want to say this in conclusion. In 1934 the railroads lacked \$32,000,000 of paying their

fixed charges, and I will ask the attention of the committee to a statement which I will present, showing the operating results of the American railroads for the first 5 months of the year 1935.

Senator BYRD. Why is it that the earnings of the railroads are so so much less the first 5 months of 1935 than the first 5 months of 1934?

Mr. FLETCHER. One reason is that they raised the wages of the men.

Senator BYRD. That is not the effect of loss of business?

Mr. FLETCHER. The business runs about the same.

Senator BAILEY. Those carloadings are also less for the same weeks of the past year, are they?

Mr. FLETCHER. They generally run about the same. The men accepted a 10-percent reduction at the height of the depression, and that was restored this year; and furthermore, through the operations of the National Recovery Act the coal bill was enormously increased, and that is also reflected in this statement.

Senator BAILEY. Have you made any calculation as to what extent the Guffey bill will increase the expense of railroad transportation?

Mr. FLETCHER. It depends altogether on what the effect is on prices.

Senator BAILEY. The point I am discussing is that it has been stated it will cause an increase of \$1.50 per ton.

Mr. FLETCHER. I do not know; we cannot say what it is; but assuming it is \$1 a ton, it will cost in round figures \$100,000,000; and if it is an increase of 50 cents a ton, it will be \$50,000,000.

Here is my whole point. I come down now to a very earnest plea. I would like to see the Congress adopt a policy of treating the railroads as well as you do other lines of transportation and other lines of industry.

I remember reading in the Congressional Record the statement of a very distinguished member of this committee in which he referred to the railroads and mentioned that they had been guilty of many errors. No doubt they have been guilty of many errors, but the reason the railroads are not better off than they are is partly the fault of Congress. I do not mean that in any scolding manner, but we do feel that Congress should treat the railroads as other transportation lines, and as other industries, and that they are entitled to that treatment.

Senator BAILEY. I understood you to say that the trucks carried 17 percent of the transportation business.

Mr. FLETCHER. Practically so.

Senator BAILEY. You had the figure right there.

Mr. FLETCHER. Seventeen percent of the tonnage is hauled by trucks; I think that is about right.

Senator BAILEY. That is inclusive of shipments over inland waterways?

Mr. FLETCHER. No. It includes only highway tonnage.

Senator BAILEY. And you would suggest, in the event we undertake to pass this bill, that we put in an amendment relating to truck transportation?

Mr. FLETCHER. I do not see how you can deny us that. If we have the same treatment accorded to our competitors or to industry generally, we would have little reason to complain.

Senator GORE. Do you think the truck people would be willing to do it?

Mr. FLETCHER. I do not know. I am not in their confidence, and I have not heard any discussion of that with the people who control the destinies of the trucks.

The CHAIRMAN. Thank you very much, Mr. Fletcher.

Mr. FLETCHER. I have not stuck very closely to my manuscript.

The CHAIRMAN. You may include that in the record.

(The paper referred to is as follows:)

I desire to express my appreciation of the privilege you have extended to me of making a brief statement on behalf of the class I railroads of the United States of my position on S. 3150, the bill which is before you. I shall endeavor to conserve your time as much as possible, consistent with the obligation I owe to an important industry which is about to be subjected to a very great injustice.

The bill which you have under consideration, S. 3150, applies to express companies, sleeping-car companies, freight-forwarding companies, and railroad carriers. It does not include common carriers other than railroads and concerns closely affiliated with railroads. It provides for an income tax of 2 percent to be levied upon the compensation of employees up to \$300 per month. It also provides for an excise tax to be levied upon employers which amounts to 4 percent of the compensation of employees up to but not in excess of \$300 per month. The money is to be paid into the Treasury of the United States, and the bill as drawn is effective on the second month after its passage. In other words, if the bill were passed in this month, according to its provisions, it would be effective on October 1.

I appreciate the fact that this is a revenue measure, but under the Constitution revenue measures must originate in the House of Representatives. A bill similar to S. 3150 is pending in the House, and so far as I know has not as yet been reported from the Ways and Means Committee. It is impossible to say in what form the bill will reach the Senate should it emerge from the Ways and Means Committee and be passed by the House.

The bill in question cannot be intelligently considered unless it is coupled up with a bill which passed the Congress this week and which provides for a retirement system for railroad employees. It is obvious that the purpose of S. 3150 is to replenish the Treasury for amounts which are paid to pensioned employees entitled to receive retirement allowances under the provisions of the bill which has gone to the President. It is clear that the present bill is not in fact one to raise revenue for general governmental purposes. This is evident when we remember that it levies no tax on any compensation greater than \$300 per month. In this respect the bill does not taste nor smell like a revenue bill. Ordinarily, taxes are levied in proportion to the ability to pay, measured by the income of the taxpayer. Here, however, we have a tax in which compensation in the lower brackets must bear the entire expense. When we examine the companion bill it is clear, however, why the \$300 figure was named in the bill before you. In the pension bill the retirement allowance is based upon a certain percentage of income, excluding all compensation in excess of \$300.

It should be remembered that a year ago Congress passed the Railroad Retirement Act, which was declared unconstitutional by the Supreme Court of the United States. Time does not permit me to discuss to any great extent just what was held in that case. I desire to say, however, that the bill held unconstitutional by the Supreme Court contained precisely the same pension scheme or plan that is contained in the bill which has passed the Congress, coupled with the measure you are now considering. It will be remembered that the court in discussing the Retirement Act used this significant language:

"It is an attempt for social ends to impose by sheer fiat noncontractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the States, but as a means of assuring a particular class of employees against old-age dependency. This is neither a necessary nor an appropriate rule or regulation affecting the due fulfillment of the railroad's duty to serve the public in interstate transportation."

It would seem, therefore, that the Court has held that what may be a desirable social purpose cannot be accomplished through legislation by Congress, this not being a field which under our system of government can be occupied by the Federal power. There can be no mistake as to the effect of this decision. That I am correct in saying that what the Court held definitely excludes the Federal Government from this field is clear from the construction of the majority opinion found in the dissenting opinion of Chief Justice Hughes. Here is what Chief Justice Hughes said about it:

"But after discussing these matters, the majority finally raise a barrier against all legislative action of this nature by declaring that the subject matter itself lies beyond the reach of the congressional authority to regulate interstate commerce. In that view, no matter how suitably limited a pension act for railroad employees might be with respect to the persons to be benefited, or how appropriate the measure of retirement allowances, or how sound actuarially the plan, or how well adjusted the burden, still, under this decision, Congress would not be at liberty to enact such a measure."

It may be said that this legislation is attempted under the taxing power of Congress and not under the commerce power. It will be seen, however, that this question goes far beyond the question of the right to regulate commerce or what may be done by Congress in the process of regulation. It is a definite finding by the Court that the right to accomplish a social end of this character is one which is reserved in the Constitution to the States or to the people under the express terms of the tenth amendment. In other words, this legislation goes to the very heart of our Federal system and involves the important question of whether an end of this kind can be accomplished under the plan which reserves to the States and the people the residuum power and delegates only a limited authority to the Federal Government. In addition to this general consideration, the Court hold that the former act violated the fifth amendment in three or four important particulars. It was held that it was a denial of due process to award compensation based on past service which had no relation to commerce. This objectionable feature is retained in the bill which has passed the Congress. In the second place, it was held that it was a violation of due process to pool the service of an employee upon all railroads of the country. This objectionable feature is retained in the present bill.

Time will not permit an elaborate discussion of the fifth-amendment questions which arise in this case. It is said, however, that the present plan will withstand attack because it is divided into two parts, one which pays the retirement allowances out of the Treasury of the United States, and the other, which levies excise and income taxes upon the employer and employee to reimburse the Treasury. I submit that Congress cannot be endowed with power in a non-Federal field by so crude and simple an expedient. It will be remembered that Congress undertook at one time to abolish child labor by passing a law that commodities produced in factories where children worked could not be shipped in interstate commerce within 30 days from the time such goods were manufactured. This was held to be beyond the power of Congress under the commerce clause and that the desirable social end sought was not in any proper sense a regulation of commerce, just as it was held that the payment of retirement allowances had no such relation to efficiency and safety as would justify its enactment under the commerce clause. The case in which this was held was *Hammer v. Dagenhart* (247 U. S. 251).

Congress, anxious to accomplish this desirable social end, thereupon undertook to justify its action under the taxing power by providing a heavy tax upon goods manufactured in factories where child labor was employed. The Court held, by a vote of 8 to 1 (the previous decision being 5 to 4), that this was an abuse of the taxing power and that authority could not be conferred upon Congress to enter a field not granted by the Constitution through the use of such a device. The case in which this was held is commonly referred to as the *Child Labor case* (259 U. S. 20).

If it be said that it is the function of the committee to consider the revenue measure S. 3150 and that it need not concern itself with the pension bill which Congress has passed I respectfully submit that Congress may not constitutionally select one industry and subject it to a heavy tax not laid upon industry generally. The effect of this bill if it becomes a law is to place a tax upon an industry measured by 4 percent of the pay roll, and a tax upon employees, which is 2 percent of their compensation up to \$300. While the power of Congress to levy taxes is very broad, it is not unlimited. Cases which I could readily cite to the committee if time permitted hold that the legislature may not act arbitrarily or capriciously in the selection of objects of taxation. Courts have said that you cannot levy a tax upon persons of one race and exclude another, or put a tax upon persons of a particular complexion and exclude others.

Aside from the legal question involved, which, as I say, I have not time to discuss, I appeal to the committee on the ground of common justice not to lay this burden upon the railroad industry, just now sorely pressed, while at the same time their competitors in the field of transportation are not similarly burdened. I think I am safe in saying that 17 percent of the traffic of the country is moving on the highways. It is well known that truck traffic has been increasing by leaps

and bounds until it is now an active and formidable competitor of the railroads in the field of transportation. Under the recently enacted law truck transport is subject to the Interstate Commerce Commission in the matter of grants of certificates of convenience and necessity and with respect to the supervision of its rates. No good reason has been given or can be given why the railroad industry should be selected for this discriminatory treatment while its competitors on the highways, on the waterways, and in the air are not subjected to the same burden. No one has attempted to answer this argument and no one can.

Furthermore, I call attention to the precedent which will be established if legislation of this kind is approved. I know of no sound reason why one particular industry should be selected for special treatment of this kind. You will recall that the Social Security Act, which has become the law of the land, was passed upon the theory that all employers and employees should be treated alike, and the benefits provided for in that act, and the taxes levied by that act, apply to all forms of industry without discrimination. No one has given a reason, or can give a reason, why the railroads should be burdened more heavily than other forms of industry, or why railroad employees should be selected for exceptionally favorable treatment. In this connection I call attention to what was said by the Federal Coordinator of Transportation in his letter to the Chairman of the Senate Committee on Interstate Commerce, in which he pointed out the difficulties which would arise in the administration of the Social Security Act by reason of the exceptional treatment accorded to railroad employees. I call attention to this significant language in Mr. Eastman's statement:

"Unless this is done, Congress, by setting up a pension system for a special class of employees such as those of the railroads, inadequately articulated with the old-age benefit features of the Social Security bill, may well start in motion the process of establishing similar pension systems for other special classes of employees, thereby undermining the financial foundations upon which the present Social Security bill rests."

This is a significant warning. If this Congress passes a law taking railroad employees out of the general class covered by the Social Security Act, we may expect other classes of employees to demand similar exceptional treatment. It is the railroad employees this year; it may be the coal miners next year; it may be the steel workers the year after.

I am taking it for granted that if a bill of this kind passes, suitable amendments will be offered relieving the railroads and the railroad employees from the taxing features of the Social Security Act. Congress saw proper in passing the pension bill to provide that benefits should not be paid under the Social Security Act and presumably the same course will be taken with reference to taxes.

In passing, I presume the bill will be amended so as to provide that the same effective date shall apply here as applies to the pension bill.

I do not mean to say that the inclusion of these amendments would remove our objections to the bill—those objections are fundamental.

It is admitted that the pension bill which has passed Congress is in such form and calls for such large payments as that the taxes provided in the current bill will be totally inadequate to bear the expense. This has been shown by the testimony of Mr. Murray W. Latimer, Chairman of the Railroad Retirement Board created under last year's act, who has made a statement to the commerce committees of the Congress to which I will briefly refer. The present bill, with its 4-percent tax upon employers and its 2 percent tax upon employees, will yield approximately \$108,000,000 per year, this being divided \$72,000,000 upon the employers and \$36,000,000 upon the employees. These figures are based upon 1934 pay rolls, so far as we can secure them. Of the \$72,000,000 mentioned, approximately \$60,000,000 will be borne by the class of railroads. The committee will be interested in knowing how much the cost of the pension system will exceed the revenue which I have just stated.

According to Mr. Latimer's statement to the commerce committees, the disbursements for pensions under the pension bill will rise rapidly after the first year until it reaches an annual total of \$269,000,000 in the years 1959, 1960, and 1961. According to Mr. Latimer's best estimates of the railroad pay rolls in those years, the amount of tax on the pay rolls required to meet its estimated disbursements in those years would be 15.3 percent. I have asked the clerk to distribute to the members of the Committee a copy of Mr. Latimer's statement showing the estimated disbursements under the pension bill for each year from 1935 to 1965, and the percent of estimated pay roll which is represented by those disbursements. Mr. Latimer did not include in his estimate of disbursements the cost of administration of the pension system, that is, the salaries and expenses

of the members of the Railroad Retirement Board and their staff. For reasons which were fully explained to other committees of Congress by the director of the bureau of railway economics of this association, at a time when greater opportunity was given for discussion, we believe that this estimate of Mr. Latimer's is entirely too low. If opportunity afforded, I could state the reasons why this estimate errs greatly on the side of conservatism. Suffice it to say that we are convinced the figures given in Mr. Latimer's estimate should be plussed to such extent as to make us say with confidence that the cost will not be 15 percent of the pay roll but more nearly 18 percent of the payroll. We see, then, that Congress is confronted with a serious question as to where the money is to come from to pay these liberal pensions. Either it must fall upon the industry or the deficits must be taken care of out of the public treasury. Since the Class I railroads in 1934 lacked \$32,000,000 in paying their fixed charges, and since we now have approximately 60,000 miles of railroad out of 240,000 either in receivership or in bankruptcy, it must be clear that the industry cannot bear this constantly mounting expense which in two decades will consume 18 percent of the pay rolls. Such a course if continued will inevitably lead to the imposition of burdens which the industry cannot possibly bear. The alternative is to subsidize this special class of employees out of the Federal Treasury and thereby establish a precedent which will be difficult to escape and which is contrary to all of our theories of government.

The committee will remember that in the bill which has already passed it is provided that a commission shall be appointed, consisting of 3 Senators, 3 Representatives, and 3 persons to be appointed by the President, to study this question of railroad retirement and make a recommendation to Congress. The legislation as it stands now excludes railroad employees from the benefits of the Social Security Act but leaves the industry subject to the tax imposed by title VIII of that act. It is clear from the statements of the informed Chairman of the Railroad Retirement Board that the tax proposed in this bill will not be adequate to take care of the costs which the pension act imposes. No good reason can be given why Congress, at this time in the hurry of the closing days of the session, should give its sanction to a taxing plan which is admittedly inadequate in advance of the recommendation which will be made by the commission 2 months before the pension bill becomes effective. It would be just as well to leave the legislative situation as it is until the matter can be carefully studied, remembering that there will be 2 months of the next session before the pension bill goes into effect.

It is the position of the railroad industry that they are engaged in an important and essential public business. I think it is generally admitted that the commercial welfare of the country demands sound, efficient and, if possible, solvent railroad companies to carry on the business of the country. It is a business affected with the public interest, subject to the most intense regulation. At the present time practically all of the railroad systems of the country have pension systems which, in the main, have proven very satisfactory. In this matter of granting allowances to employees as liberal as the finances of the railroads will permit, the railroad industry has been among the pioneers. At the present time, even in the distressed condition of railroad finance, approximately \$36,000,000 is being disbursed annually for pensions to aged and disabled employees. It is true these systems are voluntary, but I call attention to the fact that although 60,000 miles of railroads have gone into bankruptcy courts, in not a single instance has the action of any receiver, trustee, or judge administering the system interfered with the payment of pensions. In all these instances there has been a general recognition of the fact that the amount disbursed for pensions is a legitimate charge to operating expenses. It cannot be said, therefore, that this industry has been neglectful of the welfare of its employees. Railroad labor is faithful and efficient. For approximately 13 years profound peace has reigned in this industry. In this time there have been no strikes or lock-outs or disturbances. Looking at the question broadly, railroad employees are the best paid of any of those who labor in the fruitful and essential industries. They are protected by Federal law with reference to their hours of service; there are elaborate provisions whereby they are given the benefit of safety appliances; their wages are insured by contracts which are under the general supervision of the administrative authority created by the Railway Labor Act. They have no reason to complain of any treatment accorded to them by railroad management. One of the reasons why there has been a loss of traffic to competing agencies is because of the fact that the railroads accord to their men wages and treatment which others are not compelled to regard.

Our plea comes down to this: that we are entitled to equality of treatment before the law. It has been our protest, and that protest we are now endeavoring to reiterate, that Congress should not select the railroad industry for adverse and discriminatory treatment. If the railroads are to be subjected to this expense, why should not a similar expense be put upon their competitors or upon industry generally? A distinguished member of this committee has recently expressed upon the floor of the Senate his interest in the railroad question and made the observation that railroad management had in the past made some mistakes. This may be true, since it is human to err. On the other hand, the difficulties in which the railroads find themselves have been accentuated by a disposition on the part of Congress, which we deplore, to select this industry for adverse and discriminatory treatment. If this bill is passed and this burden placed upon the railroads it will be as unfair and as unjust an act as has ever been perpetrated by any legislative body.

I place before each of you a statement showing the net income or deficit of 50 of the largest steam railways for the first 5 months of 1935 in comparison with the first 5 months of 1934. A glance at this statement will show the serious condition of the industry just as this time, since the red figures so largely predominate.

Mr. SHEA. Mr. Chairman, the employees have another witness who desires a few moments.

The CHAIRMAN. Very well. We will hear Mr. Latimer afterward.

STATEMENT OF HERMAN L. EKERN, OF MADISON, WIS., APPEARING FOR THE RAILWAY EMPLOYEES

Mr. EKERN. I take it the question here before this committee is really what this tax will be, because as I understand it the annuity bill or compensation bill has passed both houses, and is before the President.

On the question of constitutionality I take it the Social Security bill has probably disposed of that question as far as the Congress is concerned, and if there is any question on that I will be glad to answer it after I take up the financial aspects of this bill.

Senator BAILEY. What would be the effect if we do not pass the legislation before us, having passed this other legislation called the retirement bill?

Mr. EKERN. The effect would be that the Government would begin to pay the pensions June 1, 1936, out of the Treasury of the United States.

Senator GORE. And charge it to the taxpayers of the United States.

Mr. EKERN. They would pay it out of any money appropriated for that purpose under an appropriation by Congress.

Senator BAILEY. That being so, would it not be better to pay all of these payments out of the general fund, and let the burden rest on the whole of the country, and not on the railroads and their employees?

Mr. EKERN. Under the Social Security bill you have exempted these employees from that bill.

Senator BAILEY. I will agree it is not being done, nor is it being done with respect to the processing taxes, and other taxes of that kind. There are special taxes relating to special products, and why would it not be sound policy, if the Government is going into that business, to lay the taxes on the general revenue of the people and make a distribution, so that then the burden would rest equally? I would like to hear you argue that from the standpoint of the railroad worker, because we propose to take a part of his pay.

Mr. EKERN. May I divert that until I state these figures?

Senator GORE. Let me ask you one question. If I understand you, and you are right, I am wrong; or if I am right, you are wrong. You say the bill passed the other day exempted the railroad people from the Social Security Act.

Mr. EKERN. From the benefits, deprived them from the benefits. Senator GORE. It does not exempt them from the burden.

Mr. EKERN. No; but it is proposed in the Ways and Means Committee to adopt an amendment that will exempt them from the burden, and that is the same bill that is pending here. Of course, if it comes over here with that amendment, that will be before you.

On this bill, let me call attention to what this bill will raise. The lowest total wage that has ever been paid by the railroads during the past 20 years is a billion and a half dollars. That was paid in 1932.

Senator BAILEY. How does that compare with net profits and the gross revenues?

Mr. EKERN. It compares with operating revenues about one-half of the operating revenues, and it is charged as a part of the operating expense, and it is about three-fifths of the operating expenses of the railroads, or about 60 percent. It is 50 percent of the operating revenue.

Senator GORE. You say the wages were a billion and a half dollars?

Mr. EKERN. Yes; a billion and a half dollars.

Now, this 6 percent, 2 paid by the men and 4 by the carriers, will produce \$90,000,000 on that basis per calendar year. At the present time the railroad people testified that the wages amount to about a billion and three-quarters, and at 6 percent that is \$105,000,000.

The average wages during the 14-year period from 1920 to 1933 were two and three-quarters billion dollars. That is in the testimony heretofore taken. That would produce at 6 percent \$165,000,000 a year. The highest amount of wages received was in 1929, when it was a little over 3 billion, and at 6 percent that would produce a tax revenue of \$180,000,000.

Senator BAILEY. So it has been reduced by half since 1929?

Mr. EKERN. Practically so.

Senator GORE. Is that due in part to the fact that the railroad has been cutting down the number of employees in an effort to economize?

Mr. EKERN. The railroads have cut employees since 1929 from 2,000,000 down to a certain extent, and then they have raised them now, so that the figures that we are quoting as to costs and demand are largely on the basis of 1,100,000. I think they now have, under this bill, about 1,200,000 employees.

Senator GORE. Will this tax have a tendency to reduce still further the number of employees?

Mr. EKERN. I don't think so.

Senator BAILEY. Will you tell me how many people are engaged in truck driving?

Mr. EKERN. There are in truck transportation—I can not tell you exactly, but I think about two-thirds of a million or more.

Senator BAILEY. I understand it is 700,000, about.

The CHAIRMAN. Of course, this social security is on a 50-50 basis, and not the 4 and 2 percent, and there is a question in the minds of a great many people why there should be a discrimination with the employees of the railroads, when all other employees pay one-half. What have you to say about that?

Mr. EKERN. I am glad you asked that question, but if you will pardon me, before I answer that, let me finish the statement with regard to the figures.

All the figures that have been discussed are with regard to the percentage of costs here. It is all bottomed on this theory that we are going to collect these revenues on the lowest wage basis, or at least on a wage basis of \$1,600,000 instead of the present billion and three quarters, for 13 or 14 years hence, on these percentages. If you double the wages, you immediately cut the percentages in two. That has to be kept in mind when you talk about what this is going to cost in percentages of wages, and whether the percentages we are talking about will be sufficient.

The reason for the division of 2 percent and 4 percent is this: On practically every contributory public retirement annuity plan for teachers, public employees, and others, throughout the United States, it is the fundamental principle that the annuities determined upon service, after adoption of the plan, are borne equally by the employer and employee, which in this case would be 2 and 2 percent.

However, in the case of service prior to the taking effect of the act, it is recognized that the part prior to the date the act became effective should be paid for wholly by the employer.

Senator GORE. Repeat that, please.

Mr. EKERN. That all of the costs of annuities that arise from services prior to the adoption of the plan, or the date the act became effective, should be paid by the employer. Those who serve after the plan is adopted are interested in the annuities they are building up. The industry has had the benefit of services prior to that time, and obviously the industry should carry that cost for retirement annuities chargeable to prior service.

This was figured out very carefully. I went over it personally with the actuaries, and they are all agreed that this cost will be practically a third of the total costs, and that makes 2 for prior service and 2 for subsequent service for the railroads and 2 for the men, and adding that up makes the 6 percent. That is sound and practical, and that is the reason for that division.

Senator CONNALLY. That would be true for a period, but after those that have had former service die and get out, it would not be fair then to continue on.

Mr. EKERN. It will only be true for a period of, say, 30, 40, or 50 years. I assume this Congress has had experience of changing laws that have been enacted, and there is nothing in this bill and there cannot be anything in this bill, as I understand it that would bind future Congresses. Consequently, Congress has full power to change this act as it pleases.

Senator CONNALLY. We would have a hard time doing it if it ever gets on the books.

Senator GORE. Theoretically all of this burden sooner or later will be shifted and borne in the first instance by shippers, and in the last instance by the consumers of the goods shipped. Is that not true?

Mr. EKERN. Everything that goes into freight rates and passenger fares of course is borne by the public, but your question assumes that this is an added burden to the railroads. The answer to your question, if you will permit me, is that the people who have studied pension questions I think are all generally agreed that a sound, adequate

and satisfactory retirement system does not add the amount of the pension payment to the cost of operation of the employer, but in fact results in such a condition that it is absorbed, and that has been generally accepted with respect to pensions all over the country.

There is good reason why the directors of our corporations almost universally adopt private pensions for their employees, mostly at the cost of the corporation, a few on joint contributory system.

Senator GORE. Do you not think they know what they are doing, that they can shift this onto the public, and take care of themselves? Suppose these railroad people struck or threatened to strike, and got an increase in their wages of 2 percent. Then isn't the whole business shifted back to the consuming public?

Mr. EKERN. Of course if you add 2 percent to the wages, you add that 2 percent to the operating expenses of the railroad.

Senator BAILEY. Then, on that point, you would want 2 percent on the trucks?

Mr. EKERN. I will answer that in this way, that I believe as soon as this can be worked out the system should be extended to any carrier under Interstate Commerce Commission control.

I do not think it would interfere a particle with the railroad workers, and I think I can speak for them in that respect, that the railroad workers would be willing to have that done.

Senator BARKLEY. Is it possible to work out a system for employees of trucks and busses until there has been a stabilization of employment in those lines to give some permanency to it as to the situation of the employee?

Mr. EKERN. Yours is a very practical question, and I think it is a matter of time until you can work it out.

Senator BAILEY. In the meantime what would happen to railroad workers having to work under competitive conditions? The railroad men have asked me to say that the railroads have given fair treatment as compared to trucks, and other kinds of transportation, and I told them that I thought they were entitled to that. The railroad man is working for an institution which is at a disadvantage as compared with trucks.

Mr. EKERN. If you will pardon me, I think there is a misunderstanding as to the relative costs of this system, and I would like to get to the other figures, which I want to submit to you.

Senator GEORGE (presiding). It is going to be necessary for the Committee to adjourn in a very few minutes. How much more time do you want?

Mr. EKERN. I think I can conclude in about 10 minutes if I can have it.

Senator BAILEY. I am perfectly willing to give these gentlemen more time. I do not think we should undertake to pass on this matter without sufficient study of it.

Senator GEORGE. We might proceed a few minutes, but the Chairman of the committee was anxious that Mr. Latimer be called this morning.

Senator BAILEY. I wish to say that it is much more important that we act intelligently, than it is to save a few hours.

Senator WALSH. Let me ask this. Would it be possible to divide the pay roll of the railroad, and provide that the 4 percent be paid to that portion of the employees of the railroad who were the older

employees in the service, and that a separate pay roll be provided for the employees who enter the service after this date, and that the ratio for them be 3 and 3?

Mr. EKERN. It really makes very little difference; the railroad will pay about the same. I think as a practical proposition it would be much simpler to have this paid on a fixed ratio.

Senator WALSH. Of course, at the present time it would not make much difference, but I should think in 20 or 30 years you would have a state which would make a great deal of difference.

Mr. EKERN. I think in that time this will undoubtedly be revised. As a matter of fact, in passing the bill that was passed, you provided for an investigation by the Board to be appointed and also by a commission directed to investigate and report on January 1 of next year, so that there is no difficulty about a further revision of that if it seems desirable.

Senator CONNALLY. The bill we passed the other day—does that provide for pensioning a man already out of the employ of the railroad?

Mr. EKERN. No; it does not. We had that in the bill passed a year ago, recognizing men in the service within 1 year, and that was held unconstitutional by the Supreme Court, both by the majority and the minority. That is not in this bill.

Senator CONNALLY. What you have in mind is the men are retired, and their pay should be borne by the company rather than the employees.

Mr. EKERN. That is right.

Senator WALSH. How many railroad employees are there who have already retired, and are the beneficiaries of railroad pensions?

Mr. EKERN. I am not able to state.

Senator WALSH. Does anyone know?

Mr. SHEA. I think about 50,000.

Senator WALSH. There are 50,000 on the retirement list who are not being paid, and there is no provision to take care of them, and they are at the mercy of the railroad.

Senator GORE. The bill we passed last year did undertake to pension men not in the service of the railroad.

Mr. EKERN. Only those who had been in service within 1 year, and presumably were on a reserve or call list, but it did not make the presumption clear and the Court threw it out.

Senator BARKLEY. I want to ask this, if this Act which applies to all railroad employees is to cost only \$72,000,000, I do not see how 50,000 already retired are drawing \$36,000,000.

Mr. EKERN. We are not going to retire all of these men.

Senator BARKLEY. The railroads are now paying out \$36,000,000, and the statement was made that 50,000 employees are drawing that.

Mr. EKERN. That is an average of about \$750 a year, or a little less, because I think \$2,000,000 of that is being paid on relief, so that it would be about \$680 a year average annuity.

It is expected there will be retired from 30,000 to 50,000 men under this, who will get \$40,000,000 during the 7 months ending December 31, 1936. The next payment will not be until June 1, 1936, and next year the payment will amount to \$72,000,000. That is the first full year.

The next year it is \$84,000,000, and the next year \$96,000,000, and all of those who have testified have agreed that the payment of \$100,000,000 will be more than enough to pay all of the annuities becoming payable during the first 10 years.

Senator BAILEY. That is \$100,000,000 derived from both sides.

Mr. EKERN. Yes; that is correct.

Senator CONNALLY. A man going to retire shortly has a big advantage over the man not retiring for a long time, because he will get retirement when he has only paid one or two installments.

Mr. EKERN. That is right. The reason for it is this: You can justify any retirement system on but one theory, and it is satisfactory equally to the employer, employee, and public as a whole. You cannot justify it solely as a benefit to the employees.

Senator CONNALLY. That is what you are going to do with the men retiring in the next 6 or 7 months; they have got their salary, done what they pleased with it, yet you are going to pay them, and take it out of the men still in the service.

Mr. EKERN. Those men are being paid wages today, and the wages are approximately twice what they will get in annuities. A tender-hearted superintendent, and one not so tender-hearted, will not turn that man out to starve. He will be kept on the pay roll, and at the regular rate, and it is desired to get those men on pensions.

There is a real economy in that, in the advancement in the service going to the younger men, along with pensioning the old, and that is back of every pension system of every industry.

Senator GORE. Do you think the fact a man who goes on a pension in 2 or 3 months, and lives on it as an abandoned shell of his life, puts him in a self-respecting attitude?

Mr. EKERN. I do not think he would complain. He would probably get only half of what he would get if he stayed on in the service.

Yesterday afternoon's papers had a statement, inadvertently, of course, that at the end of 10 years this system would cost 4 billion dollars a year. Of course everyone recognizes how ridiculous that statement is, yet I am told that same statement was repeated this morning. I don't charge the railroad people with responsibility for such statements.

Senator BAILEY. Let us see if we can get an agreement. Would it be 100 billion?

Mr. EKERN. The statement was 4 billion a year.

Senator BAILEY. We all agree that is untrue, and you say a hundred million, do you not?

Mr. EKERN. I say 100 million coming in, but there is more than that going out at that time.

Senator BAILEY. That is accumulations.

Mr. EKERN. Partly. Some accumulations.

Senator BAILEY. I just want to know what it costs the people that pay the taxes, the workers, and the railroads.

Mr. EKERN. It will cost them whatever the required percentage is on the total amount of wages. It will cost them in 10 years, at 1945, 10 percent on the present pay roll of \$1,600,000,000. That is assuming no increase in the pay roll, and also assuming a maximum amount of retirement, which we do not believe will happen.

Senator BAILEY. I want to get your specific figures.

Mr. EKERN. If the wages stay at \$1,600,000,000 it will cost 10.3 percent to produce \$164,000,000, according to Mr. Latimer's figures.

Senator LA FOLLETTE. Is that at the end of 10 years?

Mr. EKERN. At the end of 10 years.

Senator BAILEY. That is the payment of the railroad.

Mr. EKERN. That is the payment by both men and railroads. I am merely stating Mr. Latimer's figures.

Senator BAILEY. That corrects the \$4,000,000,000.

Mr. EKERN. Yes; that corrects the \$4,000,000,000 statement. That is what I want to get at. Now, if the committee please, no one can fortell just what the wages will be, what the total number of employees will be, or what the retirements will be in 10 years, so we accept the figures of Mr. Latimer as fairly correct. If we had established such a system as this 30 years ago, it would be in full operation, going along nicely. We would have underestimated enormously the increase in the operation revenue and the wages on the basis of which the cost would have been paid.

Senator BAILEY. Will you tell us just what the railroads made last year after the payment of taxes and all other operating expenses?

Mr. EKERN. I have not gone into that, but I know they have fared like the farmers, merchants, and bankers.

Senator BAILEY. Your figures indicating a reduction of income and of employees compares rather evenly in general with the reduction in the national income.

Mr. EKERN. Let me make this statement, which I think is absolutely fair. I assume when the railroad employees have suffered a cut in their total wages of one-half and the railroads have suffered a like cut in their wages, that they have fared about the same with the farmers, bankers, and others in industry.

Senator BAILEY. The annual income fell from \$72,000,000,000 to \$38,000,000,000, and has now gotten back to about \$48,000,000,000.

Mr. EKERN. I was going to say that so far as suffering is concerned, it is not only one of employees, but also of carriers. You cannot draw any line on that.

Senator BAILEY. I would like to get from somebody on the other side, what did the railroads make?

Mr. FLETCHER. They were \$32,000,000 short of other previous years, they were in the red.

Mr. EKERN. After interest charges also?

Mr. FLETCHER. Yes.

Senator BAILEY. They would expect to pay their interest charges, otherwise go into receivership.

Mr. EKERN. Our farmers have not paid interest charges, and our merchants and manufacturers have been in the red until recently, so I don't think that is any criterion at all, when I look back to about 1929, when the railroads made enormous revenues.

Senator BAILEY. You say the railroads lost \$32,000,000, and that is not significant, you say?

Mr. EKERN. It is not significant of what will happen in the next ten or fifteen years.

Senator BAILEY. Do you think we have any reasonable hope the railroads will be better off? I have heard a great deal of complaint of how they suffer from competition.

Mr. EKERN. You have done something to remedy that, and I am hoping it will work out. The railroad men are all interested in the future fortunes of the railroad.

Senator BARKLEY. I have to go to the floor on account of another bill pending. Will we have another session tomorrow?

Senator GEORGE. The Chairman did not contemplate a session, but it is obvious we will have to have one.

Senator BAILEY. I think we are getting a great deal of very valuable information.

Senator GEORGE. I think the Committee will now adjourn until ten o'clock in the morning.

(Thereupon at 12:10 o'clock p. m., the hearing was adjourned until 10:00 o'clock a. m., Friday, August 23, 1935.)

TAXATION OF INTERSTATE CARRIERS AND EMPLOYEES

FRIDAY, AUGUST 23, 1935

UNITED STATES SENATE,
COMMITTEE ON FINANCE,
Washington, D. C.

The committee met, pursuant to adjournment, at 10 o'clock a. m., in the committee room, Hon. Pat Harrison presiding.

Present: Senators Harrison (presiding), King, George, Gore, Costigan, Bailey, Clark, Byrd, Lonergan, Gerry, La Follette, Metcalf, and Capper.

The CHAIRMAN. The committee will be in order.

Mr. Ekern, you did not quite finish yesterday.

STATEMENT OF HERMAN L. EKERN—Resumed

Mr. EKERN. I did not. I was asked some questions which I promised to answer, and also I dealt with some figures as to which I did not complete my statement.

The CHAIRMAN. All right, you may proceed.

Mr. EKERN. I will try to be very brief in this, Mr. Chairman. Since this hearing yesterday the House Committee on Ways and Means has reported a corresponding bill to the one under consideration here, with an amendment changing the tax rate of 2 percent payable by the employees and 4 percent payable by the carriers to a tax levied for 1 year only, which tax was made 3.5 percent payable by the employees and 3.5 percent payable by the carriers.

Now it is significant that this tax which is proposed here to be levied is limited to 1 year only. I want to say right at the outset that the employees do not agree to this manner of dividing the tax, but in view of the lateness of this session, and due to the further fact that this tax is only levied for 1 year, from March 1, 1936, to February 28, 1937, we are not entering any objection to this amendment at this time. This is, however, with the distinct understanding, Mr. Chairman, that we shall ask in any reenactment of this law, this taxing act, that the principle of a division of one-half and one-half for the subsequent service and the employer bearing the total cost of the prior service shall be maintained in a broad general way in the manner which has been discussed heretofore before all the other committees and discussed before your committee.

The reasons for that were stated yesterday, and I think the committee will have them in mind, and I want to make this absolutely clear on the record, that the railroad employees, who are willing to go along on any tax that is reasonable and necessary for this purpose, do insist that as to the obligations for prior service the burden assumed for

prior service, that is a burden of the employer, which in any tax that is hereafter levied should be recognized as such a burden and not as a burden of the employees. I think perhaps that is all I need to say on that point.

Now with regard to the results of this increase in the tax, I think it is pertinent, perhaps, to call attention to the figures on this. It results in a uniform increase in the total yearly revenue of one-sixth. On the basis of the minimum total wages of a billion and a half in 1932 the tax revenue at 7 percent would start at \$105,000,000 instead of the \$90,000,000 that we discussed yesterday. It brings the tax revenue on the maximum wages of 1929—and by the way, the wages were in excess of \$3,000,000,000 for 6 years, or 7 years prior to 1929, and on that \$3,000,000,000 the tax revenue at 7 percent would be \$210,000,000.

Now, if you go back, then, to this 14-year average I spoke of yesterday, it brings the tax revenue up to \$192,500,000. On the present wages of \$1,750,000,000, it brings the tax revenue which would actually be collected now for the calendar year to \$122,500,000. That would mean you would get five-sixths of that during the year 1936. During that year the estimated annuity payments—and I think that will cover it very well—are probably \$40,000,000, as we figure it, or dividing it exactly, \$42,000,000.

Mr. KRAUTHOFF. You mean for 7 months from the first of June?

Mr. EKERN. From the first day of June to the end of the calendar year, for 7 months. The following year the estimate is, as I want to recall to you, \$72,000,000. That is 1937. In 1938 it is \$86,000,000, and so on. The 6-percent basis applied to the low total wages of \$1,600,000,000 will carry this through for approximately 10 years.

Now obviously if you add one-sixth of the total collections you will carry it through much longer than that, because that additional one-sixth is an added protection against any drain on the Treasury, and that undoubtedly will carry it through at least to 14 years, and we figure possibly somewhat longer, on the low total wages. Now if the wage scale should return, or the total wages, not the wage scale, if the total wages should return even approximately to that prior to 1932, say increased by 50 percent, obviously the same percentage applied to that would also increase the tax revenue 50 percent, and it is not unreasonable, in my judgment, to expect that the total wages, with the resumption of business and getting out of this depression, will come back. It has already come back, according to the testimony of the railroads, and it is surely coming back. So we can reasonably expect that the tax revenues here will be a very considerable amount more than have been used in any of these figures that compare tax revenue with outgo.

Senator BAILEY. Has that been announced by the railroads, that we have already recovered?

Mr. EKERN. The total wages paid are now greater than in 1932.

Senator BAILEY. That is very gratifying. You said that the railroad people told us that we have already recovered. I did not know that.

Mr. EKERN. That is in the testimony.

Senator BAILEY. Do you say that we have recovered?

Mr. EKERN. Not that we have recovered, that we are on the way to recovery, that we are recovering.

Senator BAILEY. Are you predicating your theories or your views on the theory that we are in for a fine period of rising markets, the restoration of normal business?

Mr. EKERN. Do you want my personal opinion?

Senator BAILEY. Yes.

Mr. EKERN. I am merely stating the facts as they are now stating them. I think there is a reasonable ground for believing that we are going to have a steady recovery.

Senator BAILEY. Right along from now on?

Mr. EKERN. No; we are going to have the usual ups and downs, but the net result is going to be an increase.

Senator BAILEY. I am tremendously interested in that. You think it will be in the next 4 or 5 years, that this recovery will be coming on?

Mr. EKERN. I am not prepared to give any details for the time you indicate for that purpose. I do not claim either to be a financial or an economic expert.

Senator BAILEY. But you are an optimist.

Mr. EKERN. Very much so.

The CHAIRMAN. Proceed.

Mr. EKERN. Now in discussing this tax, and in making this statement which I made a few moments ago to the chairman before the other Senators arrived, that we are not objecting to the 1 year imposition of the 3.5-percent tax on the men and 3.5-percent tax on the carriers, making a total of 7 percent, I want to reiterate that we do object to the division of that as a permanent principle.

Senator BAILEY. What have you in mind as to a permanent principle?

Mr. EKERN. The permanent principle that we believe is applicable here, as a principle of the pension legislation, is an equal division of the cost of that part of the pensions which are applicable to current service after the act takes effect, and that that part of the pension which is payable on account of the service before the act takes effect is properly a charge against the employer. That is the basis of the 4-percent and the 2-percent division.

Senator BAILEY. That would be the ratio that you have in mind?

Mr. EKERN. Well, not necessarily the ratio, but that would be the difference, 2 percent difference there, and to some extent that ratio.

Senator BAILEY. Not 2 percent difference, it is 100 percent difference.

Mr. EKERN. No; 2 and 2 are 4 percent, that is the sense in which I used it.

Senator BAILEY. Oh, you used 2 points?

Mr. EKERN. Two points.

Senator BAILEY. It is not 2 percent?

Mr. EKERN. It is not 2 percent of the two figures. Shall I go on, Mr. Chairman?

Senator GEORGE. Yes; you may proceed.

Mr. EKERN. We think that this tax is not an unfair tax on the railroads, or on the railroad industry.

Senator BAILEY. Well now, on that point I want to get some information. Would you consider it an unfair tax if it were not applied under the retirement act here, which has already been passed, entitled "H. R. 8651"?

Mr. EKERN. As a provision for those annuities?

Senator BAILEY. Yes.

Mr. EKERN. No.

Senator BAILEY. You would not?

Mr. EKERN. No; absolutely not. I will give you my reasons for it.

Senator BAILEY. I want to follow you up about that. Suppose you take the money and apply it for governmental purposes.

Mr. EKERN. That is absolutely all right.

Senator BAILEY. You would not consider it unfair?

Mr. EKERN. If in the wisdom of Congress that is the desire I do not think anybody could question it.

Senator BAILEY. Now, I want to get that clear. Then the employees and the railroads would not get anything.

Mr. EKERN. They would get the same as any other citizen from the tax.

Senator BAILEY. The funds in the General Treasury would not be distributed for this retirement benefit?

Mr. EKERN. As far as this bill goes this tax goes into the General Treasury.

Senator BAILEY. Now let us be honest about it. If I vote I am going to vote for it with the view that it is going to the railroad workers. Now are you advocating that we shall do that or are you not?

Mr. EKERN. I am advocating, and have advocated continuously, the enactment of an annuity retirement law for railroad workers, which you have already enacted.

Senator BAILEY. Yes.

Mr. EKERN. And I think in view of that enactment it is a very fair thing that we should provide for an increased revenue from the railroad industry.

Senator BAILEY. Is not that just what we are doing, or proposing to do in the act which we are considering?

Mr. EKERN. You are providing for an additional revenue, yes.

Senator BAILEY. For that purpose.

Mr. EKERN. But you might repeal the retirement law tomorrow.

Senator BAILEY. Oh, yes.

Mr. EKERN. Or you might let the retirement law stay in force and repeal this law tomorrow; or you might adjust, as we expect you will, this tax rate at the next session of Congress beginning on January 3, 1936.

Senator BAILEY. Congress has power always to repeal and modify its acts, I understand that, but here is what I have in mind: I have got to account to my constituents for my vote on this legislation. The only way I can account for it to the railway workers in my State and to the employers, would be by way of saying, "Yes, I voted for this tax on you, but I voted for you to get it." Is not that what you have in mind?

Mr. EKERN. Exactly, from a practical standpoint that is very fair.

Senator BAILEY. You would not advise me to vote for it on any other ground?

Mr. EKERN. I am not sure about that. Let me give you my reasons.

Senator BAILEY. I am going to follow you about that. Would you advise me to vote for an additional income tax on the railway workers over and above the ordinary income taxes unless it were in contemplation that the money was to be returned to them?

Mr. EKERN. Well, I cannot answer that, because there is no contemplation here of this money's being returned to them; only a part is returned to them in any event here, for several years to come.

Senator BAILEY. Let us have it in your language. You say "a part"; it will be the larger part, I suppose?

Mr. EKERN. I do not think that you would probably divide this up in this way if you did not have in mind that there would be some kind of a division.

Senator BAILEY. Now let us go a little bit further about that. This taxes an income up to \$3,600 a year, an employee's income; is that right?

Mr. EKERN. That is correct.

Senator BAILEY. That tax is 3.5 percent; is that right?

Mr. EKERN. Under the bill that has passed the House.

Senator BAILEY. Now we are imposing upon him an income tax in addition to the income tax that is imposed upon others than employees of the railroads.

Mr. EKERN. Yes.

Senator BAILEY. Would that be fair unless you were to return the money to the workers?

Mr. EKERN. That depends upon whether you regard it as a tax upon the industry as such or a tax upon the individual. Now let me give you my points on that.

Senator BAILEY. This is the tax—there is no question about that—this is the tax clearly written on the wages of a salary paid to workers. There is no question about that.

Mr. EKERN. Let me give you the point of view, if you will permit me, Senator.

Senator BAILEY. All right.

Mr. EKERN. I think I can clear your mind on that and give you a perfect defense.

Senator BAILEY. I am going to tell you now, do not tell me to vote for this unless I am sure that the money is going to employees. You will not tell the people that you represent that either.

Mr. EKERN. We haven't any doubt that it will. You have already provided for that. But let me bring this out to you. Representative Crosser brought this out in the House hearings on the Committee on Ways and Means. The total wages on the railroads are equal to one-half of their total operating expenses. A tax of 6 percent, which he was then discussing, on the wages is, in effect, the same as 3 percent on their operating revenue. The proposed 6-percent tax on the railroad industry is no different, essentially, from the 3-percent tax which the Government now collects from utilities on the sale of electrical energy, and that tax has been in force for some time.

The imposition of the proposed tax upon carriers, upon railroads in interstate commerce as a class distinguished from competing busses and trucks, is again no different from the imposition of a tax upon electrical utilities as a class distinguished from competing gas utilities which are not subject to the tax.

Senator BAILEY. Here is the difference. The tax on the utilities is a tax on the corporation itself. The tax we propose here is a tax on the salaries of the employees. Now we are not taxing the salaries of employees of utilities.

Mr. EKERN. I am following that right up. Just pardon me for a little interjection here. This bill is not subject to any of the infirmities for which specific prior Federal taxing acts have been held invalid by the Supreme Court of the United States. The taxes stricken down have been uniformly stricken down because they were neither designed to nor would have raised revenue. In this case there isn't any question about that. This tax is designed to raise revenue, and it will put the revenue into the United States Treasury, and there isn't any question about it. There are no conditions here, no strings to this. The money is to be collected and go into the United States Treasury.

I might just refer to the Child Labor Taxing Act, which was purely a prohibitory act; the Futures Trading Act, which was held unconstitutional and was purely a prohibitory act, and when it was reenacted as a regulation of interstate commerce the Grain Futures Act was held by Chief Justice Taft to be a valid act.

There are, of course, cases where these prohibitory taxing acts have been held valid. Notable among these, of course, as everybody recognizes, is the Bank Note Taxing Act, the Colored Oleomargarine Act, and a number of others.

Now, getting to your point, Senator, Representative Crosser made this statement in the hearing on the House bill before the Ways and Means Committee on August 15. That is on page 11 of that report:

The bill, H. R. 8652, is designed to raise revenue. It will raise revenue. Its provisions are certain and definite. It involves no delegation of power.

The tax is levied upon a long-recognized and well-defined class. The carriers subjected to the tax are those long regulated and supervised under the Interstate Commerce Act, under provisions applicable exclusively to such carriers.

The employee classification is based upon that set forth in the Railway Labor Act and the earlier acts affecting employees of the carriers. These employees enjoy advantages which distinguish them clearly from employees of other employers engaged in similar occupations.

Now what are those advantages?

Under a long line of acts of Congress special provision has been made for their safety. Their hours of labor have long been regulated. Their right to maintain organizations to bargain collectively under representatives of their own choosing has been enforced by law for many years. The long-established seniority rule, together with the necessity for continuous operation of the national transportation system by railroad, have brought about greater continuity and permanence of employment than in any other field of employment.

Senator BAILEY. Let us come to the advantages. Do you have in contemplation now that we put a tax upon them to offset those advantages or to enhance their advantages and give them another advantage?

Mr. EKERN. Yes, we are giving them another advantage.

Senator BAILEY. So it is not by way of an offset, it is by way of an additional advantage?

Mr. EKERN. It is an additional advantage. But here is another point. There are distinctions between the railway labor employment and other employments which are not dependent upon statutes. For instance, the long-established seniority rule, together with the necessity for continuous operation of the national transportation system by railroads, has brought about greater continuity and permanence of employment than in any other field of employment.

Senator BAILEY. That is no reason why you should tax them. I agree that there are advantages which are very admirable, but that is no argument to put a tax on them.

Mr. EKERN. Just a moment, Senator. You tax on ability to pay. Here is something that you are trying to do in the interest, not alone of these employees, not of the employers alone, the carriers, but of the industry as a whole, to facilitate the operation of these railroads in the best possible manner.

Senator BAILEY. Well, we tax on ability to pay, that is true, but we measure that ability by the income, and you propose here on the man who gets in excess of \$2,500, assuming he is married, or in excess of \$1,000, assuming he is single, in addition to the income tax which is imposed by the Congress, another tax on his pay roll. Now I think there is not a man on this committee, I think I am safe in saying, but that will vote for that tax simply with the understanding that it is to go back to the employees by way of this first act that we have already passed. We might just as well be frank with ourselves about that. You will be frank about that; won't you?

Mr. EKERN. You have already enacted the other law.

Senator BAILEY. And this act is for the purpose of paying the retirement funds under that law. Why not admit that and be done with it?

Mr. EKERN. Now, I do not want to appear to be dodging this, Senator.

Senator BAILEY. Of course not.

Mr. EKERN. I want to be absolutely fair with you. The theory of this act, as presented yesterday by Judge Krauthoff, is that these two acts, so far as relates to action on them by Congress, are distinct. They are more distinct even than the separate titles in the Social Security Act. What Congress has in mind taking care of, of course, is a matter for Congress purely.

Senator BAILEY. I am going to hold you down on that. Of course, it is a matter for Congress, but it is also a matter for you, when you advocate the act. I am going to ask you, and you may answer if you wish, and I think you will, are not you arguing in perfect good faith for the taxing act on the employees with the view of having the money paid to them under the act we passed here; are not you doing it?

Mr. EKERN. Yes.

Senator BAILEY. All right.

Mr. EKERN. You already provided for it. Let me say then, Mr. Chairman, as I understand it, and I want to be corrected if I am in error, that it is not within the power of Congress to pass any taxing act which a succeeding Congress cannot change. I assume it is beyond the power of Congress to tie itself up in any appropriation which binds a subsequent Congress unless there is some contract obligation involved, which there is not in the annuity act that you passed.

Senator BAILEY. What position would you take if Congress undertook to divert the fund derived from the railway employees to funds to be used for governmental purposes?

Mr. EKERN. I expect that Congress will.

Senator BAILEY. Will divert the funds?

Mr. EKERN. We are going to raise here this first year something like \$90,000,000 and you are only going to use \$40,000,000 here for

the payment of annuities. I haven't any doubt if Congress needs that \$50,000,000 it can appropriate it right out of the Treasury. There is no doubt about that.

Senator BAILEY. And you would not make any protest about it?

Mr. EKERN. Certainly not.

Senator BAILEY. Are not you putting yourself in the position of advocating a special tax on the railway employees for the purpose of obtaining revenue for the United States and not for the purpose of their retirement fund?

Mr. EKERN. For both.

Senator BAILEY. Don't you put me in a bad position if I should go back to North Carolina and tell my friends that I voted for a special tax upon them over and above the income tax and the other excise taxes, that it is a special tax on them for the purpose of paying the national debt, for instance, and carrying on the Government that way? Does that put me in a very good position?

Mr. EKERN. In the present situation you have no difficulty. The representatives of the railroad employees with whom this has been thoroughly considered are unanimous in supporting this taxing bill. As a matter of fact, let me add this, Senator—

Senator BAILEY. I think they are unanimous for it on the ground that it is carrying out the retirement fund views. That is the basis of unanimity, of course.

Mr. EKERN. We do not have any misunderstanding about that.

Senator BAILEY. All right.

Mr. EKERN. I want to put into the evidence here Congressman Crosser's statement, just this much:

In recognition of the facts the employees are practically unanimous in support of the proposed tax. The great interest of the Nation in the railroad transportation system makes it certain that these distinctions are and must be maintained. The proposed tax is one amply sustained as a proper classification.

Now there is just one other point I want to mention, and that is with regard to the amount of the tax. We think that so far as any burden is thrown on the Federal Government by this Railroad Retirement Act, that it is fully provided for under the 6 percent for 10 years and under the 7 percent for 14 years, or more. We are agreed on that. I think all those who testified here are agreed on that, and if there is any question about that Mr. Latimer can discuss it. We are not protesting against the 7 percent, as I stated before, in this 1-year tax; we are not protesting against 7 percent excepting on the division of it, as I indicated before. We think the prior service should be borne by the railroads.

Senator BAILEY. You are not protesting against the 3.5 and 3.5, you are accepting that much?

Mr. EKERN. For the 1 year, but only for the 1 year.

Senator BAILEY. And next year you are going to ask that be changed to 4 on the railroads and 2 on the employees?

Mr. EKERN. No; we are not making any specific request on that. We are willing to have that thoroughly investigated by the Commission which you provided for, and we want a fair division on that which will be fair then as a principle to carry through the years. This is a long-term proposition.

Senator BAILEY. The 4 and 2, you are accepting that as being fair?

Mr. EKERN. The 4 and 2 we regard as fair. That is our proposal.

Senator BAILEY. All right.

Mr. EKERN. Now I do not know that I need to go into the tax and the cost any further, because all these questions have been quite fully developed. I do, however, desire to call attention to one thing which to my mind is very unfortunate.

Yesterday morning in my testimony I called attention to an article carried in one of the large newspapers, and it was repeated this morning, to the effect that this railroad retirement annuity system would cost the Government, or the Treasury, some \$4,000,000,000 a year after the tenth year. I am very much surprised this morning to find, in an article in the Washington Post of August 23, under the title "By the Associated Press" this statement:

The committee has been worried over assertions that 6 percent would be inadequate to finance the pensions, and that the Government might have to contribute \$2,000,000,000 annually and in 10 years perhaps \$4,000,000,000.

Now, Mr. Chairman, I call attention to this for this reason: The great mass of the people has no means of getting information as to this except through their newspapers, and this is going out as the deliberate statement of the greatest news distributing agency we have in this country, or perhaps in the world, and I think that is something that is inexcusable and should be corrected, and should be corrected as promptly as possible. There ought not to be any question about that.

Senator BAILEY. I am going to join you in that. Most of us in the Senate are afraid to make a speech because we do not know what the papers are going to say what we said the next day. If you have a remedy on that, you give it to me and we will attach it right to this bill.

Mr. EKERN. The only remedy I have ever discovered, Senator, is to call attention to mis-statements as often as you have a public opportunity.

Senator COSTIGAN. What basis, if any, was there for that report?

Mr. EKERN. I can say, Senator, from my appearances before the committees, and so far as I have heard the discussion, there was absolutely no basis.

Senator BAILEY. Do you care to state what was said yesterday, as to what the facts were?

Mr. EKERN. There is no question about the facts which have been testified before all the committees, as to what the annual cost is.

Senator COSTIGAN. Is that press report based on any testimony given before this or any other committee?

Mr. EKERN. No; perhaps you might like to have the whole report put into the testimony. It is not very long.

Senator COSTIGAN. I think it is quite unnecessary to have it in the testimony.

Senator GERRY. What is the amount you gave yesterday?

Mr. EKERN. It ranges from \$40,000,000 the first year to \$42,000,000 up to about \$137,000,000, or something like that, at the end of 10 years. That is the very maximum.

Senator COSTIGAN. You now refer to the testimony given yesterday?

Mr. EKERN. Yes; as against the \$2,000,000,000 which is set out here. Of course to anyone who is at all familiar with this the thing is wholly ridiculous.

Mr. FLETCHER. If the committee would permit me now, or later, I would like to make an explanation that I think would show where the \$4,000,000,000 figure comes from, where it comes into this picture.

Mr. EKERN. I know about the \$4,000,000,000.

The CHAIRMAN. How much more time do you expect to take on this?

Mr. EKERN. I am almost through, Senator. I was asked some questions about the constitutionality of this yesterday. I think some of the questions have developed my point of view. As I understand it, the decisions with regard to the taxing power, so far as the decisions on taxes levied by the Federal Government are concerned, have not struck down any tax which was designed to raise revenue and which did, in fact, raise revenue and did not have any of these prohibitory conditions.

Senator BAILEY. Now let me ask a question there on the theory of constitutionality. I understood you just now to argue that since the railway employees were especially favored that it would be a righteous thing for the United States Government to levy a tax upon their income over and above the taxes levied upon incomes of other people in the United States. Do you really take that view?

Mr. EKERN. That only enters into the constitutional question as a matter of classification.

Senator BAILEY. But if it enters into anything it must be a reality, it cannot be a figment.

Mr. EKERN. It is a fact, there is no question about the fact. I am stating that as a matter of classification.

Senator BAILEY. And you said we can classify incomes in America on the ground of the relationship of the man enjoying the income to the others of the population?

Mr. EKERN. Oh, yes.

Senator BAILEY. On a basis different from his income but related to his status?

Mr. EKERN. Oh, yes; you have done that.

Senator BAILEY. Are you advocating that now with respect to railway employees?

Mr. EKERN. Congress has done it and I assume for constitutional purposes you can do it.

Senator BAILEY. You are asking these Congressmen to do it and you are speaking for the railway workers. Now if I get into a crux about that in North Carolina are you going to let me say that you asked me to do that? Suppose I get up and say: "You are an especially favored class. We put an income tax on you over and above the income tax on your neighbor"?

Mr. EKERN. Chairman Crosser of the subcommittee which handled this bill, and who introduced the bill, indicates that we are perfectly willing to have you say that. You should say it. As a constitutional question, that is very plain.

Senator BAILEY. Then I want to get that fully developed. You are asking that the tax be reduced hereafter, but how far could we go on the theory that they are a favored class?

Mr. EKERN. Senator, I suggested that this whole matter of the rate of the tax was one which the Commission would be expected to investigate and to report upon for the Congress which meets next year.

Senator BAILEY. Well, I was very much surprised when you took that position.

Mr. EKERN. I think that is a fair position.

Senator BAILEY. I was surprised to have you take the position that I should impose an extra tax on any particular class of people in

the United States, and especially the railroad workers, not on the ground that the money is to be returned to them but on the ground that they already enjoy advantages and ought to pay extra taxes on that account.

Mr. EKERN. As a classification.

Senator BAILEY. You classify them for the purpose of increased taxes.

Mr. EKERN. Yes, sir. Now then, with regard to the carrier, I assume that there is not any question as to the classification of the carriers.

Senator BAILEY. I am going to tell you not a Member of Congress will say that on the floor.

Mr. EKERN. I want that in the testimony, that we have made the statement. We are not asking the Members of Congress to make any statement one way or another, but with regard to the classification of the railroads there cannot be any question, because for years you have separated the carriers by railroad in interstate commerce from all other activities, in the Interstate Commerce Act and in all the related acts, so there is no question there. As I stated before, with regard to the appropriation, we have been unable to find any decision that holds that you cannot make an appropriation.

Now the case of Massachusetts against Mellon, it is true went off somewhat without any flat-footed decision on the question of whether or not Congress could be limited by the court in making an appropriation, but it was there squarely decided that neither a State nor a citizen of the United States could challenge the appropriation.

Applying that principle, there does not seem to be any constitutional question with regard to the right to appropriate.

Senator BAILEY. That is *Massachusetts v. Mellon*, and the *Frothingham v. Mellon case*?

Mr. EKERN. Yes.

Senator BAILEY. Do you deduce from that that the spending power of the United States cannot be challenged at all, that Congress can spend money for anything? Do you go that far?

Mr. EKERN. That is not necessary. It is not necessary to go that far, Senator.

Senator BAILEY. I do not think so either.

Mr. EKERN. I do not think it is, but the long-established practice clearly shows that Congress is spending money for a great many purposes that are not so essential as the present purpose.

Let me go one step further. I have had to do with this legislation from its initiation in Congress.

Senator BAILEY. You mean these bills, these two bills?

Mr. EKERN. Well, the legislation that preceded it, as well as these two bills, and in the legislation that preceded this I asked for its enactment under the commerce clause, and it was enacted accordingly, and as you know the Supreme Court of the United States held that it was unconstitutional.

Senator BAILEY. They could not do it under the commerce clause?

Mr. EKERN. Let me correct one or two things that were stated by Judge Fletcher yesterday. First let me say I agree with him in his statement that Justice Roberts held that the enactment of the law last year was wholly beyond the power of Congress under the commerce clause.

Senator BAILEY. You are contending then that the court was right?

Mr. EKERN. No; I do not agree that the court was right. Judge Fletcher did not add this, which is the significant thing: That finding or decision of the court was based on the specific statement, which is in the opinion by Judge Roberts and is reiterated by Chief Justice Hughes in his dissenting opinion—that while Congress could lawfully require—I am stating it in broad language—the dismissal or retirement of employees in the interest of safety and efficiency, it was beyond the power of Congress to add to that a requirement that the man be paid something to live on after he is separated from the service; in other words to pay a pension or an annuity to this retired man.

I do not agree with that conclusion of Justice Roberts. It is the finding and holding of the majority court, but it is absolutely contrary to all the experience in pension matters, private pensions as well as public pensions throughout the United States and over the whole world.

Senator BAILEY. Does not Justice Roberts take the view that it is a matter of regulation of commerce?

Mr. EKERN. Exactly; but if it is essential to the retirement of a man from service in practical operation to pay him something for his continued subsistence, then why is not the pension just as essential to the regulation of commerce as the right to have this man quit service for, say, inefficiency? As a matter of fact, that is only a small part of it, getting the old man out of the service. The big part of it is, when you take this man and lift him out of this position where he is not of such great value, or his value may have largely ceased and you are continuing to pay him the salary, possibly reduced in some cases but in many cases the entire salary, when you lift him out of the position in a manner satisfactory to him, where you pay him probably half or less than half as a pension, and then you move up a man who is in the flower of his manhood and is able to give the fullest and best service, you are improving immensely the ability of the transportation system to perform the service that you want performed by the transportation system, and then you enable the railroad to go down again and pick up the younger experienced man who now because of the reduction in the force is unemployed.

Senator BAILEY. You are still then referring to the theory of regulation. How will it do that if the security bill does not do that?

Mr. EKERN. Pardon me, Senator. May I omit discussion on that?

Senator BAILEY. If you wish to.

Mr. EKERN. We are perfectly safe on the security bill plan, with our division, and the security bill is perfectly safe on the theory of our division between the two bills, in my judgment. I am just calling attention to the fact that this bill is also a sound bill on the theory of a regulation of commerce. Let me carry that out in just a moment. In the bill that was passed there was no finding of fact, there was nothing that brought before the court the fact that there was a connection between retirement and the payment of pensions, and as I say, Justice Roberts went off on that tack. That was the real thing that struck down this law without any question. Now, here is a significant thing: It was urged by the railroads in the attack on the act of last year, that it was void because it took in employees who were not engaged in interstate commerce but who were employees of

these railroads in interstate commerce. Justice Wheat in the lower court held that that contention on the part of the railroads was valid. In the opinion of Justice Roberts there is no mention of that, and Justice Roberts absolutely ignores that contention.

There is one other point that Justice Roberts made against the law, namely, that in the establishment of a pension system there could be no recognition of service prior to the taking effect of the act. If that is to be the case, then obviously, if you are to establish a pension system where you use as a means of determining the amount of the pension the amount of the wage and the duration of service, it would be 20 or 30 years from the establishment of the system before you would get any substantial benefits from it, before you would accumulate enough to pay a pension on which you could retire the men. That is contrary to what has been done by this Government in the establishment of the judicial pensions, in the establishment of all the Federal employee pensions, in the establishment of every State pension system that I know anything about, and I think I am familiar with practically all of them, and in the establishment of all the industrial, commercial, and financial corporation private pension systems, as well as in the establishment of every one of the present railroad pension systems.

It fails to recognize the fact that this act a year ago and now could just as well provide for the payment of a flat pension of \$50 a month to everyone retired at 60 or 70 years of age. If you do that, where is the recognition of prior service? There is not any difference. There are things that we have cured in this act, and we can go before the court with the proper presentation of the facts and have this act sustained on this additional basis of being in full compliance with the power of Congress to regulate commerce. On the question of prior service, it is a most unfortunate decision, in that it throws a shadow of doubt on every public pension system throughout the United States under authority of any State or municipality, because it calls these pensions pure gratuities, and as you all know the constitutions of most of the States prohibit gratuities.

Senator BAILEY. That has reference to the power of Congress. There is no reference to the power of States. There is a broad distinction there which you know, as a lawyer, you would make.

Mr. EKERN. The point I make is this: If all these pensions are gratuities—

Senator BAILEY (interposing). You say, "if they are." When the Justice was speaking of gratuities he was speaking with reference to the act before him and the power of Congress. Now he was saying that they are gratuities so far as the power of Congress was concerned. He did not say they were gratuities so far as the power of the State was concerned. There is a very great distinction.

Mr. EKERN. I would make the same argument that you are making, Senator, if one of these State acts were attacked, but on the other hand, I was merely stating that it raises that question.

Senator BAILEY. The States are more largely social institutions than the Federal Government is.

Mr. EKERN. Not with respect to their own employees, where the Constitution prohibits additional compensation or gratuity.

Senator BAILEY. I was speaking in reference to my own State.

Mr. EKERN. We have that situation in a large number of States. In this discussion I am not questioning at all the constitutionality of this act, this taxing act, and the constitutionality of the annuity act on the basis of being wholly as separate acts, valid under the power of Congress to levy taxes and to make appropriations. There will also be an opportunity to sustain this if it goes before the Supreme Court on the grounds I have stated, that it is a regulation of commerce.

Senator BAILEY. Then I gather from you that the acts are separate acts, introduced independent of the bill, wholly for the purpose of undertaking to meet the question of constitutionality.

Mr. EKERN. I would rather have Judge Krauthoff answer that question, because he is the author of this plan, but I joined with him in this plan and I believe it is constitutional the more I study it.

Senator BAILEY. You might as well frankly say that these acts were separated and put into two acts wholly for the purpose of undertaking to meet the constitutional objections which would arise if they were made in one act. You will agree that the first act would amount to nothing if the tax was out.

Mr. EKERN. I want the tax, yes; there is no question about that.

Senator KING. You do not expect, by reason of the declaration of the first act, that it will immediately be followed by an appropriation from the Treasury of the United States, without provision being made to meet that appropriation?

Mr. EKERN. No; I would not. I would expect that the Congress would make a provision for raising the funds necessary to carry this into effect.

Senator KING. In other words it is not your expectation that that act, standing alone, calls for a direct appropriation from the Treasury of the United States which would be met by all the taxpayers in the United States. That is to say, you did not expect that all of the taxpayers in the United States were to be called upon to meet the provisions of the bill which we passed a few days ago?

Mr. EKERN. May I answer it in this way: The bill for the retirement annuities and the bill for the tax were both introduced in this House by Senator Wagner. The bill for the retirement and for the tax were both introduced in the House by Representative Crosser, if that answers your question.

Senator KING. Well, you understand of course, that all bills for the raising of revenue must originate in the House of Representatives.

Mr. EKERN. Yes.

Senator KING. So the introduction of the bill by Senator Wagner here would be sort of superfluous.

Mr. EKERN. It gives this opportunity for a hearing before the other bill gets over. Does that answer your question?

Senator KING. Yes.

Mr. EKERN. I merely want to reiterate this, that so far as this taxing bill is concerned there is no provision for a trust fund or for any other earmarked fund in the Treasury of the United States; and there is no provision for payment out of any specific fund other than those appropriated for the purpose in the Retirement Act. So in that respect the two are entirely distinct and separate, and there is no attempt to tie them together.

Senator KING. Is that all you have?

Mr. EKERN. Yes. Thank you.

Senator BAILEY. Let me ask you, do you take the view, in the first place, that these two acts taken together would be constitutional without reference to the commerce clause?

Mr. EKERN. Yes.

Senator BAILEY. Do you take the view, in the second place, they may be referred to the commerce clause and that would enable the argument for the constitutionality?

Mr. EKERN. I think the act can stand on the commerce clause only.

Senator BAILEY. Then you take the third view that the Congress has the power to impose an income tax on railway employees over and above the income tax levied in the revenue act, and that would be constitutional, notwithstanding it is fallacious on the ground that the railway employees are a special favored class?

Mr. EKERN. I take the position that on any legitimate classification of individuals you may impose a separate income tax; that is correct.

Senator BAILEY. You take the view that you may tax the lawyer's income, do you, without also taxing the merchant's?

Mr. EKERN. I think it could be done lawfully; yes, without question. I think that is true. I merely want to add that I think the development, in the hearings on these bills and the reporting of these bills here have given a definite basis to bring this act, the Railroad Retirement Act, as passed by you, and this taxing bill, if they are to be considered together, directly within the holding of Chief Justice Taft in the case of Chicago Board of Trade against Olson.

Senator BAILEY. Do you take the view we can put a lower tax on the farmer and a higher tax on the railway worker, income tax?

Mr. EKERN. Oh, I think so.

Senator BAILEY. And we can run all the way through all the classifications of our citizens, is that your view?

Mr. EKERN. I do not know of any limitation.

Senator BAILEY. That is all right.

Mr. EKERN. Thank you Mr. Chairman.

Senator BAILEY. I will just say to you, if we get into that it will be beyond the power of any politician that ever lived in this country.

Mr. EKERN. I am discussing the constitutional question, Senator.

Senator BAILEY. I am thinking about the other too.

Mr. EKERN. It just occurred to me, the question was asked here yesterday—

Senator BAILEY (interposing). I think you would be much better off just to state frankly the view which the committee must take or the Congress must take, that we are levying or proposing to levy a special tax upon the railway employee for the special purpose of providing funds to pension him. That is the truth. That is the view of this whole committee. I will ask you finally if that is not your view. We cannot kid ourselves. We cannot kid the Supreme Court. We cannot kid the railway workers. Why should we try to do it?

Mr. EKERN. Senator, I wonder if I might just have 5 minutes to answer that question. May I answer it? If you will permit me to go through it, I would like to do it. I have used a great deal of time, Senator, and I appreciate your courtesy. The question that you asked me brings out a specific point, and that is whether or not these things are tied together. They were in the act you passed a year ago, because there we provided for a specific fund into which all the money

was to be paid, and that the annuities were to be paid solely out of that fund. In this case all the money paid in is the money of the United States. Any money that is paid out for these annuities is purely the money of the United States.

Now one reason I object on principle to the resting of this tax on the employees of 3½ percent is because there is not a dollar of credit set up to any employee from the excess payments that are made by that employee over what is required for the current payment of the annuities. Everything that he pays over and above that is really that much of a tax, and if you repeal the annuity act, which you will not do, none of them have ever been repealed, but if you should repeal it in 3 or 4 or 5 years the excess that these employees will have paid, and which is a very considerable sum over any possibility of paying annuities, will all remain in the United States Treasury for public purposes. It will be a tax that has been levied for that purpose. There is no credit provided for, nothing provided for other than the current payment of the annuities as they come due. It is an entirely different thing from a situation where these payments would be segregated and credited to the individual and held in reserve for him. The whole theory of this is that it is a tax, that is true, on this particular group, and that the money is put into the Treasury and then from year to year currently, year after year, this money is paid out out of the Treasury. That must be kept in mind because, unless you have that in mind, you will not get the position from which I am answering your questions. I thank you, Senator.

Senator BAILEY. Now you answered my question in a way. I understand you are not asking me to vote for this legislation, for these taxes on the railway employees, except with the understanding that it will come back to them in pensions and retirement funds; you would not ask me to do it?

Mr. EKERN. Except it is to be a continuous thing.

Senator BAILEY. You would not ask me to put a tax on them and then vote to repeal the retirement bill; you would not ask me to do that?

Mr. EKERN. No.

Senator BAILEY. Take the farmers. We are levying great taxes upon their produce, upon cotton 4.2 cents a pound, but we do that with the full understanding that that money is going back to the farmer, and we promised it to him at the time. Our political lives would not last 5 minutes. Now don't you think the court would look all the way through these two acts and see just what we have seen this morning?

Mr. EKERN. I haven't any illusions about what the court will do. The court will know about all that has been done with regard to the legislation.

Congressman CROSSER. We are very anxious to conclude the hearings because we are getting near the end. We understood it was only to be 2 hours that were to be taken up in the hearings to begin with. I do not want to interfere with the committee's discretion in the matter, but I understood it would not take very long.

Senator KING. Was it expected that the only speakers this morning were to be the proponents of the measure?

Congressman CROSSER. No.

Senator KING. All right Mr. Fletcher.

STATEMENT OF R. V. FLETCHER VICE PRESIDENT AND GENERAL COUNSEL, ASSOCIATION OF AMERICAN RAILWAYS

Mr. FLETCHER. I represent, as you know, the railroad interests that are opposing this bill. Yesterday, when the chairman of the committee was in the chair he advised us he would give us a half an hour to each side. The people who are for this bill have had an hour and forty minutes.

Senator KING. Proceed, Judge.

Mr. FLETCHER. I understand the committee wants to hear Mr. Latimer, the expert. I am perfectly willing to defer my observations until he has concluded, or go on now if the committee would prefer.

Senator KING. Let Mr. Latimer proceed.

STATEMENT OF MURRAY W. LATIMER, CHAIRMAN RAILROAD RETIREMENT BOARD

Mr. LATIMER. Judge Krauthoff and Mr. Ekern both have dealt rather extensively with the financial aspect of this matter. I think Judge Krauthoff's statement of yesterday, reading from some testimony which I gave in the House before the Committee on Interstate and Foreign Commerce, substantially states the correct picture.

As I understand it, the question here is this: The Retirement Act, which has already been passed, provides for certain benefits, the amounts of benefits which will be paid out by that act have been estimated. Your interest is to levy a tax here which will provide for those benefits, and that tax is to be assessed—I am not a lawyer and I do not know whether I am speaking correct legal language or not—but as I understand it your problem is to fix a tax to be assessed against the employees of the carriers and their employers and to be related to the pay roll of the carriers.

The question, therefore, is how much of a tax relative to the pay roll of the carriers is necessary to support these benefits. As Judge Krauthoff stated, if you regard this tax as a year-to-year matter a rather low tax will be required initially. Because of the fact that the benefits are increasing and will continue to increase for many years the tax would have to be raised if assessed on a year-to-year basis.

Now there are three possible ways, as I see it, of handling the tax. In the first place, the tax could be fixed each year or each few years so as to cover the amounts indicated to be required for benefit expenditures for such short periods. This process would mean, for a period of years, a steady rise in the amount of the taxes to be collected. Or, second, an attempt could be made, in order to avoid the certain increase in the taxes, to fix a tax at the present time which would cover the rising benefit expenditures. Among other things, this would involve the assumption that, since the taxes levied now would exceed benefit payments, the Treasury would and could pay interest or the equivalent on the amounts of the excess of tax collections above benefit payments. A third possibility is a compromise between these two methods. It involves starting taxes relatively low and increasing them over a period of 10 or 12 years until a percentage tax rate is reached which would, under the assumption involved in the second method, cover future expenditures without necessity for further increase. This method was used in the Social Security Act

and was adopted on the ground that now is not the best time to levy large taxes.

Senator KING. In the meantime would you pay any benefit to those who were retired?

Mr. LATIMER. Just as in the Social Security Act.

Senator KING. I mean under this bill?

Mr. LATIMER. The taxes under my suggestion would yield revenues more than sufficient to pay benefits over the next several years. The object would be to raise taxes by steps in such a way that the higher ultimate tax rate which would otherwise be necessary could be avoided. As nearly as I can calculate if taxes are assessed so as merely to cover the current benefits the rate would ultimately rise to 14 or 15 percent of the pay roll. Just as under the Security Act, if you would assess taxes on a cash disbursement basis, the rate would ultimately rise to over 10 percent rather than the 6 percent which is the actual maximum.

Senator KING. Then you think the theory that the highest taxes authorized under the bill would at some time prove inadequate?

Mr. LATIMER. It is conceded, I believe, that the present tax rate as proposed in this S. 3150 would have to be raised. I think most of us are agreed that that would not become necessary for 10 years, but nevertheless the rate would have to be raised then.

Senator KING. Was that predicated upon the assumption that the railroads will continue as they now are or that there will be improved conditions?

Mr. LATIMER. The calculations assume that there will be a certain improvement. The estimate which was read yesterday (those figures were mine), assume that the present railroad employment would remain constant, but that the wage level would go back to 95 percent of the 1929 level, that is, the average per capita wages would be 95 percent of 1929. This assumption results in an estimated pay roll which, for the next several years, is some 15 or 20 percent higher than it now is. These are figures which were originally prepared for the Railroad Retirement Act and after a considerable period of study we thought that the assumption as to wages was reasonable.

Senator KING. In the light of the judgment which you have reached do you suggest any amendment to the measure which is before us?

Mr. LATIMER. I have this suggestion to offer. As I say, it may be too late, however I have this suggestion: The tax which now is proposed in this S. 3150 is 4 percent on the railroads and 2 percent on the employees. That, as I say, would require raising within 10 years. It may be mentioned before I make my suggestion, that the age of the railroad employee is much higher than the average age of employees in this country. Consequently it follows that if the railroads and their employees are kept within the bounds of the Social Security Act a very substantial saving will be made to pay for the benefits of the Social Security Act as far as they apply to railroad employees as compared to what those same benefits would cost in a separate plan.

My suggestion, therefore, involves the proposal that the railroads be kept in the Social Security Act, insofar as those benefits go; that those benefits, however, not be paid to railroad employees directly, but be transmitted to them through the medium of the Railroad Retirement Board, and that there be set up in this act, in addition

to the taxes which are levied under the Social Security Act, taxes which will be sufficient to raise the additional money required to support the additional benefits of the Railroad Retirement Act.

Senator GORE. Did not the House change the rate yesterday?

Mr. LATIMER. Yes, sir; it changed it to $3\frac{1}{2}$ percent on each party for a period of 1 year.

The suggestion which I make, and which is based on a careful study of railroad employment, extending over the period of a year and a half, as I see it would enable taxes now to be levied with quite as much certainty as under the Social Security Act, and would not require any further changing of the tax rate. Certainly further studies would have to be made as to the exact coordination and articulation of the Social Security Act and this Railroad Retirement Act. I think I have gone into that sufficiently far to be able to say it presents no insuperable problems.

Senator GORE. You say the House has made this rate $3\frac{1}{2}$ percent on each party a year. Do you suppose Congress will take some further action in the meantime?

Mr. LATIMER. I believe the understanding is that there is to be a study made, beginning immediately, which would afford further suggestions to be made at the next session of Congress. The Retirement Act, which has already been passed, does provide for the setting up of a commission which is to study the whole problem and report on January 1 next.

Senator GERRY. What do your figures show?

Mr. LATIMER. As to the taxes required?

Senator GERRY. Yes.

Mr. LATIMER. As to the taxes required in this act, it is my suggestion that the railroad and their employees be kept under the Social Security Act; the taxes required are as follows: In the year 1936, or the balance of the calendar year beginning March 1, or in any event let us say through December 31, 1936, I suggest 4 percent tax on the railroads and 2 percent on the employees. That same tax would carry through the year 1945, during which period the taxes under the Social Security Act would have risen to a total of 4. That makes for a total tax of 6 percent through the year 1936.

Senator KING. On the railroad?

Mr. LATIMER. That is the total tax. Eight percent is the total tax in the years 1937, 1938, and 1939; 9 percent in 1940, 1941, and 1942; 10 percent for the years 1943 to 1948 inclusive; and 9 percent thereafter. The ultimate division which I suggest is 5 percent on the carriers, 3 percent of which would go to the Social Security Act and 2 percent to the Railroad Retirement Act, 1 percent on employees under the Railroad Retirement Act and 3 percent under the Social Security Act. I must say that these schedules have necessarily been rather hastily drawn. I think there may be a possible error one way or the other, one-half of 1 percent on the pay roll. In any event, it is a small, relatively small, error and could very easily be corrected through the further studies of this Commission.

This whole suggestion, Mr. Chairman, involves the creation of a plan supplemental to and not in lieu of the Social Security Act. As I say, it effects very distinct economy for the railroads and for their employees. It keeps all the employees under one basic protection, and it can be handled.

Senator BAILEY. Do you suggest a wholly a new plan here?

Mr. LATIMER. What I am suggesting now, that the taxes be changed and that the exact method of coordination and articulation be left to the Commission.

Senator KING. Which Commission?

Mr. LATIMER. The Commission which has already been established by the Retirement Act. I have these three suggested amendments in three separate places which specify these taxes under this act and which, in my judgment, would yield to the Federal Government sufficient revenues to pay the benefits which have already been provided in the act, leaving to the Commission the exact method of coordinating the method of payment of benefits with the Social Security Act.

(The amendments offered by Mr. Latimer are as follows:)

Page 3, line 12, between the words "centum" and "of", insert the following: "until and including the calendar year 1945; 1½ per centum during the calendar years 1946, 1947, and 1948, and after December 31, 1948, 1 per centum."

Page 4, line 9, between the words "centum" and "of", insert the following: "until and including the calendar year 1945; 3½ per centum during the calendar years 1946, 1947, and 1948, and after December 31, 1942, 2 per centum."

Page 5, line 9, between the words "centum" and "annually", insert the following: "until and including the calendar year 1945; 5 per centum, during the calendar years 1946, 1947, and 1948 and after December 31, 1948, 3 per centum."

Senator GERRY. That is an entirely different plan than what has been before the committee; is it not?

Mr. LATIMER. Not entirely different; no, sir. It merely changes the tax rates. For example, section 2 of S. 3150 provides for an income tax on employees. The section now reads in part as follows:

In addition to other taxes, there shall be levied, collected and paid upon the income of every employee 2 per centum of the compensation of such employees.

Senator GERRY. Is that in the Social Security Act?

Mr. LATIMER. No, sir; not in what I am suggesting. The amendment which I am suggesting would make this read:

In addition to other taxes, there shall be levied, collected and paid upon the income of every employee 2 per centum until and including the calendar year 1945; 1.5 per centum during the calendar year 1946, 1947, and 1948, and after December 31, 1948, 1 per centum of the compensation of such employee, not in excess of \$300 per month.

Senator KING. Does not your plan contemplate, to give a crude illustration, two chariots running parallel, with different drivers, with probably a rein passing from one chariot to the hands of the driver of the other chariot, and vice versa, are not you trying to run two chariots side by side with two drivers and the possible crossing of reins?

Mr. LATIMER. I see no chance of there being any cross-conflicts, or cross-play between the two systems which are set up. It does need further study, I am willing to admit, but nevertheless my point is now that this does bring into the Federal Government a revenue sufficient to provide the benefits of this act.

Senator KING. Were you consulted by the Ways and Means Committee in the consideration of the bill?

Mr. LATIMER. Yes, sir.

Senator KING. Did you suggest that plan here?

Mr. LATIMER. I had not worked it out. They asked me what level of percentage would be required to support this and I answered

it would be 10, which I think is generally agreed upon. That has not been acceptable to either party, because it does involve a too high tax rate initially. This further suggestion I made too late to them. I do not know whether they would have accepted it or not. I talked with Mr. Doughton about it, but, as I say, it does have the advantage of costing the railroads and their employees a good many millions of dollars a year less than the other.

Senator LA FOLLETTE. What you are suggesting, as I understand it, is that the Railroad Retirement Act should be supplemental to the Social Security Act?

Mr. LATIMER. That is not my thought. It merely means that the benefits expressed in the Benefits Act, which has already been passed, remain as they are; that, however, the further language be put in that this act shall not be in addition—I mean these benefits shall not be in addition—to the Social Security Act, but the actual benefits paid shall be the difference between what is payable under the Social Security Act and the benefits specified in the Retirement Act.

Senator LA FOLLETTE. It is as broad as it is long.

Mr. LATIMER. It is; yes.

Senator GEORGE. You just leave the employers and employees—that is, the carriers and employees—under the Social Security Act?

Mr. LATIMER. Yes.

Senator GEORGE. For protection purposes and benefit purposes?

Mr. LATIMER. Yes.

Senator GEORGE. This would be simply in addition?

Mr. LATIMER. Yes.

Senator LA FOLLETTE. Additional tax for additional benefits.

Mr. LATIMER. Yes.

Senator KING. Is that all?

Mr. LATIMER. Yes.

STATEMENT OF R. V. FLETCHER, VICE PRESIDENT AND GENERAL COUNSEL, ASSOCIATION OF AMERICAN RAILROADS

Mr. FLETCHER. I am not going to take very much time, I only want to say a few things which I am sure I can conclude before 12 o'clock.

Senator KING. Judge, if there is anything further you desire to submit you may do it in writing.

Mr. FLETCHER. Would it be convenient for the committee to let me continue until 12 o'clock?

Senator KING. You may proceed.

Mr. FLETCHER. Now the very interesting statements made by Mr. Latimer here throw a flood of light upon the situation as it confronts the Congress at this time. Congress has passed a law setting up these retirement allowances and it has taken the railroad workers out from under the benefit of the Social Security Act.

Now Mr. Latimer proposes, as I understand it, to put them back under the Social Security Act so far as benefits are concerned, and to leave them where they are so far as tax is concerned. The act that passed the House on yesterday took the railroad workers out from the taxing provisions of the Social Security Act, that being supposed or presumed to be consistent with the action taken by Congress in the other bill, in taking them out of the benefits of the Social Security Act.

Senator BAILEY. And the railroads also?

MR. FLETCHER. Yes, the railroads also, both railroads and workers. In other words, it is a complete substitute. This bill—when I say “this bill”, I mean both parts of the bill, the taxing part and the benefit part—is a substitute for the Social Security Act so far as the railroad industry is concerned and railroad workers are concerned.

Now it is suggested, and I haven't had an opportunity quite to digest it in my own mind in all of its detail, that the railroad workers could be put back under the act which the House bill takes them out of, and that they should be put back under the act with respect to benefits. It all illustrates, Mr. Chairman, how confused this situation is and how much better it would have been, I respectfully submit, to have allowed this matter to be studied by the nine men which the act already passed provides for, one of whom those of us who deal with this matter hope will be Mr. Latimer, to study this question in the light of what could be said to the committee by the experts in order to work out a really rational plan.

Look at what the House bill does. It places the burden equally upon railroads and railroad workers, the general principle with which we are in accord. If anything of this kind is to be done it seems to be fair in that respect. It provides for 7 percent, but it provides also that the act shall automatically cease to be effective at the end of 1 year. It does not require additional action by Congress. It expires by its own terms on the 28th day of February 1937. Now, that was obviously because the the House Committee on Ways and Means, and indeed the House, realized that this taxing plan that they set up would be inadequate, something else would have to be done about it, and it is hoped, I presume, that the study which will be made by the nine men appointed for that purpose will throw some light upon what is really a scientific basis, a sound actuarial basis, a fair basis for putting this plan into effect.

Now it is proposed pending that study that you are to give the sanction of the Senate to what has been done in the House, which seems to me to be a confession of their inability, in the short time they had, to reach any kind of a sound conclusion as to how this matter should be handled.

Now we have Mr. Latimer, who is, as far as I know, an outstanding expert on this question, and perfectly impartial, a Government official under the previous law, and a student of this question coming along suggesting a new proposition.

SENATOR CLARK. That proposed scheme, is that supplemental to the social security bill?

MR. FLETCHER. Yes, he replied to Senator La Follette that it was supplemental to it, in a certain sense. The Social Security Act, as I believe I said on yesterday in the few minutes I had at my disposal, is a bill which treats everybody alike, whether it be railroad workers or industrial workers, and is one which accords with our general argument here which we have been making to the Congress for many years. We are entitled to the same treatment that applies to industry generally and we should not be selected for weird experimentation in the field of desirable social legislation. I use that word “weird.” Somebody said it was the wrong word. I think I can make the suggestion this morning in the light of the situation brought about by the act which passed the House.

Now on this question of cost, ultimate cost, final cost, I would like to call your attention to a statement made by the Federal Coordinator of Transportation when he addressed a letter to the chairman of the Committee on Interstate Commerce in the Senate, Senator Wheeler, as to just what is involved in this proposition if you begin at the beginning and consider it clear through to the end.

This letter was addressed to a criticism or comment upon a bill which was slightly different from the bill which has now passed the Congress, and I will explain briefly what the difference is, but may I read a little of this. He had given certain figures, and then he said:

The above figures show that the normal annual cost of benefits under the proposed plan is 5.70 percent of the pay roll.

That means, as I understand it, if you had started this pension system when the railroad industry began to function back in 1830, or whenever it was, and carried it right straight along you could have put 5.70 percent upon the pay roll and gotten enough revenue to meet the requirements contained in the pension bill which has already been enacted. But he says:

This cost is normal only in the sense that if that percentage had been applied to the pay roll in the past it would have met the cost.

The proposed bill, of course, does not apply to the past, but it does give benefits to present employees exactly as if the proposed system had been in effect during the whole period of service. Now he says:

As the result there is a cost incurred in respect of past service over and above the normal cost—

that is extra cost—

which may be termed an initial deficit which is over \$3,700,000,000.

I think that is where our newspaper friends got the figure of \$4,000,000,000. Now that means, as I understand it, if you have to start this now you would have to get \$3,700,000,000 somewhere, put it out on interest at 3 percent. That is the figure he charges that should be kept on there for the purpose of paying annuities which would be given to men by reason of their past service accrued at the time this bill becomes effective.

MR. KRAUTHOFF. That was not what he meant.

MR. FLETCHER. I will ask Mr. Latimer if that is not what he meant? I will appeal to Mr. Latimer. The figure you say is \$2,800,000,000 under the present bill?

MR. LATIMER. That is a deficit in the sense that if you want to put up one lump sum right now and pay all the liabilities which have accrued to this date and never pay another penny, yes. Under the plan I have just suggested that is unnecessary, if we can assume the plan is going through, because you merely substitute a level percentage which completely wipes out any necessity for that.

MR. FLETCHER. I must frankly confess I heard it here just a moment ago. I would have to have a little time to think about that.

SENATOR KING. Do you concede, Mr. Latimer, that we would have to tax the future, in order to meet the deficit of the past?

MR. LATIMER. You need never try to meet that entire deficit, Senator, because it is not necessary to have that much money in the fund to pay the benefits.

Senator KING. But theoretically and rationally you would have to assume now that you would start out with a large deficit which has to be met by increasing the taxes, which otherwise would remain at a lower level, assuming that there had been an annuity system established many years ago.

Mr. LATIMER. Let us get what that deficit is there clearly. It is not a cash deficit which is outgo. It never goes out. What it means is if you had \$2,800,000,000, 3-percent interest on that is around \$84,000,000 a year. You do not have to get taxes that would raise \$2,800,000,000. All you have to do is get taxes which would substitute for the \$84,000,000, which you would otherwise earn on the fund.

Senator BAILEY. If we tomorrow issue \$2,800,000,000 in our money, if we had the power of issuing it, and put it in the fund, that would account for the whole proposition, would it not?

Mr. LATIMER. It would account for all the debt, the interest you would get on the \$2,800,000,000.

Senator BAILEY. And if you could not get 3 percent on that amount you would have to increase your fund?

Mr. LATIMER. The statement of Judge Fletcher's, if true, does assume earnings of 3-percent interest per annum.

Senator BAILEY. We have got a great many people who think the more money we issue the more prosperous the country would be. Would you suggest we issue \$3,000,000,000?

Mr. LATIMER. No, sir; we suggest nothing of the sort. The point seems to me to be, what you are doing there is allowing the Government fund to earn interest, and in the other way you are raising it directly through taxes currently.

Senator LAFOLLETTE. Mr. Latimer, it is a question of which plan the Congress would follow in establishing any kind of an annuity system. We could have had a lump-sum system under the social security bill, if Congress had desired to follow that policy, but after studying it, and after the President's commission had studied it, it determined to follow the policy of a tax which ultimately, it is calculated, looking a long way into the future, will be at the level when it reaches a sufficient annual collection to carry the load.

Mr. LATIMER. Yes; and there is a partial reserve set up, tremendous as it may seem, which under section 201 of the Security Act will be invested to earn the minimum of 3 percent, which would otherwise have to be raised in direct taxes.

Senator LAFOLLETTE. I mean it would be just as fair to say this thing has got a deficit of \$2,800,000,000 to start with as it would to calculate what it would cost to carry the social-security plan under a lump-sum payment.

Senator GERRY. Do not you count that interest as being compounded?

Mr. LATIMER. In the Social Security Act the interest would be compounded. Not only that, but the Social Security Act does set up a method whereby the fund will yield 3 percent interest as a minimum.

Mr. FLETCHER. I am concerned with that point, Senators, but I am specially concerned to convince you I am not trying to make intentional misstatements about it. This language was in the letter sent by the coordinator. As I understand it means this, in the simple language which I can comprehend, that if you were to start this pen-

sion system off now and utterly to ignore past service, as the social-security bill does, I might say, you could make a tax of 5.70 percent, we will say 6 percent for easy calculation, upon the pay rolls, and that would carry the thing along; but if the Congress should desire to secure funds, borrow money and set up a fund the income of which would take care of past services, you would have to borrow \$3,700,000,000 under the bill which is under discussion, which Mr. Latimer tells me is now \$2,800,000,000, under the particular bill which Congress has passed. Is that right, Mr. Latimer?

Mr. LATIMER. In the way you state it, that is right.

Mr. FLETCHER. The Congress might not see proper to proceed that way, but that is the reason why the figure of \$4,000,000,000 is in the public mind as I understand it, that is the capitalized figure of this amount. It is the amount which has to be set aside if you are going to proceed that way, bearing interest at 3 percent, to take care of past services.

Mr. KRAUTHOFF. Mr. Latimer told me yesterday it would cost \$2,800,000,000 to keep the tax rate at a flat rate of 6 percent for all time to come.

Mr. FLETCHER. That is what I say. He said \$2,800,000,000 would take care of past service, and 5.70 percent would take care of the future.

Mr. LATIMER. It would take care of all of it, \$2,800,000,000 earning interest at 3 percent plus 6 percent on the pay roll annually with initial excesses of revenues and payments also invested to yield 3 percent.

Mr. FLETCHER. Yes, sir; that is right. If you want to borrow \$2,800,000,000 and invest it at 3 percent you would have it that way. I think the observations made by Mr. Latimer this morning, together with what has occurred before the committee, strengthens the view stated by Mr. Eastman in this same statement to which I refer, which I did not have time to read to the committee yesterday, where he says, after recommending that this matter be given further study by the experts, the expert body which the act creates:

Unless this is done Congress, by setting up a pension system for a special class of employees such as those of the railroads, inadequately articulated with the old-age benefits features of the social security bill, may well start in motion the process of establishing similar pension systems for other special classes of employees, thereby undermining the financial conditions upon which the present social security bill rests.

I have no right to say so, but perhaps some such thought as that suggested the recommendation made by Mr. Latimer this morning, that this should be tied in to the social security bill. Now it is, I think, quite agreed by everybody who has studied this question that this tax upon the pay roll will ultimately get to be 15 percent.

Senator BAILEY. Get to be what?

Mr. FLETCHER. Get to be 15 percent of the amount of the pay roll. That may take 20 years.

I was interested to note in this same communication, addressed to the chairman of the Senate committee by Mr. Eastman, that he refers to the fact that if taxes on carriers and on employees are not increased, the minimum annual burden on the general Federal funds would amount to over \$100,000,000 annually, and unless an appropriation of this amount were currently set aside and invested, the burden of the general fund would rise within 25 years to \$200,000,000 annually.

"None of the above figures"—I want to make that clear—"include costs of administration which have been estimated to range from 0.15 of 1 percent to 0.2 of 1 percent of the pay roll."

Now, Mr. Chairman, Mr. Ekern in his half-hour address of yesterday, and his hour and 15 minute address of today, referred frequently to the fact that you might expect an increase in the pay roll, and therefore an increase in the revenues which would be derived from this tax. Well, of course, there will be an increase in the pay roll if there is an increase in business, but I call your attention to the fact under the seniority rules, which prevail upon railroads, if you increase your employment you increase it by taking back into the service men, who have been on the extra lists, so-called; and as you increase pay rolls, and therefore increase the amount of the revenues derived by the tax upon the pay rolls, you automatically increase the number of people entitled to benefits. So one will offset the other, I think, speaking generally, and therefore it is no argument in favor of this bill to say as prosperity returns, if it does, and if the railroads have a better financial experience than they have had and increase the amounts of the pay rolls and thereby increase the revenue at the same time and in the same ratio and by the same token increasing the burdens which fall upon this fund by reason of taking these additional men back into the service.

Now we think this estimate made by Mr. Latimer is ultraconservative. There are some reasons for it. These calculations, as I understand it, made by Mr. Latimer, did not take into account at all the number of employees of the carriers other than railroad carriers. This bill applies to other carriers than railroads, as you know. There are about 1,100,000 men assumed by Mr. Latimer to be in railroad service, but when you look at this bill and see how broad it is in its inclusion of employees of every class of carriers, meaning thereby the Pullman Co. and the express company and so on, why you will have about 1,334,000, men or 20 percent greater than the figure used by Mr. Latimer.

Furthermore, Mr. Latimer did not allow for credit to former employees who may in the future return to work, for past or future services, and of course there was no allowance in his figure for the cost of administration. It costs \$3,000,000 a year to administer the act, according to the best figures that we have.

I suppose I have not the time nor you the patience to listen to any extended argument on the constitutional features of this act. I mentioned it yesterday hurriedly. I would like to say a word about this case of Massachusetts against Mellon, which has been discussed so much. That was a case, you understand, which arose for the reason that Congress had passed what I call the "Maternity Act." You had another name that is more familiar, perhaps, to Members of Congress than to me.

Senator LA FOLLETTE. The Sheppard-Towner Act.

Mr. FLETCHER. That is right. That provided for appropriations out of the Federal Treasury to aid the States in benevolent plans which they had set up to take care of a certain class of persons. Now the State of Massachusetts conceived the idea that it was not a good bill, and therefore they attacked, by an original suit in the Supreme Court of the United States, the right of Congress to appropriate money for a purpose of that kind upon the theory that that was not a function of the Federal Government.

At the same time a taxpayer here in the District of Columbia—you called the name, which I do not remember now.

Senator BAILEY. Frothingham.

Mr. FLETCHER. That is right, Frothingham. Filed a taxpayer's suit in the court of the District of Columbia, the Supreme Court, as they call it, claiming Congress could not collect from her and put it in the Treasury and spend a certain part of the money for a purpose that was beyond the power of Congress. The court held in the case of the taxpayer's suit that she could not maintain that suit because she was not prejudiced any more than any other taxpayer.

Senator BAILEY. Her interest was too remote?

Mr. FLETCHER. Her interest was too remote, in this sense, that they would not entertain that suit unless the taxpayer should show special damages which were over and beyond the damages suffered by the general public. That is very familiar to every lawyer.

They held in the case of the State suit that the States sustain, under our system of Government, no such relation to our citizens as to let the State act as a guardian ad litem for all the citizens of the State of Massachusetts. The Constitution did not vest in the State government any such authority to represent its citizens. So you see the decision was entirely procedural and it did not go at all to the moral question which must be addressed to the conscience of the Senators.

Suppose that this committee should say, "Well, these gentlemen sponsoring this bill have evolved an ingenious theory which, on account of procedural difficulties, will prevent the bill from being attacked successfully in the court?" Congress would not sanction it upon that theory. I know of nobody who would pass the law, however zealous he might be for the welfare of the workers, based upon a theory of that sort. You could not defend it in the large forum of public opinion.

So I am not so much concerned, in arguing this to the committee, whether the railroads who are being destroyed by this legislation—maybe "destroyed" is too strong a term. (I mean greatly injured and impaired. Whether the railroads will be able to find some way to circumvent this bill, I think they will, I think the court will look through the whole proposition, but aside from that your duty, as I see it, is to see whether this is in accord really with the spirit of the Constitution.

Senator KING. Judge, having placed the railroad employees outside of the limitations, outside of the limit of the social security bill, is there not some moral obligation, either in Congress or in the railroads, or in the State or in some other branch, to give to the employees of the railroad at least the same benefit that we are giving to employees in other activities?

Mr. FLETCHER. Why of course, Senator. Nobody could answer that except affirmatively. I might say in that connection that I do not know any class of people that are better qualified to do their work, more patriotic, more intelligent than railroad employees. They are high-class men, men of the highest grade. There has been profound peace in the industry since 1922, the time of the last general strike, either through the principle of mutual sacrifice or mutual accommodation between the men who call themselves the managers and the men who call themselves the workers. That peace has not been broken. They have hours of service regulated by law. Their

wages are controlled under contracts which are supervised by the machinery set up by the Railway Labor Act. I know of no better class of citizens than they. I know of no better class that is entitled to more consideration at the hands of Congress. Our whole protest here, and with that I conclude, is against that kind of discriminatory treatment which takes them out of the class, makes them a favored class at the expense of an industry as hard-driven as the railroad industry is.

I call your attention again to the little paper I handed you yesterday which shows in black figures the railroads this year who have been making any money, and in red figures the railroads who have been running behind. I think that is a startling fact, a startling picture that you can very well consider.

My final suggestion is that they should not, of course, be deprived of the privileges of the Social Security Act and given no other consideration. It is to protest against the enactment of legislation of this kind which has not been given that kind of careful and expert consideration which is necessary to make it a finished piece of legislation.

Senator KING. Let me ask you one question before you conclude.

Senator BAILEY. Before the judge takes his seat I wish to get my mind clear on the relation of this legislation and the social-security legislation to the present pension system of the railroads. What would be the effect upon the existing pension system?

Mr. FLETCHER. What would be the effect of this legislation?

Senator BAILEY. Yes.

Mr. FLETCHER. Why, Senator, here is what would happen there: The men who have severed their connections with the railroads in the active sense and are now on the retired list receiving compensation are not mentioned in this bill.

Senator BAILEY. And what would be the attitude of the railroads?

Mr. FLETCHER. I would say the railroads would make every effort possible to continue the payment of those allowances. How far they could go I do not know. If a man has not got the money he has not got it, that is all.

Senator BAILEY. It would cost \$36,000,000 a year?

Mr. FLETCHER. \$36,000,000; that is about right. If the railroads get to the point where they will all have to go through bankruptcy and be reorganized, with this burden here of \$52,000,000, or whatever that figure is, \$54,000,000 which would have to be paid under this act, and then they have got to pay 1 percent next year under the Unemployment Act, if they haven't got the actual money over and above the operating expenses to pay the pensions to these men, they are under no legal obligation to pay it. It is purely a moral obligation. I am not sure as to what would happen. I had hoped they might continue to make those payments. Now it would be the effect of this bill, to which I have called attention, that no provision is made for the men who have actually retired.

Did you observe that Mr. Ekern, in his able speech this morning, after all, finally got back to what I contend must be the only basis for this kind of legislation, namely, the commerce power that exists in Congress.

Senator KING. You heard Mr. Latimer's suggestion; he threw out the thought that there should be some sort of coordination between this plan and the social-security plan. If a plan could be worked out

so that there would be no injustice to the railroad employees and their annuity system should be brought within the limit and power and authority of the Social Security Act, would you think that would be a wise measure?

Mr. FLETCHER. Personally, I should think something might be done along that line which would be very wholesome. I want to be understood, however, that I have no authority to pledge the 140 railroads that belong to the association, that have seen fit to employ me.

Senator KING. I am asking for your personal views.

Mr. FLETCHER. I do not know just why Mr. Latimer thinks that this bill ought to be tacked on to the Social Security Act, or just why the railroad worker should not be treated like the rest of them and left under the Social Security Act if it is a sound piece of legislation.

Senator LA FOLLETTE. If your contention concerning the constitutional infirmity of this legislation is sound, the same contention would apply to the Social Security Act?

Mr. FLETCHER. Not quite.

Senator LA FOLLETTE. What distinction do you make?

Mr. FLETCHER. Because the Social Security Act avoids this infirmity, namely, it does not pick out arbitrarily and capriciously, or for any reason, one particular class of employees and favor them over others.

Senator KING. It is more general than this?

Mr. FLETCHER. Yes.

Senator LA FOLLETTE. Of course the Social Security Act is not involved here. As I understand it, the main attack, if one is made upon the Social Security Act, will be much along the line of the main attack which you have made upon the constitutionality of this measure.

Mr. FLETCHER. If you mean, Senator, that the whole question of doing justice to the workers from the viewpoint of what is desirable socially lies beyond the power of Congress, yes.

Senator LA FOLLETTE. That is right.

Mr. FLETCHER. I am trying to be honest about it, but I do think this act is subject to the additional infirmity which I have just mentioned.

Senator LA FOLLETTE. Thank you very much.

Mr. KRAUTHOFF. We want to make just one statement about Mr. Latimer's recommendation.

The CHAIRMAN. All right, you may proceed.

Mr. KRAUTHOFF. The House passed a bill yesterday on a 1-year basis of a 7-percent tax, half and half. It is agreed that that will more than carry the system for the year. The whole subject will come before Congress on the first Monday in January. Mr. Latimer intends now that you amend the House bill, which the House might not agree to do, and throw the whole subject in the conference, and we would lose the advantage of the bill passing at this session. So we hope, on behalf of the railway employees, that the committee will adopt the House bill as written and allow Mr. Latimer to work out his theories between now and the first of January.

Senator LA FOLLETTE. Judge, is not it pretty generally agreed that the bill that passed the House, insofar as we can calculate upon the basis of some of the imponderable effects that are involved, will provide a bonus even if it were continued beyond?

Mr. KRAUTHOFF. Carried for at least 10 years.

Senator LA FOLLETTE. For at least 10 years. I understood Mr. Ekern to suggest probably 14.

Mr. KRAUTHOFF. It probably will cost 6 percent to carry it for 10 years.

Senator LA FOLLETTE. Seven percent would carry it longer.

Mr. KRAUTHOFF. Now, I wrote the bill that has been the subject of all this discussion. The Senator from North Carolina asked some questions about it that in my judgment were not answered quite as precisely as I would like to answer them, but I do not like to take the time of the committee now. I will be very glad to answer the Senator's questions.

The CHAIRMAN. Proceed.

Mr. KRAUTHOFF. The point I am trying to make is this, as a practical proposition: These two bills have a relation to each other. You could not, of course, justify the imposition of a tax of this kind upon railway employees unless, as a practical proposition, you had passed the other bill, but as a legal proposition the two are not so inter-related that one depends upon the other. That is the theory on which I wrote these two separate bills.

Now, if the Supreme Court of the United States will say they are parts of the same thing and hence we cannot pass them at all, then of course it will have to strike down the social security bill, the processing tax bill, the Guffey coal bill, and every board of the Government of the United States which levies taxes for social purposes, and we will meet that situation as it might then arise.

Senator CLARK. If the bill has passed what would be the deficit in 10 years?

Mr. KRAUTHOFF. It will pay for itself.

Senator CLARK. It will pay for itself, but you will have accumulated some 2 or 3 billion dollars of obligations in excess of the amount of the fund, would you not?

Mr. KRAUTHOFF. There will be no fund. The money goes into the Treasury.

Senator CLARK. I understand.

Mr. KRAUTHOFF. If at the end of 10 years the Congress repeals the whole system Congress will not owe anything. If at the end of 10 years and for 15 years thereafter you should continue it on a 6- or 7-percent basis, you will then have to take \$4,000,000,000. In other words, if 10 years from now you go to an insurance company and say, "We want to carry this on 15 years at 6 percent", the insurance company would tell you the premium would be \$4,000,000,000. If you wanted to stop you could stop.

Senator CLARK. If you stop that would mean thousands of young men who have been contributing for 10 years would have been contributing without getting any recompense.

Mr. KRAUTHOFF. That would be true. Now, then, about the \$2,700,000,000, may I explain that? That sum means that if you wanted to continue this system for all time to come on a 6-percent basis, you could do it by taking the amount stated as a working capital, investing it at 3 percent.

The CHAIRMAN. Thank you very much, Judge.

**STATEMENT OF CLARENCE A. MILLER, GENERAL COUNSEL THE
AMERICAN SHORT LINE RAILROAD ASSOCIATION**

Mr. MILLER. My name is C. A. Miller. I am appearing before your committee in my capacity as general counsel of the American Short Line Railroad Association, with offices in the Union Trust Building, Washington, D. C.

Judge Fletcher has appeared for the class I carriers. I am appearing for the so-called "class II" and "class III" carriers, as classified by the Interstate Commerce Commission, that is, carriers having gross annual revenues of less than \$1,000,000 each. Our association, however, has in its membership some class I carriers.

The American Short Line Railroad Association is composed of 322 short-line railroads, and represents approximately 75 percent of the independently owned and operated short-line mileage of the United States. The mileage operated by our member lines is 11,360.52 miles. Most of our member lines are operated by steam, although 32 of them are operated by electricity.

At the present time there are about 570 short-line railroads in the United States. They operate about 15,000 miles of tract and serve more than 12,000 communities. They furnish transportation to a large territory, much of which is still in the process of development. These are the roads that have, generally speaking, furnished modern transportation facilities for undeveloped territories.

A very considerable portion of the present short-line mileage of the United States was originally constructed for the purpose of transporting mineral, forest and farm products out of regions that were then inaccessible. Villages, towns, and farming communities have been gradually built up along these lines, and hundreds of important industries have been established on them. These are all now dependent on the short lines for their rail transportation service.

A number of these small lines have been abandoned due to the exhaustion of the natural resources which constituted the majority of their traffic, and for which they were originally built to transport. A very considerable number of them have been abandoned by reason of the unregulated competition of highway motor vehicles to which they have been subjected.

According to the best available figures, about 38 percent of these short lines do not earn operating expenses and taxes, and about 55 percent of them do not earn their fixed charges.

If the bill now before you, H. R. 8652, is enacted into law, and sustained by the Supreme Court of the United States, there would be placed upon the members of our Association alone an additional financial burden of approximately \$1,050,000 per annum. The additional financial burden imposed upon the short lines would be approximately \$1,312,500 per annum.

The additional cost of operation would result in about 67 percent of the short lines failing to earn operating expenses and taxes, and about 80 percent of them failing to earn their fixed charges.

The Interstate Commerce Commission regulates the rates which the railroads may charge for their services. As a matter of practical experience, it has been found that it is not possible to increase rates beyond a certain point and enable the traffic to move. The railroads,

therefore, have no way to obtain the money necessary to meet the additional financial burden which this bill would impose upon them. The inevitable result will be the acceleration of the abandonment, of short lines, with a resulting increase in unemployment of railroad men.

You will see, therefore, that these short lines are wholly unable to meet the additional financial obligations which would be imposed upon them by the bill which is now before you.

Your committee has, during the present session of Congress, listened to so much argument with respect to the power of the Government to tax and its power to regulate interstate commerce, that it is with a great deal of deference that I venture to make some observations with respect to the measure before you as a taxing statute.

Notwithstanding the views held to the contrary, there is ample authority to support the proposition that you have a duty to consider the constitutional phases of legislation presented to you for action.

You must have been impressed by this time with the fact that it is not possible to discuss the bill which is before your committee without, at the same time, discussing H. R. 8651, the bill which the Committee on Interstate and Foreign Commerce has reported out, and which establishes a retirement system for employees of carriers subject to the Interstate Commerce Act.

These bills, taken together, are concededly efforts to circumvent the decision of the Supreme Court of the United States, on May 6, 1935, in *Railroad Retirement Board, et al. v. Alton Railroad Co., et al.*, declaring the Railroad Retirement Act of June 27, 1934, unconstitutional.

The majority of the court, in that case held that it was beyond the power of Congress to pass any compulsory pension act for railroad employees. At least, that is the view which the Chief Justice took in his dissenting opinion, which was concurred in by Justice Brandeis, Stone, and Cardozo.

The proponents of this legislation are before you urging its enactment as a measure to reimburse the Treasury for expenditures that would be made if H. R. 8651 were enacted into law. H. R. 8651 is predicated upon the theory that there is no limit to the spending power of the Federal Government, and this bill is predicated upon the theory that there is no limit to the taxing power of the Government. We do not believe that the decisions of the Supreme Court of the United States will sustain either of these propositions.

These two bills attempt to set up a railroad retirement system at the expense of the railroads and their employees—a thing which the Supreme Court of the United States said Congress does not have the power to do. The Supreme Court of the United States will look this matter squarely in the face when it comes to consider the constitutionality of the legislation and we must likewise look it in the face in our consideration of it.

In *Bailey v. Drerel Furniture Co.* (259 U. S. 20), a case with which every member of this committee is familiar, the Court said:

A court must be blind not to see that the so-called "tax" is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?

In both the Railroad Retirement Act case and the Child Labor cases, the Court was compelled to look to the boundaries of the constitutional powers of Congress in making its determinations, and did so irrespective of the views of the members of that Court with respect to the legislation from an economic or humanitarian point of view.

We believe the authorities are ample to support the conclusion that H. R. 8652 and H. R. 8651, either individually or collectively, are beyond the constitutional powers of Congress to enact.

The argument has been made, however, that even if H. R. 8652 is unconstitutional the carriers cannot question it. This argument is allegedly based upon the decision of the Supreme Court of the United States in *Massachusetts v. Mellon*, and *Frothingham v. Mellon* (262 U. S. 447 (1923)). In that case the Court held that the individual taxpayer there involved could not restrain the enforcement of the Maternity Act, 1921, 42 Stat. L. 224, which authorized appropriations from the National Treasury to be apportioned among such States as should accept and comply with its provisions, for the purpose of cooperating with them to reduce maternal and infant mortality, and to protect the health of mothers and infants. It was there held that the taxpayer involved had no such interest in the subject-matter, nor were any such injury inflicted or threatened as would enable her to maintain her suit.

That case, however, does not go so far as the proponents of this legislation would have made believe it goes.

In that case the Court said:

The right of a taxpayer to enjoin the execution of a Federal appropriation act, on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed upon by this Court. In cases where it was presented, the question has either been allowed to pass sub silentio or the determination of it expressly withheld.

Further on in the case, the Court said:

The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining, some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented, the Court enjoins, in effect, not the execution of the statute, but the case of the official, the statute notwithstanding.

When an act seeks to take away from the railroads millions of dollars annually, in a form of taxation, in order to meet expenses incurred by other legislation beyond the constitutional power of Congress to enact, it is inconceivable that the railroads would be denied the right of contesting the validity of that legislation.

Judge Fletcher has pointed out to you that you can no more pick out the railroads as a special subject of taxation than you can pick out red-headed men. The classification is just as arbitrary in the one case as in the other, and is so arbitrary and unreasonable as to deny the carriers due process of law.

The Supreme Court has, of course, gone a long way to uphold any exercise of the taxing power of Congress. If, however, in the exercise of its taxing power, the Congress violates the provisions of the fifth amendment, the Court is under the duty of applying the limitations and guarantees of the fifth amendment. Thus the Court recognized and did in *Nichols v. Coolidge* (274 U. S. 531), and *Heiner v. Donnan* (285 U. S. 312).

In the *Nichols case* a statute imposing a retroactive tax on the States was held unconstitutional, and in the *Donnan case* a statute providing for a conclusive presumption that gifts made within 2 years prior to death were made in contemplation of death was held unconstitutional. In both cases the Court made statements to the effect that a Federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process law clause of the fifth amendment.

The bill is part and parcel of a scheme to establish a compulsory railroad employees retirement and pension system, and is not in anywise a revenue-raising measure, so far as the constitutional functions of the Government are concerned.

(Whereupon at 12 noon the committee adjourned.)